IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

REMEMBRANCE RESCUE PROJECT, Plaintiff, v. BRIAN FARRELL and BILLY GOLDFEDER Defendants.	)	Case No. 14 L 6205 Calendar 13 Hon. Anna H. Demacopoulos

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant Billy Goldfeder's Motion to Dismiss Plaintiff's Third Amended Complaint. Having read the submitted briefs, heard the arguments of counsel for the parties on February 23, 2016, and therefore being fully informed in the premises, the Court finds as follows:

BACKGROUND

According to the allegations of the Third Amended Complaint ("TAC") Plaintiff, Remembrance Rescue Project ("RRP"), is an Illinois not-for-profit corporation comprised of a group of firefighters, which engages in a national campaign for fire education, historical preservation and remembrance for the fallen firefighters of New York City as a result of the attacks of September 11, 2001. (TAC, ¶¶1-2). Beginning in July 2011, RRP purchased certain Fire Department of New York ("FDNY") fire engines that had been involved in the rescue efforts at the World Trade Center on September 11, 2001. (*Id.* at ¶3). RRP travels across the country in its purchased FDNY Rescue Units, providing educational sessions for local schools, community events and memorials. (*Id.* at ¶¶4-5). Local firefighters across the country volunteer their time to

facilitate events and transport the fire engines from place to place. (*Id.* at ¶5). Plaintiff alleges that it is "completely dependent upon t-shirt sales and donations for its operations." (*Id.* at ¶7).

Defendant Billy Goldfeder is a retired fire chief from the State of Ohio, who is an author and a "blogger" with a nationally distributed blog. (TAC, Ct. III ¶2). In the 3rd AC, Plaintiff alleges that on May 22, 2014, Defendant Goldfeder republished alleged defamatory statements by forwarding an email authored by Brian Farrell[1] to various individuals in the Los Angeles Fire Department who were scheduled to host RRP events. (TAC, Ct. III ¶3). Plaintiff alleges that the allegedly false and defamatory statements published by Defendant Goldfeder included: (1) the founders of RRP financially benefit from the operation of the project; (2) the RRP is a fraudulent group of individuals who has the purpose of financial gain for the founders and operators of the project; (3) the RRP has engaged in financial impropriety; (4) Rescue Units 4 and 5 are make-believe trucks whose purposes are to fulfill the "fire-buff" interests of their founders and provide financial benefit to the operators of the project; and (5) the RRP has not donated money to support firefighters or their families. (TAC, Ct. III ¶3 and Ct. IV ¶4).

The above statements were allegedly published to local fire departments who were prospective recipients of the fire engines who were due to hose RRP events, including to agents and employees of the Los Angeles Fire Department. Plaintiff alleges that Defendant Goldfeder knew or recklessly disregarded the falsity of those statements. (*Id.* Ct III ¶11, Ct. IV, ¶13). As a result, RRP allegedly suffered damages of a pecuniary nature, including cancellations, reservations and lost sponsors which are explicitly listed in Count IV. (*Id.* Ct. III ¶12, Ct. IV ¶19). Plaintiff seeks money damages of at least $50,000 per count.

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[1] Brian Farrell is an individual associated with an organization known as the *Terry Farrell Relief Fund.* (TAC, Ct. I ¶2). On September 1, 2015, the Court granted Defendant Brian Farrell's Motion to Quash service. As such, only Counts III and IV remain pending against Defendant Goldfeder.

MOTION TO DISMISS

In his motion, Defendant Goldfeder argue that the Third Amended Complaint should be dismissed per 735 ILCS 5/2-619 where Goldfeder's alleged republication of Mr. Farrell's email is privileged under the Communications Decency Act ("CDA"), 47 USC § 230. Defendant also offers several bases for dismissal per 735 ILCS 2-615, including that: (1) RRP is a "public figure" with regard to defamation jurisprudence but fails to plead actual malice; (2) the alleged defamatory statements were "fair comment on a matter of public interest"; and (4) Plaintiff fails to plead it suffered special damages in Count IV. Plaintiff responds that the CDA "was not enacted to be a complete shield for [internet computer service] users or providers" against any tort claims that involve the use of the internet. (Plt. Resp. p. 4)(citing *Laning v. Southwest Airlines,* 2012 IL App (1st) 101164, ¶40. Such an interpretation of the CDA would "produce an absurd result and runs contrary to the intent of the statute." (*Id.* at 7). Plaintiff further asserts that the causes of action for libel *per se* and libel *per quod* are sufficiently pled.

STANDARD OF REVIEW

Illinois is a fact-pleading jurisdiction. *Weiss v. Waterhouse Secs., Ins.*, 208 Ill.2d 439, 451 (2004). "[A] plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Id.* A motion brought pursuant to 735 ILCS 5/2-615 of the Illinois Code of Civil Procedure challenges the legal sufficiency of the complaint. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 305 (2008). The issue on a 2-615 motion is whether the allegations, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Borowiec v. Gateway 2000, Inc.*, 219 Ill.2d 376, 382 (2004). "A cause of action should not be dismissed pursuant to Section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises,*

Inc. v. County of Cook, 232 Ill.2d 463, 473 (2009). In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. *Wilson v. County of Cook*, 2012 IL 112026, ¶14 (2012); *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill.2d 381, 385 (2005).

A motion for involuntary dismissal under 735 ILCS 5/2-619 admits the legal sufficiency of the complaint, but raises defects, defenses or other affirmative matter appearing on the face of the complaint or established by external submissions which defeat the action. *Joseph v. Chicago Transit Authority*, 306 Ill. App. 3d 927, 930 (1st Dist. 1999). Subsection (a)(1) provides as basis for dismissal where "the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction." 735 ILCS 5/2-619(a)(1). Subsection (a)(9) provides a basis for involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matters avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

A combined motion to dismiss is expressly permitted by the rules so long as each portion of the motion "shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005." 735 ILCS 5/2-619.1. Each part shall also clearly show the grounds relied upon under the Section on which it is based.

ANALYSIS

To state a claim for defamation, "the plaintiff must set out sufficient facts to show that the defendants made a false statement concerning him, that there was an unprivileged publication to a third party with fault by the defendant, which caused damage to the plaintiff." *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490 (1988). Defamatory statements may be

actionable *per se* or actionable *per quod*. *Myers v. Levy*, 348 Ill. App. 3d 906, 914 (2d Dist. 2004). A publication is defamatory *per se* if it is so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary and extrinsic facts are not needed to explain it. *Id.* A claim for defamation *per quod* requires the plaintiff to allege both extrinsic facts to establish that the statement is defamatory and special damages with particularity. *Id.*

Because publication of the alleged false statements is an element necessary to state a defamation claim, the issue presented by the 2-619 motion—whether the Communications Decency Act ("CDA"), 47 U.S.C. §230, applies and shields Defendant Goldfeder, a blogger and individual who forwarded an email written by another party, from having the status of *publisher*—may be dispositive in this matter.

The CDA provides that "[n]o 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." 47 U.S. C. §230(c)(1). Moreover, "[n]o cause of action may be brought and no liability may be imposed under any State law that is inconsistent with this section." 47 U.S.C. §230(e). Under the CDA, the term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system 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). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. §230(f)(3).

"The majority of federal courts have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)(internal quotations omitted). Both state and federal courts in Illinois have recognized that "because subsection 230(c)(1) limits who may be called the publisher or speaker of information that appears online, it could foreclose any liability that depends on deeming the [internet computer service] user or provider a publisher or speaker, like a cause of action for defamation, obscenity, or copyright infringement." *Lansing v. Southwest Airlines Co.*, 2012 IL App (1st) 101164, ¶41 (1st Dist. 2012)(*citing Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003); *City of Chicago v. Stubhub*!, Inc., 624 F.3d 363, 366 (7th Cir. 2010). In other words, under the CDA, "providers and users of interactive computer services" are immunized from liability "when the defamatory or obscene material is 'provided' by someone else." *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003); *see also Barrett v. Fonorow,* 343 Ill. App. 3d 1184, 1193 (2d Dist. 2003)("Congress intended section 230 to prevent the element of 'publication' from being satisfied in a state tort cause of action where a provider or user of an interactive computer service disseminates information provided by another information content provider.").

In order to benefit from the protections of the CDA under the facts alleged in this matter, Defendant Goldfeder must be deemed to be a "provider or user of an interactive computer service" but not the "information content provider." The latter element is satisfied by the allegations of the TAC, which allege that Brian Farrell, a former defendant to this action, authored the email containing the allegedly defamatory statements and Defendant Goldfeder simply forwarded it. Though this factual scenario may be unique under existing Illinois state and Seventh Circuit case law, at least three other courts have considered similar issues. Each court

held that, absent other theories of liability, a defendant that forwards an email authored by another with containing allegedly defamatory statement will be immunized by the CDA against claims for defamation.

In *Barrett v. Rosenthal*, the Supreme Court of California considered a case where plaintiffs were operators of a website dedicated to exposing health frauds. 40 Cal. 4th 33 (Cal. 2006). Plaintiffs brought a claim for libel against Rosenthal, an operator of an Internet discussion group, who received an email containing an article authored by another defendant and posted the article on her website and also forwarded the email. *Id.* at 41. Rosenthal moved to strike the complaint, arguing, among other things, that she was immune from liability under the §230, the CDA. *Id.* at 40. After an extensive analysis of existing case law on the CDA with particular attention to the term "user," the court concluded that "[b]y declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users." *Id.* at 61.

In *Mitan v. A. Neumann & Assocs., LLC*, defendant was a business brokerage firm located in New Jersey. 2010 U.S. Dist. LEXIS 121568 *1-2 (D.N.J. Nov. 17, 2010). Defendant's principal, Neumann, received an email from a business broker in Virginia that contained an embedded electronic text entitled "Mitan Alert!" *Id.* The Mitan Alert identified plaintiff "and detailed a variety of unsavory and illegal business practices engaged in by the Mitan family." *Id.* at 2. Neumann, upon receiving the email, added some additional text and forwarded the message to attorneys and individuals he had worked with in a recent business transaction. *Id.* The court held that, under the CDA, the "'information content provider' would be the person responsible, in whole or in part, for the creation or development of the Mitan Alert on the Internet." *Id.* at 19. Accordingly, "as the downstream Internet user who received an email containing defamatory text

and simply hit the forward icon on his computer," the court held that Neumann's acts were shielded by the CDA." *Id.* at 19 (internal quotations omitted).

More recently, in *Tanisha Sys. v. Chandra*, 2015 U.S. Dist. LEXIS 177164, (N.D. Ga. Dec. 4, 2015), a federal district court in Georgia considered whether a defendant-blogger forwarded a blog post containing allegedly defamatory statements was entitled to immunity from liability under the CDA. Like the defendant in *Mitan,* defendant had added his own statements of approval before republishing the alleged defamatory statements by forwarding the email. The court expressly rejected plaintiff's argument that the blogger's action of additional text would preclude application of the CDA. However, because plaintiff had also "alleged that Chandra had conspired with [another defendant] to defame it that it evades the CDA immunity provision." *Id.* at 20-21. Allegations of conspiracy between Farrell and Goldfeder are not part of the allegations of the TAC.

In this case, Plaintiff alleges that Defendant Goldfeder published the defamatory statements written by Brian Farrell via email. It is undisputed that Goldfeder was not the author of the statements. Therefore, under the provisions of the CDA, Goldfeder was a "user. . . of an interactive computer service," whereas Brian Farrell was the "information content provider." Accordingly, Defendant Goldfeder is immune from liability from the defamation claims pled against him in the Third Amended Complaint. Having found that Plaintiff's claims for defamation may not lie against this defendant, the Court need not consider whether such claims have been sufficiently pled as to withstand a 2-615 challenge.

WHEREFORE, IT IS HEREBY ORDERED:

Defendant's motion to dismiss is granted pursuant to 2-619.

udge Anna Helen Demacopoulos

ENTERED: MAY 23 2016

Circuit Court – 2002

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Judge