

Braverman v Yelp, Inc.
2014 NY Slip Op 30444(U)
February 24, 2014
Supreme Court, New York County
Docket Number: 158299/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MAL BRAVERMAN,

Plaintiff,

Index No.
158299/2013

Decision and
Order

- against -

Mot. Seq. 01

YELP, INC.,

Defendant.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, defamation, and violation of N.Y. General Business Law ("GBL") §§ 349 and 350, based on certain negative reviews of Plaintiff's cosmetic dentistry practice that were posted on Yelp.com, and on Defendant's alleged failure to post favorable reviews of the same. Plaintiff, Mal Braverman ("Plaintiff" or "Mr. Braverman"), is a licensed cosmetic dentist practicing at 30 Central Park South, New York, New York. Defendant, Yelp, Inc., ("Defendant" or "Yelp"), is the owner and operator of a website, Yelp.com, which allows members of the public to review local businesses such as Plaintiff's. Plaintiff claims that the negative reviews in question are defamatory, and further claims that Defendant failed to post favorable reviews of Plaintiff's dental practice, despite having agreed to do so in exchange for Plaintiff's paid subscription to Yelp's advertising program.

Defendant moves for an Order dismissing Plaintiff's complaint, pursuant to CPLR §§ 3211(a)(1), (5), and (7), on the grounds of documentary evidence, *res judicata* and collateral estoppel, and a failure to state a cause of action. Alternatively, Defendant moves to dismiss Plaintiff's complaint based on a forum selection clause, pursuant to CPLR §§ 3211(a)(1) and 501. Defendant also moves for costs, sanctions, and attorney's fees, pursuant to CPLR § 8303-a and 22 N.Y.C.R.R. 130-1.1.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(5) the cause of action may not be maintained because of . . . collateral estoppel, [or] . . . res judicata

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

Collateral estoppel, or issue preclusion, “precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same.” (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500[1984]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Plaintiff's complaint asserts two causes of action for defamation based on certain negative reviews and webpage content posted on Yelp.com. "The elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*." (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]).

"Although a publisher of defamatory material authored by a third party is generally subject to tort liability, Congress has carved out an exception for Internet publication." (*Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 286 [2011]; 47 U.S.C. § 230). Under 47 U.S.C. § 230, also known as the Federal Communications Decency Act, a defendant is "immune from state law liability if (1) it is a 'provider or user of an interactive computer service'; (2) the complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider' (47 U.S.C. § 230 [c] [1])." (*Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 286-287 [2011]).

Plaintiff's complaint alleges that Yelp published two defamatory reviews about Plaintiff's dental practice. Plaintiff's complaint also asserts, "Defendant Yelp authored the defamatory content on their website, since they added to the website page a section of said page offering readers to a 'Deals Nearby' 'Best of Yelp, New York Cosmetic Dentists' list of five other cosmetic dentists." Plaintiff's complaint further asserts, "[t]hese five listed other cosmetic dentists were Yelp paid advertisers. Their addition onto this webpage was information that came from Yelp alone, not from any third party. This posting by Yelp on this webpage clearly requests that reviewers employ other cosmetic dentists rather than employing Plaintiff." In addition, Plaintiff's complaint alleges that Yelp's claimed defamatory conduct falls outside the exception to state tort liability established under 47 U.S.C. § 230.

Here, Plaintiff's defamation claims are barred by the doctrines of *res judicata* and collateral estoppel. Plaintiff filed a previous complaint against Yelp for defamation based on the same negative reviews and webpage content at issue in the instant complaint. In that, prior action, Plaintiff's cause of action for defamation was dismissed on the ground that Yelp is immune from liability under 47 U.S.C. § 230. Thus, the instant claims for defamation assert matters previously litigated and decided against Plaintiff. Plaintiff is therefore estopped from re-litigating these same matters

in the case at bar.

Plaintiff's complaint also asserts two causes of action for breach of contract. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

"It is well-accepted policy that forum-selection clauses are prima facie valid. In order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court." (*British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 [1st Dep't 1991]).

Defendant submits documentary evidence establishing the terms of the advertising agreement (the "Agreement") between Plaintiff and Yelp, and argues that the Agreement itself constitutes documentary evidence warranting the dismissal of Plaintiff's complaint. Specifically, Defendant argues that the Agreement conclusively establishes that Yelp had no obligation to post Plaintiff's favorable reviews, so any failure to post such reviews is not a breach of the Agreement.

In support of its argument that the Agreement directly contradicts Plaintiff's breach of contract claims, Defendant highlights an Agreement provision that states, "Client's purchase of Ad Programs will not influence the automated software, or otherwise allow or enable Client, directly or indirectly, to remove, alter or reorder the reviews on the Site." The Agreement also contains a merger clause whereby the terms of the Agreement "supersede any and all prior related oral, emailed or written representations and agreements between the parties."

Alternatively, Defendant points to the Agreement's forum selection clause, which states, "FOR ANY CLAIM BROUGHT BY EITHER PARTY, YOU AGREE TO SUBMIT AND CONSENT TO THE PERSONAL AND EXCLUSIVE JURISDICTION IN, AND THE EXCLUSIVE VENUE OF, THE STATE AND

FEDERAL COURTS LOCATED WITHIN SAN FRANCISCO COUNTY, CALIFORNIA” (sic). Defendant argues that this forum selection clause constitutes documentary evidence that warrants the dismissal of Plaintiff’s complaint.

Plaintiff’s complaint alleges, “as a result of Plaintiff’s complaint concerning the ‘filtering’ out of his favorable reviews, Plaintiff was advised by Yelp personnel that if Plaintiff became a Yelp paid subscriber, his favorable reviews would be printed on the same website page as the unfavorable reviews.” Plaintiff’s complaint further alleges, “based upon this agreement, Plaintiff and Defendant agreed that Plaintiff would become a paid Yelp advertiser, paying \$350.00 per month, in exchange for Defendant posting Plaintiff’s favorable reviews on the same webpage as the unfavorable reviews on April 13, 2012.”

Plaintiff’s complaint also asserts, “Plaintiff remained a paid Yelp subscriber until June 15, 2012 when as a result of Defendant’s breach of said agreement in not posting Plaintiff’s favorable reviews as promised, Plaintiff discontinued as a paid Yelp subscriber,” and further alleges damages resulting from Defendant’s alleged nonperformance, namely, the subscription fees that Plaintiff allegedly paid to Yelp in performance of the purported agreement. Plaintiff’s complaint also alleges consequential damages, the loss of business income, resulting from Defendant’s purported breach.

Here, it is undisputed that Plaintiff paid to enroll in Yelp’s advertising program. In doing so, Plaintiff assented to Agreement, which, by its terms, constitutes the sole contract between the parties. Thus, even if Yelp did promise to post Plaintiff’s favorable reviews in exchange for Plaintiff’s paid subscription to Yelp’s advertising program, as alleged, the Agreement, on its face, supersedes any such promise. Accordingly, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, Defendant’s documentary evidence flatly contradicts Plaintiff’s breach of contract claims.

Nevertheless, a promise to confer a benefit in the future may be actionable when the promisor had no intention of fulfilling the promise at the time it was given. (*Braddock v. Braddock*, 60 A.D.3d 84, 89 [1st Dep’t 2009]). Although Plaintiff’s complaint does not allege that Yelp falsely stated its future intentions when making

the representation at issue, Plaintiff's complaint does make factual assertions from which this conclusion may be drawn. (*Braddock v. Braddock*, 60 A.D.3d 84, 89 [1st Dep't 2009]) (finding complaint alleging that certain oral representations were not fulfilled was sufficient to state a claim for fraud; "[w]hile an inference that the promisor never intended to fulfill his promise should not be based solely upon the assertion that the promise was not, in fact, fulfilled . . . we must recognize that a present intention not to fulfill a promise is generally inferred from surrounding circumstances, since people do not ordinarily acknowledge that they are lying"). Accordingly, accepting Plaintiff's allegations as true, and determining simply whether the facts alleged fit within any cognizable legal theory, Plaintiff's complaint adequately states a cause of action for fraudulent inducement.

However, the fact that Plaintiff's complaint appears to assert a cause of action for fraudulent inducement is not, without more, sufficient to invalidate the forum selection clause in question. (*British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 [1st Dep't 1991]). Plaintiff does not claim that the Agreement was never intended to constitute a binding contract between the parties. (see *DeSola Group v. Coors Brewing Co.*, 199 A.D.2d 141 [1st Dep't 1993]). Nor does Plaintiff's complaint allege any fraud with respect to the forum selection provision itself, and Plaintiff is presumed to know the contents of the instrument he signed, and to have assented to such terms. (*British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 [1st Dep't 1991]).

Additionally, "[f]orum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes." *Brooke Group v. JCH Syndicate*, 488, 87 N.Y.2d 530, 534 (1996). Although Plaintiff argues that litigation in California would be cost-prohibitive, Plaintiff offers no evidence that the cost of commencing an action in California would be so financially prohibitive that, for all practical purposes, Plaintiff would be deprived of his day in court. *Bernstein v. Wysoki*, 77 A.D.3d 241 (2d Dep't 2010). Accordingly, Plaintiff fails to meet its burden of showing that the forum selection clause contained in the Agreement should not be enforced.

In light of the foregoing, it is not necessary to reach Defendant's remaining arguments seeking dismissal pursuant to CPLR(a)(7).

Wherefore it is hereby,

ORDERED that Defendant's, Yelp, Inc., motion to dismiss is granted; and the complaint is dismissed in its entirety.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: February 20, 2014



Eileen A. Rakower, J.S.C.