

**Chelsea Fine Custom Kitchens, Inc. v Apartment
Therapy LLC**

2008 NY Slip Op 31871(U)

June 27, 2008

Supreme Court, New York County

Docket Number: 0603554/2007

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

Index Number : 603554/2007

INDEX NO.

603554/07

CHELSEA FINE CUSTOM KITCHENS,

MOTION DATE

vs

APARTMENT THERAPY LLC

MOTION SEQ. NO.

001

Sequence Number : 001

MOTION CAL. NO.

DISMISS ACTION

motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JUL - 1 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

6/27/08



BARBARA R. KAPNICK

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
CHELSEA FINE CUSTOM KITCHENS, INC.,

Plaintiff,

- against -

APARTMENT THERAPY LLC and MAXWELL
GILLINGHAM-RYAN,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 603554/07
Motion Seq. No. 001

This is an action for commercial disparagement (first cause of action), tortious interference with prospective business relations (second cause of action), commercial misappropriation (third cause of action), injunctive relief for unfair competition (fourth cause of action), damages for deceptive trade practices pursuant to GBL § 349(h) (fifth cause of action), injunctive relief under GBL § 349(h) (sixth cause of action), and attorneys' fees under GBL § 349 (seventh cause of action).

Plaintiff Chelsea Fine Custom Kitchens, Inc. ("Chelsea"), a designer and seller of luxury custom kitchens and related items and projects, claims that a web site, www.apartmenttherapy.com,¹ operated by defendant Apartment Therapy LLC ("Apartment Therapy"), and its Managing Member, defendant Maxwell Gillingham-Ryan,

¹ The stated mission of the web site is to help "people make their homes more beautiful, organized and healthy by connecting them to a wealth of resources, ideas and community online."

contains false and misleading information concerning the quality of Chelsea's service and the competitiveness of Chelsea's pricing.

Defendants contend that all of the qualitative or subjective comments on the site concerning vendors, including Chelsea, are posted by third parties, and have refused plaintiff's request that the references be removed from the Apartment Therapy site.

Defendants now move for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the Complaint, on the grounds that:

(i) web site operators are absolutely immune under the federal Communications Decency Act ("CDA") for statements made by third parties;

(ii) the comments about Chelsea on Apartment Therapy's web site are expressions of opinion that New York law broadly protects, absent any showing, which has not been made herein, of malice;

(iii) the Complaint does not meet the pleading standards of the torts alleged, since the Complaint fails to, among other things, allege special damages; and

(iv) any claim regarding the misappropriation of photographic images and other artwork is a claim for copyright infringement over which federal courts have exclusive jurisdiction.

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 USC § 230(c)(1). "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." 47 USC § 230(e)(3).

Thus, it has been held that, unless an exception applies, a "provider or user of an interactive computer service" is immunized from a state law claim if "the claim is based on 'information provided by another information content provider'" (e.g., message board postings) and the claim would treat the provider or user "as the publisher or speaker" of that information." *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F3d 413, 418-419 (1st Cir 2007).

Plaintiff concedes that the CDA precludes certain claims against providers or users of an interactive computer service arising from information provided by another content provider. However, plaintiff argues that there is an issue of fact at this early stage of the instant litigation as to whether or not defendants themselves created the objectionable content under the guise of publishing third party consumer comments.²

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² The allegedly false and misleading comments were allegedly posted by "hejiranyc" in September 2007. Defendants have not identified "hejiranyc" except to deny that he or she is an employee, officer, director or shareholder of Apartment Therapy.

* 5]
Plaintiff further argues that the CDA does not apply to the claims in this action because section 230(e)(2) provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property." Plaintiff contends that the claims herein fall within this exception since plaintiff has filed trade name and service mark applications under the Lanham Act.

Based on the papers submitted and the oral argument held on the record on April 30, 2008, this Court finds that the Complaint fails to allege any facts beyond mere speculation showing that defendant created any of the comments posted in the name of third parties. Moreover, this Court finds no support for plaintiff's position that this action pertains to intellectual property and is thus subject to the exception set forth in section 230(e)(2).

Accordingly, defendants may not be treated as the publisher or speaker of the posted comments at issue, and are thus immune pursuant to 47 USC § 230(3) from State law claims based on those statements.

Defendants' motion is, therefore, granted. The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and Order of this Court.

Dated: June 27, 2008



BARBARA R. KAPNICK
J.S.C.

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