Safari Club International et al. v. Lawrence P. Rudolph,
SACV 13-1989 JVS (ANx)

Tentative Ruling on Motion to Dismiss and Special Motion to Strike

Defendant Lawrence P. Rudolph ("Rudolph") moves this Court to dismiss Plaintiffs' John Whipple ("Whipple") and Safari Club International's ("Safari Club," and together, "Plaintiffs") First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. to Dismiss ("MTD"), Docket No. 47.) Whipple opposes the motion. (Opp'n to MTD, Docket No. 52.) Rudolph has replied. (MTD Reply, Docket No. 55.)

In addition, Rudolph has filed a special motion to strike Plaintiffs' FAC pursuant to California's anti-SLAPP statute, Cal. Code Civ. P. § 425.16. (Mot. to Strike ("MTS"), Docket No. 48.) Whipple opposes the motion. (Opp'n to MTS, Docket No. 51.) Rudolph has replied. (MTS Reply, Docket No. 56.)

Safari Club has given notice that it joins in both of Rudolph's oppositions. (Docket Nos. 53, 54.)

For the following reasons, the Court GRANTS Rudolph's special motion to strike and DENIES the motion to dismiss as moot.

I. Background

The background is drawn from the FAC, other filings, and evidence submitted to this Court. In resolving a motion to dismiss under Rule 12(b)(6), the Court is generally limited to consideration of the allegations in the complaint, but may also consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). A document "may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." Id. Because Plaintiffs' claims refer several times to the recording Rudolph made of his February 20, 2013 conversation with Whipple, the Court may consider the recording itself in resolving the 12(b)(6) motion. See Weiner v. ARS Nat'l Servs., Inc., 887 F. Supp. 2d 1029, 1030 n.1, 1031–32 (S.D. Cal. 2012) (taking judicial notice of transcript and audio file of recording allegedly made in violation of Cal. Penal Code § 632). Moreover, because the Court's decision to grant the special motion to strike, under

which evidence beyond the pleadings may be considered, renders the motion to dismiss moot, it is appropriate to consider Rudolph's additional evidence.

Safari Club is an international hunting and wildlife conservation organization with approximately 50,000 members and nearly 200 chapters across 26 countries. (FAC ¶ 6, Docket No. 36.) Between 2009 and 2011, Rudolph served as Safari Club's president. (Id. ¶ 10.) After serving as president, Rudolph served as Safari Club's Chief Communications Officer. (Id. ¶ 11.) In August 2012, believing Rudolph to have breached his duties of loyalty, care, and fair dealing, Safari Club expelled Rudolph from his membership. (Id. ¶¶ 12–13.)

In November 2012, Rudolph filed a lawsuit against Safari Club and a number of individuals, including Whipple, in the Western District of Pennsylvania. (Id. ¶ 15.)

On February 20, 2013, Whipple met with Rudolph at Rudolph's request in Orange County, California. (Id. ¶ 16.) At that time, Whipple was the president of Safari Club and a named defendant in the lawsuit Rudolph had filed. (Id. ¶ 18.) Whipple had known Rudolph for twelve to fifteen years prior to that meeting and considered him a friend. (Id. ¶ 20.)

Rudolph and Whipple met for approximately five hours at an Orange County restaurant called Wineworks for Everyone on the afternoon of February 20, 2013. (Id. ¶¶ 22–23.) At Rudolph's urging, the two discussed the ongoing litigation between Rudolph and Safari Club. (Id. ¶ 24.) The FAC alleges that at the time of their conversation, there were roughly five to ten other patrons in the room in which Rudolph and Whipple sat, but that none of those patrons was ever within earshot of their conversation. (Id.) The FAC also alleges that Rudolph and Whipple kept their voices at a noise level such that no one could overhear their conversation, and that when a server approached their table, the two would stop talking altogether or stop discussing anything substantive. (Id. ¶¶ 25–26.)

However, according to a declaration submitted by Rudolph, several patrons were sitting close enough that they could have overheard the conversation, neither Whipple nor Rudolph lowered their voices or curtailed their conversation, and there was nothing in Whipple's body language to indicate he was attempting to maintain privacy. (Rudolph Decl. ¶¶ 20–21, Docket No. 48-2.)

Rudolph secretly made a recording of the conversation with Whipple ("the Recording,")[1], which Whipple was unaware of at the time, and did not consent to. (FAC ¶¶ 27–28.) Rudolph has shared the Recording with his attorneys and used it to create a video presentation ("the Rudolph Video") for public dissemination. (Id. ¶ 31; Rudolph Decl. 22.)

On December 23, 2013, Rudolph removed to this Court an action that Plaintiffs had filed against him in Orange County Superior Court alleging violation of Cal. Penal. Code § 632. (Notice of Removal, Docket No. 1.) On January 16, 2014, the Court denied Plaintiffs' request for a preliminary injunction. (Order, Docket No. 27.) The Court reasoned that Plaintiffs had not shown a likelihood of success on the merits because, critical to the § 632 claim, Whipple did not appear to have a reasonable expectation of confidentiality: "The February 20 meeting was held in a public place, a restaurant called [Wineworks for Everyone.] The nature of the place was not conducive to an expectation of confidentiality. . . . [T]here were numerous opportunities to be overheard, and no efforts at confidentiality were taken." (Id. at 4–5.) An appeal of that ruling is pending in the Ninth Circuit. The Ninth Circuit denied Plaintiffs' application for a stay. (Docket No. 57.)

After the Temporary Restraining Order in this action was dissolved, Rudolph published the Rudolph Video on Youtube for the purpose of sharing it with Safari Club members and the public at large, as well as to use Whipple's statements in the Rudolph Video as evidence in Rudolph's ongoing litigation with Safari Club in other jurisdictions.[2] (Rudolph Decl. ¶¶ 22–24.)

On February 3, 2014, Plaintiffs filed the FAC. (Docket No. 36.) The FAC alleges seven causes of action: (1) invasion of privacy in violation of Cal. Penal Code. §§ 632 & 637.2; (2) injunctive relief; (3) negligence per se; (4) common law invasion of privacy; (5) false light invasion of privacy; (6) intentional infliction of emotional distress; and (7) negligent infliction of emotional distress. (See FAC.)

[1] The Recording and a transcript was submitted to the Court in Docket Nos. 15 and 16.

[2] The Rudolph Video is available at http://www.youtube.com/watch?v=2aYY0YF4ktA.

II. Legal Standards

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." A plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the court must follow a two-pronged approach. First, the court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the court "accept as true a legal conclusion couched as a factual allegation." Id. (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

B. Special Motion to Strike

California's anti-SLAPP statute allows for pre-trial dismissal of "SLAPPs" ("Strategic Lawsuits against Public Participation"). Cal. Code Civ. P. § 425.16. The statute aims to identify, early in the litigation process, "meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001); see also Wilcox v. Super. Ct., 27 Cal. App. 4th 809, 816 (1994).

The anti-SLAPP statute permits a defendant to file a "special motion to strike" to dismiss an action before trial. Cal. Code Civ. P. § 425.16. "To prevail on an anti-SLAPP motion, the moving defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's constitutional right to free speech." Makaeff v. Trump Univ., LLC, 715 F.3d 254,

261 (9th Cir. 2013) (citing Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)). "The burden then shifts to the plaintiff . . . to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal. Id. (citations omitted). Under this standard, the claim should be dismissed if the plaintiff presents an insufficient legal basis for it, or if, on the basis of the facts shown by the plaintiff, "no reasonable jury could find for the plaintiff." Metabolife, 264 F.3d at 840 (citation and internal quotation marks omitted).

Where an anti-SLAPP motion is brought on the grounds that the plaintiff's claim is legally deficient, the Court should adjudicate the motion under the standards for a Rule 12(b)(6) motion to dismiss. See Lauter v. Anoufrieva, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2009); In re Bah, 321 B.R. 41, 45 n.6 (B.A.P. 9th Cir. 2005). "In other words, the court must read the complaint broadly, take all well-pleaded allegations as true, and dismiss with leave to amend." In re Bah, 321 B.R. at 45 n.6.

"In any action subject to subdivision (b) [of California's Anti-SLAPP statute], a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code Civ. P. § 425.16(c).

III. Discussion

A. Special Motion to Strike

The Court must grant the special motion to strike, because Plaintiffs' suit arises from an act in furtherance of Rudolph's right to expression, and Whipple has not met his burden to establish a reasonable probability of prevailing on the claims.

1. Arising From Protected Activity

Under the anti-SLAAP statute, the special motion to strike may only apply to a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Cal. Code. Civ. P. § 425.16(b). The "arising from" requirement is met by, among other possibilities, "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." Id. § 425.16(e).

> For purposes of the anti-SLAPP statute, a cause of action "arises from" conduct that it is based on. Thus, we first ask what activities form the basis for each of Plaintiffs' causes of action. We then ask whether those activities are protected, bringing the cause of action within the scope of the anti-SLAPP statute. Where a cause of action is based on both protected activity and unprotected activity, it is subject to [the anti-SLAPP statute] unless the protected conduct is merely incidental to the unprotected conduct. Protected activity is not merely incidental to unprotected activity if the alleged activity underl[ies] the cause of action.

Graham-Sult v. Clainos, 738 F.3d 1131, 1142 (9th Cir. 2013) opinion superseded on denial of reh'g by amended opinion, No. 11-16779, 2014 WL 444153 (9th Cir. Feb. 5, 2014) (internal quotation marks and citations omitted).

As an initial matter, the Rudolph Video itself is a statement in connection with an issue under consideration by a judicial body, see Cal. Code Civ. P. § 425.16(e)2), insofar as it speaks directly to issues being litigated between Safari Club and Rudolph in other jurisdictions and is addressed to Safari Club members and the general public. See Nevillle v. Chudacoff, 160 Cal. App. 4th 1255, 1266 (2008) (holding that a statement is in connection with an issue considered by a court if it relates to a substantive issue in the proceeding and is directed to a person having some interest in the proceeding).

Whipple argues that the claims in the FAC arise from the allegedly illegal Recording, rather than the Rudolph Video. (Opp'n to MTS at 8–10.) As to several of the claims, this is plainly false: the invasion of privacy claims and the intentional and negligent infliction of emotional distress claims clearly speak to the dissemination of the Rudolph Video rather than merely the Recording. (See FAC ¶¶ 53, 55–57, 59, 64, 68–69, 71, 74.) Moreover, the claim for injunctive relief expressly seeks to prevent the dissemination of the Recording. (FAC ¶ 45.) As for the illegal recording claim and the negligence per se claim premised on the illegal recording, while the FAC does mention the Rudolph Video in its general allegations, and both of those claims incorporate those allegations, Whipple is right that the crux of those claims pertains to the Recording itself, rather than the edited Rudolph Video.

However, in Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156,

166 (2003) the California Court of Appeal explained that the coverage of the anti-SLAPP statute must be construed broadly, and that the statute also protects conduct in furtherance of protected speech. The court went on to hold that the defendants' act of secretly recording the plaintiff in order to edit and rebroadcast that recording in connection with a public issue was in furtherance of protected speech, and that the anti-SLAPP statute applied. Id. The situation here is similar. Rudolph met with Whipple and recorded their conversation, whether lawfully or not, in order to edit and rebroadcast those statements in the Rudolph Video, which addressed matters in litigation and was meant to inform Safari Club's members and the broader public about Safari Club's actions.

Finally, Whipple maintains that the anti-SLAPP statute does not cover illegal activity, such as violations of § 632. See Flatley v. Mauro, 39 Cal. 4th 299, 320 (2006) (holding that a defendant whose conduct is conclusively demonstrated to have been illegal may not invoke the anti-SLAPP statute). But as Rudolph points out, that is not the case here. When a defendant's activity may or may not be criminal, the defendant may still seek refuge under the anti-SLAPP law unless the activity is criminal as admitted by the defendant or conclusively established by evidence. See Gerbosi v. Gaims, Weill, W. & Epstein, LLP, 193 Cal. App. 4th 435, 446 (2011). Indeed to hold otherwise would create a trap for defendants under which any plaintiff could plead that a defendant's acts were unlawful and that the anti-SLAPP statute could not be invoked. As the Court found in denying the preliminary injunction, Plaintiffs failed to establish the likelihood of prevailing on their § 632 claim. (See Order at 4–5, Docket No. 27.)

Thus, the Court concludes that Rudolph has made the necessary showing that his acts were in furtherance of his free speech rights.

2. Whipple's Burden to Show a Fair Probability of Prevailing

Whipple was required to show both that Plaintiffs' claims are legally sufficient and supported by a sufficient prima facie showing of facts to obtain judgment if Plaintiffs' evidence is credited. Wilson v. Parker, Covert & Childester, 28 Cal. 4th 728, 741 (2003). But Whipple did not submit any evidence with his opposition, instead resting on the arguments in his opposition to the motion to dismiss. That is insufficient to carry Whipple's burden here. Cf. DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 568 (2000) (holding that it is insufficient under the second prong of the anti-SLAPP statute to survive a

demurrer, and that the allegations must be substantiated). The determination whether a plaintiff can establish a probability he or she will prevail "cannot be based on allegations but must be based on evidence." Id. at 564.

Thus, Whipple's complete failure to bring evidence to accompany his opposition is alone sufficient to grant the special motion to strike. Therefore the Court strikes the FAC.

B. Motion to Dismiss

Because the Court grants the special motion to strike, the motion to dismiss is necessarily denied as moot.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the special motion to strike and DENIES the motion to dismiss as moot.

Pursuant to Cal. Code. Civ. P. § 425.16(c), Rudolph is entitled to recover his attorney fees and costs.

IT IS SO ORDERED.