

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/09/15

DEPT. 38

HONORABLE MAUREEN DUFFY-LEWIS

JUDGE R. ALVA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. LOMELI, CA

Deputy Sheriff

Reporter

8:30 am BC520019

Plaintiff
Counsel

JAMES BROWN

VS

Defendant
Counsel

ELECTRONIC ARTS INC

170.6 - deft - Judge Alarcon

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER - DEFENDANT ELECTRONIC ARTS, INC.'S SPECIAL MOTION TO STRIKE

In the matter heretofore submitted on 01/29/15, the court announces its ruling as follows:

James Brown is a famous football player and actor who alleges his likeness was repeatedly used by defendant in their Madden Football video games, despite Brown's express refusal. Defendant filed a special motion to strike the entire action under CCP section 425.16.

With regard to defendant's initial burden, a special motion to strike is the rare instance where a plaintiff must present evidence to the court at the outset of the action. Once the defendant shows that the action/cause of action is the proper subject of such motion, the plaintiff must provide evidence to show there is a probability of prevailing on the merits of the claims. Mann v. Quality Old Time Services, Inc. (2004) 120 Cal App 4th 90, 103.

While defendant may provide evidence, the court cannot weigh this evidence against plaintiff's in terms of credibility or persuasiveness. Defendant's evidence is to be considered only to determine whether it defeats plaintiff's claims as a matter of law under the rules of evidence. 1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal App 4th 568, 585. That evidence - and any objections to the plaintiff's

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evidence - would be presented in the reply; followed by an argument that plaintiff cannot prevail on the merits. Of course, defendant may make that argument without any evidentiary objections.

In certain situations, the defendant presents a different type of "rules of evidence" argument based upon the position that - by law - the plaintiff will never be able to present any evidence. While that argument would also be proper in the reply, it is more likely to be made in the moving papers. No Doubt v. Activision Publishing, Inc. (2011) 192 Cal App 4th 1018, 1029, footnote 4. This makes "judicial/procedural sense" as it allows the plaintiff to argue at law in the opposition.

Typically, the "plaintiff will never be able to present evidence" argument is based upon Civil Code section 47b (the Litigation Privilege). For example, Sipple v. Foundation for National Progress (1999) 71 Cal App 4th, 226, 240-1. In the matter before this court, though, defendant is not making a litigation privilege argument, but rather raises 5 purported Constitutional/First Amendment arguments, based on law and on facts.

As always, the first part of the analysis regards defendant's burden - Is this case subject to special motion to strike? Strangely enough, defendant glosses over this requirement. In the brief section devoted to this burden (Moving Papers 3:11-27 and 4:1-2), the

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bulk of the argument is devoted to presenting the rules. (Moving Papers 3:11-24). Then, defendant makes the conclusion that "EA easily satisfies its initial burden." (Moving Papers 3:25-27 and 4:1-2). Plaintiff, however, takes no issue with this and provides no argument in opposition; conceding that defendant has met its burden. To create a clean record, the court repeatedly asked defendant to provide the legal authority. While the question was deflected, finally the case of No Doubt v. Activision was mentioned. That case is specifically on point, regarding video games, the claims of violation of right to publicity and unfair business practices, anti-SLAPP motions and Constitutional defenses. This case was cited in the Moving Papers, albeit in a different section.

As a controlling case has been cited, as the law is clear and as there is no counter-argument from the plaintiff, the court determines that defendant meets its initial burden.

As stated above, this is typically where the Moving Papers would end. However, defendant continues and, in the bulk of their papers, presents the aforementioned 5 defenses - any of which, according to the defendant's papers, will prevent plaintiff from presenting any evidence.

When analyzing these defenses, the court will (1) determine whether the defense is proper to this case; (2) determine whether the defense is proper for

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special motion to strike analysis and (3) analyze the facts as to the defenses.

First, though, the court must determine if it can make extensive factual determinations as to the defenses. As noted, when making a determination as to the probability of prevailing on a cause of action, the court cannot weigh defendant's evidence against plaintiff's in terms of credibility or persuasiveness. Defendant's evidence is to be considered only to determine whether it defeats plaintiff's claims as a matter of law. However, here, the court is require to look at the evidence provided by both parties and make factual determinations.

Winter v. DC Comics (2003) 30 Cal 4th 881 provides the authority to make such factual determinations. In that matter, when discussing the appropriateness of the court resolving a Constitutional defense at summary judgment, it was determined that "Courts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of the circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." Winter at 891-2.

Given this reasoning, and that the court in No Doubt (and other similar cases such as Kirby and Winter, infra) makes such factual determinations, this court

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determines that the court may make factual determinations. To help the court make these determinations, defendant provided this court with copies of the games in question along with a video game player and assorted accessories. Plaintiff is aware that these items were lodged with the court.

With regard to analysis of defenses, as to incidental use defense, when a plaintiff's likeness is incidental to the defendant's work as a whole, the use does not infringe upon the right of publicity. *Ladany v. William Morrow & Co (SDNY 1978) 465 F Supp 870*. It is undisputed that the avatar allegedly depicting plaintiff is 1 of 7,500 in the game. However, incidental use is premised on the theory that incidental use has no commercial value. *Pooley v. National Hole-In-One Association (D Arizona 2000) 89 F. Supp. 2d 1108*. Jim Brown is not a 1 in 7,500 player. As both sides admit, he is well known as one of the best football player of all time (as well an actor of renown). Brown is iconic and unique. His likeness is not merely incidental to the game. Therefore, defendant is not successful as to this Constitutional defense.

As to constitutional public interest defense, it has been determined that the public interest defense does not apply to video games. *Keller v. Electronic Arts (9th Cir 2013) 724 F3d 268, 1283*. Therefore, it is not proper to raise this defense at all, let alone at special motion to strike.

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As to public affairs exemption, Civil Code section 3344(d) provides the basis for compensatory relief for the use of another's name or likeness. It is not a defense nor is it constitutional. It, therefore, does not apply to the special motion to strike analysis.

As to Rogers/Restatement Test, neither side seems invested in this argument. In one paragraph, moving party requests this court adopt the test. As the California courts have yet to adopt this test (see Keller at 1282), and as those same courts state that the transformative use test is the one appropriate, this court determines that the Rogers/Restatement defense does not apply at all.

As to transformative use test, in Kirby v. Sega (2006) 144 Cal App 4th 47, Kierin Kirby, professionally known as Lady Miss Kier of the group Deee-Lite, alleged the video game distributor Sega violated her common law and statutory rights of publicity by including a character named in the game that was allegedly based on her. She alleged that Sega misappropriated her likeness by giving the character Ulala similar features and by borrowing from Kirby's distinctive look. The court found that a complete defense was present in the First Amendment. Even though Ulala had a likeness to Kirby, Ulala's physique, hairstyle, costumes and dance moves differed from Kirby's. Taken together, these (and other) differences demonstrate that the character was 'transformative.' In other words, changed or 'different enough.'

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In No Doubt, however, the images used were not transformative. The avatars were immutable images of the real celebrity musicians. Such realistic depictions categorically, disqualified the avatars from First Amendment protection. No Doubt at 1033. Similar reasoning was applied in Keller (with a reference to No Doubt) regarding the immutability of the avatar allegedly depicting a college football player. The inability to alter the avatar was a factor in determining that the video game character was not transformative. Keller at 1277.

In Winter, well known musicians, Edgar and Johnny Winter sued DC Comics for misappropriation (under Civil Code 3344) after a series of Jonah Hex comics featured villainous half-worm, half-human characters named the Autumn Brothers. Those characters had the well known long hair and albino skin of the musicians. The transformative test was used- at summary judgment- to determine that any claims were barred by the First Amendment as a matter of law. It was determined that any claims were barred by the First Amendment as a matter of law. It was determined that comic depictions were not just conventional depictions but contained significant expressive content. The man-worms were determined to be "fanciful, creative characters," as was Ulala, and thus transformative. Therefore, the First Amendment applied as a complete defense. Winter at 890.

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The same cannot be said here. Both sides agree, the avatar's characteristics are substantively identical to that of Brown - the avatar has the same position on the field, number of years in the NFL, height, weight, age, home state, skill level, statistics and skin color. The action takes place on a football field, not in space or some altered environment; nor can it be considered part of ironic social commentary. Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal 4th 387, 408-9. Again, similar reasoning was applied in Keller, where it was determined that since the game realistically portrayed college football players in the context of college football games, the 'environment of the game' was not a transformative environment. Keller at 1278.

Realizing that the cases do not support their view, defendant argues that Keller, No Doubt and Hart [Hart v. Electronic Arts (3rd Cir 2013) 717 F3d 141; another action where the depiction of football player in a video game] are all wrong. Defendant's argument is not convincing to this court and, even if it were, the court is bound to follow the law.

While defendant has met its initial burden to show this matter is subject to a special motion to strike, it fails to meet the further burden to show there is an applicable, ultimate defense. Had defendant met that burden, the motion would have been granted. However, as defendant has not, the burden now shifts to the plaintiff to provide evidence to show a prob-

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ability of prevailing on his claim.

With regard to plaintiff's burden, plaintiff clearly understands his burden, as he devotes a paragraph to the concepts contained therein. (Opposition 6:2-12; "Legal Standard"). However, similar to the moving papers, plaintiff also simply quotes the law (Opposition 6: 3-11) and then concludes that his "claims easily meet the standard." (Opposition 6:12). No further argument is made with regard to the facts, their application to the causes of action and the probability of prevailing on the merits of each claim, despite the rule that "plaintiff's burden in opposing an anti-SLAPP motion is to substantiate each element of their cause of action and not merely to counter defendant's affirmative defenses." No Doubt at 1028.

Ironically, just as plaintiff's opposition ignored defendant's failure to present legal authority to support the defense burden, defendant's reply ignores plaintiff's failure to present evidence to support plaintiff's burden. Tacitly, the defendant therefore agrees with plaintiff's statement that his "claims easily meet this standard."

Independent of this admission, the evidence presented in this matter - both by the plaintiff and by the defendant [CCP 425.16(b)(2)] - is sufficient to show there is a probability of prevailing on the merits of the causes of action set forth in the complaint - (1) deprivation of rights in violation of Civil Code 3344;

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(2) violation of right of publicity under common law;
 (3) unfair competition; and (4) unjust enrichment.

Therefore, the special motion to strike is DENIED. The court finds that this motion was neither frivolous nor solely intended to cause unnecessary delay. Therefore, plaintiff is not entitled to fees and costs.

Objections of Electronic Arts, Inc to plaintiff's evidence and opposing brief ruled on as follows:

OVERRULED as to objections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29,

SUSTAINED as to objections 17, 19, 23, 30 (partially), 31 (partially) and 32 (partially).

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the MINUTE ORDER of 03/09/15 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in LOS ANGELES, California, one copy of the original filed/entered

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herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 03/09/15

Sherri R. Carter, Executive Officer/Clerk

By:

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