

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. GEORGE H. WU, JUDGE PRESIDING

EDROP-OFF CHICAGO LLC and CORRI)
MCFADDEN,)
)
)
 Plaintiffs,)

vs.

) No. CV 12-04095-GW
)
)
)

NANCY R. BURKE, MIDLEY, INC.)
d/b/a PURSEBLOG.COM, and DOES)
1-10 inclusive,)
)
)
 Defendants.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, May 20, 2013, 10:20 A.M.

DEFENDANT PURSEBLOG'S RENEWED MOTION TO STRIKE THE FIRST
AMENDED COMPLAINT

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1 LOS ANGELES, CA.; MONDAY, MAY 20, 2013; 10:20 A.M.

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3 THE COURT: Let me call the matter of eDrop versus
4 Burke. Let me have appearance of counsel.

5 MS. SHELTON: Good morning, Your Honor. Dominique
6 Shelton, Edwards Wildman for the plaintiffs.

7 THE COURT: All right.

8 MR. BALLON: Good morning, your honor. Ian Ballon
9 and Adrienne Lawrence, Greenberg Traurig for defendant
10 Purseblog.

11 THE COURT: All right. We are here on a
12 continuation of -- well, I guess the SLAPP motion
13 consideration in this matter. I've issued another tentative
14 on this. I presume both sides have seen it.

15 MS. SHELTON: Yes, Your Honor.

16 MR. BALLON: Yes, Your Honor.

17 THE COURT: Does somebody want to argue something?

18 MS. SHELTON: Yes, Your Honor.

19 Your Honor, I wanted to advise the court that I am
20 leaving my firm and it's unclear at this point who will be
21 representing the plaintiffs. I'd like to ask for a 90-day
22 continuance so that the issues can be resolved.

23 THE COURT: All right. I will take that under
24 consideration.

25 From the defense?

1 MR. BALLON: Your Honor, if I may, I would like to
2 argue from the tentative.

3 THE COURT: Sure.

4 MR. BALLON: This has been a very expensive case
5 and we would very much like --

6 THE COURT: Well, frankly I told you guys at the
7 start of this matter that it's going to be an expensive case
8 and that's the reason why the parties should resolve it
9 earlier rather than later. And the problem with SLAPP
10 motions in general is that I don't find in my personal
11 experience that SLAPP motions help the situation. SLAPP
12 motions wind up making things more expensive in the long run
13 for litigation. It is a statute which is ill thought out,
14 ill advised, and I understand why Kazinski wants to get rid
15 of it in federal court.

16 MR. BALLON: Well, Your Honor, not to get too far
17 off topic, as we have documented in the papers before we
18 even entered our appearance I tried to do exactly that. I
19 sought settlement and I warned if we don't settle we will
20 file an anti-SLAPP motion.

21 THE COURT: The problem is that it's one of those
22 things where timing is everything because at one point in
23 time my understanding was the defense wanted to settle and
24 the plaintiff was resisting. And then another point in time
25 the plaintiffs wanted to settle and the defendants were

1 being resistant. So, I'm not going to put blame. It is
2 what it is and the water is already under the bridge.

3 The major problem, however, is this issue of how
4 this case is going to proceed because as I've indicated the
5 issue at this point is whether or not in this context
6 because we are in federal court because in federal court we
7 have rules insofar as allowing amendments and all of this
8 other type of stuff, the California law insofar as how we do
9 SLAPP motions is kind of like -- it's questionable in this
10 particular context because obviously I've allowed an
11 amendment.

12 The amendment now seems to indicate that there is
13 a federal cause of action on the Lanham Act. There
14 apparently are two causes of action under Illinois state
15 statutes and then there are common law claims. And the
16 question is are the common law claims, claims that arise
17 under Illinois law or under California law or something
18 else.

19 And then the context, however, is that in the
20 situation where the court has allowed this amendment, this
21 permissive amendment, does the SLAPP -- is the SLAPP forward
22 looking in the sense that now we just look at the situation
23 under the first amended complaint or do we evaluate
24 everything under the original complaint? And the answer is,
25 well, it's unclear.

1 MR. BALLON: Let me suggest a simple way to cut
2 through a number of the issues because the court has done a
3 very good job outlining a lot of questions, many of them
4 complicated. And I think we can cut through some of them.

5 On page 7 of Your Honor's tentative you raise the
6 point that the question of whether the original complaint
7 remains relevant may be moot as a practical matter if the
8 claims are realleged. And that's exactly what we are
9 dealing with in this case. So, I think all of the complex
10 issues about the original complaint can be put to the side.

11 Purseblog would accept the court's proposition
12 because all of the original claims in the original complaint
13 against Purseblog were realleged in the amended complaint
14 and the court --

15 THE COURT: That's fine. Except then the question
16 becomes as realleged or as originally alleged, are they
17 governed by California law or are they governed by Illinois
18 law or is that something that needs to be determined?

19 MR. BALLON: Well, I think they are governed by
20 California law and I will argue that but I don't want to get
21 too far ahead of myself because I think the first important
22 point is because the claims were realleged and accepting the
23 court's tentative at least with respect to the common law
24 claims, if the court is going to dismiss those under the
25 anti-SLAPP motion then all of the claims alleged against

1 plaintiff in the original complaint in the end are being
2 dismissed with the exception of the trademark claim which
3 has now been alleged under the Lanham Act which I will get
4 back to in a moment.

5 THE COURT: Well, let's address that at this point
6 in time. Is the defendant -- the defendants are going to be
7 making the argument that the SLAPP motion applies to a
8 federal cause of action?

9 MR. BALLON: No, not at all.

10 THE COURT: Okay.

11 MR. BALLON: The argument we would make with
12 respect to the Lanham Act is I sought leave from the court
13 to file a motion under Rule 12. Again, I didn't go back and
14 look at the transcript. But I believe it was clear what I
15 was trying to do was to get rid of the entire -- to update
16 the anti-SLAPP motion and address under Rule 12 all of the
17 new claims under the amended complaint and that's what we
18 did.

19 If you look at our papers it's very clear. The
20 first sentence of the introduction says we are seeking
21 release to dismiss the complaint under Rule 12 and the
22 anti-SLAPP motion. The index, however brief, makes it clear
23 plaintiffs did not object in their opposition. The issue is
24 fully briefed and therefore actually with respect to the
25 Lanham Act if you go back and look at the three briefs, the

1 addendum, the opposition, and the reply, you have a fully
2 briefed Rule 12 motion.

3 The Lanham Act claim is frivolous. It doesn't
4 meet the standards of *Iqbal* and *Twombly* and under Rule 1
5 there is no good reason to defer ruling on that. And if we
6 get rid of that claim, that goes a long way to getting rid
7 of the whole case because I would argue that the other
8 claims all would be dismissed under SLAPP.

9 With respect to the issue of choice of law, I
10 believe that there are two strong reasons why California law
11 applies in this case. One, is the government interest
12 analysis which I'd like to revisit because I believe there
13 are some facts that were presented to the court that weren't
14 considered in the tentative.

15 THE COURT: Well, let me just stop though.
16 Insofar as the government interest, what would the
17 California state interest be? I mean the speakers are not
18 California residents. The person being spoken about aren't
19 California residents. The things that were spoken were
20 communicated via the Internet which is available
21 countrywide. So, what would there -- why would there be any
22 like California interest that would be higher or would be
23 placed higher than for example either Illinois where the
24 plaintiffs are -- or is it Florida?

25 MR. BALLON: The defendant is a Florida company.

1 THE COURT: All right.

2 MR. BALLON: Those are excellent questions but I'm
3 prepared to answer them. First of all, the plaintiffs in
4 their own complaint, the original complaint alleged that a
5 substantial amount of their revenue, eDrop-Off's revenue,
6 was earned by California residents, particularly here in
7 Los Angeles.

8 Plaintiffs' complaint also alleged that a
9 substantial number of the participants on Purseblog are
10 California residents. And, indeed, even in the amended
11 complaint there is reference to California. California also
12 has a strong interest because the anti-SLAPP statute
13 according to the Ninth Circuit --

14 THE COURT: Let me stop you. As to the first
15 argument, the persons who are in California aren't the
16 subject or they aren't really related to the persons who are
17 in the dispute. They are tangentially involved in the
18 dispute because they may be purchasers of one sort or
19 another. But, again, it's not their -- well, let's put it
20 this way. They have no ax to grind in this particular
21 matter because it's not between them or about them. It's
22 between the parties who are non-California residents or
23 citizens or whatever.

24 MR. BALLON: I think that would be true in many
25 states but it's not true in California because California

1 has a unique constitutional right to speech that is broader
2 than the federal constitution and I believe broader than the
3 constitutions of all other states.

4 Certainly, although the plaintiff has the burden
5 of proving that foreign law applies, there is no evidence
6 that was presented that Illinois has a similar interest.
7 The California constitution, as the court noted in a
8 footnote, protects the right to read in addition to the
9 right to speak.

10 The California constitution makes it very clear
11 that California is concerned not only with the people who
12 are speaking but with the right of California citizens to
13 have unfettered speech and I think that's an important
14 substantive principle embodied in the California
15 constitution.

16 In addition, the anti-SLAPP statute itself
17 according to the Ninth Circuit has both procedural and
18 substantive components. The substantive components make
19 very clear what the important policy is of the State of
20 California which is in the statute itself, 425.16(a), the
21 legislature finds and declares that in the public
22 interest -- so it's a concern not just of the litigants
23 before the court but of the public to encourage continued
24 participation in matters of public significance and that
25 this participation shall not be chilled through abuse of the

1 judicial process. To this end the section shall be
2 construed broadly.

3 I believe that that states what the California
4 interest is. It's also been reiterated both in the
5 Ninth Circuit and in California Supreme Court cases, for
6 example, *Barrett v. Rosenthal*, California Supreme Court
7 case, 40 Cal 4th 33, 2006.

8 California has a significant interest in
9 protecting free speech used on the Internet, holding that
10 speech on publicly accessible website is subject to
11 protection.

12 In *Schroeder v. Irvine City Council* -- now that's
13 an intermediate appellate court decision, 97 Cal.app.4h,
14 California has, quote, a substantial governmental interest
15 in deterring unmeritorious lawsuits generally.

16 THE COURT: Let me stop. I'm familiar with the
17 law.

18 MR. BALLON: Okay. So I do believe that
19 California actually has a strong interest. It's a unique
20 interest that Illinois doesn't share embodied in our
21 constitution and in the statute to the extent that it
22 represents the substantive laws of California and this court
23 sitting in diversity must apply the substantive law of
24 California.

25 Again, I also believe that it's reflected in

1 plaintiff's own factual allegation alleging that a
2 substantial portion of their revenue and a substantial
3 number of our users are in California.

4 In addition to government interest though, I also
5 would like to revisit the issue of judicial estoppel because
6 I believe that independently on the grounds of judicial
7 estoppel the plaintiff should be estopped from asserting a
8 new choice of law in this case.

9 In this case, the plaintiffs, as the court is well
10 aware, sought a TRO from this court in a complaint that in
11 numerous places alleged California law. To the extent there
12 is any question, I have a highlighted copy of the original
13 complaint which I'll be happy to give to the clerk and to
14 give to opposing counsel which highlights in a number of
15 places the specific connection to California.

16 So, the references -- and we've fully briefed
17 these. But among others, paragraph 6, that -- I'm sorry.
18 These are the California jurisdictional connections that the
19 content and statements in the complaint were posted by
20 BeenBurned on Purseblog which is a website accessible to and
21 frequently trafficked by California residents.

22 There is reference in 46 to further conduct in
23 California websites, e-mails, and newsletters and other
24 things in California.

25 There is repeated reference to California and the

1 requests for California law. Indeed, even the first amended
2 complaint in paragraph 93 repeats from the original
3 complaint that these acts are actionable under the laws of
4 the State of California. So, even in paragraph 93 of the
5 amended complaint continues to allege California law.

6 The reality is the plaintiffs came before this
7 court to seek a TRO8 under California law in a complaint
8 alleging California law. The TRO was denied and thereafter
9 they filed for identical relief in the state of Illinois
10 moving again for the identical TRO.

11 And what has happened here is because we had
12 raised the issue of anti-SLAPP -- in fact, as it's fully
13 documented with evidence in our original anti-SLAPP moving
14 papers, in between that time before we entered our
15 appearance before we did anything --

16 THE COURT: Let me stop you. I understand your
17 argument.

18 What else?

19 MR. BALLON: So as a consequence, the issue of
20 judicial estoppel. The court raised the point that we had
21 not shown prejudice. The Ninth Circuit in a case last year,
22 which I will reference in a moment, *Milton Greene Archives*
23 *v. Marilyn Monroe*, 692 F. 3d 983 said very clearly that
24 being forced to continue litigating a case that's not
25 meritorious itself is a detriment. But I would go beyond

1 that. And, of course, the facts of that are much more
2 egregious. That was litigation that went on for many
3 decades. But --

4 THE COURT: The problem is that the merits of this
5 case are nowhere near to be resolved.

6 MR. BALLON: Well, I believe that we have shown
7 that actually the state claims are preempted under the CDA
8 and that the claims are unmeritorious. We briefed the
9 Lanham Act claim that is more frivolous than the state law
10 claims.

11 I would say also with respect to prejudice that
12 the case of *Samson v. Nama* which we had cited says that
13 actually there needs to be either a prejudice to the
14 defendant or a benefit to the plaintiffs.

15 Now there is certainly the prejudice to the
16 defendant in the Marilyn Monroe sense of having to continue
17 to litigate. But there is also clearly a benefit to the
18 plaintiff which is why the judicial estoppel doctrine should
19 apply under *Samson* and that is simply that by basically
20 pivoting and now coming before this court and saying, you
21 know, we were kidding. We alleged California law initially,
22 but now we are alleging Illinois law, they do so solely for
23 the purpose of trying to benefit themselves by avoiding
24 anti-SLAPP on these two claims.

25 Yet, if these two claims are dismissed, if the

1 Lanham Act claim is dismissed the case is gone. Now
2 plaintiffs are free to take it to the Ninth Circuit but then
3 the case is dismissed. So I think there plainly is both
4 detriment to the defendant and benefit to the plaintiffs.

5 THE COURT: Let me stop you. What about the
6 Illinois causes of action?

7 MR. BALLON: I know. That's why I'm saying.
8 That's why under government -- that's why they should be
9 estopped to pivot and now argue that Illinois law applies.
10 These are the same claims that were raised in Illinois.
11 They are carbon copies of claims that the plaintiffs made in
12 the Illinois action. They've simply realleged them here.

13 THE COURT: Let me stop. What's the status of the
14 Illinois action?

15 MR. BALLON: The Illinois action has been stayed
16 pending Your Honor's ruling.

17 THE COURT: If I resolve the SLAPP motion, the
18 SLAPP motion wouldn't cover the Illinois causes of action,
19 nor would it cover the Lanham Act.

20 Now, I presume that the Lanham Act could be
21 covered by the 12(b)(6) that you are claiming that you made.
22 But the state causes of action -- Illinois state causes of
23 action would still go forward. Although, arguably then the
24 case would be transferred to Illinois for the matter to be
25 resolved in Illinois. I can understand that. All right.

1 So I think I understand your position.

2 Let me just ask. Is there anything else that you
3 are arguing?

4 MR. BALLON: The only other thing I would say is
5 that actually the state statutory claims also could be
6 resolved.

7 THE COURT: When you say the state statutory --

8 MR. BALLON: The state Illinois claims could be
9 resolved on 12(b)(6). So, we believe that they should be
10 dismissed because under both government interests and
11 judicial estoppel California law applies. But even if
12 Illinois applies, then based on Rule 12(b)(6) we believe
13 that we've made that showing based on the applicability of
14 the CDA.

15 THE COURT: Okay. From the plaintiff's counsel,
16 what's your response to all of that?

17 MS. SHELTON: Your Honor, I'd like to renew the
18 request that we continue the hearing for 90 days in that I
19 will be leaving my firm and it's unclear at this point who
20 will be representing the client in this litigation.

21 THE COURT: That's future. That depends on what
22 I'm going to be doing in the future. But at this point in
23 time the matter is fully briefed. So, what's your response
24 to the arguments that have been made by defense counsel?

25 MS. SHELTON: Your Honor, first of all, we do not

1 agree that there is any 12(b)(6) motion that has been fully
2 briefed before Your Honor.

3 We will address the anti-SLAPP -- amended
4 anti-SLAPP motion that defendants have brought. We just
5 want to dial it back, to go back to what this case is really
6 about.

7 We are talking about two plaintiffs that are based
8 in Illinois, a website that is based in Florida that
9 operates out of New York. There is absolutely no nexus to
10 California other than the fact that the original complaint
11 was filed here on a TRO basis for emergency relief because
12 counsel could get into court as quickly as possible here.

13 THE COURT: That may have been the initial mistake
14 because the mere fact that one can get into this court
15 speedily doesn't necessarily mean that the matter should
16 have been brought in this court originally.

17 MS. SHELTON: Your Honor, but it also does not
18 mean that the government interest as to conflicts of law
19 should not be applied.

20 In the *Schering* case as well as in the *Competitive*
21 *Technologies* Case, the court looked at whether California's
22 anti-SLAPP law should apply in a situation where there is no
23 nexus of the actual dispute to California. And in both of
24 those two cases the courts concluded that California law
25 should not apply.

1 THE COURT: Yes, but those cases were not ones
2 that if my memory serves me well where the case was
3 originally brought in California. That's the problem here,
4 that the case was first brought here in California. When
5 you bring a case in California, you have all of these
6 tangential problems.

7 MS. SHELTON: Well, Your Honor. The choice of
8 forum does not determine the application of the choice of
9 law determinations. Just to give an example, the *La luna*
10 *Enters vs. CBS Corp.* case, 74 F. Supp.2d 384, Southern
11 District of New York 1999 involved a case where although the
12 action was brought in New York and the plaintiff chose that
13 forum, the court entered into a conflicts of law analysis
14 and determined that New York had nothing to do with the
15 dispute. And even though that was the plaintiff's choice of
16 forum, that the interests the court had to look at are where
17 were the parties located and this was in a trade defamation
18 case.

19 Similarly, in the Schering case which involved
20 trade libel, that was a situation where the court recognized
21 that it's the state where the corporation is domiciled
22 usually where -- and in this case plaintiff is domiciled in
23 Illinois -- that has the greatest governmental interest in
24 resolving a trade libel or a defamation claim using the
25 restatement second conflict of laws.

1 So, to sort of go back into the analysis and
2 looking at where we are now, fast forwarding to the first
3 amended complaint which is the operative complaint, not the
4 original complaint, it's important to look at the current
5 status of the case and where it is today.

6 THE COURT: Let me stop. I know what the current
7 status of this case is at this point in time. I understand
8 there is a distinction between the original complaint and
9 the first amended complaint so you don't have to give me
10 that.

11 All right. This is what I'm going to do on this
12 matter. I'm going to take the matter under submission but
13 I'm going to stay the case for 30 days. I'm not going to
14 give you 90 days. I will give you 30 days. In that time I
15 guess you will be getting somebody else in your firm up to
16 speed on this matter.

17 If I require further submissions from either side,
18 and I might, I will let you know after 30 days as to what it
19 is that I would need in addition if anything.

20 I will put this matter back on calendar for a
21 nonappearance status conference so it doesn't again fall
22 through the cracks. I will put it for July the 15th. And I
23 will consider the arguments that have been made so far.

24 But as to how I will treat the case, I will treat
25 the case as not concerning a SLAPP motion as to the original

1 complaint, because the defendant is taking the position that
2 the SLAPP motion can be applied to the first amended
3 complaint, and as applied to the first amended complaint
4 there is a basis for granting it. And I will consider the
5 arguments that are made as applying it only to the first
6 amended complaint, not as to the original complaint.

7 Then we do get into some questions about choice of
8 law. If I cannot resolve it with what I have, I will ask
9 for further briefing on the point.

10 MS. SHELTON: Thank you, Your Honor.

11 MR. BALLON: Your Honor, could I just give you the
12 cite?

13 THE COURT: Sure. What I'm going to do is I'm
14 going to order a copy of the transcript in this matter and
15 so you can give it on the record at this point in time.

16 MR. BALLON: Okay. The *Samson* case is actually
17 *Samson v. Nama Holdings*, 637 F.3d. 915 at page 935. That's
18 Ninth Circuit 2010. And on judicial estoppel I would also
19 draw the court's attention to *Maclaine v. Philip Morris*.
20 That's a Fifth Circuit case from 2003, 69 F. Appendix 658.
21 And that's simply a case reversing a district court's
22 allowing a party to change --

23 THE COURT: Sorry. What year was that case?

24 MR. BALLON: That's 2003.

25 THE COURT: Okay. For some reason I didn't know

1 you could cite to Fed Appendix cases prior to before 2007.
2 Maybe I'm wrong. At least in the Ninth Circuit you are not
3 suppose to I think. But, be that as it may, it's on the
4 record.

5 MR. BALLON: My colleague who is much smarter than
6 I am says that you can cite them prior to 2007 but they are
7 not binding precedent. But obviously --

8 THE COURT: The Fifth Circuit case wouldn't be
9 binding precedent anyway. All right. Thank you very much
10 both sides. And we will see what happens.

11 MS. SHELTON: Thank you, Your Honor.

12 MR. BALLON: Thank you, Your Honor.

13 (At 10:45 a.m. proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: May 29, 2013

/s/ WIL S. WILCOX

U.S. COURT REPORTER

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