

421 F.Supp.2d 1257

United States District Court, N.D. California,  
San Jose Division.

**Robert ANTHONY**, individually and on behalf  
of others similarly situated, Plaintiff,  
v.  
**YAHOO! INC.**, a Delaware corporation,  
Defendant.

March 17, 2006

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

WHYTE, District Judge.

Robert Anthony has sued Yahoo! Inc. for (1) breach of contract, (2) fraud, [and] (3) negligent misrepresentation. [...] Yahoo! moves to dismiss all of Anthony's claims. Anthony opposes the motion. The court has read the moving and responding papers and considered counsels' arguments. For the reasons set forth below, the court grants in part and denies in part Yahoo!'s motion.

**I. BACKGROUND**

Anthony alleges that Yahoo! offers two on-line dating services: Yahoo! Personals and Yahoo! Premier. The former is "for dates and fun," while the latter caters to people looking for "loving, lasting relationships." Yahoo! represents that both services "will help the subscriber find better first dates and more second dates." Yahoo! advises users to be truthful and reserves the right to remove deceptive profiles, thus "giv[ing] all subscribers and potential subscribers a sense of confidence in the authenticity of the images displayed on [its] website[.]" However, Anthony claims, Yahoo! "deliberately and intentionally" originates, creates, and perpetuates false and/or non-existent profiles on its site to trick people like Anthony into joining the service and renewing their memberships. In addition, Anthony asserts, when a subscription nears its end date, Yahoo! sends the subscriber a fake

profile, heralding it as a "potential 'new match.'" Anthony provides twenty-three examples of these "false and/or non-existent profiles," which include (1) "[u]sing recurrent phrases for multiple images with such unique dictation and vernacular that such a random occurrence would not be possible" and (2) "[i]dentical images [with] multiple 'identities.'" Finally, Anthony alleges that Yahoo! continues to circulate profiles of "actual, legitimate former subscribers whose subscriptions had expired," thus giving the misleading impression that these individuals are still available for dates. Anthony claims to represent two nationwide subclasses: (1) current members of Yahoo!'s dating services and (2) former members who subscribed after January 1, 2001.

**II. ANALYSIS**

**A. Motion to Dismiss**

Dismissal under Rule 12(b)(6) is proper only when a complaint exhibits either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." [...] The court must accept the facts alleged in the complaint as true. [...]

**B. Breach of Contract**

[Anthony alleged that Yahoo! had breached its own Terms of Service, Personals Additional Terms of Service, and Personals Guidelines. The Court concluded, however, that Anthony had not identified in his Complaint, nor could he, any express contractual term that requires Yahoo! to not create or forward false profiles. It therefore dismissed the contract claim, with leave to amend so that Anthony could allege an action for breach of the implied covenant of good faith and fair dealing.]

**C. Fraud and Negligent Misrepresentation**

Anthony's second and third causes of action are for fraud and negligent misrepresentation. "The elements of fraud ... are: a representation, usually of fact, which is false, knowledge of its

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<sup>\*</sup> [Anthony later, on April 7, 2006, did file another amended complaint in which he raised this claim.—TGA]

falsity, intent to defraud, justifiable reliance upon the misrepresentation, and damage resulting from that justifiable reliance.” *Stansfield v. Starkey*, 220 Cal.App.3d 59, 72-73 (1990). “[N]egligent misrepresentation [is] very similar [but] ... lacks the element of intent to deceive.” *Intrieri v. Sup. Court*, 117 Cal.App.4th 72, 85-86 (2004).

### 1. The Communications Decency Act

Yahoo! argues that the Communications Decency Act (“CDA”) bars Anthony’s fraud and negligent misrepresentation claims. The CDA provides that (1) “[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” and (2) “[n]o cause of action may be brought and no liability may be imposed under any State or local rule that is inconsistent with this section.” 47 U.S.C. §§ 230(c)(1) & (e)(3). Section 230(f)(2) defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet[.]” 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). “Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Ben Ezra, Weinstein, & Company, Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir.2000). Yahoo! contends that it cannot be liable “based on profile content” under the CDA.

Yahoo’s assertion sweeps too broadly. Anthony alleges that Yahoo! creates false profiles, not merely fails to delete them. See First Amended Complaint ¶ 19 (Yahoo! “deliberately and intentionally originates, creates, and perpetuates false and/or non-existent profiles”). In addition, Anthony claims that Yahoo! sends users false profiles for the purpose of luring them into renewing their subscriptions. See *id.* at ¶ 32

(“With actual knowledge of the fraudulent nature of the profiles and images, YAHOO would send such false profiles and images to, among others, subscribers whose subscriptions to the service were about to expire in an effort to convince them to renew their subscriptions”). No case of which this court is aware has immunized a defendant from allegations that it created tortious content. Compare *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir.1997); *Blumenthal v. Drudge*, 992 F.Supp. 44, 50 (D.D.C.1998); *Lars Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 831 (2002); *Carafano v. Metrosplash.com., Inc.*, 339 F.3d 1119, 1124 (9th Cir.2003). In fact, these cases have acknowledged that the CDA “would not immunize [an ‘interactive computer service’ provider] with respect to any information [it] developed or created entirely by itself...” *Blumenthal*, 992 F.Supp. at 50. One need look no further than the face of the statute to see why. The CDA only immunizes “information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). If, as Anthony claims, Yahoo! manufactured false profiles, then it is an “information content provider” itself and the CDA does not shield it from tort liability.

In addition, the CDA does not defeat Anthony’s allegations that Yahoo! sent “profiles of actual, legitimate former subscribers whose subscriptions had expired and who were no longer members of the service, to current members of the service.” Admittedly, third parties created these profiles. Nevertheless, the CDA only entitles Yahoo! not to be “the publisher or speaker” of the profiles. It does not absolve Yahoo! from liability for any accompanying misrepresentations. Because Anthony posits that Yahoo!’s manner of presenting the profiles—not the underlying profiles themselves—constitute fraud, the CDA does not apply.

### III. ORDER

For the foregoing reasons, the court [...] denies Yahoo!’s motion to dismiss Anthony’s claims for fraud [and] negligent misrepresentation [...].