United States Court of Appeals

For the First Circuit

No. 21-1582 **RIAN G. WATERS,**

Plaintiff - Appellant,

v.

FACEBOOK, INC.; GOOGLE LLC; AIDAN KEARNEY,

Defendants - Appellees,

KATHERINE PETER; JEREMY HALEY; MARTHA SMITH-BLACKMORE; WILLIAM HIGGINS; JIM DALTON; MAURA TRACY HEALEY; JOHN DOES (1-10),

Defendants.

APPELLANT'S REPLY BRIEF

Respectfully submitted by:

Pro Se /s/ Rian Waters 12/17/2021

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Google's distribution is the reason I filed as much as I did.

Google argues "[i]nstead of opposing the motion to dismiss, Plaintiff filed an Amended Complaint on January 11, 2021, that repeated essentially the same allegations." But the reason why it was a basically a repeat complaint was because I made an agreement to extend the due dates (ADD 008 at 35) for the Defendants answers under the assumption the court would address the injunction motion labeled an emergency (ADD 008 at 17) before January 8th. But the court did not make a decision, and the court never addressed the merits of injunction the motion. Without electronic filing I was unable to file the amended complaint on the 8th. Google "continued to distribute threats and other obstructing material even after they were [legally informed through counsel] that the threats were critically impairing my ability to litigate." (OB 25-26) (RA 91 at 81)

Distribution is a verb, especially in the context of the Defendants algorithms. The following threat distributed by Defendant Google was the primary reason for my impairment. "On November 12th 2020 Aidan Kearney described how he used his platform to cause distress and punish

the family members of a pro se litigant in a different case, Aidan Kearney then stated 'When general Sherman marched to f***ing Atlanta he lit everything on fire ******* everything, men women children dogs everything ******* burns until you surrender that's how it ******* works if you want to declare war then people ******* die in war including civilians. *When we bombed Hiroshima and Nagasaki we knew that a bunch of ******* kids women are gonna die in that too ******* bad then ******* surrender ******* surrender and then they finally surrendered didn't they, that's what you gotta do unfortunately there is collateral damage so I want to make sure the message is sent here, if you **** with me, if you try to sue me, I'm not going to go after you, I'm going to go after your ******* family*, don't **** with me, that's all I'm saying alright. I'm not playing with these people I paid 30,000 ******* dollars in legal fees last year the sh*ts not ******* cute anymore and I'm not ******* playing defensive and hiding anymore. I'm going to burn your family to the ground just understand that.'" (RA 90 at 78-79) see also RA 89 at 75)

Gonzalez v. Google

In the case Google relies on the most, Gonzalez v. Google LLC, 2 F.4th 871, (9th Cir. 2021) Two judges on the panel encouraged their circuit to rehear the case En Banc to reconsider the limits on Section 230 immunity, and in a dissent Circuit Judge GOULD stated, "Further, on all these claims, I would permit amendment… on a theory that the claims are supported by specialized federal common law that may be applied in cases involving a particularly strong national interest and a gap in applicable statutory law" Id. At 919 But since Section 1983 causation already includes common law principles, (OB 28-29) this court can provide me relief with or without amending federal common law.

The Ninth Circuit also found that substantial assistance is not barred by section 230.

Sic utere tuo ut alienum non laedas

Google made a non sequitur argument claiming that the maxim Sic utere tuo ut alienum non laedas has nothing to do with my claims, because it "lies at the foundation of so much of the common law of nuisances." The maxim has many applications, it was commonly used by people downstream from coal mines. " Eg. H. B. Bowling Coal Co. v.

Ruffner, 117 Tenn. 180 (1906); It was used with corporate labor laws, eg. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 544 (1922) Said to be the foundation of police power. Elmer E. Smead, Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power , 21 Cornell L. Rev. 276 (1936) As well as the foundation of most international treaties. Broadband (Article 10 sec 2 League of Nations treaty series vol LXXXIV p 97); Art 35 sec 1 (Ibid CLI p.5); see United States v. Arjona, 120 U.S. 479, 484 (1887)

Force v. Facebook

Force is different from this case for several reasons. First, in that case the unlawful conduct happened off Facebook, and there was no evidence that the participants of the unlawful conduct were connected to the conspirator that was alleged to have encouraged the unlawful conduct. In this case all the illegal conduct complained of happened on Facebook or Google, and the co-conspirators that sent threats in this case did so on the primary conspirator's social media accounts. "By contrast, the killer of Force is alleged to have been a Facebook user, but plaintiffs do not set forth what specific content encouraged his attack, other than

that ‘Hamas ... use[d] Facebook to promote terrorist stabbings.’” Force v. Facebook, Inc., 934 F.3d 53, 59 (2d Cir. 2019) Second, jurisdiction was not established because “a substantial majority of the plaintiffs are alleged to be United States citizens domiciled in Israel. A suit based on diversity jurisdiction may not proceed with these plaintiffs as parties.” Id. 75 If jurisdiction was established the US Supreme court may have took the case. Third, that case did not involve any state action, while this case involves several police and state agents using Facebook and Google to assist in public shaming without due process. Forth, this case is a first impression on a Defendant seeking to use section 230 to bar a 42 USC 1986 claim, and as parties in a Massachusetts case Google and Facebook had a duty to ‘act with reasonable diligence to bring their litigation to a final conclusion,’ and to conduct themselves with at least that modicum of civility, courtesy and respect, for.. [the] parties, that simple common decency and common sense dictate.” Reznik v. Friswell, 2003 Mass. App. Div. 42, 44 (Mass. Dist. Ct. App. 2003) quoting Bucchiere v. New EnglandTel. Tel. Co.,396 Mass. 639, 642 (1986) Fifth, I allege the Defendants’ algorithms favor far-right extremist content. Sixth, *Force* was in the second circuit, and while it could be used as persuasive, it is

not any more persuasive than Clarence Thomas's recent statements addressing distributer liability, product design flaws, and algorithms. Malwarebytes, Inc. v. Enigma Software Grp. U.S., 141 S. Ct. 13, (2020)

Section 230 cannot be read the way Google wants

"The sweeping interpretation of Section 230(c)(1) advanced by [Google] effectively reads Section 230(c)(2) out of the statute. If Section 230(c)(1) immunizes an interactive computer service from liability anytime third-party content is involved or anytime the claim 'stems,' 'derives,' or 'arises' from third-party content, then an interactive computer service is inevitably immune from any action taken with respect to third-party content. There would be no need to ever determine whether, under Section 230(c)(2), the interactive computer service had a 'good faith' basis for taking down the third-party content or whether that content was 'obscene' or 'lewd' or 'otherwise objectionable…' It is axiomatic that a statutory provision should not be read so broadly as to swallow and render meaningless another provision of the same statute." (petition in Jane Doe V. Facebook US 21-459) (OB 49-50)

Google notes that "the court also deemed all other remaining motions as moot (including Defendants' motions to dismiss, which had been fully briefed.)" However, Google did not Appeal the motion to dismiss, and the court did not say it considered any of the memorandums in its sua sponte decision.

The issues in the Rule 60(B) motion are appealable

Facebook argues that "this Court lacks jurisdiction to review the [issues in the] Rule 60(b) order." The Lower court never denied a Rule 60(b) motion. As the Lower court noted, it "lack[ed] jurisdiction to hear Plaintiff's Rule 60(b) motion because of his pending appeal... however, the court liberally construes his motion as one pursuant to Rule 62.1 for an indicative Ruling." (FBAPP 192) If the lower court's decision held the same weight as when it had jurisdiction, than rule 62.1(a)(c) would be pointless. "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." Colón-Torres v. Negrón-Fernández, 997 F.3d 63, 75 (1st Cir. 2021) Since the Court of appeals never remanded for the district court to decide the motion, the Lower court's conclusory order should not hold any weight as

to the merits that he was without jurisdiction to address. See Rule 62.1(c) “Recharacterization is unlike ‘liberal construction,’ in that it requires a court deliberately to override the pro se litigant's choice of procedural vehicle for his claim.” JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring Castro v. U.S., 540 U.S. 375, 386 (2003)

But I should be able to raise the issues anyway, aside from the injunction motions, the lower court’s sua sponte decision to dismiss was not based on two party arguments, unlike, Cochran v. Quest Software, Inc., 328 F.3d 1, 11 (1st Cir. 2003) I argued that Kearney’s misconduct was obstructing the case in my rule 59(e) motion, (FBAPP 133-5) but the lower court did not allow me to “raise arguments” (ADD 11-2) (even though it was my first opportunity to respond,) so any “virtually iron-clad rule" of not allowing new arguments on appeal must be set aside for the absolute rule of due process. "[t]o the extent that the post-judgment motions relate to issues raised before judgment, the appellate court will deal with them anyway." Dice Corp. v. Bold Techs., 556 F. App'x 378, 383 (6th Cir. 2014)

Informal Notice of Appeal

Regardless, if necessary, I filed an informal notice of appeal in the First Circuit on October 13th, 2021, in my "MOTION to extend time to file brief and appendix filed by Appellant Rian G. Waters." pg 1) The motion stated, *"The lower court ruled on my rule 60(b) motion on October 12th, 2021* at around 4:25 pm, and it took me a while to read the decision and look up how it affects the appeal. *Amended Notice of Appeal will be filed today*." The caption of the October 13th filing *listed me the Appellant*, and *each of the Appellees*. The Appellant brief was also filed two days after the indicative ruling decision which is within the allotted time to file a notice and contains the necessary information. "[T]he notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." Smith v. Barry, 502 U.S. 244, 248-49 (1992) ("The Federal Rules do envision that the notice of appeal and the appellant's brief will be two separate filings... They do not preclude an appellate court from treating a filing styled as a brief as a notice of appeal, however, if the filing is timely under Rule 4 and conveys the information required by Rule 3(c). Such treatment is, in fact, appropriate

under Torres and under Rule 3(c)'s provision that '[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal...' Rule 4(a)(1) sets out a transmittal procedure to be followed when the notice of appeal is mistakenly filed with an appellate court, and provides that a misfiled notice 'shall be deemed filed in the district court' on the day it was received by the court of appeals.") Id. 249 We have "jurisdiction over [an] underlying order if the appellant's intent to challenge it is clear, and the adverse party will suffer no prejudice if review is permitted." Lincoln Composites, Inc. v. Firetrace USA, LLC, 825 F.3d 453, 458 (8th Cir. 2016)

Section 1983 causation

Facebook falsely alleges that for the first time on appeal I try to "morph [my] state law claims for "product design" (Count I) and "gross negligence" (Count II) into a claim under Section 1983." However, both the product liability claim and gross negligence claim were alleged prior to, (RA 86-89) and re-alleged within the section 1983 claim. (RA 100 at 137) (R.A. 101 at 150,) and the Rule 60 (B) motion alleged these theories particularly. (FBAPP170 FBAPP173-4) The Lower Court did not address causation outside of conspiracy for 1983.

Kearney does not have a worthy argument.

Technically this court should not waste its time reviewing Kearney's arguments (or any other brief related to a motion to dismiss) below because the court did not say that Kearney's arguments factored into his decision. "[A] court should let the parties and an appellate court know why it acts, and on what factual basis." Ben David v. Travisono, 495 F.2d 562, 563 (1st Cir. 1974)

Even if does it is pointless, Kearney's only notable filing in the lower court was a motion to dismiss with a short memorandum, Kearney made four arguments that are relevant to the claims I am pursuing in my opening brief.

a) claim splitting doctrine, which my opening brief showed is irrelevant. OB. 55

b) "[P]olice leaking information would not constitute coercive power or even significant encouragement sufficient to label Kearney a state actor." But, "It is not enough to examine seriatim each of the factor upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is

controlling.” Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (OB.15 see also OB. 14-22)

c) Kearney argued that I did not show “some racial or otherwise class-based, invidiously discriminatory animus.” Thanks to my adjustment disorder I pointed out twice in my opening brief (OB 39) that, “No allegations of racial or class-based invidiously discriminatory animus are required to establish a cause of action under the first part of § 1985(2)” Kush v. Rutledge, 460 U.S. 719 (1983) None of the Defendants or Lower court have argued a response to Social Justice Warrior being a class. (OB 42-47)

d) Kearney argued that I did not argue enough facts for conspiracy, but he did not deny numerous conspiratorial facts that were alleged after the motions to dismiss. (OB 23-24)

Kearney is effectively defaulted on a lot of issues.

Normally when a Appellee doesn’t file a brief their only penalty is they are not heard on oral argument. This makes sense because an Appellate court can generally affirm for any reason on the record. This

case is not normal though, as the court dismissed sua sponte with prejudice essentially flipping the standard of review. (OB 6-13)

None of the Defendants put up any defense to my misconduct allegations. (Opening Brief pg 10) Kearney never denied having a conspiratorial design preventing me from having an attorney. (OB. 54)

Neither Kearney nor the Lower court argued any reason why Kearney's fake profiles used to conduct his public shaming without due process does not meet the alternative requirement for 1985(3) "or go in disguise upon the public highway, or on the premises of another." (OB. 41-42)

Kearney provides no argument in defense against any of the conspiracy theories (OB. 23-28)

None of the Defendants or the lower court had any argument in defense to my supplant state action argument. (OB 15) Kearney never addressed any of my State action theories, (OB. 14-20)

Conclusion

This court should remand the case and reassign to a new judge.

Certificate Of Service

I, Rian Waters, hereby certify that on December 17th 2021, I served the attached Petition, on Facebook, Google, Aidan Kearney, and Katherine Peter by Electronic filing for attorneys of record, and by emailing: bristolturtlechick@gmail.com;

Subscribed under the penalties of perjury.
/S/ Rian Waters Dated: December 17th, 2021
6 Liberty square PMB # 424 Boston MA 02109
(530)739-8951 Watersrian@gmail.com

Certificate of Compliance

The Brief is written in 14 point Century Schoolbook 2995 words all included.