

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CURTIS J. NEELEY, JR., MFA

PLAINTIFF

v.

Civil No. 12-5074

NAMEMEDIA, INC.; GOOGLE, INC.;
MICROSOFT CORPORATION;
FEDERAL COMMUNICATIONS COMMISSION; and
THE UNITED STATES

DEFENDANTS

O R D E R

Now on this 5th day of September, 2012, comes on for consideration **Plaintiff's Motion to Alter or Amend Judgment** (document #22) and the accompanying Brief in Support. The Court, being well and sufficiently advised, finds and orders as follows:

1. On April 18, 2012, plaintiff Curtis J. Neeley filed his "Complaint for Libelous Invasions of Privacy, Author's Rights Violations, Fraudulent Use of Stolen Art, and Failure to Regulate Wire Communications or Protect Exclusive Rights for Authors."

2. The Court dismissed the complaint in its Order entered August 1, 2012 (document #21), finding that

* all of Mr. Neeley's claims against defendant NameMedia, Inc. and some of his claims against defendant Google, Inc. were barred by res judicata;

* Mr. Neeley failed to state a false-light invasion-of-privacy claim against Google;

* Mr. Neeley failed to state a defamation claim against defendant Microsoft Corporation;

* Mr. Neeley failed to exhaust his administrative remedies with respect to defendant Federal Communications

Commission (FCC); and

* Mr. Neeley failed to state any claim against the United States.

3. Mr. Neeley contends the Order was based on certain errors of law and fact and asks the Court to reconsider its rulings. The Court will address each of Mr. Neeley's arguments in turn.

4. First, Mr. Neeley argues that the finding of res judicata as to the claims against Google was in error.

(a) Mr. Neeley argues that the claims in the present case have nothing substantively in common with the claims in his previous case, case #09-5151, and points to Google's unauthorized republication of his artwork from "entirely different locations."

The Court can only assume (because he has offered no specific example to the contrary) that Mr. Neeley refers to the allegation that Google scanned and uploaded three of his nude images (which were correctly attributed to Mr. Neeley) from a New York library book and made them accessible to the public in an online preview of the book. The Court specifically found that this particular claim did not arise out of the same underlying facts as the previous case and was not barred by res judicata. Thus, Mr. Neeley's argument has no merit.

(b) Next, Mr. Neeley argues that the Court's misuse of the term "public domain" in reference to the internet requires reconsideration of its res judicata finding.

The context in which the Court used the term is as follows:

Most of the claims plaintiff makes in the present case stem from the same underlying facts and occurrences that were the basis for the claims made in case #09-5151: plaintiff's artwork depicting nude figures, *which he placed in the public domain*, were accessible to users, including minors, by conducting an internet search of plaintiff's name.

Order of Aug. 1, 2012 (document #21), page 4 (emphasis added). In retrospect, what the Court intended to convey with that phrase was that Mr. Neeley had made his nude artwork publicly accessible by placing it on an internet website. The Court did not rely on any legal definition of "public domain" in making its res judicata determination. Therefore, any error in the Court's use of the term did not affect its analysis and is not a basis for reconsideration.

5. In his second point for reconsideration, Mr. Neeley argues that the Court improperly dismissed his invasion-of-privacy claim.

(a) Mr. Neeley contends that the Court failed to consider two of the four recognized types of invasion of privacy:

* unreasonably intruding on the seclusion of others; and

* giving unreasonable publicity to another's private life.

The Court notes that the section of Mr. Neeley's Complaint in which he alleged invasion of privacy stated, "Scanning visual art from this book and digital republication of this visual art before minors presented Neeley in a negative false light." Complaint (document #1), page 7. The Complaint made no allegation of any other type of invasion of privacy.

The Court cannot know what a plaintiff intends to claim if it is not explicitly stated in the complaint. Here, Mr. Neeley alleged only false-light invasion of privacy, which the Court considered. He cannot now amend his Complaint to include other avenues of relief.

(b) Mr. Neeley next goes on to argue that the Court's analysis of his false-light claim was flawed, in that it improperly considered whether the false light was "negative."

By stating in its Order that Mr. Neeley had "failed to explain how the publishing of his own artwork places him in a negative false light," the Court merely tracked the language of Mr. Neeley's Complaint, as shown above. The Court's analysis did not depend on whether the false light was "negative." In any event, Mr. Neeley has made no argument as to the falsity of the

photographs¹ or any malice in their publication, which are required elements in a claim of false-light invasion of privacy. Therefore, Mr. Neeley has presented no grounds for the Court to reconsider its ruling.

6. With regard to the dismissal of the claims against Microsoft, Mr. Neeley takes exception to the Court's statement that he "failed to state facts that would allow the Court to draw the reasonable inference that defendant Microsoft published plaintiff's nude artwork of its own accord." Mr. Neeley likens text-image association on a search engine to "publication," as it is used in *Lancaster v. Red Robin International, Inc.*, 2011 Ark. App. 706, at 8, to define defamation. However, he offers no authority to support the comparison.

To the contrary, computer-service providers, such as Microsoft and Google, are not considered "publishers" for the purpose of defamation claims, so long as the published material was provided by another party. 47 U.S.C. § 230(c)(1); *Johnson v. Arden*, 614 F.3d 785, 790-91 (8th Cir. 2010) (holding that the Communications Decency Act, 47 § U.S.C. 230, provides internet-service providers with federal immunity against state tort defamation actions that would make service providers liable for information originating from third-party users of the service).

¹Mr. Neeley contends that the false light was that he desired minors or "other anonymous persons" to view the nude photographs by searching for them on a computer in an elementary school library. To presume that the availability of the photographs on the internet would lead a reasonable person to make such an assumption is quite a stretch.

Therefore, Mr. Neeley's argument is without merit.

7. With regard to the dismissal of his claims against the FCC, Mr. Neeley proposes no error of law or fact but suggests that the Court might have found evidence that he exhausted his administrative remedies had it only performed various internet searches. He states, "[U]sing this text query ["Curtis J. Neeley site:fcc.gov"] and missing the prior administrative complaint process attempted supports only the predisposition to dismiss regardless of fact."

Prior to the instant motion, Mr. Neeley had provided the Court with no documents associated with any FCC administrative proceeding, nor any denial of such a proceeding, and he only mentioned having contacted someone at the FCC in his Objection to Report and Recommendation. "Contacting" a federal agency is not equivalent to pursuing (or even attempting to pursue) an administrative remedy through the agency. Furthermore, it is the plaintiff's responsibility to prove exhaustion of administrative remedies—not the Court's—and Mr. Neeley's implication that the Court failed to perform necessary research is not well taken.

Because Mr. Neeley has not offered any grounds supporting reconsideration of this ruling, his motion will be denied.

8. Finally, Mr. Neeley argues that he has the right to exclusively control his original artwork pursuant to *Roe v. Wade*, 410 U.S. 113 (1973). He compares his creations of nude artwork to

an unwanted fetus and argues that the United States has violated his fundamental right to privacy by not allowing him to purge the images from the internet.

While Mr. Neeley has made a creative analogy, the Supreme Court's decision in *Roe v. Wade* is not on point with any aspect of this case and does not support Mr. Neeley's position. Mr. Neeley has not stated a cognizable claim against the United States; therefore, his motion will be denied.

IT IS THEREFORE ORDERED that **Plaintiff's Motion to Alter or Amend Judgment** (document #22) is **denied**.

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE