UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLORIDA ABOLITIONIST and JANE DOE,

Plaintiffs,

v. Case No: 6:17-cv-218-Orl-28TBS

BACKPAGE.COM LLC, EVILEMPIRE.COM, BIGCITY.COM, CARL FERRER, MICHAEL LACEY and JAMES LARKIN,

Defendants.

ORDER

Plaintiffs Florida Abolitionist and Jane Doe complain that Defendants Backpage.com LLC, Evilempire.com, Bigcity.com, Carl Ferrer, Michael Lacey and James Larkin are liable to them under 18 U.S.C. § 1591 Sex Trafficking laws (Count I), Distributor or Publisher Liability (Count II), Outrage (Count III), Invasion of Privacy or Right to Publicity (Count IV), Violations of FLA. STAT. Ann. §540.08 Commercial Exploitation of a Person's Name or Personality (Count V), Civil Conspiracy (VI), and Negligence (VII) (Doc. 1 at 35-40). Specifically, Plaintiffs allege that Jane Doe was victimized by her drug-addicted mother and third-party criminals who involved her in sex trafficking by posting on Defendants' websites, beginning on March 30, 2013 (Doc. 1 at ¶ 9). Plaintiffs' central allegation is that Defendants created

> [O]nline content designed to facilitate sex trafficking and for deliberately obscuring evidence of criminal behavior to ensure that they continue to profit from the exploitation of children for sex. Indeed, Defendants made millions of dollars in profits each year from websites that they designed and intended to

> be used, and that they knew were being used, for illegal sex trafficking, including children.

(Id. at 1). Plaintiffs seek preliminary and permanent injunctive relief, declaratory relief, and money damages (compensatory, punitive, and treble damages) (Id. at 40). On May 5, 2017, Defendant moved to dismiss the lawsuit pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6) (Doc. 42). The motion has been briefed and the parties await its disposition.

In their Case Management Report the parties list separate dates for every deadline beyond the mandatory disclosure stage (Doc. 59). They jointly moved for a scheduling conference, pursuant to FED. R. CIV. P. 16(a) (Doc. 60), which was granted (Doc. 63), and the conference was held on July 28, 2017 (Doc. 69).

Defendants, without making a separate motion for a stay, ask that no discovery occur until after the Court rules on their motion to dismiss. As grounds they argue that they are immune from suit under the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230") and object to this Court establishing a schedule for the progression of the litigation (Doc. 60 at 3). Defendants also posit that their motion to dismiss "may dispose of the case and/or significantly narrow the issues." (Id.). If the case survives Defendants' motion to dismiss, they argue that discovery should proceed in two phases, with an expedited "Phase I," "limited to discovery of any advertisements of Jane Doe and injury to Florida Abolitionist" followed by a "Phase II" that would include "all other discovery, with dispositive motion dates for each phase" (Id. at 4). Plaintiffs want to commence all discovery now (Doc. 60 at 2).

The Federal Rules of Civil Procedure "strongly favor full discovery whenever possible." Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). Motions to stay discovery may be granted pursuant to FED. R. CIV. P. 26(c). Corbin v.

Affiliated Comput. Servs., Inc., No. 6:13-cv-180-Orl-18TBS, 2013 WL 3322650, at *1 (M.D. Fla. July 1, 2013). The movant bears the burden of showing good cause and reasonableness to stay discovery. Id. (citing Howard v. Galesi, 107 F.R.D. 348 (S.D.N.Y. 1985)); Feldman v. Flood, 176 F.R.D. 651, 652 (M.D. Fla. 1997). Courts in this district have long disfavored motions to stay discovery because they impede the Court's duty to manage its cases and expedite discovery. Generally, the pendency of a dispositive motion does not establish the good cause necessary to support the motion. "[T]here is no general rule that discovery be stayed while a pending motion to dismiss is resolved." Reilly v. Amy's Kitchen, Inc., No. 13-21525-CIV, 2013 WL 3929709, *1 (S.D. Fla. July 31, 2013) (citing Chudasama v. Mazda Corp., 123 F.3d 1353, 1367-68 (11th Cir. 1997)); see also Jones v. Bank of Am. Corp., No. 4:08-cv-152 (WLS), 2013 WL 5657700, *2 (M.D. Fla. Oct. 15, 2013) (denying motion to stay discovery pending resolution of motion to dismiss). Consequently, motions to stay discovery under these circumstances are rarely granted. Middle District Discovery[1] (2015) at 5.

When entertaining motions to stay discovery on the grounds presented here, courts are expected to preview the merits of the pending dispositive motion. See Fetchick v. Eslinger, Case No. 6:15-cv-96-Orl-28TBS, 2016 WL 8929252, at *2 (M.D. Fla. Jan. 11, 2016) (citing Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988)); see also Koock v. Sugar & Felsenthal, LLP, No. 8:09-cv-609-T-17EAJ, 2009 WL 2579307, at *2 (M.D. Fla. Aug. 19, 2009). "While it is not necessary for the Court to, in effect, decide the motion to dismiss to determine whether the motion to stay discovery should be granted, it is necessary for the Court to 'take a preliminary peek' at the merits

[1] The Court has adopted certain rules, practices, and procedures that are embodied in the Local Rules and the district's discovery handbook.

of the motion to dismiss to see if it appears to be clearly meritorious and truly case dispositive." Renuen Corp. v. Lameira, No. 6:14-CV-1754-ORL-41T, 2015 WL 1138462, at *2 (M.D. Fla. Mar. 13, 2015), reconsideration denied, 2015 WL 1815698 (M.D. Fla. Apr. 22, 2015) (citing Feldman, 176 F.R.D. at 652-53).

Defendants seek dismissal on the ground that Section 230 bars Plaintiffs' claims and makes them immune from suit (Doc. 42). Congress enacted the CDA to encourage free speech on the internet, unencumbered by federal or state regulation. 47 U.S.C. § 230(b)(2). The CDA was also enacted for the stated purpose of ensuring "vigorous enforcement" of federal laws intended to "punish trafficking in obscenity …" Id. at § 230(b)(5). The statute grants immunity to providers and users of an interactive computer service for content published on their computer service by independent content providers. Roca Labs. Inc. v. Customer Opinion Corp., 140 F. Supp. 3d 1311, 1318 (M.D. Fla. 2015). This "Good Samaritan" protection is codified as follows:

> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information content provider.
>
> (2) Civil Liability
>
> No provider or user of an interactive computer service shall be held liable of –
>
> (A) [A]ny action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B)[A]ny action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C.A. § 230(c). Thus, Section 230 has established "broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Roca Labs., 140 F. Supp. 3d at 1319 (quoting Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006)). Though the immunity protection is broad, it "does not apply without limitation." Almeida, 456 F.3d at 1321. Section 230's safe harbor provision does not immunize defendants from actions to enforce (1) any federal criminal statute, (2) "any law pertaining to intellectual property;" (3) any state law that is consistent with the statute; or (4) actions related to the application of the Electronic Communications Privacy Act of 1986, "or any similar State law." 47 U.S.C.A. § 230(e)(1)-(4); see also Almeida, 456 F.3d at 1321-22.

To enjoy immunity under Section 230, "(1) defendant [must] be a service provider or user of an interactive computer service; (2) the cause of action treats a defendant as a publisher or speaker of information; and (3) a different information content provider provided the information." Roca Labs., 140 F. Supp. 3d at 1319 (citing Whitney Info. Network, Inc. v. Verio, Inc., No. 2:04CV462FTM29SPC, 2006 WL 66724, at * 2 (M.D. Fla. Jan. 11, 2006)). Defendants argue that all three-prongs have been met, no exceptions apply, and they are immune from this suit entirely (Doc. 42).

In determining the merits of a motion to dismiss, the court must "accept all factual allegations in the complaint as true." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). Plaintiffs' first cause of action is grounded in a federal criminal statute that creates a private right of action (Doc. 1 at ¶¶ 116-118); 18 U.S.C.A. § 1595.[2] The

[2] The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C.A. §§ 1589, 1595, extends to victims of trafficking a private right of action for restitution against "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter."

Eleventh Circuit has not yet issued a ruling on whether this cause of action qualifies as an exception to Section 230's safe harbor provision (47 U.S.C.A. § 230(e)(1)); therefore, it is a legitimate issue that may survive the motion to dismiss. Plaintiffs' argument that Defendants are not entitled to immunity because they created/provided some of the challenged content (Doc. 52 at 11-15; Doc. 1 at ¶¶ 37-44, 77-83), if accepted as true, would disprove the first prong of the analysis and bar application of the statute's immunity provision. And, Plaintiffs argument that under Section 230(e)(2), Defendants are not entitled to immunity from Jane Doe's right-of-publicity claim is also a legitimate issue and may be meritorious (Doc. 52 at 17-18).

After reviewing the complaint and the briefing on the motion to dismiss, I am not convinced that there is "an immediate and clear possibility" that the motion to dismiss will be decided in Defendants' favor, that it will significantly narrow the issues, or that it will dispose of Plaintiffs' entire complaint. Therefore, Defendants' request to stay discovery pending resolution of the motion to dismiss is **DENIED**. Discovery shall move forward in this case, in a single phase.

DONE and **ORDERED** in Orlando, Florida on August 11, 2017.

THOMAS B. SMITH
United States Magistrate Judge

Copies furnished to Counsel of Record