

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KAREN HEPP,

Plaintiff

v.

FACEBOOK, INC., ET AL.,

Defendants

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CIVIL ACTION

NO. 19-4034-JMY

MEMORANDUM

YOUNGE, J.

JUNE 5, 2020

I. INTRODUCTION

This case arises out of the use of an allegedly unauthorized photograph of Plaintiff Karen Hepp, captured by a security camera in a New York City convenience store, that was then posted by third-party users on the respective websites and social media platforms of Defendants Facebook, Inc.; Imgur, Inc.; Reddit, Inc.; Giphy, Inc.; and foreign Defendant WCGZ, S.R.O. (See Amended Complaint (“Am. Compl.”), ECF No. 50.) Plaintiff asserts that she is a public figure who has suffered harm from the unlawful dissemination and publication of her image, and accordingly, she contends that Defendants have violated her common law and statutory right of publicity.

Defendants Facebook, Imgur, and Reddit have each filed Motions to Dismiss (“MTD”) Plaintiff’s Amended Complaint under Fed. R. Civ. P. 12(b)(6), asserting, *inter alia*, immunity under the Communications Decency Act (“CDA”), 47 U.S.C. § 230.¹ (See Imgur MTD and

¹ Giphy also filed a Motion to Dismiss (Giphy MTD, ECF No. 55). However, on May 13, 2020, Plaintiff voluntarily dismissed Giphy from this lawsuit with prejudice. (ECF No. 74.) Accordingly, Giphy’s Motion is no longer before the Court.

Mem., ECF Nos. 53, 53-1; Reddit MTD and Mem., ECF Nos. 54, 54-1; Facebook MTD, ECF No. 56 (collectively the “Motions to Dismiss”).) The Court finds this matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7.1(f). For the reasons that follow, the Motions to Dismiss will be granted based on CDA immunity.²

II. BACKGROUND

A. Factual Background³

Plaintiff is a newscaster who has worked for the Philadelphia-based Fox 29 news team since November 2010. (Am. Compl. ¶ 37.) She “is a co-anchor of the 4 am to 6 am hours of

As to Defendant WGCZ S.R.O., the Amended Complaint alleges that it is “is a limited liability company existing under the laws of the Czech Republic” that “owns and operates ‘XNXX.com,’ a popular adult-oriented website featuring pornographic materials.” (Am. Compl. ¶¶ 34-35.) WGCZ S.R.O.’s counsel executed a waiver of service on February 28, 2020. (See ECF No. 68.) On May 28, 2020, WGCZ S.R.O. filed a Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(2), asserting lack of personal jurisdiction. (See WGCZ S.R.O. MTD, ECF No. 77.) Plaintiff’s response to WGCZ S.R.O.’s Motion is not due until June 11, 2020, (see Local Rule 7.1(c)). Because this Motion is not yet ripe, it is not addressed in this Memorandum.

² Imgur’s and Reddit’s Motions to Dismiss also assert that this Court lacks personal jurisdiction because the Amended Complaint does not allege any suit-related contacts with this forum by either of these Defendants. (See Imgur Mem. 4-10 and Reddit Mem. 9-12.) However, because Plaintiff’s claims fail for the reason stated *infra*, the Court need not address personal jurisdiction over these Defendants. See, e.g., 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067.6 (4th ed. 2020) (“Alternatively, when the jurisdictional question is complex or difficult, a court simply may avoid the issue by resolving the suit on the merits when they clearly must be decided in favor of the party challenging jurisdiction, thereby obviating any need to decide the question; that approach is possible even when the jurisdictional issue lacks complexity.”); *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d 277, 329 (W.D. Pa. 2010) (“To streamline the decision making, courts, in situations where complex issues of personal jurisdiction exist and there is a pending motion which would be dispositive in favor of the party over whom jurisdiction is disputed, may defer ruling on the motion to dismiss and proceed to resolve the dispositive motion.”); see also *Herrick v. Grindr LLC*, 765 F. App’x 586, 593 n.2 (2d Cir. 2019) (“Because the complaint must be dismissed in its entirety on the grounds of CDA immunity and failure to state claims, we need not address Grindr Holding’s and KL Grindr’s personal jurisdiction arguments.”).

³ The factual allegations in the Amended Complaint are accepted as true and construed in the light most favorable to Plaintiff as the non-moving party. *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 262-63 (3d Cir. 2008). The Court also adopts the CM/ECF docketing system pagination.

‘Good Day Philadelphia,’ a morning news program, and joins the set as co-host for the final hour of the show from 9 am to 10 am.” (*Id.* ¶ 38.) Prior to working at Fox 29, Plaintiff worked for other news organizations in New York City, Philadelphia, and Connecticut. (*Id.* ¶¶ 39-41.)

Plaintiff alleges that “[a]pproximately two years ago, [she] discovered through her co-workers and managers, that, without her consent, a photograph of her taken by a security camera in a convenience store in New York City was being used in online advertisements for erectile dysfunction and dating websites.” (*Id.* ¶ 43.) Plaintiff further alleges that she “was unaware that her photograph had been taken” in the store, that she “does not know the identity or the location of the store or how her photograph was secured,” and that she “has since learned that the photograph has appeared illegally on many other websites.” (*Id.* ¶¶ 44-45.)

With regard to the moving Defendants, Plaintiff alleges as follows:

- “[Her] photo was featured in a Facebook advertisement soliciting users to ‘meet and chat with single women.’” (*Id.* ¶ 46.)
- “[Her] photo was featured on Imgur under the heading ‘milf,’ which is a derogatory and degrading slang acronym that refers to a sexually attractive woman with young children.” (*Id.* ¶ 47.)
- “[Her] photo was featured on Reddit titled ‘Amazing’ in the subgroup r/obsf (‘older but still \$#^@ble’) and posted by a user known as ‘pepsi_next.’ There is a hyperlink for the photograph which links to the Imgur site.” (*Id.* ¶ 48.)

The Amended Complaint also references and attaches as exhibits images and internet addresses of the websites on which her image appeared.⁴ (*Id.* ¶¶ 46-48, Exs. L-M.) Significantly, the Amended Complaint does not allege that Defendants Facebook, Imgur, or Reddit created, authored, or directly published the content that is the subject of this lawsuit. (*See generally*, Am. Compl.)

⁴ These exhibits and internet addresses include those related to former Defendant Giphy, which has been dismissed from this action.

Plaintiff alleges that the unauthorized dissemination of her image impacts her “image/brand on social media sites” and her “social media ranking” on sites such as Instagram and Twitter. (*See, e.g., id.* ¶¶ 51-55.) In the specific counts of the Amended Complaint, Plaintiff alleges that “Defendants’ actions with respect to [her] image have caused serious, permanent and irreparable harm” to “Plaintiff’s reputation, brand and image.” (*Id.* ¶ 71; *see also id.* ¶ 64.)

B. Procedural History

Plaintiff filed this action on September 4, 2019, asserting in her original Complaint claims against Facebook, Imgur, Reddit, Giphy, WCGZ, S.R.O., and Does 1-10,⁵ alleging a claim for violation of 42 Pa. Stat. and Cons. Stat. Ann. § 8316 (Count I), and a claim under the Pennsylvania common law right of publicity (Count II). (Compl., ECF No. 1.) Subsequently, Defendants Imgur, Giphy, Reddit, and Facebook filed motions to dismiss the Complaint. (*See* ECF Nos. 29, 45, 46, 47.)

On February 18, 2020, while the motions to dismiss the original Complaint were pending, Plaintiff filed her Amended Complaint, again asserting claims against the above-noted Defendants under 42 Pa. Stat. and Cons. Stat. Ann. § 8316 (Count I), and the Pennsylvania common law right of publicity (Count II). (*See generally* Am. Compl.) Accordingly, the Court dismissed the motions to dismiss the original Complaint as moot. (*See* ECF No. 51.) In response to the Amended Complaint, Defendants Imgur, Reddit, and Facebook filed the Motions that are the subject of this Memorandum.⁶

⁵ Plaintiff alleges that the Doe Defendants are “the owners and operators of other websites and/or media outlets” who either performed the acts alleged, “acted as agents, principals, alter egos, employees, or representatives of the other Defendants,” or “otherwise participated in the acts alleged with the other Defendants.” (Am. Compl. ¶ 36.)

⁶ When the motions to dismiss the original Complaint were filed, Plaintiff had not yet demonstrated proof of service of the Complaint on the foreign Defendant, WCGZ, S.R.O. (*See* ECF Nos. 34, 43.) Plaintiff later effected service upon WCGZ, S.R.O. pursuant to the Hague Convention and, as

III. LEGAL STANDARD

The motion to dismiss standard under Federal Rule of Civil Procedure 12(b)(6) is set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). After *Iqbal*, it is clear that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to defeat a Rule 12(b)(6) motion to dismiss. *Id.* at 678; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “To survive dismissal, ‘a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). Facial plausibility is “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Iqbal*, 556 U.S. at 678). Instead, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Iqbal*, 556 U.S. at 678).

Our Court of Appeals requires us to apply a three-step analysis under a 12(b)(6) motion: (1) “[the district court] must tak[e] note of the elements [the] plaintiff must plead to state a claim;” (2) “it should identify allegations that, ‘because they are no more than conclusions, are not entitled to the assumption of truth;” and, (3) “[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 675, 679). The plausibility determination is a “context-specific

noted above, its counsel executed a waiver of service. (See ECF Nos. 52, 68.) The current Motions to Dismiss were filed before Defendant WCGZ, S.R.O.’s response to the Amended Complaint was due. As further noted above, WCGZ, S.R.O. has since filed a Motion to Dismiss the Amended Complaint, which Motion is not yet ripe for decision.

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