Datner v. Yahoo
BC 355217

Tentative decision on demurrer: sustained

Tentative decision on motion to strike: off calendar

Defendant Yahoo!, Inc. demurs to Plaintiff Avi Datner's First Amended Complaint ("FAC"), and separately moves to strike portions thereof. The court has read and considered the moving, opposition and reply papers, and renders the following tentative decision.

A. Statement of the Case

Plaintiff Avi Datner commenced this lawsuit on July 11, 2006. After a demurrer, Plaintiff filed his FAC on October 23, 2006.

The FAC alleges that Plaintiff is in the business of selling advertising to companies which perform services for parties, weddings, and other events. The primary means of Plaintiff advertising his business is through his website, Party pop.com. Plaintiff learned in 2005 that his website did not appear in a search results for wedding or party services through Defendant's search engine. In contrast, the same search through AOL, MSN, and Google revealed his website. Plaintiff notified Defendant of this result and, for a short time, his website did appear in searches through Defendant. That is no longer true.

The FAC alleges causes of action for intentional interference with prospective economic advantage, "negligent interference with prospective economic advantage,"[1] and violation of B&P section 17200.

B. Applicable Law

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36 CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318.

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[1]No such cause of action exists in California.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1538, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

C. Analysis

The FAC's first cause of action for intentional interference with prospective economic advantage. To state this cause of action, Plaintiff must allege: (1) the existence of a specifically-identifiable economic relationship that had the probability of future economic benefit; (2) the defendant's knowledge of that relationship; (3) intentional, wrongful conduct designed to disrupt the relationship; (4) actual disruption of that relationship; and (5) damages. Korea Supply Co. v. Lochkeed Martin Corp., (2003) 29 Cal.4th 1134, 1153-1154. The alleged act of interference must itself be wrongful by some legal measure other than the fact of interference itself. *Id.*; *see also*, Della Penna v. Toyota Motor Sales U.S.A., Inc., (1995) 11 Cal.4th 376, 393.

The FAC alleges none of these elements. Plaintiff fails to identify a single economic relationship with which Defendant interfered, let alone Defendant's knowledge of the unidentified economic relationships, conduct designed to disrupt the relationship, or damages. Plaintiff has also not alleged any conduct by Defendant wrongful by some legal measure separate from the interference.

Nor could he. Defendant has no legal duty to include his business in its search results. Plaintiff does not allege that he had any contractual relationship with Defendant, nor does he identify any law which would require Defendant to include his business in its search engine. Defendant is not a telephone company regulated by a public utilities commission and bound to include all advertising businesses in its telephone book. Defendant is free to include or exclude any company it wants from its search results. Defendant's failure to list Plaintiff's business is simply not a wrongful act.

Furthermore, Yahoo! has a First Amendment right to include or exclude whatever it wants in its search engine results. *Cf.* Blatty v. N.Y. Times Co., (1986) 42 Cal.3d 1033, 1048-1049 (New York Times can exclude any book it wishes from its "Best Sellers" list); Jefferson County v. Moody's Investor Services, Inc., (10th Cir. 1999) 175 F.3d 848.

The demurrer to the first cause of action is sustained without leave to amend.

The second cause of action fails for the simple reason that there is no such thing as negligent interference with prospective economic advantage. As discussed above, claims for interference with prospective economic advantage require pleading and proof of some intentional, wrongful conduct because the act of interference itself is simply not wrongful. By definition, intentional conduct is not negligent. If a defendant breaches some other duty of care,

then the cause of action is simply negligence. Plaintiff has not alleged that Defendant breached any duty of care.

The third cause of action for violation of B&P section 17200 fails for numerous reasons. First, Plaintiff purports to represent the general public. Following the passage of Proposition 64 in November 2004, he may not do so except in a class action.

Second, even as a personal action, as noted above Defendant owes no duty to include Plaintiff's website in its search results. Therefore, the failure to include it is simply not actionable, as the conduct is not wrongful.

Plaintiff asserts that Defendant "expressly and impliedly represents to the general public that search results conducted on its website are fair, accurate and based on unbiased mathematical algorithms designed to give the public true search results based on the words used in the search." Plaintiff points to no such representations anywhere on Defendant's site.[2] Even if they exist, the absence of Plaintiff's business from search results is not in any way unfair or inaccurate. Not all search engines work in the same manner. The identical search conducted on two different engines will not provide identical results. If that were the case, there would be no reason to use one search engine over another.

The demurrer is sustained in its entirety without leave to amend. An OSC re: dismissal is set for January 5, 2007.[3]

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[2]The court is dubious whether there is any such thing as an "implied representation." Either a representation is made expressly, or it is not made at all.

[3]The motion to strike is placed off calendar as moot.