

New York Commercial Division Round-Up

Posted at 3:14 PM on November 29, 2010 by Sheppard Mullin

[Yelp! Wins Dismissal of Claims for New York Deceptive Acts and Practices and Defamation Based upon Alleged Manipulation of User Reviews](#)

By [Eric O'Connor](#)

In [Reit v. Yelp, Inc.](#), Index No. 600555/10, — N.Y.S.2d —, 2010 WL 3490167 (Sup Ct, NY County, Sept. 2, 2010) (“*Reit*”), Plaintiff Reit, a dentist, sued Yelp!, Inc. (“Yelp”) and Michael S., an anonymous poster, for defamation, and Yelp alone for deceptive acts and practices under [New York’s General Business Law \(“NYGBL”\) §§ 349 and 350](#). Justice Jane S. Solomon vacated a prior entry of a TRO and held that (i) plaintiff’s defamation claim against Yelp is barred by the [Federal Communications Decency Act of 1996, 47 USC § 230](#) (the “CDA”), and (ii) plaintiff’s claims under NYGBL §§ 349 and 350 must also be dismissed because Yelp’s alleged manipulation of reviews was business conduct and not addressed to consumers and, thus, was not a deceptive act or practice.

The Court followed a line of cases holding that the CDA shields interactive computer service providers, like Yelp, from defamation claims. However, under New York’s deceptive acts or practices laws, the CDA does not shield Yelp’s use of speech as leverage in its business model. If an interactive computer service provider directed more of its alleged misconduct at consumers, as opposed to the business-directed communications here, a plaintiff may be able to state a claim under New York law.

The CDA Shielded Yelp from the Defamation Claim.

Section 230 of the CDA grants “interactive computer service” providers immunity from liability for publishing false or defamatory material provided by third parties. Thus, the exercise of traditional editorial functions – like whether to publish, withdraw, postpone or alter content – are immune. *Reit*, 2010 WL 3490167, at *1-2 (citation omitted). However, an internet computer service could become an “information content provider” and lose its immunity if it provides its own speech or develops information. *Id.*

Here, Reit claimed that after he complained to Yelp about one anonymous and allegedly defamatory review, Yelp removed the ten existing positive reviews of his dentist business, allegedly in an attempt to coerce businesses into paying for advertising on Yelp.com. *Id.* at *1. Reit claimed that Yelp should lose immunity because its removal of positive posts was beyond the normal editorial function of selecting material for publication. Justice Solomon disagreed and held that Reit’s defamation claims are barred by the CDA because (i) the information was supplied by a third party, (ii) Yelp allegedly using “bad” posts in marketing does not change the nature of the posted data, and (iii) “Yelp’s selection of the posts it maintains on Yelp.com can be considered the selection of material for publication, an action ‘quintessentially related to a publisher’s role’” *Id.* at *2 (citation omitted).

New York Deceptive Acts and Practices Claims Dismissed Because Alleged Conduct Was Not Directed at Consumers.

Reit's basic complaint was that Yelp encourages business and individual consumers to believe that the reviews they consume are not manipulated by Yelp, even though Yelp's business model deliberately manipulates the consumer posts to gain business advertisers. *Id.* at *2. Reit alleged that Yelp's Business Owner's Guide represents that its review pages are ordered, reviewed and removed by a computer algorithm "to avoid human bias." *Id.* at *3. However, Yelp's sales force allegedly uses negative reviews on the website as leads for new advertising business and then tells prospective business advertisers that they will assist them in deleting a number of troubling negative reviews. If the costumer refuses, Yelp supposedly deletes positive reviews and retains negative reviews of that business owner.

To plead a deceptive act or practice, a plaintiff must allege (1) consumer-oriented conduct that is (2) materially misleading to a reasonable consumer and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice. *Id.* (citation omitted). Justice Solomon held that Reit failed at least two and possibly all three elements. Reit cannot satisfy the first element because Yelp's alleged deletion of postings for the purpose of selling advertising, if true, is business conduct, not consumer oriented conduct. Second, there was nothing misleading to a consumer because the text of Yelp's Business Owner's Guide is addressed to business owners, not consumers seeking dentists. And, although not clear, the third element also seemed to fail because Reit "does not allege that he was a victim of the conduct he complains about." *Id.* at *3-4.

For further information, please contact [Eric O'Connor](#) at (212) 634-3077.