



REX - Real Estate Exchange Inc v. Zillow Inc et al

2021 | Cited 0 times | W.D. Washington | December 20, 2021

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,

Plaintiff, v. ZILLOW, INC.; ZILLOW GROUP, INC.; ZILLOW HOMES, INC.; ZILLOW LISTING SERVICES, INC.; TRULIA, LLC; and THE NATIONAL ASSOCIATION OF REALTORS,

Defendants.

C21-312 TSZ ORDER

THIS MATTER comes before the Court on a motion to dismiss, docket no. 101, filed by defendant the National Association of REALTORS®

. Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following Order. Background

On September 2, 2021, the Court entered an Order, 1

docket no. 98, denying in part and granting under Federal Rule of Civil Procedure 12(b)(6) to dismiss , docket no. 84. U.S.C. § 1, , RCW 19.86.030. The Court or deceptive acts under the Lanham Act, 15 U.S.C. § 1125, and the CPA, RCW 19.86.020, and dismissed the claims without prejudice and with leave to amend. 2

On September 30, 2021, Plaintiff filed an amended complaint, docket no. 99. In its amended complaint, Plaintiff maintains its claims against NAR for alleged violations of Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI), and Section 1125 of the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V). Am. Compl. at ¶¶ 131 41, 153 62, 179 88 & 189 201 (docket no. 99). Plaintiff also brings a new claim against NAR, alleging defamation in violation of Washington law (Count VII). Id. at ¶¶ 202 216. Plaintiff relies on a liability, and alleges that Zillow acted as NAR when Zillow designed its website

1 2 The Court concluded that Plaintiff failed to state a Lanham Act or CPA claim against NAR for



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false not plausibly allege that NAR had any involvement misleading website displays. displays. Id. at ¶¶ 156, 184 & 207. NAR requests that the Court dismiss all claims.

Discussion

1. Article III Standing The Court previously concluded that Plaintiff has standing to bring its claims against NAR. Order at 7 8 (docket no. 98). NAR takes a second bite at the apple, and argues that Plaintiff did not cause

Plaintiff alleges that some, but not all, NAR- reviewed, approved of, or required Zillow to implement its new displays. See Am.

Compl. at ¶¶ 83 85. - affiliated MLSs did not require Zillow to change its websites, NAR contends that its rules cannot have caused that NAR is a direct participant in the challenged conduct. Id. at ¶ 7.

complaint continues to allege that Zillow changed its websites as low] Id. at ¶ 105. Plaintiff also alleges that a Zillow representative stated Id. The Court The amended complaint plausibly alleges that Zillow changed its websites rules.

2. Rule 12(b)(6) Standard Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must indicate more than mere speculation of a right to relief. Id. When a complaint fails to adequately state a

and money by the parties and the c Id. at 558. A complaint may be lacking for one of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a cognizable legal claim.

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is wheth Twombly, 550 U.S. at 570. If the Court considers matters outside the complaint, it must

convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

3. Antitrust Violations The Court previously denied NAR and the CPA, RCW 19.86.030. In its amended complaint, Plaintiff does not substantively amend its antitrust claims against NAR. Compare Compl. (docket no. 1) with Am. Compl. (docket no. 99). allegations concerning the conduct of some NAR-



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only some NAR-affiliated MLSs engaged in the anticompetitive not new. See Compl. at ¶ 161; Am. Compl. at ¶ 198. The amended complaint does not contain new allegations that support dismissing antitrust claims.

Accordingly, the antitrust claims brought under Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI).

4. False Advertising or Other Deceptive Acts The Court deceptive acts brought under the Lanham Act and the CPA, RCW 19.86.020. The Court

explaining what NAR websites, let alone when, where, and how NAR did it. These allegations remain absent

To cure the identified deficiencies, Plaintiff now embraces an agency theory, claiming websites. Am. Compl. at ¶¶ 156 & 184.

Env LLC v. Mod. Mach. Co., No. C18- 5445, 2020 WL 1847747, at *4 (W.D. Wash. Apr. 13, 2020) (citing Uni-Com NW, Ltd. v. Argus Pub Co., 47 Wn. App. 787, 796, 737 P.2d 304 (1987)). Id. (citing McLean v. St. Regis Paper Co., 6 Wn. App. 727, 732, 496 P.2d 571 (1972)); see also Bastida v. Holdings Corp., C16-388, 2016 WL 4250135, at *2 (W.D. Wash. Aug. 4, 2016) (dismissing complaint because plaintiff failed to plead sufficient facts to establish that the defendant had an agency relationship with a subsidiary corporation).

A. Pleading Standard Federal Rule of Civil Procedure R. Civ. P. 9(b). Plaintiff does not

However, [t]he fact that Plaintiff is proceeding under an agency theory does not absolve Plaintiff of Rule 9(b) RPost Holdings, Inc. v. Trustifi Corp., No. CV11-2118, 2011 WL 4802372, at *4 (C.D. Cal. Oct. 11, 2011); see also Morici v. Hashfast Techs. LLC, No. 14-cv-00087, 2015 WL 906005, at *4 (N.D. Cal. Feb. 27, 2015); Jackson v. Fischer, No. C11-2753, 2013 WL 6732872, at *17 (N.D. Cal. Dec. 20, 2013) where a plaintiff alleges that a defendant is liable for fraud under an agency theory, Rule 9(b) requires that the existence of the agency relationship

B. Plaintiff has not pleaded an agency relationship with particularity under Rule 9(b). Plaintiff alleges that -mingling and se that, -mingling and segregation rules in changing the description of REX- Am. Compl. at ¶¶ 156 & 184. The amended complaint contains no factual allegations to support the existence of an agency relationship between Zillow and NAR, and Plaintiff has not pleaded the elements of agency. Plaintiff fails to plead any facts alleging that NAR exercised control over the design of . hat Zillow joined NAR and abided by rules is too conclusory to plausibly allege that designing its website displays.

Even under Federal Rule of Civil Procedure pleading standard, allegations do not s are nothing more than



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legal conclusions unsupported by any factual

assertions. Although the Court recognizes that Plaintiff need not provide detailed factual allegations under Rule 8(a)(2), it must See *Twombly*, 550 U.S. at 555. Plaintiff has failed to plead any facts alleging that NAR manifested consent for Zillow to act on its behalf, and subject to its control, with respect

claims for false advertising or deceptive acts brought under the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V), and these claims are DISMISSED with prejudice. 3

5. Defamation In its amended complaint, Plaintiff brings a defamation claim against NAR and Zillow. Am. Compl. at ¶¶ 202-216. To state a defamation claim in Washington, a plaintiff must plead four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages. *Duc Tan v. Le*, 177 Wn.2d 649, 662, 300 P.3d 356 (2013) (citing *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989)). The Court applies the pleading standards of Rule 8(a)(2) when evaluating defamation claim. See *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861, 2011 WL 13100746, at *2 (W.D. Wash. May 19, 2011) (explaining that the tort claim of defamation is not subject to the heightened pleading standards of Rule 9(b)). The doctrine of vicarious liability can apply to defamation claims. Restatement (Second) of Agency § 254 (Am. L. Inst. 1958).

Plaintiff does not allege that NAR made any false statements. Instead, Plaintiff alleges. See Am. Compl. at ¶¶ 203-04 claims for false advertising or deceptive acts, Plaintiff alleges that,

Id. at ¶ 207. As discussed above, Plaintiff has failed to

3 Leave to amend should be freely given, see Fed. R. Civ. P. 15(a)(2), and the Court previously provided Plaintiff leave to amend these claims. Order (docket no. 98 at 25). L

to further amend these claims is futile. See *Lopez*, 203 F.3d at 1130. plead any factual allegations and relies on legal conclusions to support its claim that making allegedly false statements on its websites. usory to plausibly allege that NAR exercised control over Zillow with respect to the

Plaintiff also alleges that NAR, operating through its member MLSs, of Resp. (docket no. 102 at 17); see Am. Compl. at ¶¶ 205-06. These allegations are solely conclusions without any underlying facts to support assertions. This type of pleading, without more, cannot support a claim of defaresponse, docket no. 102, to motion to dismiss devotes only one page in opposition to the motion as it relates to the defamation claim. Any attempt to replead this defamation claim will be subject to close scrutiny by the Court as to whether the amended complaint complies with the requirements of Federal Rule of Civil Procedure 11(b). 4

T 101, the defamation claim, and hereby DISMISSES, without prejudice, the defamation claim asserted against NAR (Count VII).



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4 In the Matter of National Housewares, is misplaced. , Inc., 90 F.T.C. 512 (1977). In that case, the Federal Trade Commission was making specific respondent had engaged in misleading or deceptive acts. Id. at *10. Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1069 (9th Cir. 2016), does not provide support claim. Although a corporate officer or director might be personally liable for torts which he or she authorizes or directs, see id., Plaintiff has not plausibly alleged that NAR authorized or directed Zillow to make false statements on its websites. Conclusion

For the foregoing reasons, the Court ORDERS: (1) is DENIED in part and GRANTED in part, as follows. The motion is DENIED as to the antitrust claims brought under Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI). The motion is GRANTED as to the claims for false advertising or deceptive acts brought under the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V), and these claims are DISMISSED with prejudice. The motion is GRANTED as to the defamation claim (Count VII), and this claim is DISMISSED without prejudice and with leave to amend;

(2) Plaintiff may file any amended complaint relating solely to the dismissed defamation claim on or before January 13, 2022. Any answer or response is due on or before January 27, 2021. See Fed. R. Civ. P. 15(a)(3); and

(3) The Clerk is directed to send a copy of this Order to all counsel of record. IT IS SO ORDERED. Dated this th day of December, 2021.

Thomas S. Zilly United States District Judge

