Third Circuit Affirms Dismissal Of Sprawling Anti-Competitive Conduct Complaint Against Facebook

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Porzio Litigation Update

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The Third Circuit Court of Appeals recently affirmed the New Jersey district court's dismissal of a *pro se* plaintiff's 271-count complaint against our client, Facebook. In *Shulman, d/b/a Advances Magazine v. Facebook.com et. als*., No. 18-2708, —F 3d.—, 2019 WL —— (3rd Cir. Oct. 11, 2019) (Slip Op.), plaintiff alleged that Facebook engaged in a conspiracy with the media co-defendants (CNN, PBS, and NPR) to suspend his Facebook account and defame him, which damaged his on-line social media magazine business. Shulman also alleged that Facebook's method of billing advertisers based upon how often their ads are viewed is anti-competitive and more advantageous to larger advertisers—including the media defendants—than to smaller advertisers like *Advances Magazine*. Shulman further claimed that Facebook violated his privacy by enabling on his devices features such as geolocation, cameras, and keystroke monitoring.

In dismissing Shulman's Second Amended Complaint ("SAC") with prejudice, the district court concluded that it failed to state a claim because: 1) the Communications Decency Act provided Facebook with an immunity from suit for re-publishing third-party content (not a cause of action as Shulman claimed); 2) the CAN-SPAM Act regulates spam mail, not Facebook's alleged labeling Shulman as a "spammer" (the alleged basis for his numerous account suspensions); 3) Shulman alleged no predicate racketeering activity as required by the federal and New Jersey RICO statutes; 4) the SAC failed to identify the relevant market that the defendants allegedly monopolized by anti-competitive conduct; 5) Shulman pled no ascertainable loss under New Jersey's Consumer Fraud Act; and 6) New Jersey's Personal Information and Privacy Protection Act is inapplicable. 2018 WL 3344236 (D.N.J. July 9, 2018).

Not content with three bites at the apple, Shulman unsuccessfully moved for reconsideration to add new claims and "evidence" (1) to the record. Liberally construing Shulman's motion as one brought under Fed. R. App. P. 10(e)(2), the district court determined that Shulman was seeking not to supplement the record, but to supply an entirely new record, and denied the motion. Shulman did not appeal this ruling. 2019 WL 449197 (D.N.J. Feb. 2, 2019) at *2.

The Third Circuit affirmed the dismissal order, concluding that the district court "carefully sorted the largely meandering and loquacious" SAC. Amongst the district court's "uniformly correct rulings" the Court of Appeals highlighted were: 1) Shulman failed to adequately plead a claim under Section 2 of the Sherman Act because he did not identify the relevant market defendants were monopolizing (citing *Broadway Corp. v. Qualcomm Inc*., 501 F.3d 297, 306-07 (3rd Cir. 2007)); 2) Plaintiff did not plead a cognizable claim under the Robinson-Patman Act because social media advertising space is not a

commodity (citing *Advo, Inc. v. Philadelphia Newspapers, Inc*., 51 F.3d 1191, 1195 n. 3 (3rd Cir. 1995); and 3) the SAC lacked the required plausible allegations about misleading email communications under the CAN-SPAM Act. Slip Op. at 4-5.

Although *Shulman* breaks no new legal ground, it is a cautionary tale of the disruption, delay and expense of litigating against experienced and dedicated *pro se* claimants (2). During the two-year litigation, Shulman filed motions for expedited discovery, a preliminary injunction, reconsideration, interlocutory appeal, summary judgment, and sanctions—all of which the district court denied. The district court, solicitous of plaintiff's status, granted Facebook's original motion to dismiss the First Amended Complaint without prejudice due to various deficiencies, but permitted Shulman leave to amend, which resulted in a morphing and expansion of his claims. The district court also rejected Facebook's argument that Shulman could not seek waiver of the appellate filing fees due to being *in forma pauperis* because his appeal was not "taken in good faith" as required by 28 U.S.C. §1915 (3). 2019 WL 449197 (D.N.J. Feb. 2, 2019) at *1-2.

Identifying, simplifying and restating the disparate claims, grouping thematically related causes of action (e.g. Sherman, Clayton and Robinson Patman Act), strictly focusing on the predicate pleading requirements, and resisting plaintiff's attempts to supplement the record prompted the district court to eventually dismiss the case and the Court of Appeals to affirm its ruling.

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(1) Shulman raised entirely new allegations based on events that occurred after the filing of the SAC, including the public testimony of Facebook representatives.

(2) In Shulman v. Zsak, 485 F. App'x. 528, 532 (3d Cir. 2012), the Third Circuit, in affirming the district court's dismissal of Shulman's civil-rights claims, observed that "Shulman's complaint was defective both by dint of lacking specificity and, paradoxically, for being overlong."

(3) A good faith appeal is one that raises "the existence of a 'substantial question' or one which has merit," U.S. v. Durham, 130 F. Supp. 445, 446 (D.C. Cir. 1955) or issues that "are reasonably arguable," Sejeck v. Singer Mfg. Co., 113 F. Supp. 281, 282 (D.N.J. 1953).