

Rickel v. Mountain Valley TV Corp., 1996 U.S. Dist. LEXIS 19961

ROLLAND JAMES RICKEL, Plaintiff,

v.

MOUNTAIN VALLEY TELEVISION CORPORATION,
THE BOARD OF DIRECTORS OF SAME, AND
HAL TITEN, INDIVIDUALLY AND
AS A MEMBER OF THE BOARD OF DIRECTORS, Defendants.

No. C-96-1033 DLJ

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1996 U.S. Dist. LEXIS 19961

November 25, 1996, Decided

November 25, 1996, FILED;

November 27, 1996, Entered

DISPOSITION: [*1] Summary judgment GRANTED for defendants on all remaining causes of action.

COUNSEL: For ROLLAND JAMES RICKEL, Plaintiff: Matthew L. Howard, Matthew L. Howard, M.D.,J.D., Ukiah, CA.

For MOUNTAIN VALLEY TELEVISION CORPORATION, MOUNTAIN VALLEY TELEVISION BOARD OF DIRECTORS, HAL TITEN, both individually and as a member of the Board of Directors, defendants: Simon J. Frankel, Howard Rice Nemerovski Canady Falk & Rabin, San Francisco, CA. Wendy S. Lader, James N. Horwood, Spiegel & McDiarmid, Washington, DC.

JUDGES: D. Lowell Jensen, United States District Judge

OPINIONBY: D. Lowell Jensen

OPINION: ORDER

On November 20, 1996, the Court heard argument on cross-motions for partial summary judgment. Matthew L. Howard appeared on behalf of plaintiff; Wendy S. Lader appeared for defendants. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS defendants' motions for summary judgment and DENIES plaintiff's motions.

I. BACKGROUND

A. Factual Background and Procedural History

Defendant Mountain Valley Television Corporation ("MVTC") is a non-profit corporation whose sole function is to control, manage, [*2] operate, and regulate community programming on Community Access Cable Channel 3 in Ukiah Valley, California. See Defendant's Counter-Motion for Summary Judgment on First Cause of Action and Opposition to Plaintiff's Motion ("Def's First Mot.") at 3:8-14; Frankel Decl., Ex. A. Plaintiff Rolland James Rickel ("plaintiff") has been a user of the public access cable television facilities provided by MVTC, broadcasting programs of community interest including a regularly scheduled program called "Studio 3 Presents." Complaint at P 9; Plaintiff's Motion for Summary Judgment on First Cause of Action ("Pl's First Mot.") at 2:10-11.

Century Communications Corporation ("Century") is the entity that operates cable services in the City of Ukiah and in Mendocino County pursuant to non-exclusive cable franchise agreements with the City and County. Century is the successor to Group W Cable, Inc., which was originally awarded cable franchises by the City and County, and Century operates under these same franchises. Def's First Mot. at 3:20-4:3; Frankel Decl., Exs. B & C. As a condition of these franchises, the cable operator is required to provide funding to support public, educational, and governmental [*3] access ("PEG") programming. Def's First Mot. at 4:7-14; Frankel Decl., Exs. B & C; Legrand Decl. at P 2. In 1987, Community Access Cable Channel 3 was created as the PEG channel in Ukiah. From 1987 to 1992, the channel was managed by the Mendocino County Office of Education. Defendant MVTC took over management of the channel in June of 1992 and MVTC's sole source of financing is the cable company. Legrand Decl. at PP 2, 3; see also, Frankel Decl., Ex. D.

Plaintiff's present claims are based on allegations that in January of 1995, plaintiff submitted a videotape to MVTC which MVTC refused to broadcast. n1 Complaint at P 11. Following this incident, on April 21, 1995, MVTC suspended plaintiff from further broadcasting on Channel 3. MVTC claims that its actions were based on its determination that the tape at issue contained subliminal advertising as well as false representations that plaintiff was an agent of MVTC, both of which are violations of MVTC policies. These policies, including MVTC's general prohibition against commercial advertising, are reflected in MVTC's Operating Policy and Procedures, in a Statement of Compliance signed by plaintiff, and in a Program Agreement signed [*4] by plaintiff. Defendants' Motion for Partial Summary Judgment on the Second, Third, Fourth and Fifth Causes of Action ("Def's Second Mot.") at 1:18-25; 4:10-28; Legrand Decl., Exs. 1 & 2. Plaintiff claims that MVTC told him that it refused to accept further submissions of videotaped programming from him because MVTC believed his broadcasts to be libelous. Pl's First Mot. at 2:11-15. Plaintiff also believes that defendants are trying to keep him off the air because they do not like him personally, because they do not agree with his politics, and because he has had previous disputes with MVTC dating back to 1991. Rickel Decl. at P 5; see also Legrand Decl. at PP 5, 6.

-----Footnotes-----

n1 There is some confusion between the parties as to the timing of the refusal to broadcast plaintiff's videotape. Defendants claim that the refusal occurred on March 23, 1995, which appears to be correct based on the log submitted by plaintiff. See Plaintiff's Opposition to

Defendants' Motion for Summary Judgment on the Third and Fourth Causes of Action and Counter-Motion for Partial Summary Judgment on the Same Causes of Action ("Pl's Second Mot."), Ex. 2.

----- -End Footnotes- - [*5]

According to plaintiff, on February 7, 1995, he met with defendant Hal Titen ("Titen") to ascertain the reason for MVTC's refusal to air plaintiff's videotape. n2 Complaint at P 12. Between February and April of 1995, plaintiff allegedly corresponded with Titen in an effort to learn why his tape was not broadcast. Complaint at P 13. On April 21, 1995, plaintiff received the letter of suspension issued by the MVTC Board of Directors informing plaintiff that his suspension was due to his alleged insertion of subliminal advertising in his videotapes, and due to his alleged misrepresentation of his video service as an agent of MVTC. Pl's First Mot. at 2:15-18. Defendant Titen met with plaintiff on April 25, 1995 to discuss the suspension. Legrand Decl. at P 9. Plaintiff then sent MVTC a letter dated May 1, 1995 in which plaintiff admitted the violations of MVTC's ban on commercial advertising, but tried to explain that they were unintentional. Legrand Decl., Ex. 5. In response, defendants invited plaintiff to a Board of Directors meeting in June of 1995, which plaintiff attended. At another Board meeting in October of 1995, attended by plaintiff and his attorney, the Board agreed to [*6] reduce plaintiff's suspension to three years. Def's Second Motion at 6:19-22; 14:6-7. At a February 26, 1996 Board meeting, plaintiff again requested that his access privileges be restored. n3 Legrand Decl. at P 12. Plaintiff claims that the Board of Directors of MVTC refused this request. Complaint at PP 15, 16. However, defendants assert that at a meeting held on March 18, 1996, attended by plaintiff's lawyer, but not plaintiff himself, the Board decided to reduce plaintiff's suspension and let him back on the air at the end of May of 1996 contingent upon plaintiff's allowing MVTC to preview his videotape submissions. Def's Second Mot. at 6:26-28; Legrand Decl. at P 12. Plaintiff refused this offer and filed the present suit on March 20, 1996.

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n2 It should be noted that this February date is before the March 23, 1995 date on which the refusal apparently actually occurred.

n3 It is this meeting at which plaintiff claims defendants charged that his video was "libelous." Rickel Decl. at P 9. Defendants deny this allegation. Legrand Decl. at P 13.

----- -End Footnotes- - [*7]

On September 23, 1996, plaintiff moved for summary judgment on his first cause of action pursuant to 47 U.S.C. @ 531(e). Defendants then filed an opposition and a counter-motion for summary judgment on the first cause of action on October 9, 1996. Next, defendants filed a motion for summary judgment on plaintiff's second, third, fourth, and fifth causes of action on October 10, 1996. On October 29, 1996, plaintiff filed a statement of non-opposition on the second and fifth causes of action, both of which were based on violations of 42 U.S.C. @ 1983. n4 On that same date, plaintiff also filed an opposition and a counter-motion for summary judgment on the third cause of action (violation of due process provided by California law) and

fourth cause of action (tortious interference with prospective economic advantage).

-----Footnotes-----

n4 Because defendants are not state actors, the parties now agree that defendants are not subject to @ 1983 liability.

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

B. Legal Standard

The Federal Rules of Civil Procedure provide [*8] for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "if the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 435 (1986).

On cross motions for summary judgment, the burdens faced by the opposing parties vary with [*9] the burden of proof they will face at trial. When the moving party will have the burden of proof at trial, "his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-488 (1984).

In contrast, a moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 (citing *Celotex*, 477 U.S. at 323); *Kaiser Cement*, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence [*10] the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49

(2nd Cir. 1985); Thornhill Pub. Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. See, e.g., Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial.

II. DISCUSSION

A. 47 U.S.C. @ 531(e) (First Cause of Action)

Plaintiff alleges that defendants violated section 611(e) of the Cable Television Consumer Protection and Competition Act ("the Cable Act"), 47 U.S.C. @ 531(e), regarding cable channels for public, educational, or governmental use ("PEG channels"). In relevant part, @ 531, as amended in 1996, states as follows:

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental [*11] use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

47 U.S.C. @ 531(e) (emphasis added). Plaintiff further alleges that he is authorized to enforce this violation pursuant to 47 U.S.C. @ 532(d), which states as follows:

Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court

47 U.S.C. @ 532(d). While @ 532 regulates cable channels for commercial use, rather than PEG channels, courts have looked to @ 532 in implying a private right of action under @ 531. See *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264, 268-69 (S.D.N.Y. 1995). Defendants contend that the express language of the statutory provisions at issue applies only to "cable operators," a category within which MVTC does not fit.

A "cable operator" is defined by the Cable Act as

any person or group of persons (A) who provides cable service over a cable system and directly through one or [*12] more affiliates owns a significant interest in such cable system, or (B) who otherwise controls, or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. @ 522(5). MVTC clearly does not "own a significant interest in a cable system" n5 as required by @ 522(5)(A) to be considered a cable operator. See *Legrand Decl.* at P 3. Furthermore, while MVTC manages and operates Channel 3, it does not control, manage, or operate a "cable system" as required by @ 522(5)(B) to be considered a cable operator. Defendants explain that the entity which actually controls and operates the "cable system" that serves Ukiah is Century Communications Corporation. *Def's First Mot.* at 6:8-11.

-----Footnotes-----

n5 A "cable system" is

a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . .

47 U.S.C. @ 522(7).

-----End Footnotes- - [*13]

The sparse case law on this issue supports defendants' position. Defendants cite *Britton v. City of Erie*, 933 F. Supp. 1261 (W.D. Penn. 1995), for the proposition that a public access management entity is not a cable operator within the meaning of the relevant provisions of the Cable Act. In *Britton*, the plaintiff, an African-American man who produced programs shown on the Erie public access channel, alleged that the City of Erie, the Erie City Council, and the Erie Cable Television Access Authority discriminated against him in eliminating the public access channel. *Id.* at 1264. The supervisory structure for the public access channel in *Britton* was similar to the structure in the present case. In *Britton*, the City of Erie entered into a contract with Erie Telecommunications, Inc. ("ETI") under which ETI was to construct and operate a cable television system in the City. When this franchise contract was renewed, the parties decided that a local access authority would assume control from ETI of public access television in the City. *Id.*

Amongst other claims, plaintiff asserted a claim under @ 1983 for violation of 47 U.S.C. @ 531(e) and a claim directly under [*14] @ 531(e), asserting an implied private right of action pursuant to that section. Defendants in *Britton* argued that even if @ 531(e) did create an implied private right of action, none of them could be held liable under that section because none of them was a "cable operator." *Id.* at 1269. Looking to the definitions of "cable operator" and "cable system" in the Cable Act, the district court agreed with defendants. The court found that cable service was provided by ETI and that "although some of the programming carried on the cable system originated from the Access Authority, this programming was transmitted to subscribers by ETI." *Id.* at 1270. Thus, the court found that none of the defendants controlled or bore responsibility for the operation of the cable system. Because plaintiff did not name ETI as a party, nor did he allege ETI was liable in any way for the elimination of the public access station, plaintiff's claims arising from alleged violations of @ 531(e), both under @ 1983 and the implied private right of action, were dismissed. *Id.*

Defendants also cite *Denver Area Educ. Telecomm. Consortium, Inc., et al. v. FCC et al.*, 135 L. Ed. 2d 888, 116 S. Ct. [*15] 2374 (1996). In this case, the Court determined the constitutionality of three provisions in section 10 of the Cable Act of 1992 authorizing cable operators to prohibit or block certain indecent programming on leased access n6 and PEG channels. A plurality of the Court decided that the Cable Act provision permitting a cable operator to prevent "patently offensive" programming on public access channels was unconstitutional. *Id.* at 2397.

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n6 Leased access channels are channels that federal law requires cable system operators to reserve for commercial lease by unaffiliated third parties. Denver, 116 S. Ct. at 2381. The private party lessee of the time slot historically has had total control of the programming during that time slot. Id. at 2394.

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

In the part of the Denver opinion written by Justice Breyer and joined by Justices Stevens and Souter, the Justices acknowledged that the institutional system for public access channels, through its supervising boards and access managers, can set programming [*16] policy, approve or disapprove particular programming services, and police their policies in several ways, including certification of compliance with local standards or prescreening individual programs. Id. at 2395 (emphasis added). Because the access channel manager is already locally accountable for maintaining responsible programming and for protecting children from patently offensive material, the Justices found that it was unnecessary, and therefore unconstitutional, to provide cable operators with the power to control the broadcasting of such programming. Id. at 2397. Moreover, a majority of the Court, in discussing the structure of public access channels, explicitly recognized the difference between a "cable operator," such as Century in the present case, and an access manager, like MVTC. See id. at 2394-2397 (Breyer, J., joined by Stevens and Souter, JJ.), 2409 (Kennedy, J., joined by Ginsburg, J.).

Plaintiff fails to meaningfully distinguish these cases from the present case. Furthermore, plaintiff misrepresents *Glendora v. Cablevision Sys. Corp.*, 45 F.3d 36 (2d Cir. 1995), on remand, 893 F. Supp. 264 (S.D.N.Y. 1995). That case involved a suit against the [*17] cable operator only -- no mention was made of a public access managing entity. Nonetheless, plaintiff argues that sound public policy mandates that "intermediary managers," such as MVTC, must be held accountable under 47 U.S.C. @ 531(e). Pl's First Reply at 4:3-5. He argues that Congress intended to provide a forum for a wide distribution of diverse viewpoints and therefore restricted the rights of cable companies to censor material other than obscenity on PEG channels. Pl's First Reply at 4:27-5:3. He then points out that if he is not allowed to proceed against the "intermediary manager," there is no entity that can be held liable. On the one hand, he cannot sue Century because it has no knowledge or control over the content of the programming; on the other hand, the intermediary, MVTC, is immune from suit because it is not the "cable operator." Thus, plaintiff has no remedy for the alleged wrong done to him.

Regardless of the validity of plaintiff's policy arguments, it is not for this Court to rewrite @ 531. Congress apparently did not see fit to expand liability under 47 U.S.C. @ 531(e) beyond "cable operators" in making revisions to the Cable Act in both 1992 and 1996, and [*18] this Court cannot do so in Congress' place. Because plaintiff presents no evidence to create a factual dispute as to MVTC's being a "cable operator" within the meaning of the Act or MVTC's having conspired with Century, the Court must grant summary judgment for defendants. n7

-----Footnotes-----

n7 Plaintiff claims that defendants admit that MVTC is a cable operator at P 30 of their answer.

Contrary to plaintiff's assertion, defendants merely admit that MVTC manages the public access cable television facility in Ukiah.

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

B. Due Process (Third Cause of Action)

While plaintiff has basically conceded that defendants are not state actors subject to liability for constitutional due process violations, he still claims that under California law he has a common law right to due process or "fair procedure" which can be asserted against private entities. Pl's Second Mot. at 3:3-5:16. California case law indicates, however, that plaintiff's claim does not fall within the narrow scope of this common law right.

California courts have [*19] fashioned a right to due process with respect to membership in a professional society or other organization where property rights are attached to membership, such as a labor union or a mutual benefit society. See, e.g., *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944) (labor union); *Salkin v. California Dental Ass'n*, 176 Cal. App. 3d 1118, 224 Cal. Rptr. 352 (1986) (voluntary professional organization); *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253 (1974) (professional medical association). This right has been extended only in situations where an employee has been expelled from a job. *Ezekial v. Winkley*, 20 Cal. 3d 267, 142 Cal. Rptr. 418, 572 P.2d 32 (1977) (extending due process right to dismissal of medical resident from private hospital staff). In *Ezekial*, the California Supreme Court explained the rationale behind the common law right to fair procedure:

Certain private entities possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced. . . . We have said that the right to practice [*20] a lawful trade or profession is sufficiently "fundamental" to require substantial protection against arbitrary administrative interference, either by government or by a private entity.

20 Cal. 3d at 272 (citations omitted).

Turning to the present case, first, MVTC is not a membership organization to which plaintiff belonged. Rather, plaintiff was merely a user of facilities made available by MVTC. Next, plaintiff has not been excluded from practicing his "trade" of producing videos for broadcast because he has been able to continue broadcasting on a leased access channel. For these reasons, the common law right to fair procedure does not apply in this case and summary judgment must therefore be granted for defendants on this cause of action. n8

-----Footnotes-----

n8 Even if plaintiff was entitled to fair procedures, defendants present overwhelming evidence that he was afforded them. For instance, plaintiff was given notice of what constituted a violation; notice of his suspension; and he was invited to attend Board meetings to protest the suspension.

-----End Footnotes- - [*21]

C. Tortious Interference With Prospective Economic Advantage Fourth Cause of Action)

In order to establish tortious interference with prospective economic advantage, a plaintiff must demonstrate the following: (1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship; (3) intentional acts on the part of defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Westside Center Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521-22 (1996) (citations omitted).

Regarding the first element, plaintiff must identify an existing relationship which may lead to future economic advantage. *Id.* at 524 (emphasis added). In his complaint, plaintiff merely alleges that he has been unable to bring his business activities before the "general public." Complaint at P 40. When asked by interrogatory to identify potential relationships that were impeded by MVTC, plaintiff cites the membership list of the Ukiah Chamber of Commerce. Frankel [*22] Decl., Exs. E & F. This is clearly the type of speculative expectation that is insufficient to provide a basis for a claim of injury to business relations.

Also in his response to defendants' interrogatories, plaintiff supplies a log of his programs and points to an existing relationship with the Ukiah Women's Athletic Association ("UWAA"), pursuant to which he regularly broadcasted UWAA's activities. Pl's Second Mot., Ex. 2; Frankel Decl., Ex. E. Plaintiff claims that while he was underwriting his own programs at the time of the suspension, he expected the UWAA to begin underwriting. Pl's Second Mot. at 6:4-6. Nevertheless, because plaintiff apparently was not being paid for his services by UWAA at the time of the suspension, defendants argue that the relationship with UWAA does not constitute an economic relationship. Moreover, they argue that plaintiff's expectation that UWAA or some other member of the Ukiah Chamber of Commerce would begin to underwrite its own programs was at most a hope or desire, rather than a probable future benefit as required to prove plaintiff's prima facie case. Def's Second Reply at 8:6-21. The Court agrees with defendants.

Moreover, plaintiff has failed [*23] to present any evidence that defendants knew of these alleged relationships or that defendants intended to interfere with them. Cf. *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal. 3d 752, 765, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984), overruled on other grounds, by *Freeman & Mills v. Belcher Oil Co.*, 11 Cal. 4th 85, 900 P.2d 669 (1995). Plaintiff's mere allegation that MVTC must have known of his relationship with UWAA because MVTC aired the tapes is insufficient to create a factual dispute as to MVTC's knowledge of any actual or potential business relationship between the plaintiff and UWAA. Finally, defendants point out that plaintiff has presented absolutely no evidence of defendants' intent. Therefore, summary judgment must be granted for defendants.

III. CONCLUSION

Based on the foregoing, the Court hereby GRANTS summary judgment for defendants on all

remaining causes of action.

IT IS SO ORDERED.

Dated: November 25, 1996.

D. Lowell Jensen

United States District Judge