18-0396-cv

United States Court of Appeals
for the
Second Circuit

MATTHEW HERRICK,

Plaintiff-Appellant,

v.

GRINDER, LLC, KL GRINDR HOLDINGS, INC.,
and GRINDR HOLDING COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE GRINDR HOLDING COMPANY

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), Appellee Grindr Holding Company ("GHC") states that it is a private, non-governmental entity, that it has no parent company, and that no publicly-held corporation owns 10% or more of GHC's stock.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the District Court properly found that Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230"), barred Plaintiff-Appellant Matthew Herrick's ("Appellant") claims for defect in design, defect in manufacture, defect in warning, negligent design, failure to warn or to provide adequate instruction, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress?

(2) Whether the District Court properly found that Appellant failed to plead plausible claims for fraud, promissory estoppel, negligent misrepresentation, and deceptive practices and false advertising under New York General Business Law?

STANDARD OF REVIEW

The Court reviews *de novo* the District Court's decision to grant motions to dismiss under Federal Rule of Civil Procedure Rule 12(b)(2) or 12(b)(6). *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018). The Court may affirm the District Court's decision for any reason supported by the record. *Latner v. Mount Sinai Health Sys., Inc.*, 879 F.3d 52, 54 (2d Cir. 2018).

STATEMENT OF THE CASE

Appellant seeks to hold Grindr LLC ("Grindr"), a California Limited Liability Company, and its then members, Grindr Holding Company ("GHC") and KL Grindr Holdings, Inc. ("KL Grindr"), liable for speech and other content that a third party promulgated on Grindr's interactive computer service. GHC joins Grindr's Opposition Brief and files this separate brief to make additional arguments relevant to it.

I. The Grindr App

Grindr owns, operates, and maintains a geosocial-networking application ("Grindr App.") for smartphones geared towards gay and bisexual men. (A-57, ¶ 21.) Since its launch in early 2009, the Grindr App. has become the largest and most popular gay social networking app in the world, connecting nearly 10 million users in almost 200 countries. (A-57, ¶ 29.) The Grindr App. utilizes location-based technology, which enables users who are near each other to interact and connect. (A- 57, ¶¶ 22-23.) Through the Grindr App, a user can filter other users by various attributes, determine how close another user is, see that user's photographs, read that user's biography, and chat with that user. (A-59, ¶ 31.) The Grindr App. is available on multiple smartphone platforms. (A-58, ¶ 28.)

II. Grindr Holding Company

At the time the suit was filed, GHC held a minority ownership interest in Grindr. (A-188, ¶ 3.)[1] GHC is a Delaware corporation that had its principal place of business in the County of Los Angeles, California. (A-188, ¶ 2; *see also* A-56, ¶ 18.)

GHC neither owns nor leases any property in the state of New York. (A-188, ¶ 2.) It has no physical presence in New York. (*Id.*) GHC has no offices in New York and does not employ anyone who works or resides in New York. (*Id.*) In fact, GHC has no employees at all. (*Id.*) GHC does not have any bank accounts or telephone numbers in New York state. (*Id.*) GHC is not a registered New York entity of any type, and it has never sought to become registered in New York. (*Id.*) GHC has not advertised, solicited, or engaged in any form of business in New York. (*Id.*) Put simply, GHC has no presence of any kind in New York. (*Id.*)

III. Third Party Harassment of Appellant

In this action, Appellant alleges that his ex-boyfriend harassed him by impersonating him through phony accounts the ex-boyfriend created on the Grindr App. (A-54, ¶ 5; A-65, ¶ 49.) Appellant further alleges that unwanted visitors came to his home and work in response to invitations that his ex-boyfriend extended using the phony accounts. (A-65–69, ¶¶ 49–50, 54, 63.)

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[1] GHC has since sold its interests in Grindr and is no longer a member of Grindr.

Appellant blames Grindr, GHC, and KL Grindr (collectively, "Appellees") for his ex-boyfriend's alleged acts. (A-69, ¶ 66.) He alleges that Grindr was not sufficiently responsive to his complaints and that the Grindr App. does not employ sufficient technology to prevent misuse. (A-54, ¶ 7; A-61, ¶ 38; A-64, ¶ 44; A-70–74, ¶¶ 67, 79, 83–86.) Appellant, however, does not make any specific allegations of misconduct as to GHC. Indeed, the only allegations that Appellant specifically makes as to GHC is that GHC (i) is a member of Grindr; and (ii) is "incorporated under the laws of Delaware with its principal place of business in California." (A-56, ¶¶ 16, 18.)

IV. Appellant's Jurisdictional Allegations

Appellant alleges in conclusory fashion that Appellees, collectively, are subject to the personal jurisdiction of the Southern District of New York. (A-56, ¶ 19.) He fails to plead any facts supporting personal jurisdiction over GHC and alleges no facts that GHC has contacts of any kind with New York.

V. Procedural History

On January 27, 2017, Appellant commenced this action against Grindr in the Supreme Court of the State of New York, New York County. (A-9–40.) Upon Appellant's application, Justice Kathryn Freed entered an Ex Parte Order to Show Cause and temporary restraining order ("TRO"). (A-41–42.)

On February 8, 2017, Grindr timely removed the action to the District Court, on the basis of diversity jurisdiction. (ECF No. 1.)

On February 22, 2017, the District Court held a hearing on Appellant's application to extend the TRO. (A-43.) At that hearing, Grindr's counsel informed the District Court that Grindr rigorously worked to try to stop the alleged impersonation by conducting daily searches for accounts that might have been created by Appellant's ex-boyfriend. (A-149–53.) By conducting searches based on email addresses, phone numbers, and street addresses, Grindr was able to identify and delete numerous accounts. (*Id.*) By order dated and filed February 24, 2017, the District Court denied extension of the TRO. (A-43–52.)

On March 31, 2017, Appellant filed his Amended Complaint (the "FAC"), adding GHC and KL Grindr as defendants.[2] (A-53–95.)

On April 21, 2017, Grindr moved to dismiss the FAC pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) on the basis that all of the claims were barred by Section 230 and that they were improperly pleaded. (A-96–97.) GHC joined Grindr's motion and additionally sought dismissal on the grounds that: (i) the District Court lacked personal jurisdiction over it; (ii) it could not be liable based

[2] KL Grindr and Grindr Holding Co. were, at the time of the Complaint, Grindr's two corporate members. For no articulated reason, the FAC attempts to extend Appellant's claims against Grindr to these members. Appellant simply groups the three separate entities—along with the Grindr App.—into a single defined term. (*See* A-53.)

solely on its status as a member of Grindr; and (iii) Appellant impermissibly engaged in group pleading. (A-186; ECF No. 60.)

By Decision and Order dated and filed January 25, 2018, the District Court properly dismissed Appellant's FAC with prejudice.[3] (A-190-218.)

[3] The District Court's finding that each of Appellant's claims was subject to dismissal pursuant to Rule 12(b)(6) did not address GHC's other bases for dismissal of the FAC. Nevertheless, this Court may affirm the District Court's decision for any reason supported by the record. *Latner*, 879 F.3d at 54.

SUMMARY OF THE ARGUMENT

Appellant seeks to hold Appellees responsible for the acts of his estranged ex-boyfriend. To that end, Appellant asserts fourteen claims against Appellees, including claims for products liability, negligent design, negligence, copyright infringement, promissory estoppel, fraud, deceptive business practices, false advertising, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent misrepresentation.

The District Court found that Section 230 barred Appellant's claims for defect in design, defect in manufacture, defect in warning, negligent design, failure to warn or to provide adequate instruction, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. It further found that Appellant failed to plead plausible claims for fraud, promissory estoppel, negligent misrepresentation, and deceptive practices and false advertising under New York General Business Law. For the reasons identified in Grindr's and KL Grindr's joint Opposition Brief, which GHC hereby joins, the Court should affirm the District Court's order dismissing all of Appellant's claims under Rule 12(b)(6).

The Court may affirm dismissal of Appellant's claims as to GHC for the additional reasons that (1) the District Court lacks personal jurisdiction over GHC; (2) GHC cannot be held liable for Grindr's alleged actions as a matter of law; (3) the FAC lacks the basic level of specificity mandated by Federal Rule of Civil Procedure

8(a); and (4) the FAC falls short of Federal Rule of Civil Procedure 9(b)'s heightened pleading standard.

ARGUMENT

I. GRINDR HOLDING COMPANY IS NOT SUBJECT TO THE DISTRICT COURT'S PERSONAL JURISDICTION

For a court to lawfully exercise personal jurisdiction over a defendant, three primary requirements must be satisfied. First, "service of process upon the defendant must have been procedurally proper." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012). Second, "there must be a statutory basis for personal jurisdiction that renders such service of process effective." *Id.* Third, "the exercise of personal jurisdiction must comport with constitutional due process principles." *Id.* at 60. The allegations in the FAC do not establish the second or third requirements for the District Court to exercise personal jurisdiction over GHC.[4]

A. The Court Should Affirm Dismissal Because the District Court Lacks Personal Jurisdiction Under New York Law

A district court may exercise jurisdiction over a defendant that would be subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is located. *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 183-84 (2d Cir. 1998). In a diversity case such as this, district courts look to the law of the state in which it sits to determine whether it has personal jurisdiction. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999).

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[4] Although the District Court did not address the issue of personal jurisdiction, it noted the FAC contained no factual allegations against KL Grindr or GHC, and that Appellant appeared to acknowledge he engaged in group pleading. (A-196 n.5.)

A defendant is subject to general jurisdiction in New York if it is domiciled in New York, served with process in New York, or continuously and systematically does business in New York. N.Y. C.P.L.R. § 301. As clarified by the Supreme Court, an entity is subject to general jurisdiction only in those places where it is "at home," which is generally limited to the entity's state of incorporation or principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 137–39 & n.19 (2014).

Alternatively, a defendant may be subject to specific jurisdiction under New York's long-arm statute if it engages in the following acts *and* such acts relate to an asserted claim: (1) transacts business within the state or contracts to supply goods or services in the state; (2) commits a tortious act within the state; (3) commits a tortious act outside the state but injures a person or property in the state; or (4) owns, uses, or possesses any real property in the state. N.Y. C.P.L.R. § 302(a). As recently underscored by the Supreme Court, in order for a state to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017). When there is no such connection, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state." *Id.*; *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (holding that, for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying

controversy, principally, [an] activity or an occurrence that takes place in the forum); *id*. at 931 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

The FAC lacks factual allegations sufficient to give rise to personal jurisdiction over GHC under New York law. As a preliminary matter, Appellant does not even allege that jurisdiction is proper under any New York statute. But even if Appellant had identified a theory of personal jurisdiction under New York law, the FAC's allegations are still inadequate because the FAC simply declares that "Defendants are subject to the personal jurisdiction of the Southern District of New York," (A-56, ¶ 19), but Appellant pleads no facts to support this bald conclusion.

First, there is no general jurisdiction over GHC under New York C.P.L.R. § 301 because Appellant does not allege, as he must, that GHC is domiciled in New York, was served with process in New York, or does business in New York. To the contrary, the FAC admits that GHC "is . . . incorporated under the laws of Delaware and has its principal place of business in California." (A-56, ¶ 18.) Further, Appellant served GHC with process in Delaware, not New York. (ECF No. 39.) Finally, GHC does not do business in New York nor does it have a physical or business presence in New York of any kind. (A-188, ¶ 2.)

Second, Appellant does not allege facts sufficient for the District Court to exercise specific jurisdiction over GHC under New York's long-arm statute. The

FAC does not allege that GHC or one of its agents conducted any business in New York. It also fails to allege that GHC or one of its agents committed any tortious conduct in New York or giving rise to injury in New York. Most importantly, it does not allege any relation between GHC's ostensible New York contacts and the claims at issue here. As set forth above, Appellant cannot do so because GHC has no presence of any kind in New York. (*See* A-188, ¶ 2.)

B. The Court Should Affirm Dismissal Because the District Court Lacks Personal Jurisdiction Under the Due Process Clause

The due process requirement for personal jurisdiction protects an entity without meaningful ties to the forum state from being subjected to binding judgments within its jurisdiction. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567–68 (2d Cir. 1996). There are two aspects of the due process analysis: (1) the minimum contacts inquiry, and (2) the reasonableness inquiry. *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010).

In determining whether minimum contacts exist, courts must examine the "quality and nature" of the contacts under a totality of circumstances test, to determine whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws . . . such that [the defendant] should reasonably anticipate being haled into court there." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007). At the motion to dismiss stage, the plaintiff needs to make a *prima facie*

showing of personal jurisdiction over the defendant. *Penguin Grp. (USA), Inc. v. Am. Buddha*, 609 F.3d 30, 34-35 (2d Cir. 2010). "Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Penguin,* 609 F.3d at 35 (internal quotations marks and alterations omitted).

The District Court cannot exercise personal jurisdiction over GHC consistent with GHC's due process rights because Appellant has not alleged that GHC has contacts of any kind with the state of New York. Appellant alleges only that "Grindr Holding Company is . . . incorporated under the law of Delaware and has its principal place of business in California." (A-56, ¶ 18.) Such non-specific jurisdictional allegations are fatal to Appellant's FAC.

Moreover, GHC's ownership interest in Grindr is insufficient as a matter of law to give rise to personal jurisdiction consistent with principles of due process. *See NovelAire Techs., L.L.C. v. Munters AB*, No. 13 Civ. 472 (CM), 2013 WL 6182938, at *12 (S.D.N.Y. Nov. 21, 2013) (holding that an ownership interest in a corporation is insufficient to satisfy the constitutional standards of minimal contacts).

Because Appellant has not alleged that GHC has any contacts with New York, the District Court lacks personal jurisdiction over GHC and the Court should affirm the dismissal of Appellant's claims as to GHC.

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Grindr Holding Company Cannot Be Held Liable for Grindr's Actions as a Matter of Law

The Court should affirm the District Court's dismissal of the FAC as to GHC because Appellant seeks to hold GHC liable for the alleged acts and omissions of Grindr based solely on GHC's status as an LLC member. But GHC's status as a member of Grindr is insufficient to plead claims against GHC as a matter of law.

Because Grindr is a California limited liability company, (A-56, ¶ 15), California law governs whether GHC may be held liable for Grindr's acts. *See, e.g.*, *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (1995) ("[U]nder New York choice of law principles, '[t]he law of the state of incorporation determines when the corporate form will be disregarded[.]'"); *Ellison v. Clos-ette Too, LLC*, 2014 WL 5002099 (S.D.N.Y. Oct. 7, 2014) (holding that "[t]his [choice of law] principle applies to LLCs as well as corporations."). California follows the Revised Uniform Limited Liability Company Act, which precludes a member of an LLC from being held liable for the acts of the LLC: "[T]he "debts, obligations, or other liabilities of a limited liability company . . . do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager for the limited liability company." Cal. Corp. Code § 17703.04; *see also see also CB Richard Ellis, Inc. v. Terra Nostra Consultants*, 230 Cal. App.

4th 405, 411 (2014) ("[M]embers of a limited liability company are not liable for the 'debts, obligations, or other liabilities' of the limited liability company.").

There is a limited exception where the member is the alter ego of the LLC. Here, however, Appellant does not allege alter ego in the FAC, much less plead facts sufficient to state such a theory as to GHC. Accordingly, the FAC should be dismissed as to GHC. *See, e.g.*, *Sandoval v. Ali*, 34 F.Supp.3d 1031, 1040 (N.D. Cal. 2014) (granting motion to dismiss because "[c]onclusory allegations of 'alter ego' status are insufficient to state a claim").

B. The First Amended Complaint Lacks the Basic Level of Specificity Mandated by Rule 8(a)

Because he cannot allege any wrongdoing by GHC, Appellant attempts to plead his claims by lumping the Appellees together and seeing what sticks. As this Court has held, however, this type of group pleading is improper. Federal Rule of Civil Procedure Rule 8(a) requires, at a minimum, that a complaint give each defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests." *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d. Cir. 1961). It does not permit a plaintiff to merely "lump [ ] all the defendants together in each claim and provid[e] no factual basis to distinguish their conduct." *Atuahene v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001). Where a plaintiff names multiple defendants, it must provide a plausible factual basis to distinguish between the conduct of each of the defendants.

The FAC does not contain a single allegation of misconduct or wrongdoing that is specific to GHC. Appellant relies instead on vague allegations about the supposed acts of "Grindr," which the FAC defines to include all of the Appellees as a group. (A-53, ¶ 1 (defining term "Grindr" to include Grindr LLC, KL Grindr Holdings, Inc., and GHC).) This Court has rejected the practice of pleading claims by lumping defendants together. *See, e.g.*, *Atuahene*, 10 Fed. Appx. at 34 (affirming district court's grant of a motion to dismiss where the complaint "failed to differentiate among the defendants, alleging instead violations by 'the defendants'"). Because Appellant only provides blanket allegations of the Appellees' misconduct, GHC is left guessing as to which allegations apply to it, or to one of the other Appellees. The Court should therefore affirm the District Court's dismissal of Appellant's claims as to GHC

C. The First Amended Complaint Lacks the Heightened Specificity Required by Rule 9(b)

Under Rule 9(b), complaints alleging fraud must satisfy heightened pleading requirements. The complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent," to survive a motion to dismiss. *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004).[5]

[5] Rule 9(b)'s heightened pleading requirement applies to Appellant's claims for

In a complaint against multiple defendants, such specificity is even more important. *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) ("Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."). Thus, just like Rule 8(a), Rule 9(b) prohibits plaintiffs from pleading fraud claims that impute "guilt by association" by lumping together the acts of multiple defendants. *Employees' Ret. Sys. of Gov't of the Virgin Islands v. Blanford*, 794 F.3d 297, 304 (2d Cir. 2015) (citation omitted). Bare allegations that an individual or entity is somehow affiliated with fraudulent acts of a collective is not enough to satisfy Rule 9(b). *Angermeir v. Cohen*, 14 F.Supp.3d 134, 147 (S.D.N.Y. 2014).

The FAC does not contain any allegations of GHC's specific role in any alleged deception or fraud. Appellant again relies on blanket allegations about the acts of "Defendants" and "Grindr," both of which are defined to include all defendants as a group. Because Appellant provides only allegations as to what "Grindr" and "Defendants" allegedly did, GHC is left guessing which of Appellant's allegations – if any – apply to GHC. Such group pleading is improper. *See, e.g.*,

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fraud (Ninth Cause of Action) and negligent misrepresentation (Fourteenth Cause of Action), which sounds in fraud. *Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F.Supp.3d 331, 350 (E.D.N.Y. 2014).

Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986) (holding that allegations that referred to misrepresentations by "Defendants" were deficient under Rule 9(b)).

The Court should affirm the District Court's dismissal of Appellant's claims for fraud and negligent misrepresentation as to GHC because Appellant has not pleaded with specificity that GHC played any role in the alleged actions underlying his fraud claims.

CONCLUSION

Appellee GHC respectfully requests that this Court affirm the District Court's Order dismissing Appellant's FAC in full.

Dated: August 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of 14,000 words of Local Rule 32.1(a)(4) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,646 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

DATED: August 23, 2018

By: */s/ Moez M. Kaba*
Moez M. Kaba

CERTIFICATE OF SERVICE

Counsel for Appellee Grindr Holding Company certifies that on August 23, 2018, a copy of the attached Brief was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the above Brief is being sent, via third-party commercial carrier for delivery overnight, to the Clerk.

I certify that all parties required to be served have been served.

DATED: August 23, 2018 HUESTON HENNIGAN LLP

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