UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
2:12-cv-02040-JAD-PAL

Eliot Bernstein,
Defendant, Counter Plaintiff

v.

MARC J. RANDAZZA, Individually and Professionally
Plaintiffs, Counter Defendant

Answer to Complaint
and Counter Claim

I. Admissions and Denials

Comes now Defendant Eliot Bernstein, hereafter "Bernstein", on information and belief alleges the following;

1. Defendant Bernstein denies that he is, "a knowing and willful participant and co-conspirator in Cox's activities." Defendant Bernstein has no knowledge of unlawful actions Plaintiff Marc Randazza, hereafter "Randazza" has accused Cox of in this complaint.

2. Defendant Bernstein denies Randazza's allegation that "Cox realized she would face legal action regarding her improper registration and use of the domain names affiliated with Complainant. Cox has since transferred <marcrandazza.com> back to her name, while others have been transferred to Defendant Bernstein, who continues to register, use, and traffic in the domain names." Defendant Bernstein has no knowledge of Cox fearing any legal action and thereby transferring said domain names to him or anyone else. Defendant Bernstein has no knowledge of Cox registering domain names or use of the domain names affiliated with Complainant improperly.

3. Defendant Bernstein denies any violation of the Anti-cybersquatting Consumer Protection Act (the "ACPA"), 15 U.S.C. §§ 1125(d) and 8131, right of publicity, and right of inclusion upon seclusion.

4. Defendant Bernstein denies that "This Court has personal jurisdiction over Defendant Bernstein because he a) specifically targeted his actions at individuals (Plaintiffs) in the State of Nevada that is the subject of this suit and he did so with the full knowledge that Plaintiffs are in the state of Nevada and that his actions would have an effect in the state of Nevada; b) he owns websites on the World Wide Web that are accessible to residents of the State of Nevada; and c) he committed acts that he knew or should have known would cause injury to Plaintiffs in the State of Nevada. "

Bernstein denies that the District of Nevada has jurisdiction over him, his domain names, his intellectual property or personal jurisdiction over him in any way.

5. Defendant Bernstein denies Randazza's allegation that Bernstein is a proxy for Cox in any way. Randazza stated, " Defendant Bernstein, as a proxy, is listed as the registrant for <marcjrandazza.com>, <fuckmarcrandazza.com>, <marcjohnrandazza.com>, <marcrandazzasucks.com>, and <marcrandazzaisalyingasshole.com>.

6. Defendant Bernstein denies each allegation of Randazza's complaint, which is not specifically admitted or otherwise addressed below.

7. Defendant Bernstein admits he is an individual residing in the State of Florida.

8. Defendant Bernstein denies owning, purchasing or doing anything on or with any Infringing Domain Names. Bernstein denies Randazza's allegation that he is a proxy for any "Infringing Domain Names". Bernstein denies that any domain names in this complaint are infringing in any way and that he is a proxy of any kind for Defendant Cox.

9. Defendant Bernstein denies that he is a proxy, and is a "knowing and voluntary participant in Cox's enterprise". Bernstein has not ever been a participant in any enterprise with Cox nor do they have a business or personal relationship. Defendant Crystal Cox is a journalist who has been covering my stolen technology story for around 4 years now.

10. Defendant Bernstein denies the following, "Defendant Bernstein have used the Infringing Domain Names on the Internet. Defendant Cox registered the Infringing Domain Names in an attempt to extort money from Plaintiff Randazza or from another buyer, as evidenced by an email she sent to Mr. Randazza on or about January 16, 2012" Defendant Bernstein denies ever registering or owning a domain name for the purpose of " an attempt to extort money from Plaintiff Randazza or from another buyer". This is a false allegation in which Plaintiff Randazza has falsely and maliciously, willfully and neglectfully stated to third parties for over 2 years now in regard to Defendant Bernstein.

11. Defendant Bernstein denies the following allegation; "Bernstein is a knowing participant in Cox's efforts to prevent the plaintiff from testifying." Defendant Bernstein is unaware of any testifying of the Plaintiff nor of "Cox's efforts to prevent the plaintiff from testifying.

12. Defendant Bernstein denies any commercial use of the name Randazza and denies Said domain names were not used commercially or for personally or financial gain in any way.

13. Defendant Bernstein denies the following; "Defendant Cox's and Bernstein's conduct has caused Mr. Randazza to lose control over the reputation and goodwill associated with his personal name, both for personal and business purposes, and Mr. Randazza has suffered and continues to suffer other immeasurable damages. For the harm and loss Mr. Randazza

has suffered and for the harm and loss that will continue absent the intervention of this Court, Plaintiff has no adequate remedy at law. Unless Defendants are enjoined from further misuse of the Infringing Domain Names and enjoined from further use of the Randazza name and the Randazza trademarks, Plaintiffs will suffer irreparable harm because the damages sustained will be immeasurable, unpredictable, and unending. Moreover, the Lanham Act specifically provides for injunctive as requested in this circumstance. See 15 U.S.C. § 8131(2); 15 U.S.C. § 1116."

Bernstein denies causing any reputation loss or suffering to Mr. Randazza.

14. Defendant Bernstein denies the following; "Defendants Cox and Bernstein registered the Infringing Domain Names with the specific intent to profit from its registration through extortion. (Exhibit 6). Defendant Cox offered to sell the domain names to Plaintiff Randazza in return for the purchase of her “reputation management services.” Defendants Cox and Bernstein instigated an elaborate smear campaign by purchasing several dozen domains, publishing critical rantings about Plaintiff Randazza, and engaging in link spamming in an effort to increase the appearance of her websites in search engine results when Plaintiff Randazza’s name was entered."

Defendant Bernstein has never had intent to profit from the name "Randazza", nor conspired to do so in any way.

Defendant Bernstein has never had the "specific intent to profit from its registration through extortion". Defendant Bernstein has never been involved in "an elaborate smear campaign" regarding Randazza or anyone else.

15. Defendant Bernstein denies the use of any "Infringing Domain Names" with the bad-faith intent to profit from their use". Defendant Bernstein denies the following allegation, "Defendant Cox’s and Defendant Bernstein’s intent was to register the domain names incorporating Plaintiff’s full name, without his consent, with the specific intent to profit from the domains by selling them to either the Plaintiffs or a third party."

16. Defendant Bernstein denies any violation of Cybersquatting – 15 U.S.C. § 1125(d)

17. Defendant Bernstein denies registering and using alleged "Infringing Domain Names" and that " Cox and Bernstein have registered, trafficked in, and/or used domain names that are identical or confusing to Plaintiffs’ trademarks."

18. Defendant Bernstein denies causing Plaintiffs to suffer, have monetary loss and irreparable injury to his business, reputation and goodwill, due to any actions of Defendant.

19. Defendant Bernstein denies registering or using the Infringing Domain Names, trafficked in said domain names, and/or used domain names that are identical or confusing to Plaintiffs’

alleged trademarks. Defendant Bernstein denies any domain name trafficking with a bad faith intent to profit from Plaintiffs' trademarks, and to prevent Plaintiffs from registering or obtaining the Infringing Domain Names.

20. Defendant Bernstein denies a violation of Right of Publicity - NRS 597.810.

21. Defendant Bernstein denies having infringed on Plaintiff's right of publicity in name and likeness.

22. Defendant Bernstein denies seeking to capitalize on Plaintiff's name for his own commercial and / or financial gain.

23. Any and all allegations Defendant Bernstein has not specifically denied in this complaint, Bernstein now denies all those.

24. I, Eliot Bernstein have not ever engaged in extortion of Plaintiff nor anyone else.

25. I, Eliot Bernstein have never been under investigation for nor on trial for extortion.

26. I, Eliot Bernstein have never engaged in an online harass campaign against Plaintiff nor anyway else.

27. Defendant Eliot Bernstein denies allegations of Civil Conspiracy.

II Defenses

28. Defendant Eliot Bernstein has never engaged in illegal acts regarding Plaintiff or anyone else. Bernstein has not conspired with Cox nor anyone else to harm Plaintiff in any way.

29. Defendant Bernstein does not own nor control Cox's blogs, nor does Bernstein blog on Cox's blogs, which are wholly separate from domain names, as a matter of technicality.

30. Defendant Bernstein has never used Plaintiff's alleged Trademark commercially.

31. If said domains are any violation of trademark, then Plaintiff needs to address this with Godaddy of whom sells, profits commercially from these alleged trademarks.

32. Defendant Bernstein claims there is no false designation of Origin, or confusion of any kind to any reasonable reader of the alleged blogs or sites, or use of said domain names. It is pretty clear that they are gripe sites of which Cox and NOT Defendant Bernstein is the author.

33. Defendant Bernstein claims there is no confusion of goods and services, no commercial advertising or promotions, and no misrepresentation that would confuse a reader. It is clear that the blog author is criticizing, mocking, makaiking a parody of, reporting on, and giving opinion regarding Plaintiff.

34. Defendant Bernstein alleges that Plaintiff has presented nor has an authenticated evidence to back up his allegations. Genuine issues of material fact are necessary to support Plaintiffs' claims relating to violations of individual cyberpiracy protections under 15 U.S.C. § 8131. (Rearden LLC v. Rearden Commerce, Inc., 683 F.3d 1190, 1219 (9th Cir. 2012)

35. Defendant Bernstein alleges that Plaintiff cannot prevail in this case

36. Right of Publicity NRS 597.810 does not apply to all Internet activity in all states.

37. The U.S Constitution trumps Nevada's Right of Publicity NRS 597.810

38. Defendant Bernstein alleges that this case lacks constitutional validity.

39. Defendant Bernstein alleges that he has rights to those domain names in a fair marketplace of ideas, and that he has never used Plaintiff's alleged trademark for illegal activities.

40. Defendant Bernstein objects to the State of Nevada having jurisdiction over this issue and over Bernstein in any way regarding any allegation in this complaint.

41. Defendant Bernstein specifically invokes the First Amendment, Nevada Slapp and Nevada Retraction Laws in his defense.

42. Plaintiff cannot prevail in this case due to the inability to prove that the specific intent to profit existed at the time of the registration of the domain names in this case, of which Defendant Bernstein did not register but simply received. Bernstein had not intent to profit from Plaintiff's alleged trademark. Plaintiff has no way to prove otherwise.

43. Defendant Bernstein did own domains in good faith, as Plaintiff Randazza, with superior knowledge in the law clearly new. Now Randazza controls said domain names through an unconstitutional TRO granting Plaintiff Randazza the right to take the domain names and redirect them ALL to his hate campaign against Ms. Cox.

44. Bernstein alleges, It is not a trademark infringement (Lanham Act), nor a cybersquatting infringement to gripe, review, criticize your former attorney or to warn others about it. Cox's

blogs were written by Cox and never controlled by Bernstein. Owning a domain name is not authoring, nor posting of said parody, gripe or reviews.

There is no constitutional justification or legal reasoning that would stand the test of impartial judicial process that would have deleted massive blogs, removed the internet of thousands of links, gave away domain names / intellectual property, and all to remove online speech about Marc J. Randazza, Jennifer Randazza and Randazza's law firm Randazza Legal Group, in which offended Mr. Randazza.

This court erred in issuing a TRO without First Amendment Adjudication. There is no lawful reason for this court to have seized domain names, changed servers and redirected my domain names to a blog post on Randazza's blog defaming, slandering and incited hate against Ms. Cox.

This court has violated Defendant Bernstein's First Amendment rights in shutting down massive online speech and intellectual property, with no first amendment adjudication, simply because it offended Mr. Randazza.

Plaintiff Randazza has presented fraudulent information to this court, in which has harmed Defendant Bernstein. In the United States, when an officer of the court is found to have fraudulently presented facts to court so that the court is impaired in the impartial performance of its legal task, the act, known as "fraud upon the court", is a crime deemed so severe and fundamentally opposed to the operation of justice that it is not subject to any statute of limitation.

Officers of the court include: Lawyers, Judges, Referees, and those appointed; Guardian Ad Litem, Parenting Time Expeditors, Mediators, Rule 114 Neutrals, Evaluators, Administrators, special appointees, and any others whose influence are part of the judicial mechanism. "Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication". Kenner v. C.I.R., 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23

In Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function --- thus where the impartial functions of the court have been directly corrupted."

What effect does an act of "fraud upon the court" have upon the court proceeding? "Fraud upon the court" makes void the orders and judgments of that court.

45. The Preliminary Injunction in this Case against Defendant Eliot Bernstein was improper.

If a court issues an injunction prior to adjudicating the First Amendment Protection of the speech at issue, the injunction cannot pass constitutional muster.

This court denied Defendant Bernstein due process in expressly skipping the essential step of adjudicating the First Amendment protections to the speech at issue.

This court denied Defendant Bernstein due process in failing to make any findings of fact or ruling of law, much less review of the blog articles and the First Amendment. Plaintiff Marc Randazza is a Public Figure. (New York Times Vs. Sullivan)

A Judicial Order that prevents free speech from occurring is unlawful. (Erwin Chemerinsky, Constitutional Law; Principles and Policies 918 (2002) ("The Clearest definition of prior restraint is.. a judicial order that prevents speech from occurring:).

Prior Restraints are "the most serious and least tolerable infringement on First Amendment Rights." Neb. Press Ass'n v. Stewart, 427 U.S. 539, 559 (1976). There is a "deep-seated American hostility to prior restraint" Id at 589 (Brennan, J. concurring).

Injunctive relief to prevent actual or threatened damage is heavily disfavored because it interferes with the First Amendment and amounts to censorship prior to a judicial determination of the lawlessness of speech. See Moore v. City Dry Cleaners & Laundry, 41 So. 2d 865, 872 (Fla. 1949). "The special vice of prior restraint," the Supreme Court held, "is that communication will be suppressed... before an adequate determination that it is unprotected by the First Amendment". Pittsburgh Press Co v. Pittsburg Comm'n on Human Relations, 413 U.S. 376, 390 (1973). Also se Fort Wayn Books Inc. v Indiana, 489 U.S. 46, 66 (1989); M.I.C., Ltd v Bedford Township, 463 U.S. 1341, 11343 (1983.)

In this case, the Nevada Court has skipped the step of adjudicating the First Amendment protection relevant to the speech at issue. Prior Restraints are Unconstitutional.
Also see Post-Newswek Stations Orlando, Inc. v. Guetzlo.

"RKA sought extraordinary relief in the form of prior restraint to enjoin .. . This relief is not recognized in this State, nor anywhere else in the Country. In addition to ignoring the First Amendment Rights and almost a century's worth of common law, the .. court ignored virtually all procedural requirements for the issue of a preliminary injunction." Page 5 Paragraph ii of Opening Brief Appellate Case No. 3D12-3189, Irina Chevaldina Appellant vs. R.K./FI Management Inc.;et.al., Appellees. Attorney for Appellant Marc J. Randazza Florida Bar No. 325566, Randazza Legal Group Miami Florida.

46.) Defendant Bernstein alleges that Plaintiff Randazza has no common law trademark in his name. Assuming Randazza could show a common law trademark in his name, he has not and cannot demonstrate that Defendant Bernstein acted with bad-faith intent and with intent to profit from that alleged trademark.

To determine whether Defendant Bernstein acted in bad faith, the Court must consider these nine nonexclusive factors outlined in § 1125(d)(1)(b):

(1) the trademark or intellectual property rights of the defendants in the domain name;

(2) the extent to which the domain name is the legal name of a person,

(3) defendant's prior use of the domain name in connection with a bona fide offering of goods and services,

(4) whether the defendant made a bona fide noncommercial fair use of the domain name,

(5) defendant's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site,

(6) whether the defendant offered to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name,

(7) whether the defendant provided false contact information when registering the domain name,

(8) whether the defendant registered multiple domain names which defendant knew were identical to or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, and

(9) the extent to which the trademark incorporated into the domain name is distinctive.

(Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991); Anderson, 477 U.S. at 28 248-49.)

47. Defendant Bernstein alleges that there is no material facts to support the alleged violations of Right of Publicity under NRS § 597.810. Bernstein did not use Plaintiff's alleged

mark commercially. Nor did Bernstein intend to profit, to advertise, sell, or solicit the purchase of any product, merchandise, goods, or service from said domain names.

48. Plaintiffs have offered no admissible evidence that tends to show any commercial use of the their names, nor can they.

49. Registering or owning domain names that contain part of or the entirety of the Randazza's personal name is not a violation of their common law rights of publicity.

"Nevada has codified the right of publicity tort." Because "[t]he statute provides a complete and exclusive remedy for right of publicity torts," Nevada law does not recognize a common law right of publicity. As Nevada law does not recognize this cause of action. (People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1285 (9th Cir. 1995). AND (Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987) (citing Wong v. Bell, 642 42 F.2d 359, 362 (9th Cir. 1981) (holding that a district court may dismiss claims sua sponte pursuant to Rule 12(b)(6), without notice, where a claimant could not possibly win relief.)

50. There are no material facts to support a claim of common law intrusion upon seclusion. Defendants' registration of five of the domain names containing the entirety or part of their names amounted to a common law intrusion upon seclusion. To recover for the tort of intrusion, a plaintiff must prove that there was an intentional intrusion (physical or otherwise) on his seclusion that would be highly offensive to a reasonable person. (Berosini, 895 P.2d at 1279.)

"[T]o have an interest in seclusion or solitude which the law will protect, a plaintiff must 43 show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable." Generally, there is a decreased expectation of privacy in the workplace 44 and for individuals who have interjected themselves into the public sphere. (Omar v. Sea-Land Serv., Inc., - Id. at 1281 n.20)

Plaintiff have failed to show by admissible evidence that the mere registration of a domain name would be highly offensive to a reasonable person, and Plaintiff Randazza has failed to show that registering the domain names, coupled with the comments contained in the two admissible blog posts, would be highly offensive to the reasonable person as a matter of law.

Plaintiff Marc Randazza has a decreased expectation of privacy in his workplace. By his own

characterization, he is an attorney “renowned through the United States and the world for expertise
in First Amendment, intellectual property, and Internet law.

By talking about his experience and the clients he represents, Mr. Randazza invites comments on his work as an attorney and criticism from those who oppose the positions of his clients. Randazza may be perceived to have interjected himself into the public sphere by making television and radio guest appearances, giving quotes and interviews in newspapers, magazines, and other publications, appearing at speaking engagements, and having an ABA-recognized Top blog website, all as reflected on his resume.

Considering his intentional and deliberate professional exposure and interjection into the public sphere and the accompanying decrease in his privacy interests, he has not demonstrated as a matter of law that he had an actual or reasonable expectation that he would not be criticized based on his work as an attorney or that he would not be thought about unfavorably by people in opposition to his work.

51.
Defendant Bernstein alleges that Plaintiff cannot state a valid claim of conspiracy regarding "Bernstein and Cox colluded to register the domain names containing the entirety or part of the Randazzas’ names to violate their rights." As to state a valid claim for civil conspiracy, a plaintiff must show: (1) defendants, by acting in concert, intended to accomplish an unlawful objective for the purpose of harming the plaintiff; and (2) the plaintiff sustained damages as a result. “A civil conspiracy claim operates to extend, beyond the active wrongdoer, liability in tort to actors who have merely assisted, encouraged or planned the wrongdoer’s acts.”

(Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 862 P.2d 1207, 1210 (Nev. 1993) (citing 52 Collins v. Union Fed. Savings & Loan, 662 P.2d 610, 622 (Nev. 1983)).

(Flowers v. Carville, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (quoting 16 Am.Jur. 2D 53 Conspiracy § 57 (1998)).

52. Cox and Bernstein have never been business partners.

III. Relief

Defendant Bernstein prays this court rules that Plaintiff is not entitled to any relief, as a matter of law.

Certification of Service

On June XX 2014, Counter Plaintiff Crystal Cox certifies mailing a copy of this to:

U.S. District Court
Clerk of Court
Room 1334
333 Las Vegas Blvd. S.
Las Vegas , NV 89101