

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 13-01989 JVS (ANx) Date January 16, 2014

Title Safari Club International, et al. v. Dr. Lawrence P. Rudolph

Present: The James V. Selna  
Honorable

Karla J. Tunis  
Deputy Clerk

Not Present

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS)**

**Order Denying Plaintiff's Application for Preliminary Injunction**

On January 3, 2013, the Court held a hearing on the application of plaintiffs Safari Club International and John Whipple ("Whipple") (collectively "Safari Club") to preliminarily enjoin defendant Dr. Lawrence P. Rudolph ("Rudolph") from disseminating a video recording of an extended conversation which he had with Whipple on February 20, 2013 ("Video"). At the Court's request the parties submitted a DVD of the meeting and a shorter video which Rudolph had made incorporating brief portions of the Video. (Docket Nos. 14, 15.) The Court has reviewed the Video, as well as the accompanying transcript, and the Rudolph video.

The central contention here is that Rudolph violated California Penal Code 632 by conducting an unauthorized recording of a confidential communication, and that under California Penal Code Section 632.7, plaintiffs are entitled to an injunction to prevent the dissemination of the Video.

For the reasons set forth below, the application is denied.

I. Standards for Preliminary Injunction.

On an application for a preliminary injunction, the plaintiff has the burden to establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm if the preliminary relief is not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

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II. California Penal Code.

By statute, California protect confidential communication by barring the making of a recording without consent of all parties.

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. . . .

(Cal. Penal Code, § 632(a).)

The statute defines a confidential communication:

The term “confidential communication” includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(Cal. Penal Code, § 632(c); emphasis supplied.)

Civil penalties and injunctive relief are available to an aggrieved person:

(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

(1) Five thousand dollars (\$5,000).

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(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).

(Cal. Penal Code, § 637.2(a), (b); emphasis supplied.)

III. Discussion.

A. The Video.

The Court summarizes its review of the Video. The Video has its own internal date/time stamp: It begins on February 20, 2013 at approximately 13:50,<sup>1</sup> runs to 15:10, at which there is a break, and resumes for about two minutes at 16:25. A transcript of the Video has been presented, and it appears mainly accurate.

Rudolph and Whipple appear to be seated in a restaurant booth, and the camera angle suggests that the camera was on Rudolph's body, perhaps in his shirt pocket. Whipple is the only one on camera, although from time to time Rudolph's hand can be seen holding a glass of red wine.

There is background noise throughout consisting of music and somewhat muffled voices. However, from approximately 14:50 to 15:09, there is a louder conversation in the background that it is just faint enough not to be understandable.

Several times wait staff pass in the background within 5 or 6 feet. There was no change in the volume or flow of the conversation. At one point (14:17), loud footsteps can be heard, likely a woman's heels. Again, there was no change in the volume or flow of the conversation.

Behind Whipple's left shoulder, there is a mirror. (E.g., Video at 13:55.)

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<sup>1</sup>The time stamp uses the 24 hour military clock. The tape begins at 13:50 or 1:50 pm.

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The mirror appears to show a booth with occupants. The Court estimates that the mirror was 5-6 feet from Rudolph and Whipple, and that the booth in the mirror was about 10-12 feet from the mirror.

There were more than a half dozen interactions with the waiter. At no time did Rudolph or Whipple overtly lower their voices or curtail the conversation. There was nothing in Whipple's body language to suggest he was attempting to maintain privacy.<sup>2</sup> The interchanges at 13:53 (Tr. 4-5), 14:39 (Tr. 74), and 15:01 (Tr. 103) reflect a usual pause at a restaurant table when a waiter asks for the order or brings an order. Between 14:42 and 14:46 (Tr. 79-84), there are numerous interchanges, and Rudolph and Whipple maintain the stream of their conversation.

There are no indications that either Rudolph or Whipple regarded the conversation as confidential or took any steps to conceal or limit the hearing of the conversation.

It is uncontested that Whipple did not consent to the recording. (See Whipple Decl., ¶ 13.) There is no indication on the Video that either the taping was disclosed or consent sought.

B. The Requirements for an Injunction.

The Court considers the sufficiency of Safari Club's showing on the requirements for injunctive relief.

1. Likelihood of Success on the Merits.

The Court finds that Safari Club has not shown a likelihood of success because there is no reasonable expectation that the communications between Whipple and Rudolph would be free from recording or being overheard by others.

The February 20 meeting was held in a public place, a restaurant called

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<sup>2</sup>The only cautionary remark in the Video is Whipple's comment that Rudolph should be careful and not send his waiting female companion and driver a glass of wine: "Be careful here." (Tr. 74.)

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Wine Works for Everyone.<sup>3</sup> The nature of the place was not conducive to an expectation of confidentiality. As noted in the Court's summary of the Video, there were numerous opportunities to be overheard, and no efforts at confidentiality were taken.<sup>4</sup>

The Court acknowledges that in Flanagan v. Flanagan, 27 Cal. 4<sup>th</sup> 766, 774-75 (2002), the California Supreme Court found that the statute distinguishes between the freedom from having a confidential conversation recorded and freedom from subsequent dissemination of the content. The statute protects only the first interest. At the time of the conversation, Rudolph was in litigation with Safari Club, and that would make it unreasonable to expect that Whipple's statements made to an opponent were or would be held in confidence. But that does not diminish the right to be free from recording. Said another way, the likelihood of dissemination of the content of the conversation does bear on the question of whether it was confidential for purposes of the statute. The Court's emphasis on the effects of dissemination at the hearing on the application was misplaced.

The conversation does not meet the statutory definition of a confidential communication because there was no reasonable basis for a belief that the conversation would not be overheard.<sup>5</sup> (Cal. Penal Code, § 632(c).)

The Court considers the other requirements, but the failure to demonstrate a likelihood of prevailing is fatal.<sup>6</sup>

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<sup>3</sup>Whipple notes in his declaration that they were both drinking wine. (Whipple Decl., ¶ 9.)

<sup>4</sup>In this regard, the Court credits own view of the Video over Whipple's characterizations of the meeting. (See Whipple Decl., ¶¶ 11-12)

<sup>5</sup>The Court need not consider whether lunch in a restaurant amounted to an unprotected "public gathering."

<sup>6</sup>The Court would reach the same conclusion even if it employed the sliding scale test. In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale: "serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011). The balance of hardships and public interest do not cure the weaknesses in the merits showing.

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2. Balance of Hardships.

The Court finds that the balance of hardship tips marginally in favor of Safari Club. Whatever harm Safari Club may sustain as a result of the release of the Video is merely incremental to the harm which flows from the statement which Whipple made, and which Rudolph is free to quote. The harm to Rudolph is the denial of potentially corroborative evidence in his dispute with Safari Club. Even if the Video would not be admissible in California, Cal. Penal Code, § 637(d), it would certainly be beneficial to Rudolph to have a precise recording if only to refresh and ensure the accuracy of any oral recounting of the meeting Rudolph may make. The fact that Whipple may not be a party to the Pennsylvania and Wyoming litigations does not diminish the relevance of his statements about the underlying events. (See Reply, p. 4.)

3. Irreparable Harm.

Again, the Court finds that this issue tips marginally in favor of Safari Club. Use of the Video carries greater detriment than mere dissemination of the content of the meeting. Although it is an extreme example, Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998), which involved sex tapes, illustrates the point. However, the difference between statements about sexual activities and actual tapes of such activities is substantial, and the tapes would work a far greater invasion of privacy in a particularly sensitive area than is the case here.<sup>7</sup> The Court believe that monetary damages would arguably be sufficient to cover any incremental harm which would flow from the Video rather than oral dissemination of the meeting.

4. Public Interest.

Consideration of the public interest tips marginally in favor of Rudolph. The Video is relevant evidence in the disputes between Rudolph and Safari Club pending in Pennsylvania and Wyoming. At least in the Pennsylvania litigation, there is no

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<sup>7</sup>The Court notes that Michaels was decided under common privacy tort law rather than the Penal Code. Michaels, 5 F. Supp. 2d at 839-41.

