

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

P-SEND
JS-6

SCANNED

CASE NO: CV04 - 2374-RGK (RCx)

DATE: July 13, 2004

TITLE: *LAWRENCE FREEMAN v. DIRECTV INC., et al.*

PRESENT: **THE HONORABLE R. GARY KLAUSNER, U.S. DISTRICT JUDGE**

Sharon L. Williams
Courtroom Clerk

Not Reported
Court Reporter

ATTORNEY FOR PLAINTIFF:

ATTORNEY FOR DEFENDANT:

Not Present

Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER RE DEFENDANTS DIRECTV AND ICG'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT OF CLAIMS AGAINST DIRECTV (Docket Entry 23)

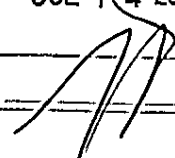
I. FACTUAL BACKGROUND

Plaintiff Lawrence Freeman ("Freeman") filed this action on April 5, 2004, on behalf of himself and all persons similarly situated against Directv Inc. ("Directv"), ICG Inc. ("ICG"), Daryl James Gray ("Gray"), and Does 1-10. The Complaint alleges that Defendants Directv and ICG ("Defendants") either conspired to commit a violation of 18 U.S.C. § 2702, or aided and abetted Gray in committing the aforementioned violation by assisting Gray in the disclosure of thousands of unauthorized stored electronic communications. Under 18 U.S.C. § 2707, plaintiffs are entitled to civil damages for violations of 18 U.S.C. § 2702.

In response to the original Complaint, Defendant Directv and ICG moved for dismissal and/or for summary judgment. Plaintiff subsequently filed a First Amended Complaint ("FAC") adding an additional named plaintiff, Michael Sherer (Sherer and Freeman collectively known as "Plaintiffs"). On June 7, 2004, Defendants filed this Motion to Dismiss, or in the alternative, for Summary Judgment of Claims against Directv on grounds that Plaintiffs have not stated any valid claims against Defendants under 18 U.S.C. § 2702. Alternatively, Directv argues that Plaintiffs' claims against Directv are barred by the settlement agreement and release signed by Freeman.

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II. JUDICIAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. Cabo Distrib. Co. v. Brady, 821 F. Supp. 601, 608 (N.D. Cal. 1992).

Dismissal is proper under Rule 12(b)(6) only where there is a lack of cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). While brevity is required in the pleading, it is not sufficient to simply allege that a wrong has been committed and demand relief; the underlying requirements is that a pleading give "fair notice" of the claim being asserted and the "grounds upon which it rests." Conley, 355 U.S. at 47-48. In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (citing California Dump Truck Owners Ass'n. v. Associated General Contractors of America, 562 F.2d 607, 614 (9th Cir. 1977); McKinney v. DeBord, 507 F.2d 501, 503 (9th Cir. 1974)). Therefore, it is only the extraordinary case in which dismissal is proper. Coriscan Prods. v. Pitchess, 338 F.2d 441, 442 (9th Cir. 1964).

If a Rule 12(b)(6) motion presents matters outside the pleadings, and such evidence is considered by the court, ". . . the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." Fed. R. Civ. P. 12(b). In that event, the standard changes from determining whether a claim for relief has been stated, Fed. R. Civ. P. 12(b)(6), to determine whether there is a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

III. DISCUSSION

Plaintiffs allege that Defendants conspired to violate 18 U.S.C. § 2702, as well as aided and abetted the violation of 18 U.S.C. § 2702. 18 U.S.C. § 2702(a)(1) prohibits a "person or entity providing an electronic communication service to the public" to "knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service . . ." In addition, under 18 U.S.C. § 2707(c), "[t]he court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation . . ."

Neither 18 U.S.C. § 2702 nor § 2707 expressly provide private rights of action on a claim of conspiracy or aiding and abetting. Moreover, Plaintiffs fail to cite a single case which recognizes such causes of action under these statutes. "Normally federal courts refrain from creating secondary liability that is not specified by statute." Doe v. GTE Corp., 347 F.3d 655, 658 (7th Cir. 2003) (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver N.A., 511 U.S. 164 (1994)). Federal courts especially refrain from creating secondary liability when, as in the case of 18 U.S.C. § 2702, the statute is precise about who can be liable. See Id. at 659. As Plaintiffs have failed to state claims which contain cognizable legal theories for damages, Defendants' motion to dismiss the causes of action is granted.

IV. CONCLUSION

In light of the foregoing, Directv and ICG's Motion to Dismiss Plaintiffs' First Amended Complaint is **GRANTED WITH PREJUDICE**, and Defendant's Motion for Summary Judgment is **DENIED as moot**.

IT IS SO ORDERED.

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Initials of Deputy Clerk:  Alw