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Circuit Revives Lawsuit Over Hacked Facebook Account

BY MARK HAMBLETT

A WOMAN who claims her ex-boyfriend altered her Facebook account and then posted malicious statements about her sexual activities has had her lawsuit revived by a federal appeals court.

Chantay Sewell's case against former boyfriend Phil Bernardin had been thrown out on statute of limitations grounds by Eastern District Judge Arthur Spatt.

But Tuesday, the U.S. Court of Appeals for the Second Circuit, in deciding a case of first impression, said that claims for alleged unlawful access to her Facebook account under the Computer Fraud and Abuse Act (CFAA) and the Stored Communications Act were timely filed.

Judges Rosemary Pooler, Robert Sack and Christopher Droney vacated the dismissal based on the Facebook claims while agreeing that claims based on use of her email account were rightfully dismissed as untimely in *Sewell v. Bernardin*, 14-3143.

Sewell and Bernardin were involved from about 2002 to 2011. Sewell had an email account with AOL and a social media account with Facebook; she did not knowingly share her passwords with Bernardin.

After a breakup, in August 2011, she found her AOL account password had been altered and

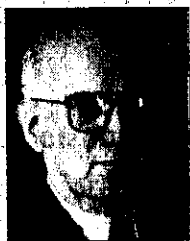
that statements about her sexual activities were emailed to family members and friends on her contacts list.

On Feb. 24, 2012, Sewell was unable to log on to her Facebook account. A week later, she found that someone else had posted more malicious statements about her sex life.

Verizon Internet Services confirmed that Bernardin's computer had been used to gain access to the servers on which Sewell's accounts were stored and changed the passwords. She filed suit against Bernardin's wife, Tara Bernardin, assuming Tara Bernardin and others had accessed the account.

Tara Bernardin settled the lawsuit in 2013 and Sewell then filed suit against Phil Bernardin in 2014.

Spatt dismissed the case as untimely under the CFAA, 18 U.S.C. §1030, which requires a civil suit must be filed "within two years of the date of the act complained of or the date of the discovery of the damage" and under » Page 2



Judge Sack

Online

★ The Second Circuit decision is posted at nylj.com.

Facebook

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the Stored Communications Act, 18 U.S.C. §2701, which requires actions be filed no "later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation."

Spatt's reasoning was that Sewell was aware her computer had been compromised on Aug. 1, which started the clock running on filing suit under both statutes. Spatt said Sewell, from that date forward, had a reasonable opportunity to discover Bernardin's activity more than two years before she filed suit on Jan. 2, 2014.

The Second Circuit agreed on the dismissal based on the AOL account, but disagreed the statute of limitations had run on the Facebook claims, saying they appeared to have accrued around Feb. 24, 2012.

"There is nothing in the facts as alleged in the complaint from which to infer that anyone gained unauthorized access to her Facebook account before then," Sack wrote for the court.

"Contrary to the district court's remark, Sewell did not allegedly discover 'that the integrity of her computer had been compromised' as of Aug. 1, 2011," he said. "She discovered only that the integrity of her AOL account had been compromised as of that time.

"Her CFAA claim accordingly is premised on impairment to the integrity of a computer owned and operated by AOL, not her own physical computer," he continued.

And just like her claims under the CFAA, Sack said the same log-

ic applies to her claim under the Stored Communications Act for the Facebook hijacking, where Sewell "could not reasonably be expected to have discovered a violation that, under the facts as alleged in the complaint, had not yet occurred."

Sack said the court had taken "judicial notice of the fact that it is not uncommon for one person to hold several or many Internet accounts, possibly with several or many different user names and passwords, less than all of which may be compromised at any one time."

Solo practitioner Harvey Mars represents Sewell.

"Both my client and I are ecstatic that the Second Circuit applied a sensible and flexible approach to the application of the statute of limitations for these very significant federal statutes," Mars said.

Gary Certain of the Law Office of Certain & Zilberg represents Bernardin.

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