

Ruling Blocks Realtor From Suing Over Comments on Rival's Blog

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Judge Ciparick
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ALBANY - New York's highest court attempted for the first time yesterday to draw a line between when website operators can claim the protection of federal law for objectionable material provided by third parties and when they can be sued for libelous content.

Adopting a broad reading of the federal Communications Decency Act (CDA), a 4-3 majority of the Court of Appeals ruled that New York City apartment rental agent and seller Christakis Shiamili is blocked from suing a rival company for anonymous comments in a February 2008 blog post about the New York real estate industry that accused Mr. Shiamili of being a racist, an anti-Semite, a wife-beater, an adulterer and a bad boss.

State defamation law is preempted by the federal act, [47 USC §230](#), which provides that no service 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," Judge Carmen Beauchamp Ciparick wrote today for the majority in [Shiamili v. Real Estate Group of New York](#), 105.

The majority upheld dismissal of the suit against Daniel Baum and Ryan McCann of The Real Estate Group of New York because they apparently did not author the "unquestionably offensive and obnoxious" comments made by a blogger named "Ardor Realty Sucks" about Mr. Shiamili and his Ardor Realty Corp. Instead, they merely passed on the material to Internet users, the court said.

Mark A. Berman of Ganfer & Shore, who writes on electronic filing and online defamation for the New York Law Journal, said in an interview that the majority set a "pretty tough obstacle" in the pleading stage of cases for plaintiffs to show enough information to avoid summary judgment where the Communications Decency Act is being used as a defense.

"In a lot of cases, it is not going to be enough to get over this hump they have established," said Mr. Berman, who was not involved in the Shiamili litigation.

Judge Ciparick said the federal act was enacted by Congress in 1996 to foster a free exchange of ideas and opinions on the Internet and that its protections are in clear contrast to books, magazines and newspapers, where publishers in New York and elsewhere are in general held liable for defamatory statements by third parties.

She said that since the Court has never ruled on the breadth of the federal act before, the majority was basing its determination in *Siamili* on how a consensus of the other state and federal courts taking up the issue have ruled.

She cited the "seminal" case in this area, [*Zeran v. Am. Online Inc.*](#), 129 F3d 327 (4th Cir. 1997), which held that "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech."

In general, other courts have interpreted the Communications Decency Act broadly.

"Consistent with this view, we read section 230 to bar lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional functions—such as deciding whether to publish, withdraw, postpone or alter content," Judge Ciparick wrote, quoting *Zeran*.

Judge Ciparick noted that service providers lose their immunity from suit when they are the source of the content. Here, however, the complaint alleged that the defamatory statements were first posted by anonymous users; there was no allegation that the defendants authored them.

Nor could it be held against the defendants that they created and ran a website implicitly encouraging users to post negative comments about the real estate industry, the majority said.

"Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects," the majority said.

Moreover, there was no allegation that the comments at issue were posted in response to any specific invitation for users to criticize Mr. Shiamili or Arbor, Judge Ciparick wrote.

Supreme Court Justice Marcy S. Friedman denied a motion to dismiss Mr. Shiamili's suit, but an Appellate Division, First Department, panel reversed in [*Shiamili v. Real Estate Group of New York Inc.*](#), 68 AD3d 581 (2010) on the grounds that the complaint alleged the defendants only edited and published the derogatory comments, but did not author them.

The Court of Appeals affirmed, with Judges Victoria Graffeo, Susan Phillips Read and Robert S. Smith joining Judge Ciparick in the majority.

'Outrageous' Statements

In dissent, Chief Judge Jonathan Lippman wrote that the statements made against Mr. Shiamili were "outrageous" and that there is a strong suggestion that operators of the anti-Shiamili website did more than rearrange a few postings.

The anti-Shiamili postings were moved to a site titled "Ardor Realty and those people" and the posting was accompanied by a digitally altered image of Jesus Christ bearing Mr. Shiamilli's picture. It carried the caption "Chris Shiamili: King of the Token Jews."

"A reasonable reader, viewing the heading and the illustration, might very well have concluded that the site editor was endorsing the truth of the appended facts, which asserted that plaintiff was an anti-Semite who employed a single Jewish realtor in order to maintain business with Jewish landlords," Judge Lippman wrote.

Judge Ciparick said that reposting content provided by third parties is well within a publisher's traditional prerogative and thus protected by §230.

But Judge Lippman said the case, at the least, should have proceeded to discovery to find out more about the role, if any, the Real Estate Group of New York and Messrs. Baum and McCann played in the postings.

Judge Lippman said that while he too favors a broad interpretation of immunity for on-line providers under the Communications Decency Act, "an interpretation that immunizes a business's complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable."

He added that the "scurrilous defamatory attacks" against Mr. Shiamili and his company are "sufficiently stated and are outside the scope of CDA immunity."

His dissent was joined by Judges Theodore T. Jones Jr. and Eugene F. Pigott Jr.

Joseph D'Ambrosio, of Ford Marrin Esposito Witmyer & Gleser, argued on behalf of the defendants.

"Although the Court was divided, we believe the majority decision is consistent with the holdings of other state and the federal courts that have addressed CDA immunity for third-party content on web sites," Mr. D'Ambrosio said yesterday.

Jonathan S. Shapiro, Mr. Shiamili's attorney, said he would explore whether an appeal in federal court is possible.

"I think the chief judge and the dissent laid out what our position was pretty well and it was a pretty strong dissent," said Mr. Shapiro, of The Shapiro Firm. "We think he got it right."

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