

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 12

Justice

L. LEE WHITNUM,

INDEX NO.

110987/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -
yahoo, Inc.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

and
Cross-motion are decided in
accordance with the accompanying
memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

Dated: 9/15/07

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

[Signature]
BARBARA R. KAPNICK J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
L. LEE WHITNUM,

Plaintiff,

-against-

YAHOO! INC.,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 110987/06

Motion Seq. No. 001

FILED
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In this action, plaintiff L. Lee Whitnum seeks to recover for lost sales in the amount of \$125,000, which she claims she sustained when defendant Yahoo! Inc. shut down its web hosting service to her website, www.hedgefundmistress.com, for approximately 8 hours on August 19, 2004, the same day the website and plaintiff's novel, "Hedge Fund Mistress", received publicity on the front page of the Boston Herald.

Defendant now moves for an order dismissing plaintiff's Complaint and Amended Complaint on the grounds, inter alia, that plaintiff agreed to accept Yahoo!'s Terms of Service which provide, in relevant part, as follows:

19.0 MODIFICATIONS TO AND DISCONTINUATION OF SERVICE

Yahoo! reserves the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Service (or any part thereof) with or without notice. You agree that Yahoo! shall not be liable to You or to any third party for any modification, suspension or discontinuance of the Service (emphasis supplied).

* * *

21.0 LIMITATION OF LIABILITY

YOU EXPRESSLY UNDERSTAND AND AGREE THAT YAHOO! AND ITS PARENTS, SUBSIDIARIES, AFFILIATES, CO-BRANDERS OR OTHER PARTNERS, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AND AGENTS, SHALL NOT BE LIABLE, UNDER ANY CIRCUMSTANCES OR LEGAL THEORIES WHATSOEVER, FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO, DAMAGES FOR LOSS OF BUSINESS, PROFITS, GOODWILL, USE, DATA, OR OTHER INTANGIBLE LOSSES (EVEN IF YAHOO! HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), RESULTING FROM: (i) THE USE OR THE INABILITY TO USE THE SERVICE OR THAT RESULT FROM ERRORS, DEFECTS, OMISSIONS, DELAYS IN OPERATION OR TRANSMISSION, OR ANY OTHER FAILURE OF PERFORMANCE OF THE SERVICE OR THE SOFTWARE (emphasis supplied); (ii) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES RESULTING FROM ANY GOODS, DATA, INFORMATION, OR SERVICES PURCHASED OR OBTAINED OR MESSAGES RECEIVED OR TRANSACTIONS ENTERED INTO THROUGH OR FROM THE SERVICE; (iii) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS OR DATA; (iv) STATEMENTS OR CONDUCT OF ANY THIRD PARTY ON THE SERVICE; OR (v) ANY GOOD OR SERVICE OFFERED OR SOLD THROUGH THE SERVICE; (vi) ANY OTHER MATTER RELATING TO THE SERVICE OR SOFTWARE.

YAHOO!'S LIABILITY TO YOU SHALL NOT, FOR ANY REASON, EXCEED THE AGGREGATE PAYMENTS ACTUALLY MADE BY YOU TO YAHOO! OVER THE COURSE OF THE EXISTING TERM. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR LIABILITIES, SO SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU.¹

Plaintiff opposes the motion and cross-moves for permission to file a second "Amended Complaint" to more specifically allege her theories of liability; namely, breach of the covenant of good faith

¹ Plaintiff has not disputed that she agreed to these terms by clicking the "I accept" button on the internet on May 7, 2004. See, Moore v. Microsoft Corp., 293 A.D.2d 587 (2nd Dep't 2002).

and fair dealing (first cause of action), willful misconduct (second cause of action) and gross negligence (third cause of action).²

Plaintiff argues that defendant may not avoid liability in this case if she is able to demonstrate that the web hosting services were intentionally shut down by defendant or were shut down as a result of defendant's gross negligence.

It is well settled that a contractual limitation on liability is enforceable (see *Uribe v Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341 ... [1998]; *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 N.Y.2d 430, 436 ... [1994]), except that public policy forbids a party from attempting to avoid liability for damages caused by grossly negligent conduct (see *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 ... [1992]).

Obremski v. The Image Bank, Inc., 30 A.D.3d 1141 (1st Dep't 2006).³

² The original Complaint and first Amended Complaint were filed by plaintiff pro se. Plaintiff has since retained an attorney who drafted the proposed second Amended Complaint.

³ Plaintiff cites to the case of Salis v. Ghana Airways, 9 A.D.3d 421 (2nd Dep't 2004), app. dism'd, 4 N.Y.3d 739 (2004), rearg. den., 4 N.Y.3d 795 (2005), in which the court found that the limitation of liability granted by the Warsaw Convention to air carriers does not apply under the Convention to claims by a passenger arising out of a carrier's "willful misconduct", in support of her argument that defendant Yahoo! may not avoid liability resulting from its willful misconduct.

Plaintiff, who claims to have spoken by telephone with different reporters in the middle of August 2004 regarding her "past relationship" with Senator John Kerry,⁴ has submitted an affidavit in which she states, in relevant part, as follows:

9. I think that the shut down was politically motivated to "protect" John Kerry and thus was willful wrongdoing, discrimination and a violation of my free speech rights.

10. It could have been shut down due to the gross negligence of Yahoo in failing to keep my site managed in a reasonable way and further gross negligence in failing to get the website back and running within a shorter period of time.

However, plaintiff has not alleged any facts in support of these conclusions.

Based on the papers submitted and the oral argument held on the record on February 21, 2007, this Court finds that plaintiff's proposed second Amended Complaint is based on mere speculation and fails to set forth a claim for either willful misconduct or gross negligence. The contractual limitation on liability, therefore, bars recovery by plaintiff in this case.

Accordingly, defendant's motion to dismiss is granted and plaintiff's cross-motion for leave to amend her Complaint is denied.

⁴ Plaintiff states that she and Senator Kerry "were involved with each other for about 20 months after his divorce and before his marriage to Teresa Heinz."

The Clerk may enter judgment dismissing plaintiff's action with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: September 5, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE