

STAN **RIFKIN**, Plaintiff, v. **ESQUIRE PUBLISHING INC.**, Defendant.

NO. CV-81-1424-MML

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

1982 U.S. Dist. LEXIS 18405; 8 Media L. Rep. 1384

February 24, 1982, Decided

February 24, 1982, Filed

DISPOSITION: [*1] Claims for slander, claims eight, nine, and ten, dismissed for failure to state claim upon which relief can be granted. Plaintiff's claim for conspiracy to slander (count seven) dismissed.

JUDGES: Malcolm M. Lucas, United States District Judge.

OPINION BY: Malcolm M. Lucas

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff in this action is presently in federal custody serving a jail term of eight years for a widely-publicized, multi-million dollar computer wire fraud. He is proceeding in this diversity action in propria persona. Plaintiff's complaint, filed on March 24, 1981, seeks both injunctive relief and damages resulting from the activities of several persons in preparing an article about plaintiff for sale to and publication in defendant's magazine. This action only concerns these pre-publication activities. No claim has been made with respect to the content of the article or the publication of the article by defendant.

On March 30, 1981 plaintiff applied for a temporary restraining order to prevent defendant from distributing the issue of its magazine containing the article in question on the grounds that the article had been obtained "by calculated falsehood, subterfuge, scheme [*2] and artifice." This motion was denied by order of March 31, 1981. The Court of Appeals affirmed this decision by order of April 9, 1981. Plaintiff's subsequent motion for a preliminary injunction against the distribution of the issue was also denied.

Plaintiff's complaint for damages is still pending before this Court. The Court notes that plaintiff's complaint seeks certain equitable relief as well. Plaintiff requests the Court to order defendant to furnish a list of all persons who were contacted using plaintiff's name in the preparation of the article and to require defendant to notify these persons that it has no connection with plaintiff and to retract any false representations made concerning

plaintiff's cooperation in the writing of the article. Plaintiff also asks the Court to enjoin defendant and its agents from harassing plaintiff, his friends or the Department of Justice.

There is no indication that defendant is presently contacting plaintiff, his friends or the Department of Justice concerning plaintiff or intends to do so in the future. The article has been written and published. This aspect of plaintiff's request for injunctive relief is, therefore, moot. The prayer [*3] for disclosure of information and a general "retraction" or "disclaimer" by defendant stands or falls on the strength of plaintiff's complaint for damages.

On April 29, 1981 defendant filed a motion to dismiss for failure to state a claim. F.R.Civ.P. 12(b)(6). Briefing of this motion was completed on August 21, 1981. The Court then took the motion under submission without oral argument.

After careful consideration of the papers filed the Court grants defendant's motion to dismiss.

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Where, as here, plaintiff is not represented by legal counsel, the Court must be especially cautious in considering a motion to dismiss.

The Court has carefully reviewed plaintiff's complaint and given plaintiff the benefit of all reasonable presumptions. Nevertheless the Court has concluded that plaintiff has failed to state a claim upon which relief can be granted.

Before proceeding to an analysis of defendant's motion, the Court notes that it has, in accordance [*4] with the briefs of both parties, assumed that California law should be applied to this dispute. In addition, because the Court treats defendant's motion strictly as a motion to dismiss rather than as a motion for summary judgment, the Court must accept plaintiff's allegations that an agency relationship existed between defendant and others named in the complaint but not parties to this action. Thus, the Court will from time to time refer to the activities of these alleged agents as those of defendant. The Court does not, thereby, express any opinion as to whether there was, in fact, an agency relationship between defendant and these persons.

Plaintiff's complaint sets out eleven claims for relief. Claims one and eleven are each captioned "conspiracy to invade privacy." Claim seven is for "conspiracy to slander." Under California law, "the only significance of the conspiracy charge is that each member [of the alleged conspiracy] may be held responsible as a joint tortfeasor, regardless of whether or not he directly participated in the act." 4 Witkin, *Summary of California Law* 2330 (8th Ed. 1974) (and authorities cited there). Defendant is, therefore, correct in asserting that [*5] claims one, seven and eleven stand or fall on the strength of plaintiff's claims for invasion of privacy and slander.

Plaintiff sets out five claims for invasion of privacy (claims two, three, four, five and six)

and three claims for slander (claims eight, nine, and ten). The Court will first address the claims for invasion of privacy.

In support of these claims, plaintiff alleges the following facts:

(1) Defendant, through Jeffery Young (Young) contacted plaintiff's friend, Gary Schneider (Schneider), and told him that he was plaintiff's friend and that he had interviewed plaintiff for an article intended for publication in defendant's magazine. Young also told Schneider that plaintiff had given him (i.e. Young) permission to contact Schneider and that plaintiff had given Schneider permission (through Young) to speak with Young about plaintiff.

(2) Defendant, through its agents, contacted plaintiff's ex-wife and told her the same things which Young had told Schneider.

(3) Defendant, through Young and Bruce Henderson (Henderson) contacted plaintiff's friend Pat Ferguson (Ferguson) and told her that they were going to write a story about Ferguson. Defendant also told Ferguson that, [*6] in order to write this story, Ferguson would have to tell them about plaintiff and asked Ferguson to help them get access to plaintiff. Plaintiff does not allege that defendant obtained access to him through Ferguson. It appears from the record that Ferguson adamantly refused to assist defendant as requested.

(4) In plaintiff's claim for conspiracy to invade privacy, plaintiff also alleges that Henderson contacted certain prison officials and told them that he was working on an article about the penal press. Plaintiff alleges that Henderson did not intend to write such an article and was merely attempting to obtain access to plaintiff, who was editor of the prison newspaper, by means of this "ruse." Plaintiff does not allege that Henderson received permission to interview plaintiff or that Henderson at any time directly contacted plaintiff. It appears from the record that Henderson was not successful in his attempt.

The Court notes that plaintiff also suggests that defendant may have had similar contacts with other persons in preparing the article. Plaintiff who is presently in federal custody, has not had an opportunity to conduct discovery to determine whether this is the case.

[*7] The following analysis would, however, remain unchanged even if plaintiff could establish that defendant had contacted other friends or acquaintances in the manner alleged. The Court may, therefore, proceed even though there may be some uncertainty as to the exact number of persons contacted by defendant.

In claims two, three and four plaintiff alleges that defendant, by these acts, intentionally and knowingly intruded upon plaintiff's privacy. In claims five and six plaintiff alleges that defendant's conduct "put plaintiff in a false light as the statements uttered. . . were and are untrue and defamatory."

The California Supreme Court has recently summarized the tort of invasion of privacy under California law:

Our courts have dealt with four distinct factual settings under the heading of invasion of privacy . . . Those four types of cases are: (1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation [of plaintiff's name or likeness for defendant's advantage.] *Forsher v. Bugliosi*, 26 Cal. 3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (S. Ct. Cal. 1980).

Claims two, three [*8] and four must be viewed as alleging an intrusion upon plaintiff's solitude or seclusion, the first of the four types of cases described in *Forsher*. They clearly do not fit within any of the other three type of cases described there. Plaintiff has not, however, alleged facts which, even if liberally understood, would support this claim for relief. Defendant's activities in contacting persons other than plaintiff in no way (physically or otherwise) ¹ intruded upon plaintiff's solitude or seclusion.

----- Footnotes -----

¹ There may be some question as to whether, under California law, an intrusion must be physical to constitute an invasion of privacy in a case such as this. *See, Kinsey v. Macur*, 107 Cal. App. 3d 265, 165 Cal.Rptr. 608, 611 (Ct.App. 1980) The Court need not address this question, however, since defendant's activities would not constitute an invasion of privacy even under the broader rule.

----- End Footnotes-----

Liability for intrusion upon one's physical solitude or seclusion exists only if the intrusion goes beyond [*9] the limits of decency, *Gill v. Hearst Publishing Co.*, 40 Cal.2d 224, 253 P.2d 441 (Cal. 1953). Other courts have suggested that liability may also arise in cases of intrusion into "spheres from which an ordinary man in plaintiff's position could reasonably expect [to be able to exclude] the particular defendant." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (discussing probable trends in California law). Defendant's attempts to gather information about plaintiff from third parties or to elicit the assistance of third parties in contacting plaintiff, even if pursued using subterfuge and fraud, cannot constitute such an intrusion upon *plaintiff's* solitude or seclusion. The Court has found no authority, nor has plaintiff cited any, which suggests the contrary.

Plaintiff is correct in noting that "an unreasonably intrusive investigation" may constitute a violation of a person's right to privacy. *Noble v. Sears Roebuck and Co.*, 33 Cal. App. 3d 654, 109 Cal.Rptr. 269 (Ct.App. 1973). The facts alleged do not, however, even approach the level of intrusiveness necessary to support such a claim.

The Court views claims five and six as [*10] alleging that defendant placed plaintiff in a false light in the public eye, the third of the four types of invasion of privacy described in *Forsher*.

Although California courts discuss the tort of "placing a person in a false light in the public eye," this tort has been held to be "in substance equivalent to" the tort of

defamation. *Kapellas v. Kofman*, 1 Cal. 3d 20, 81 Cal. Rptr. 360, 369, 459 P.2d 912 (Cal. 1969). The court in *Kapellas*, which concerned an alleged libel, concluded that insofar as plaintiff stated a claim under a false light theory, this claim was "superfluous" since the complaint also contained a specific cause of action for libel.

Under the *Kapellas* rationale, plaintiff's claims five and six are also superfluous since plaintiff's complaint includes a specific cause of action for slander arising from the same allegations of fact. Indeed, plaintiff's complaint implicitly recognizes that these claims are co-extensive in that plaintiff alleges that the statements made by defendant put him in a false light because they were "untrue and defamatory."

Other authorities suggest, however, that there may be some distinction between a claim under a false light [*11] theory and a claim for defamation in that, under some circumstances, liability might lie under the former but not under the latter. 4 Witkin, *Summary of California Law* 2601 (8th Ed. 1974). This distinct tort must, however, "be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few." *Kinsey v. Macur*, 107 Cal. App. 3d 265, 165 Cal. Rptr. 608, 611 (Ct. App. 1980). Although defendant may have contacted persons other than those few mentioned above in preparing the article in question, it is clear that defendant's pre-publication activities do not constitute a "communication to the public in general." The Court notes also that even if defendant had communicated with the public in general, there is a serious question as to whether the false communication that plaintiff was cooperating with the media and encouraging publicity would be actionable under a "false light" theory.

No relief can be granted, therefore, under claims two, three, four, five or six for invasion of privacy. The Court must, therefore, dismiss these claims. As a result, plaintiff's claims for conspiracy [*12] to invade privacy (claims one and eleven) must also be dismissed.

The Court turns now to the remaining claims for slander (claims eight, nine, and ten) and for conspiracy to slander (claim seven). In these claims plaintiff re-alleges the facts set out above. In addition, plaintiff alleges that Jennifer Crandall, an employee of defendant, contacted certain prison officials and informed them that plaintiff had been interviewed for an article. Crandall also allegedly asked for an opportunity to take photographs of plaintiff in connection with publication of that article.

Plaintiff contends that these acts were slanderous in that they were understood by the persons contacted to mean that plaintiff had broken his long standing policy of not making comments to the media. This allegedly cast aspersions on his "integrity, honesty and lack of capriciousness." Plaintiff further alleges that as a result of these activities, he has been exposed to potential sanctions (allegedly harmful differential treatment) imposed by the Department of Justice on prisoners who receive publicity.

California Civil Code § 46 defines slander. The only portions of that definition even arguably [*13] relevant to the facts of this case are §§ 46(3) and (5) which provide:

Slander is a false and unprivileged publication, orally uttered . . . which . . .

(3) tends directly to injure [any person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits . . . or (5) which, by natural consequences, causes actual damage.

Plaintiff contends that defendant's activities constitute slander under both of these standards. He argues that the communications by defendant with his friends and prison officials tend directly to injure him in respect to his office, profession, trade or business of being a prisoner. The Court rejects this argument. The clear language of § 46(3) and the cases applying that standard indicate that "being a prisoner" is not an office, profession, trade or business within the meaning of that section.

Both parties agree that plaintiff can only recover under § 46(5) if he can plead special [*14] damages suffered in respect to his "property, business, trade, profession or occupation." California Civil Code § 48a(4)(b). Again plaintiff contends that his allegations of possible harm or differential treatment as a prisoner who has received publicity satisfies this pleading requirement. The Court rejects this contention as well. Any damages which plaintiff might suffer as a result of the publicity surrounding his case are not "in respect to plaintiff's property, business, trade, profession or occupation." The Court also notes that there is a serious question as to whether any such damages result by natural consequences from defendant's alleged activities.

The Court finds, therefore, that the claims for slander, claims eight, nine, and ten, must be dismissed for failure to state a claim upon which relief can be granted. As a result, plaintiff's claim for conspiracy to slander (count seven) must also be dismissed.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on the plaintiff and counsel for the defendant in this matter.

Dated: February 24, 1982

Malcolm M. Lucas

United States District [*15] Judge