

Smith v. Intercosmos Media Group, Inc.

Case No. 02-1964 December 17, 2002

GREG LLOYD SMITH, ET AL VERSUS INTERCOSMOS MEDIA
GROUP, INC., ET AL

CIVIL ACTION NO. 02-1964 SECTION "C"

UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF LOUISIANA

December 17, 2002, Decided
December 17, 2002, Filed, Entered

DISPOSITION: [*1] Motion for summary judgment filed by the
defendant, Intercosmos Media Group, Inc. D/ b/ a directNTC.com
GRANTED.

COUNSEL: For GREG LLOYD SMITH, KESTREL TRADING
CORPORATION, plaintiffs: Michael Douglas Carbo, Ronald Joseph
Ventola, II, Michael D. Carbo, PLC, New Orleans, LA.

For INTERCOSMOS MEDIA GROUP, INC., defendant: Sigmund
Joseph Solares, David A. Vinterella, Intercosmos Media Group, Inc., New
Orleans, LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT
JUDGE.

OPINIONBY: HELEN G. BERRIGAN

OPINION: ORDER AND REASONS n1

-----Footnotes-----

n1 Bryan Owens, a second year law student at Loyola Law School, assisted in the research and preparation of this decision.

-----End Footnotes-----

This matter comes before the Court on motion for summary judgment filed by the defendant, Intercosmos Media Group, Inc. D/ b/ a directNIC.com ("Intercosmos"). Having considered the record, the memoranda of counsel and the law, the Court has determined that summary judgment is appropriate for the following reasons.

The plaintiffs, Greg Lloyd Smith and Kestel Trading Corporation, [*2] sue Intercosmos in diversity for defamation and libel. Specifically, the plaintiffs claim that Intercosmos, an interactive internet service provider, is liable for the actions of one of its customers who registered three second-level domain ("SLD") names with Intercosmos. The plaintiffs claim that this Intercosmos customer used various domains or universal resource locators ("URLs") to defame the plaintiffs. The plaintiffs claim to have determined that the name of the registrants for the domains were fictitious and so advised Intercosmos, which has nonetheless failed to permanently "block" the websites and has not revoked the registrations for the domain names.

[The plaintiffs] have been and are continuing to be damaged in their reputation and their business by the continuing defamation and libel of an unidentified person or persons that has been facilitated by Intercosmos's reckless disregard by failing to enforce its own contractual agreement and policies to make sure that domain name registrants are publicly and accurately identified. n2

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n2 Complaint, P 17

-----End Footnotes----- [*3]

The defendant argues that the plaintiffs' claims for defamation and libel and for damages and injunctive relief are preempted by the 1996 Communications Decency Act, 47 U.S.C. § 230 ("CDA"), and that the CDA

provides immunity for all claims made by the plaintiffs. The plaintiffs in their opposition n3 maintain that they have viable claims for (a) negligent performance of duties of a domain-name registrar under La. Civ. Code art 2315; and (b) injunctive-relief claim for defamation. n4

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n3 Plaintiffs title their opposition as "Memorandum in Support of the Response to Defendant's Motion for Summary Judgment." The Court will refer to it as their opposition.

n4 The Court construes the opposition as abandoning any claim for damages for defamation and libel. These were the only claims made by the plaintiffs in the complaint. However, the Court will assume that the claim for negligence articulated in the opposition has been properly plead for purposes of this motion. Rec. Doc. 19.

-----End Footnotes-----

For the [*4] first time in their opposition, the plaintiffs allege "negligence and fault" based on La. Civ. Code art. 2315. They argue that Intercosmos was negligent in: (1) unblocking access to the websites through domains that contained false and fraudulent registration information; (2) failing to revoke registrations that contain false and fraudulent registration information when it is possible to do so; and (3) maintaining defamatory content on its own servers.

With regard to the negligence claim, the plaintiffs argue that the contract between Intercosmos and the Internet Corporation for Assigned Names and Numbers ("ICANN") provides the duty to correct inaccurate registrant information upon which the negligence action is based. Intercosmos replies that even this negligence-based action is barred by the CDA and that the plaintiffs do, in fact, seek to obtain third-party enforcement of the contract between Intercosmos and ICANN, which is precluded by the CDA.

Section 230(c) provides:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. [*5]

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of --

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Section 230(e)(3) provides in relevant part, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." n5

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n5 The defendant argues in supplemental memorandum that Louisiana state law mirrors the CDA and also provides support for its defense. La. Rev. Stat. § 51:300.21.

-----End Footnotes-----

I. The Purpose of the CDA.

To determine if Intercosmos [*6] is immune it is helpful to understand the rationale for the CDA. By passing the Communications Decency Act, Congress recognized the ever increasing role that the internet plays in worldwide communication. Congress pointed to "the availability of educational and informational resources to our citizens" that the internet provides, 47 U.S.C. § 230. It also hailed the internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" Id.

Congress saw the burgeoning internet as a benefit to all Americans. It also recognized that one reason the internet played such a beneficial role in American society was that the internet flourished "with a minimum of government regulation."

Because the internet is so beneficial to American life, Congress made it a policy of the United States "to promote the continued development of the internet and other interactive media, unfettered by federal or state regulation." *Id.* Clearly, the purpose of the Act is to promote the free flow of information on the internet.

II. Does the CDA Immunize the Defendant from State Law Claims?

In [*7] their opposition, the plaintiffs contends that Intercosmos can be held liable for "the negligent performance of defendant's duties as a domain name registrar." The crux of this claim is that the defendant's negligence allowed the defamation to continue. The defendant claims this is not a valid cause of action because the CDA immunizes them from liability for such actions.

For purposes of the CDA immunity, the party claiming the immunity must be, first, a provider or user of an interactive computer service. Second, the alleged defamatory statement must be made by a third party. Third, the defamation claim the party seeks immunity from must treat the interactive computer service as the publisher or speaker of the alleged defamatory statement.

1. Intercosmos is an Interactive Service Provider

The CDA defines interactive computer service as "any information service, system, or access software that provides access to the internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230 (f)(2).

The purpose of the CDA and case law present a clear picture of the type of activities a service provider must perform [*8] to qualify for CDA immunity. The purpose of the CDA is "to promote the continued development of the internet" by allowing it to expand "unfettered by federal or state regulation." 47 U.S.C. § 230. "Courts have broadly construed the ISP [internet service provider] immunity broadly, in the spirit of the CDA's

stated purpose of promoting rather than impeding technology and Internet use." Sewali K. Patel, Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should the Courts GO?, Vanderbilt Law Review, March, 2002, at 661.

Case law shows that the type of activities alleged to have been performed by the defendant here are similar and in some aspects identical to the functions performed by other defendant internet access providers that have been granted immunity by the CDA. Specifically, the defendant's role as information service providers and web-hosting service providers describes an internet service provider for purposes of CDA immunity. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wn. App. 2001); *Does 1-30 v. Franco Productions*, 2000 WL 816779, *1(N.D.Ill.). or purposes of CDA immunity, [*9] the defendant is an interactive computer service provider.

2. Statements Were Made by a Third Party

In the complaint, the plaintiffs refer to the source of the alleged defamatory statements at issue here as "an as yet unknown and unnamed individual." n6 In the motion for summary judgment, the defendant states "In the present case, nowhere in the complaint is it alleged or suggested that Intercosmos authored or created the alleged defamatory statements made against the plaintiffs." n7

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n6 Complaint, P 8.

n7 Rec. Doc. 4, p. 8

-----End Footnotes-----

The plaintiffs and the defendant concede that the alleged defamatory statements were made by a third party.

3. The Complaint Treats the Defendant as the Publisher of the Alleged Defamatory Statements

For CDA immunity from state and federal claims, the defendant must be treated as the publisher of the alleged defamatory statements. In the

opposition, the plaintiffs claim that the defendant "allowed the defamation to continue." n8 In so doing, they are treating the [*10] defendant as publisher of the alleged defamatory statements. The Restatement (Second) of Tort § 577 defines publication:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

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n8 Rec. Doc. 19, p. 5.

-----End Footnotes-----

Thus, "the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control." *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1132.

The basis of the plaintiffs' claim is that the defendant allowed the defamation to continue by failing to take reasonable steps to remove the alleged defamatory statements. The law treats such a party as a publisher.

The defendant is immunized from liability for this state claim [*11] of negligence because the defendant meets the three requirements of the CDA immunity. First, the defendant qualifies as an interactive service provider. Second, the defendant is not the source of the alleged defamatory statements. Third, the claim against the defendant treats the defendant as publisher of the alleged defamatory statements.

III. Injunctive Relief

The plaintiffs also maintain that their claims for injunctive relief are not precluded under the CDA, apparently relying on cases cited by the *Intercosmos* in its motion, *Does 1-30 v. Franco Productions*, 2000 WL 816779 (N.D.Ill.), and *Mainstream Loudoun v. Board of Trustees of the*

Loudoun County Library, 24 F. Supp.2d 552, 561 (E.D.Va. 1998). A reading of the Does case indicates no discussion of the issue at all, only a citation to the Loudoun case. The cited Loudoun case, however, is merely a denial of reconsideration of the original decision on the issue, at 2 F. Supp.2d 783, 790. The defendant in Loudoun was a local library and the plaintiffs brought a First Amendment action under 42 U.S.C. § 1983 for the defendant's regulation [*12] of content on library computers with the use of site-blocking software. Noting that the CDA defines "interactive computer service" to include "a service or system that provides access to the Internet offered by libraries or educational institutions," the original Loudoun decision distinguished between private and governmental defendants.

Thus, as its name implies, § 230 was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material; § 230 was not enacted to insulate government regulation of Internet speech from judicial review. Even if § 230 were construed to apply to public libraries, defendants cite no authority to suggest that the "tort-based" immunity to "civil liability" described by § 230 would bar the instant action, which is for declaratory and injunctive relief."

Loudoun, 2 F. Supp.2d at 790 (emphasis original). It is important to note that the immunity sought by the defendant in Loudoun was under § 230(c)(2), which is not applicable in this matter at all.

Furthermore, Loudoun has been challenged even it its distinction between private and [*13] governmental agency. In *Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684 (Cal. App. 1st Dist. 2001), the plaintiffs sought injunctive relief against a governmental defendant under a number of state law claims as well as Section 1983. With regard to the state law claims, that court found that the Loudoun discussion of § 230(c)(2) immunity "cannot be stretched to deprive governmental entities of immunity under section 230(c)(1)."

Livermore, 87 Cal. App. 4th at 693.

Thus, any suggestion in Loudoun I that section 230 could never be applied to public libraries would have been dicta. In any event, there can be no doubt that the Loudoun court thought that public libraries could claim immunity under section 230(c)(1) because the court ventured in Loudoun II that this immunity should alleviate any concern the library might have had with potential criminal liability.

Id., 87 Cal App. 4th at 693-694. The Livermore court directly addressed the plaintiffs' arguments that immunity can not apply to claims for injunctive relief:

We reject these arguments and hold that the respondent is immune from all of appellant's [*14] state law claims. Loudoun I is distinguishable, again, because it involved immunity under section 230(c)(2), not section 230(c)(1). Whereas section 230(c)(2) prohibits interactive computer service providers from being "held liable for specified conduct, and that language may arguably refer only to damage claims, no such limiting language appears in section 230(c)(1).

Id., 87 Cal.App.4th at 697-698 (emphasis added). It continued:

Section 230 provides broadly that no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section Thus, even if for purposes of section 230 "liability" means only an award of damages ... the statute by its terms also precludes other causes of action for other forms of relief.

Id., 87 Cal.App.4th at 698 (emphasis original). See also Ben Ezra, Weinstein & Co., Inc. V. America Online, Inc., 1999 WL 727402 (D.N.M. 1999), aff'd, 206 F.3d 980 (10th Cir. 2000).

This Court adopts the sound reasoning of the court in Livermore, and concludes that any claim made by the plaintiffs for damages or injunctive [*15] relief with regard to either defamation and libel, or negligence and fault under Article 2315, are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the defendant, Intercosmos Media Group, Inc. D/ b/ a directNIC.com is GRANTED.

New Orleans, Louisiana, this 17 day of December, 2002.

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

