

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RACHEL COHEN, ET AL. : 16-CV-4453

Plaintiff, :

v. : United States Courthouse
Brooklyn, New York

FACEBOOK, INC., :
September 22, 2106
2:30 o'clock p.m.

Defendant. :

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TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE NICHOLAS G. GARAUFI S
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: ROBERT TOLCHIN, ESQ.

For the Defendant: AULDEN BURCHER, II, ESQ.

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2419

Proceedings recorded by mechanical stenography, transcript produced by CAT.

1 (Case called; both sides ready.)

2 MR. TOLCHIN: Good afternoon, your Honor. Robert
3 Tolchin for the plaintiffs in both cases.

4 MR. BURCHER: Good afternoon your Honor, Aulden
5 Burcher for the defendant FaceBook in both cases.

6 THE COURT: Welcome.

7 MR. TOLCHIN: We have some stipulations for briefing
8 schedules that we would love to hand up, if we might.

9 THE COURT: Let's first hear what this is about so
10 that I have some idea what's in my future.

11 MR. TOLCHIN: Okay. There's two cases that are
12 distinct but they are related and have overlapping issues.
13 I'll start with the earlier filed one, which is now called
14 Cohen. It started in state court. When it started in state
15 court it was called Lakin. That is an action which seeks an
16 injunction against FaceBook ordering FaceBook to cease and
17 desist from publicizing incitement to commit terrorism, to
18 providing services to terrorist organizations, to making
19 introductions between terrorist organizations and would be
20 terrorists or distinct terrorists from providing essentially a
21 social network platform to terrorist organizations such as
22 Hamas.

23 The plaintiffs in the Cohen case are 20,000,
24 roughly, Israelis, who live every day under the danger, the
25 threat of being attacked by terrorists who were incited to

1 commit terrorism through social media platforms such as
2 FaceBook.

3 After we commenced that case in state court the
4 first named plaintiff, Mr. Lakin, died. He was killed in a
5 terrorist attack. He was shot in the head and stabbed in the
6 gut and disemboweled. He lingered in the hospital for a
7 period of time and then died. His claim obviously was very
8 different from the claims of the other 20,000 plaintiffs
9 because he actually suffered a grievous physical injury and
10 death.

11 The state court case was stayed for a period of time
12 while an administrator was appointed for Mr. Lakin's estate.

13 THE COURT: Where was he --

14 MR. TOLCHIN: He's an American citizen.

15 THE COURT: Yes.

16 MR. TOLCHIN: But he was a resident of Israel.

17 THE COURT: I see.

18 MR. TOLCHIN: After an administrator was appointed
19 for his estate, we made a motion to substitute the
20 administrator as the plaintiff and on the substitution we
21 discontinued Mr. Lakin's claim without prejudice because now
22 it had become very different from the rest of the case and we
23 filed a new case which was originally filed in the Southern
24 District called Force. Force is just the first-named
25 plaintiff, but Mr. Lakin's estate is in that case.

1 THE COURT: And Force was before Judge Kaplan?

2 MR. TOLCHIN: Correct.

3 THE COURT: And he gave it up. Why did he give that
4 up? Did you ask him?

5 MR. TOLCHIN: Correct.

6 THE COURT: And being a gentleman about it all, you
7 decided I would be a good choice to handle that case too?

8 MR. TOLCHIN: We decided the two cases should be
9 heard in the same place and we followed the customary rule
10 that the case gets consolidated with the first filed action
11 and even though this case -- after the stay was lifted,
12 FaceBook removed this case to federal court from state court.

13 THE COURT: After the stay?

14 MR. TOLCHIN: There was a stay because of
15 Mr. Lakin's death.

16 THE COURT: The probate court issue?

17 MR. TOLCHIN: Correct.

18 Once the stay was lifted, the clock start ticking
19 again and FaceBook removed the case to here. The docket
20 number issuing date in Cohen --

21 THE COURT: It's fine, I understand. Procedurally
22 everything is kosher -- pardon the expression -- wouldn't you
23 say?

24 MR. BURCHER: Yes, your Honor.

25 THE COURT: There you go. So we're all here with

1 the Cohen case and the Force case which was originally with
2 Judge Kaplan, then went to Judge Irizarry and then it came to
3 me?

4 MR. TOLCHIN: Correct.

5 THE COURT: Got it.

6 MR. TOLCHIN: I believe, if I understood his cryptic
7 comment correctly, Judge Kaplan pointed out that he's from
8 Staten Island and so are you, so it made sense.

9 THE COURT: He's from the Eastern District of New
10 York originally. Staten Island is in the Eastern District.
11 I'm from Queens.

12 MR. TOLCHIN: So why did he think you're from Staten
13 Island?

14 THE COURT: I don't know. Maybe because I look so
15 nice.

16 MR. TOLCHIN: I may have misunderstood what he's
17 saying.

18 THE COURT: I understand the point though. He's
19 from the Eastern District originally. All right. And he was
20 happy to share, which I think is wonderful.

21 So you are proceeding on this, the Force case, is a
22 different case --

23 MR. TOLCHIN: The Force case --

24 THE COURT: Why are they related to each other?

25 Maybe the Force case should go back to the wheel.

1 MR. TOLCHIN: I'll tell you a few sentences about
2 the claims in the Force case and then I'll answer your
3 question.

4 The Force case rises primarily under the
5 Anti terrorism Act which is an United States federal statute
6 that allows for actions against people who give aid and
7 support to terrorist organizations. And all the people in the
8 Force case are people who were either killed or injured or
9 immediate family members who have a claim under the ATA for
10 loss of solatium and that type of damages.

11 The common elements: Both cases have to do with
12 FaceBook providing services to the same terrorist
13 organizations, inciting the same terrorist attacks. This is
14 something that's been in the news a lot but I don't know if
15 it's something that your Honor follows. The phenomenon of
16 late in terrorist attacks, particularly in Israel, is that the
17 terrorist organizations have made great use of social media
18 platforms such as FaceBook. Organizations such as Hamas have
19 pages where people can obtain instructions for how to build a
20 bomb, how to stab somebody, what are the vulnerable parts of
21 the human body, what's the best way to stab somebody, how to
22 lay in wait, how to carry out terrorist attacks.

23 People who are interested -- we all have the
24 experience that you go on FaceBook or on other websites and
25 you search for a barbecue -- maybe you are interested in

1 buying a barbecue. Then the next day when you are looking at
2 FaceBook on the side there's a little picture advertising the
3 barbecue because it follows your interests.

4 FaceBook does this: If you have interest to
5 terrorist websites or to terrorist groups or terror attacks or
6 to words, key words, that relate to such things, FaceBook will
7 suggest to you, maybe you want to be friends with this one.
8 Maybe you were interested, you like this, so why don't you
9 look at that and networks are created that wind up linking
10 people who want to do terrorist attacks, to people who are
11 bragging about terrorist attacks that they did, to
12 organizations that want to incite people to provide terrorist
13 attacks, to perform terrorist attacks, and under the ATA
14 providing any service to a terrorist organization.

15 I can't wire a dollar to Hamas. I can't go into
16 Chase Bank and wire money to Hamas because the banks know full
17 well that it is illegal to wire money to a designated
18 terrorist organization. But FaceBook doesn't seem to be
19 deterred.

20 THE COURT: You know, there's a statute, the
21 Communications Decency Act, and according to FaceBook that
22 would act as a bar to this litigation.

23 MR. TOLCHIN: It does not. But obviously that's
24 going to be your Honor's opportunity to write a very intensely
25 watched decision on that point. Because that is a common

1 defense that FaceBook is going to raise in both cases. I say
2 this --

3 THE COURT: What you are saying is they are using
4 the kinds of algorithms, if you will, that are used in
5 business and business activities, if someone is looking for a
6 car and clicks on a website where you can find out how much it
7 costs to buy a Hyundai and the next day you're on Google and
8 there's an advertisement in the right column for the sale of
9 cars or a different kind of car.

10 MR. TOLCHIN: Toyota.

11 THE COURT: Similar car, same price range, but a
12 different one?

13 MR. TOLCHIN: Right.

14 THE COURT: So those algorithms are used, can be
15 used, to steer people to those advertisers.

16 MR. TOLCHIN: That is one aspect of the case and
17 it's significant.

18 THE COURT: So you don't think that would fit within
19 the ambit of that statute?

20 MR. TOLCHIN: Not at all.

21 THE COURT: The protection of an a company that
22 provides the service that FaceBook provides.

23 MR. TOLCHIN: So the Communications Decency Act,
24 it's very short, basically a sentence that says that the
25 social media platform can't be regarded as the publisher or

1 the speaker of the content. And obviously those words come
2 from defamation law. It goes back to we all remember the AOL
3 days, Prodigy.

4 THE COURT: What do you mean we remember the AOL
5 days? Some people use AOL. So if that's a disparaging
6 statement, I take personal issue with it.

7 MR. TOLCHIN: In the beginning days of the internet
8 there were a lot of situations where people posted defamatory
9 statements about others and then hoping for a payday the
10 ex-girlfriend who was just defamed by her ex-boyfriend,
11 instead of suing the ex boyfriend for defamation, tried to sue
12 AOL or Prodigy, saying you are the deep pocket, pay me.
13 That's the place that that came from.

14 We are not claiming -- we are not suing Facebook on
15 the contention that they are the publisher or the speaker.
16 It's the provision of the social media platform, the provision
17 of services to terrorists and terrorist organizations,
18 including terrorist organizations that are designated
19 terrorist organizations with whom Americans are not permitted
20 to do business. That's the nub of the claim.

21 And the Antiterrorism Act makes that a crime and
22 provides a cause of action. And the Communications Decency
23 Act was never intended and does not counter or negative the
24 Antiterrorism Act. In fact, just going by the name of the
25 statute, we're dealing with anything but decency in

1 communi cati ons.

2 THE COURT: I understand what the act is trying to
3 protect. The question is whether this process that you are
4 describing is protected where FaceBook as the provider of the
5 service, communi cations service, is protected under that act.
6 That's an issue.

7 MR. TOLCHIN: And it gets more interesting as well
8 because we're dealing with attacks that took place outside the
9 United States and it's not necessarily the case that a U.S.
10 domestic law would even apply to this case. But obviously all
11 of these things will be briefed.

12 THE COURT: Why would this court be the proper venue
13 for a case involving injuries that may be taking place 5,000
14 miles away?

15 MR. TOLCHIN: Because the plai nti ffs, at least in
16 the Force case, the plai nti ffs are all U.S. ci ti zens and
17 because the defendant is located here. So we came --

18 THE COURT: I thought the defendant was located in
19 Cal i forni a.

20 MR. TOLCHIN: They are located in the United States
21 and they have a substantial presence in New York.

22 THE COURT: Okay. Thank you.

23 You are Mr. ?

24 MR. BURCHER: Burcher.

25 THE COURT: Burcher?

1 MR. BURCHER: Yes, sir.

2 THE COURT: Where are you from?

3 MR. BURCHER: From Kirkl and & Ell is.

4 MR. TOLCHIN: Not Staten Island.

5 THE COURT: He might be from Staten Island. His law
6 firm is Kirkl and & Ell is.

7 MR. BURCHER: I'm originally from Virginia.

8 THE COURT: Where is Kirkl and & Ell is located?

9 MR. BURCHER: Here in New York at 54th and
10 Lexington.

11 THE COURT: And so you come here and, obviously, you
12 disagree completely with the plaintiff?

13 MR. BURCHER: That's correct, your Honor.

14 THE COURT: Doesn't FaceBook have some moral
15 obligation to help cabin the kind of communication that it --
16 because of the way it's structured -- effectuates by doing
17 some of these -- through these modalities with these
18 algorithms and where they are basically putting together,
19 according to plaintiff, people who would like to be involved
20 in terrorism, with people who are terrorists and so should you
21 not, instead of being in court, be talking to all the
22 technical people and the computer experts in your company to
23 find ways to avoid a situation where, not because of any
24 interest in doing so, but because of the possible outcome of
25 the way you're structured, the kinds of problems arise that

1 plaintiff is complaining of?

2 In other words, let us put the law aside a minute
3 and talk about reality here. Reality is that people are
4 communicating through the social media, and not just FaceBook,
5 and the outcome of these inquiries, whether it's on Google or
6 using FaceBook or whatever else is used in this day and age,
7 it has the potential of hooking people up to do very, very
8 dangerous, bad and harmful things to other people in terms of
9 international and domestic terrorism.

10 So shouldn't you be like working this out as opposed
11 to litigating it?

12 MR. BURCHER: Your Honor, I believe our position is
13 that terrorism is an extremely unfortunate circumstance --

14 THE COURT: It's not unfortunate. It's dangerous
15 and killing a lot of people and courts have very limited
16 ability to thwart it. We usually get it at the back end,
17 after someone tried to do something that is illegal, if law
18 enforcement can find them, bring them to me, and they will be
19 charged with a crime and then there will be either a trial or
20 a plea and then there will be a sentence, if the person is
21 convicted, and then the person will go to jail for a while.

22 But those are individual cases. FaceBook is a
23 global phenomenon. So what I am asking you is don't you have
24 a social responsibility as a public citizen of the world to
25 find solutions to these plaintiffs' problems without having

1 these plaintiffs come here to me in Brooklyn to try to solve
2 their problems? That's what I am saying to you.

3 MR. BURCHER: Your Honor, I understand the concern
4 about the moral obligation here, and that this is a case that
5 the plaintiffs have stated a number of allegations about
6 international terrorism, including that of Hamas, are
7 unfortunate and concerning. Nonetheless, this case is not the
8 proper vehicle in order to address those concerns.

9 THE COURT: How are they going to address those
10 concerns with Facebook unless they get Facebook's attention?
11 How do you get a global communications company worth billions
12 and billions of dollars attention to deal with an issue like
13 this other than coming here and filing a lawsuit? Is there a
14 way?

15 Because if there is they ought to be doing it
16 because it's probably a lot more effective to do it that way
17 if you are agreeable to give this kind of issue immediate and
18 sincere attention. Because you have a lot of talent over
19 there at Facebook and there are things you could do that
20 wouldn't involve a court, let's say the judicial system.
21 That's what I am saying.

22 How long have you been with this law firm?

23 MR. BURCHER: One year, your Honor.

24 THE COURT: One year: I don't disparage your
25 brilliance. I'm sorry. Kirkland & Ellis sent a first-year

1 associate to United States District Court to talk to a federal
2 district judge about this case. You are admitted in this
3 court, right?

4 MR. BURCHER: Yes, your Honor.

5 THE COURT: Right. You are admitted.

6 You tell your folks back at Kirkland & Ellis that I
7 don't much like the idea that they think so little of this
8 court that they didn't send a partner here to talk about this
9 kind of a problem which implicates international terrorism and
10 the murder of innocent people in Israel and other places.

11 MR. BURCHER: Yes, your Honor.

12 THE COURT: No. Don't say anything else. I think
13 it is outrageous and irresponsible and insulting and you're
14 not the person doing the insulting. It's whoever sent you
15 here. FaceBook pays millions of dollars to lawyers. This is
16 a real problem. Whether I can solve it judicially is
17 problematical perhaps. But I want to talk to someone who
18 talks to the senior management of FaceBook.

19 Next time they send a partner.

20 MR. BURCHER: Yes, your Honor.

21 The other lead attorney in this matter was called
22 away earlier this week -- as we communicated to opposing
23 counsel -- that there was an emergency hearing in the State of
24 Texas.

25 THE COURT: They do a lot of things in Texas that I

1 don't really like very much either. So I'm not impressed that
2 Kirkland & Ellis, a law firm with how many thousand people in
3 it, two, five? How many thousand lawyers are there at
4 Kirkland & Ellis?

5 MR. BURCHER: I believe there are approximately
6 fifteen hundred, your Honor.

7 THE COURT: Fifteen hundred people. How many of
8 them are partners in litigation? You don't even know, there
9 are so many. It's not a good start, you can tell your exalted
10 partners over there, that they put you here and I've got to
11 lecture you. I want to lecture them.

12 I've been a lawyer for 41 years and I've been a
13 judge or 16 years and I'm not having this discussion with you.

14 I'm going to set another date for a pre-motion
15 conference and you better be sure that a partner of your law
16 firm shows up here.

17 MR. BURCHER: Yes, your Honor.

18 THE COURT: September 28. Are you available?

19 MR. TOLCHIN: Is it okay if I look at my calendar?

20 THE COURT: Of course.

21 MR. TOLCHIN: What day of the week was that?

22 THE COURT: It's a Wednesday.

23 MR. TOLCHIN: I have a deposition that day.

24 THE COURT: How about the 27th?

25 MR. TOLCHIN: That's fine.

1 THE COURT: All right. Tuesday, September 27 at
2 2:30 p.m. for pre-motion conference and maybe Kirkland & Ellis
3 can scrounge up a partner who is not busy with working on some
4 project in Texas to come see a lowly United States District
5 Judge in the Eastern District of New York on that day.

6 Have a nice day.

7 MR. TOLCHIN: Thank you, your H

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