

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

(FILED: August 25, 2016)

MARY C. ROMPF

Plaintiff

v.

INTERNATIONAL TENNIS HALL

OF FAME, INC., *alias*

Defendant

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C.A. No. NC-2016-0053

DECISION

STONE, J. This matter is before the Court on Defendant International Tennis Hall of Fame’s (ITHF or the Hall) Motion to Dismiss (the Motion) Plaintiff Mary C. Rompf’s (Rompf) Complaint. ITHF filed the Motion on March 16, 2016, and, on June 6, 2016, the Court heard arguments from the parties. After hearing the arguments of the parties and examining the memoranda that they submitted, the Court does not believe that ITHF has shown beyond a reasonable doubt that Rompf is not entitled to relief. For the reasons set forth in this opinion, the Hall’s Motion is denied. Jurisdiction is pursuant to Super. R. Civ. P. 12 and G.L. 1956 §§ 9-1-28 and 9-1-28.1.

I

Facts and Travel

The ITHF is located at 194 Bellevue Avenue in Newport, Rhode Island. A part of the ITHF’s mission is to encourage the growth of the game, which it accomplishes through adult and junior educational and instructional tennis programs. In furtherance of that goal, the Hall

employs a Head Tennis Professional to oversee the programs. Rompf served in that role until she was terminated by the Hall on November 6, 2014.

Following the termination of Rompf's employment, the Hall continued to identify Rompf in her previous role and used photographs of her on its website until the middle of May 2015. Rompf alleges that the ITHF made use of her name and likeness for its own purposes and benefit without her permission or approval.

As a result thereof, on February 5, 2016, Rompf filed a two-count Complaint against the Hall in the Newport County Superior Court. In Count I, Rompf alleges that the ITHF misappropriated her image and name which caused her to suffer various harms; namely, emotional and mental distress, embarrassment, and loss of reputation. That Count cites "applicable common and state laws" as its basis. In Count II, Rompf further claims that the misappropriation of her name, picture, photograph, or the like was for commercial purposes and therefore in violation of § 9-1-28.

On March 16, 2016, pursuant to Super. R. Civ. P. 12(b)(6), the ITHF filed a Motion to Dismiss the Complaint and corresponding memorandum, arguing various reasons in support. In response, Rompf filed an objection and memorandum of her own on April 22, 2016. Finally, the Hall filed a reply memorandum on April 29, 2016. On June 6, 2016, the Court heard oral arguments from the parties as a part of the civil motion calendar. At the close of the hearing, the Court indicated to the parties that it was denying the ITHF's Motion and that it would issue a written decision on the matter. In accord with that, decision is herein rendered in favor of Rompf.

II

Standard of Review

“The sole function of a motion to dismiss is to test the sufficiency of the complaint.” Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citation omitted). Looking at the four corners of a complaint, this Court examines that pleading and assumes that the allegations contained in the plaintiff’s complaint are true, viewing them in a light most favorable to the plaintiff. Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). Our Supreme Court has noted that there is a policy to interpret the pleading rules liberally so that “cases in our system are not . . . disposed of summarily on arcane or technical grounds.” Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1118 (R.I. 2004) (citation omitted). While the pleading does not need to include the ultimate facts to be proven or the precise legal theory upon which the claims are based, the complaint is required to provide the opposing party with fair and adequate notice of any claims being asserted. Barrette, 966 A.2d at 1234. The goal is to give defendants sufficient notice of the type of claim being asserted against them. See Konar, 840 A.2d at 1119; see also Berard v. Ryder Student Transp. Servs., Inc., 767 A.2d 81, 85 (R.I. 2001) (noting that the requisite notice under Rule 8 of the Superior Court Rules of Civil Procedure requires plaintiff to allege what acts committed by defendant entitle plaintiff to legal or equitable relief). Accordingly, “[a] motion to dismiss is properly granted ‘when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff’s claim.’” Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 787 (R.I. 2014) (citation omitted).

What’s more, although federal courts have employed a “plausibility” standard when deciding motions to dismiss under Federal Rule 12(b)(6), our state courts still rely on the

aforementioned standard. See DiLibero v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 1013, 1016 (R.I. 2015). Indeed, our Supreme Court has noted that it is “yet to adopt th[e federal] standard.” Id. (citing Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422–23 (R.I. 2014)).

III

Analysis

In essence, ITHF’s arguments are that: 1) Rompf failed to satisfy the requirements of notice pleading; 2) Rompf had no expectation of privacy in her name and likeness because it was used in conjunction with her employment; and 3) Rompf failed to allege commercial use as required by § 9-1-28.¹ Rompf maintains that she has sufficiently pled each count of the Complaint and that the allegations found therein satisfy the prima facie requirements of a claim for relief under Rhode Island law. For the purpose of clarity, each of ITHF’s assertions are discussed in seriatim below.

A

Notice Pleading

Initially, ITHF claims that Count I of Rompf’s Complaint does not satisfy the notice pleading standard applicable in Rhode Island courts. Particularly, ITHF relies on the fact that Rompf failed to cite the pertinent statute in setting forth her claim for invasion of privacy. Rompf responds by acknowledging that although Count I does not specifically reference a

¹ In its Reply Memorandum, ITHF notes that Rompf’s Objection is untimely pursuant to this Court’s Administrative Order regarding Motion Calendar Practice. However, in reviewing the merits of a motion to dismiss, the Court need only look to the four corners of the complaint to test its sufficiency. Barrette, 966 A.2d at 1234. Therefore—even accepting ITHF’s argument—the Court may nonetheless find the allegations contained in Rompf’s Complaint are sufficiently detailed to satisfy the notice pleading requirement.

violation of § 9-1-28.1, it is the applicable statutory provision to the circumstances alleged in the Complaint.

Pursuant to Super. R. Civ. P. 8(a)(1), a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” (Emphasis supplied.) The Rhode Island Supreme Court “has recognized the sufficiency of complaints even when the claims asserted within those complaints lack specificity.” Konar, 840 A.2d at 1118 (noting that it is a “liberal pleading rule”). Ultimately, the plaintiff is not required to “set out the precise legal theory upon which his or her claim is based,” but the complaint must give “the opposing party fair and adequate notice of the type of claim being asserted.” Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000) (quoting Bresnick v. Baskin, 650 A.2d 915, 916 (R.I. 1994)).

The Court recognizes that Super. R. Civ. P. 8(a)(1) is a “liberal pleading rule”, Konar, 840 A.2d at 1118, which is not intended to “dispose[]of [cases] summarily on arcane or technical grounds.” Id. (quoting Hendrick, 755 A.2d at 791). In the present case, ITHF was able to ascertain which statute Rompf was referring to in the Complaint merely by consulting the plain language of the pleading. Indeed, ITHF’s Memorandum in Support of its Motion to Dismiss clearly displays that it was able to identify the nature of the claim being asserted against it and formulate arguments as to why it did not believe they were legally sufficient.

In short, that is all a notice pleading is intended to do, to give “the opposing party fair and adequate notice of the type of claim being asserted.” Hendrick, 755 A.2d at 791 (quoting Bresnick, 650 A.2d at 916). Therefore, the Court believes that Count I of Rompf’s Complaint satisfies the minimal requirements set forth in Super. R. Civ. P. 8(a)(1) and denies the instant Motion on those grounds.

B

Rompf's Expectation of Privacy Pursuant to § 9-1-28.1

Next, ITHF argued that Rompf cannot maintain her current suit—as it pertains to Count I—because she has no expectation of privacy given that the conduct she complains of—the posting of her image and name on the ITHF website—arose out of her employment with ITHF. In support, ITHF relies on DaPonte v. Ocean State Job Lot, Inc., 21 A.3d 248, 252 (R.I. 2011) for the proposition that § 9-1-28.1 does not provide for a claim in the “work area of a business.” Id. (quoting Ulrich v. K-Mart Corp., 858 F. Supp. 1087, 1095 (D. Kan.1994)). To further bolster its argument, ITHF notes that, in Furtado v. Carol Cable Co., another Justice of the Rhode Island Superior Court found that employees had no right to privacy in the workplace to prevent the use of surveillance videotaping. No. C.A. 86-5198, 1987 WL 859861, at *2 (R.I. Super. Feb. 13, 1987).

In opposition, Rompf notes that § 9-1-28.1(a)(2) provides for “[t]he right to be secure from an appropriation of one’s name or likeness,” and that the Court in DaPonte was merely dealing with the right to be free in one’s physical solitude. See DaPonte, 21 A.3d at 252 (citing § 9-1-28.1(a)(1)). In similar fashion, she argues that the Furtado decision is an ill-suited case for analogy because, in that case, the court was addressing an issue whereby plaintiffs were attempting “to be shielded by the right to privacy . . . to permit [their] wrongdoings.” No. C.A. 86-5198, 1987 WL 859861, at *2, and, in this case, there is no allegation that Rompf partook in any wrongdoing.

Furthermore, Rompf argues that she has sufficiently pled a cause of action under either § 9-1-28.1(a)(2)(i) or (4)(i). Section 9-1-28.1(a)(2)(i) provides that “[i]n order to recover for violation of [the right to be secure from an appropriation of one’s name or likeness], it must be

established that . . . [t]he act was done without permission of the claimant [and] . . . [t]he act is of a benefit to someone other than the claimant.” Likewise, § 9-1-28.1(a)(4)(i) sets forth that:

“In order to recover for violation of [the right to be secure from publicity that reasonably places another in a false light before the public], it must be established that:

“(A) There has been some publication of a false or fictitious fact which implies an association which does not exist;

“(B) The association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances.”

The Court finds itself in agreement with Rompf on both of the aforementioned issues. First, as she correctly points out, the jurisprudence relied on by the ITHF for the proposition that she did not have a privacy interest in the workplace is too remote in its application to the present case. In DaPonte, the Court was addressing the right to be free in one’s physical solitude, and it found that that right was centered on the privacy interest one has in his or her home. 21 A.3d at 252. However, in the instant case, Rompf alleges violation of the rights found in §§ 9-1-28.1(a)(2) and (4), which are not similarly grounded in the sanctity of the home. Therefore, DaPonte—although certainly binding precedent on this Court—sheds little light on the issue presently before it—can a claim under §§ 9-1-28.1(a)(2) and (4) be centered around workplace activities. In a similar light, Furtado dealt with a situation where the employer was videotaping employees at work to ensure compliance with company policy and to deter wrongdoing. 1987 WL 859861, at *2. Here, ITHF published images of Rompf to the world through the internet. Although initially done in tandem with her employment, that relationship ceased to exist, unlike in Furtado where the plaintiffs were consistently in the employ of the defendant. Accordingly, the Court finds no merit in ITHF’s contention that Rompf’s claims fail simply because she cannot have a privacy interest in activities related to her employment with the ITHF.

Moreover, the Complaint contained sufficient factual allegations to withstand judicial scrutiny at this early stage. Woonsocket Sch. Comm., 89 A.3d at 787 (it must be clear beyond a reasonable doubt that plaintiff is not entitled to relief). Viewing the facts of the Complaint in a light most favorable to Rompf, the Complaint establishes that she did not consent to her name and image being used and that, presumably, the ITHF used her image to its own advantage. See Barrette, 966 A.2d at 1234; see also § 9-1-28.1(a)(2). Alternatively, Rompf alleged that her image was used in a false light by publishing the existence of a relationship between herself and the ITHF that no longer existed. Whether that relationship is “objectionable to the ordinary reasonable man,” § 9-1-28.1(a)(4)(i)(B), is a question of fact to be decided by the jury and not an issue for the Court to decide on a motion to dismiss. See Konar, 840 A.2d at 1118 (noting the disfavored nature of dismissing claims on technical grounds). Therefore, Rompf has sufficiently pled facts that would entitle her to relief under Rhode Island law and, as a result, the Motion to Dismiss is denied as it relates to Count I.

C

Commercial Allegations Pursuant to § 9-1-28

Finally, ITHF avers that Rompf’s Complaint failed to sufficiently plead a commercial use of her likeness, as required by § 9-1-28. In response, Rompf argues that essentially the ITHF’s website is an advertisement for its services and products, hence its use of Rompf’s likeness was tantamount to use for commercial purposes. Nonetheless, ITHF maintains that any allegations of commercial use are conclusory and contain no support in the Complaint.

The Court must “‘examine the complaint to determine if plaintiff[is] entitled to relief under any conceivable set of facts.’” A.F. Lusi Constr., Inc. v. R.I. Convention Ctr. Auth., 934 A.2d 791, 795 (R.I. 2007) (quoting McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005)).

Here, Rompf alleged that her name and likeness were used on the ITHF's website without her permission. The ITHF's website is located at <https://www.tennisfame.com>. The top level of its domain name identifies it as a .com or "commercial" website.²

This is entirely consistent with Rompf's allegation that the use of her name and likeness on the site was for commercial purposes. Presumably, the ITHF listed Rompf on its commercial website to entice individuals to utilize the services she offered as the Head Tennis Professional. This use would be entirely consistent with her allegation that the ITHF used her name and likeness for commercial purposes, as required by § 9-1-28. Therefore, the Court cannot conclude that Rompf is not entitled to relief under "any conceivable set of facts." A.F. Lusi Constr., Inc., 934 A.2d at 795. Accordingly, ITHF's Motion as it relates to Count II of the Complaint is likewise denied.

IV

Conclusion

After due consideration of the arguments advanced by counsel at oral argument and in their memoranda, the Court denies the ITHF's Motion to Dismiss. Prevailing counsel may present an order and judgment consistent herewith which shall enter upon notice to all other counsel of record.

² See Kenton K. Yee, Location, Location, Location: Internet Address as Evolving Property, S. Cal. Interdisc. L.J. 201, 204-05 (1997) (noting that the suffix of a domain name is referenced as the "top level" and that .com is a commercial use top level).



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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DATE DECISION FILED: August 25, 2016

JUSTICE/MAGISTRATE: Stone, J.

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