UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:12-cv-02554-SVW-SS	Date	November 15, 2012
Title	Aaron L Mintz v. Mark Bartelstein and Associates Inc		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER re Defendants' Motions in Limine [87] [89] [90] [92]; Trial Motions

I. INTRODUCTION

As the parties are familiar with the facts and procedural history, the Court will not repeat them here.[1] On October 8, 2012, Priority Sports and Mark Bartelstein (collectively, "Defendants") filed four Motions in Limine, seeking the following: (1) to exclude evidence of emotional distress damages of Plaintiff Aaron Mintz ("Plaintiff"); (2) to exclude evidence and argument that Mark Bartelstein should be subjected to personal liability; (3) to limit testimony to damages caused by the unauthorized access to Plaintiff's Gmail account; (4) to exclude testimony or evidence related to the contents of Plaintiff's Gmail account.

At trial, Defendants also moved for directed verdict on the following issues: (1) whether Bartelstein is liable for the invasion of privacy; and (2) whether Plaintiff is entitled to punitive damages.

For the reasons below, the motion to exclude evidence of emotional distress damages as they relate to the California Penal Code § 502 claim is GRANTED. The motion to exclude evidence of the contents of Plaintiff's Gmail account is DENIED, but Plaintiff has been ordered to produce all the emails in his Gmail account on the day the account was unlawfully accessed. The remaining motions in limine are DENIED. Defendants' motion for directed verdict as to Bartelstein's liability is DENIED, but their motion for directed verdict as to punitive damages is GRANTED.

[1] A summary of these facts may be found in the Court's previous order dated November 1, 2012. (Dkt. 81).

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II. DISCUSSION

A. First Motion in Limine to Exclude Evidence of Emotional Distress Damages

Defendants seek to exclude evidence of emotional distress damages suffered by Plaintiff on the ground that Plaintiff failed to specify in his initial Rule 26 disclosures, as well as the pre-trial conference order, that he intended to pursue emotional distress damages. Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires disclosure of:

> a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered . . . .

Pursuant to Rule 37(c)(1), "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Rule 37(c)(1) "gives teeth" to Rule 26 by providing a "self-executing, automatic sanction to provide a strong inducement for disclosure of material." Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). "[E]ven absent a showing in the record of bad faith or willfulness, exclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a)." Id. However, "[t]wo express exceptions ameliorate the harshness of Rule 37(c)(1): The information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless." Id. The burden is on the party facing sanctions to prove either exception. See id. at 1106-07; Estate of Gonzalez v. Hickman, No. ED CV 05-00660 MMM (RCx), 2007 WL 3237635, at *4 (C.D. Cal. June 28, 2007) (collecting cases).

Here, Plaintiff's initial disclosures state as follows:

> Pursuant to Rule 26(a)(1)(A)(iii), Mintz discloses that he seek [sic] damages against Priority Sports and Bartelstein in an amount unknown at this time. The elements of damages include, among other things, consequential and compensatory damages, statutory damages, punitive damages, and attorneys' fees and costs.

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(Dacus Decl. ¶ 2, Ex. A at 6).[2] It is clear that Plaintiff failed to provide a computation of damages for emotional distress damages. Nonetheless, the omission was harmless for two reasons. First, Defendants were already on notice that the invasion of privacy claim centered on damages from emotional distress. Plaintiff's Complaint expressly states that Plaintiff's damages from the invasion of privacy primarily arose from emotional distress, including "humiliation, embarrassment, mental anguish, and suffering." (Gutierrez Decl., ¶ 2 & Ex. 1, ¶ 52).[3] Further, it appears from Plaintiff's witness list that his losses will be proved principally through his testimony, not through expert opinions or other evidence. Therefore, no additional information could have been provided to Defendants in a computation of damages disclosure pursuant to Rule 26(a)(1)(C).

Second, federal courts repeatedly have held that a party's failure to include a computation of emotional distress damages is excusable because such damages, because of their vague and fact-specific nature, are not amenable to calculation. See, e.g., Williams v. Trader Publishing Co., 218 F.3d 481, 486 n.3 (5th Cir. 2000) ("Since compensatory damages for emotional distress are necessarily vague and are generally considered a fact issue for the jury, they may not be amenable to the kind of calculation disclosure contemplated by Rule 26(a)(1)(C)."); Goldstein v. CBE Group, Inc., No. CV 12–2540 ODW (AJWx), 2012 WL 4087253, at *2 (C.D. Cal. Sept. 17, 2012) (same); Gonzalez v. Hickman, No. ED CV 05-00660 MMM (RCx), 2007 WL 3237635, at *4 (C.D. Cal. June 28, 2007) (collecting cases). Because emotional distress damages are inherently nebulous until a jury resolves the issue, their disclosure would not have materially aided Defendants in any event. Therefore, Plaintiff's failure to include this computation in his initial disclosures was harmless with respect to Defendants' ability to litigate the invasion of privacy claim.

Conversely, Defendants were not on notice until recently that Plaintiff sought emotional distress damages in connection with Defendants' violation of California Penal Code § 502. Unlike the invasion of privacy claim, the Complaint contained no suggestion that the Section 502 claim was premised on emotional damages. The pleadings only state that as a result of the violation, "Defendants have caused damage to Mintz in an amount to be proven at trial." (Complt. ¶ 38). Additionally, the fact that Plaintiff specifically alleged emotional damages in the invasion of privacy claim, suggests that the omission of such damages from the Section 502 claim was intended. Accordingly, the Court finds that Plaintiff's failure to reference emotional damages in the initial disclosures prejudiced Defendants ability to litigate the section 502 claim. Therefore, the Court hereby excludes any evidence concerning emotional distress damages in connection with Defendants' violation of California Penal Code § 502.

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[2] Christopher Dacus is counsel for Defendants.

[3] Susan Gutierrez is counsel for Plaintiff.

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In sum, the motion in limine is DENIED as to evidence in support of the invasion of privacy claim, and GRANTED with respect to evidence supporting the California Penal Code § 502 claim.

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B. Second Motion in Limine to Exclude Evidence of Bartelstein's Liability

Defendants seek to exclude evidence and argument that Mark Bartelstein may be subjected to personal liability for the violations of California Penal Code § 502 and the invasion of privacy. In their view, there is no evidence that Bartelstein was personally involved in the wrongful conduct.

"[M]otions in limine should not be used as disguised motions for summary judgment." See Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc., No. CV 08-8525 PSG (PJWx), 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010). Nor may they be used as a disguised motion for reconsideration. Am. Home Assur. Co. v. Merck & Co., Inc., 462 F. Supp. 2d 435, 444 (S.D.N.Y. 2006) (denying motion in limine that was "in large part a disguised motion for summary judgment, or a motion for reconsideration"). Here, if Defendants believed that no evidence supports Bartelstein's liability, they should have raised that argument in a motion for summary judgment or in a motion for reconsideration. They did neither. Rather, because Defendants seek to rehash the Court's rulings on the merits, the motion in limine is improper and must be DENIED.

Nonetheless, the Court on its own motion has revisited its Order dated November 1, 2012, (Dkt. 81). The Court recognizes that the Order may be construed to grant Plaintiff summary judgment on the Cal. Penal Code § 502 and invasion of privacy claims against both Priority Sports and Bartelstein. To the extent that the Order indicates liability as to Bartelstein, that was not the intention of the Court. Rather, the Court was and remains of the view that the evidence at that time was insufficient to warrant a directed verdict for Plaintiff as to Bartelstein's liability on the two claims. Thus, the Court clarifies, as it did at trial, that the November 1 Order did not grant summary judgment against Bartelstein on the two aforementioned claims. Fed. R. Civ. P. 60(a).

At the close of Plaintiff's case at trial, Defendants moved for a directed verdict on the issue of Bartelstein's liability for the invasion of privacy claim. Having reviewed the evidence presented in the Plaintiff's case, the Court denies the motion. A court may grant a motion for judgment as a matter of law ("JMOL") against a party on a claim or issue where the party has been "fully heard on [that] issue during a jury trial" and the Court finds that a "reasonable jury would not have a legally sufficient evidentiary basis" to find for that party. Fed. R. Civ. P. 50(a) & (b). As the Ninth Circuit has explained:

When confronted with a motion for judgment as a matter of law, whether

> at the end of a plaintiff's case or at the close of all the evidence, a trial court must scrutinize the proof and the inferences reasonably to be drawn therefrom in the light most amiable to the nonmovant. In the process, the court may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of evidence. A judgment as a matter of law may be granted only if the evidence, viewed from the perspective most favorable to the nonmovant, is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.

Gibson v. City of Cranston, 37 F.3d 731, 735 (9th Cir. 1994). Here, the record contained enough evidence for a reasonable jury to conclude that Bartelstein approved or directed the decision of Priority Sports employees to access Plaintiff's Gmail account. Plaintiff introduced evidence that because Bartelstein was the owner of Priority Sports, nothing happened at the agency without Bartelstein's knowledge. The jury also heard evidence that Bartelstein was extremely upset when Plaintiff informed him of his resignation, and that Bartelstein yelled expletives at Plaintiff over the phone. Finally, Plaintiff testified that, the day after the hacking incident, he received an email from a Priority Sports employee, with Bartelstein carbon-copied, referencing the terms of Plaintiff's employment agreement with CAA. As an initial matter, Bartelstein's presence on the email list the morning after the hacking could suggest to a reasonable juror that he was involved in the hacking. Crediting this evidence, along with the evidence of Bartelstein's extensive control and antipathy toward Plaintiff, a jury could reasonably infer that Bartelstein authorized the hacking. Accordingly, there was enough evidence for a jury to conclude that Bartelstein was liable for the invasion of privacy.[4]

C. Third Motion in Limine to Exclude Evidence About the Relationship Between Plaintiff and Defendant Bartelstein

Defendants seek to exclude evidence about Plaintiff's relationship and interactions with Mark Bartelstein on the ground that it would be irrelevant and unduly prejudicial. Fed. R. Evid. 401, 403. "[M]otions in limine should rarely seek to exclude broad categories of evidence, as the court is almost always better situated to rule on evidentiary issues in their factual context during trial." Colton Crane,

[4] It is settled law in California that "[a] corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." Chase Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs., 748 F. Supp. 2d 1145, 1181-82 (C.D. Cal. 2010) (internal citations and quotation marks omitted).

2010 WL 2035800, at *1. Here, the motion is vague and overbroad. Defendants fail to identify any specific testimony that must be excluded. The Court must evaluate the challenged testimony in the context of trial to determine if it passes muster under Rule 403. The motion is DENIED.

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D. Fourth Motion in Limine to Exclude Testimony or Evidence Relating to the Contents of Plaintiff's Gmail Account

Defendants seek to exclude testimony or evidence about the contents of Plaintiff's Gmail account, including his employment agreement with CAA and the other personal emails. Defendants argue that because Plaintiff has refused to produce any of the actual emails in question, Plaintiff's testimony about these documents fails the Best Evidence Rule. Defendants alternatively argue that the Court should exclude the evidence pursuant to Rule 37 because Plaintiff failed to disclose the evidence pursuant to Rule 26.

As a threshold matter, the Best Evidence Rule is inapplicable. "The 'best evidence' rule, embodied in Fed. R. Ev. 1002, comes into play only when the Terms of a Writing are being established and an attempt is made to offer secondary evidence, i.e., a copy, to prove the contents of the original writing. The rule is not applicable when a witness testifies from Personal knowledge of the matter, even though the same information is contained in a writing." D'Angelo v. United States, 456 F. Supp. 127, 131 (D. Del. 1978). "The declarants' descriptions of the emails are provided to give the Court a context for the emails, and the descriptions are based on personal knowledge of the declarants. The Best Evidence Rule does not prohibit a witness from testifying about what the witness did, saw, or heard, even if those facts are also embodied in a writing." New Image Painting, Inc. v. Home Depot U.S.A., Inc., No. SACV 09-1224 AG (RNBx), 2009 WL 4730891, at *2 (C.D. Cal. Dec. 7, 2009) (citing United States v. Bennett, 363 F.3d 947, 953 (9th Cir. 2004)).

At the same time, it would be unduly prejudicial to permit Plaintiff to testify as to the contents of his Gmail account to prove his emotional distress damages, while permitting Plaintiff to withhold the referenced emails from Defendants. Fed. R. Evid. 403. Without an opportunity to examine the referenced emails, Defendants would be hamstrung by their inability to cross-examine Plaintiff on the extent to which any exposed emails caused Plaintiff emotional distress. Accordingly, the Court has ordered Plaintiff to turn over all the emails in his Gmail account on the day of the hacking incident.

E. Motion for Directed Verdict on Punitive Damages

At the close of Plaintiff's case at trial, Defendants moved for a directed verdict on Plaintiff's claim for punitive damages. In California, punitive damages may be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294.

Under the Civil Code, the following definitions are applicable: (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others; (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code § 3294. In turn, the term "despicable" refers to circumstances that are "base," "vile," or "contemptible." College Hospital Inc. v. Superior Court, 882 P.2d 894, 907 (Cal. 1994). "To establish conscious disregard, the plaintiff must show that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." Hoch v. Allied-Signal, Inc., 29 Cal. Rptr. 2d 615, 621 (Ct. App. 1994).

Plaintiff argues that the invasion of his privacy in this case was malicious because Defendants intentionally and unlawfully accessed his Gmail account. However, if that were enough to justify punitive damages, every intentional tort would give rise to punitive damages. Here, Plaintiff failed to present any proof beyond speculation that Defendants acted with a specific intent to injure, vex, or annoy Plaintiff beyond such injury that is intrinsic to any invasion of privacy. This was not a case, for instance, where Defendants repeatedly hacked into Plaintiff's Gmail account; it was an isolated incident. Cf. Fausto v. Credigy Servs. Corp., 598 F. Supp. 2d 1049, 1057 (N.D. Cal. 2009) (holding that punitive damages were available where there was evidence that defendants placed at least 90 threatening phone calls to plaintiffs, constituting intrusion upon seclusion). Moreover, there was no testimony that Brad Ames or Richard Smith hacked Plaintiff's Gmail account specifically to injure Plaintiff, and not merely to find information. In sum, no reasonable juror could find the foregoing to constitute clear and convincing proof of malicious or despicable conduct.

Contrary to Plaintiff's argument, the fact that the unlawful access of Plaintiff's Gmail account violated California Penal Code § 502 does not automatically render the conduct "despicable." Section 502(e)(4) provides that punitive damages are available where a defendant commits a "willful violation" of the statute and "has been guilty of oppression, fraud, or malice as defined in subdivision (c) of

Section 3294 of the Civil Code." However, this does not imply that every violation of § 502 warrants punitive damages. In fact, it suggests precisely the opposite inference, that absent a showing of malice, oppression, or fraud against the plaintiff, Section 502 violations do not trigger punitive damages.

Plaintiff alternatively argues that punitive damages are warranted because the invasion of privacy involved fraud. In particular, Plaintiff contends that Ames committed fraud by "pretending" that he was Plaintiff, that Plaintiff had "forgotten" his password, and requesting that a temporary password be sent to Plaintiff's Priority Sports email address. Even if such conduct constitutes fraud, which is doubtful, any fraud was against Google, not Plaintiff. It is therefore unsurprising and telling that Plaintiff never alleged fraud based on this theory of liability. In addition, Plaintiff has not suggested, and the Court has not located, any authority holding that a plaintiff is entitled to punitive damages for the defendant's fraudulent conduct toward a third party. Indeed, the law indicates that punitive damages for fraud may be awarded only where ***the plaintiff*** was the victim of fraud. See, e.g., Agricultural Ins. Co. v. Super. Ct., 82 Cal. Rptr. 2d 594, 605 (Ct. App. 1999) ("Should the trial court . . . find that Agricultural has successfully pleaded a fraud claim against the insureds, Agricultural must then be permitted to pursue its punitive damage claims."); McGuire v. Recontrust Co., N.A., No. No. CIV S–11–2787 KJM–CKD, 2012 WL 4510675, at *9 (E.D. Cal. Sept. 30, 2012) ("California Civil Code § 3294(a) permits a claimant to recover punitive damages from a defendant liable for oppression, fraud, or malice. Punitive damages cannot be awarded for a complaint that does not sufficiently allege one of those three actions."). For all the foregoing reasons, the Court concludes that Defendants are entitled to judgment as a matter of law on the claim for punitive damages.

III. CONCLUSION

For the foregoing reasons, the motion to exclude evidence of emotional distress damages as they relate to the California Penal Code § 502 claim is GRANTED. The motion to exclude evidence of the contents of Plaintiff's Gmail account is DENIED, but Plaintiff has been ordered to produce all the emails in his Gmail account on the day the account was hacked. The remaining motions in limine are DENIED. Defendants' motion for directed verdict as to Bartelstein's liability is DENIED, but their motion for directed verdict as to punitive damages is GRANTED. At the close of trial, Plaintiff is ordered to return to Defendants the originals and any copies of the financial records of Priority Sports, and Defendants are ordered to return to Plaintiff the originals and any copies of the emails from Plaintiff's Gmail account produced up to and during trial. If the parties discover after the date of this order that they still possess documents that should have been returned, they are ordered to destroy those documents immediately.

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