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Massachusetts District Court
Case No. 1:11-cv-12000-RBC
Greenspan v. Random House, Inc. et al

Document 45



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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AARON GREENSPAN,)	
)	CIVIL ACTION
)	NO.: 1: 11-CV-12000-RBC
)	
Plaintiff,)	
)	
v.)	
)	
RANDOM HOUSE, INC., MEZCO, INC.,)	
BENJAMIN MEZRICH, COLUMBIA)	
PICTURES INDUSTRIES, INC. a/k/a SONY)	
PICTURES a/k/a COLUMBIA TRISTAR)	
MOTION PICTURE GROUP,)	
)	
Defendants.)	
)	

**DEFENDANT COLUMBIA PICTURES INDUSTRIES, INC.’S
MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

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Implicitly recognizing that his original complaint fails to state a claim for relief, plaintiff now seeks leave to file an amended complaint. But the amended complaint simply rehashes plaintiff's original claims and adds new claims that are equally, if not more, preposterous. Even granting plaintiff the leeway to which a *pro se* plaintiff is entitled, the latest complaint is simply beyond the pale. The motion for leave to amend should be denied because the proposed amendments are futile.¹ See *Wong v. Resolve Tech.*, No. 10 Civ. 11642, 2011 WL 3157198, at *8 (D. Mass. July 25, 2011) ("Despite the liberal amendment policy, the Court should deny a motion for leave to amend if, among other reasons, the amendment would be futile.").

ARGUMENT

Despite adding over ten pages of allegations, Plaintiff's proposed amended complaint fails to state a claim against Columbia. The majority of Plaintiff's new allegations focus on Mezrich, his first book, his wife, reviews of his second book, and his speaking engagements. These new allegations do nothing to further plaintiff's claims against Columbia. Moreover, plaintiff's new factual allegations relating to Columbia do nothing to rescue his complaint, and plaintiff's new claims fail to state a claim against Columbia.

I. Plaintiff's New Factual Allegations Do Not Save His Original Claims

Insofar as the proposed amended complaint contains new factual allegations regarding Columbia, it nevertheless fails to rescue plaintiff's claims.² With respect to plaintiff's copyright claims, the proposed amended complaint again fails to allege specific similarities between plaintiff's book and Columbia's film. Plaintiff added a conclusory allegation that a

¹ Columbia also adopts the arguments in Random House, Inc., Mezco's Inc.'s, and Benjamin Mezrich's Opposition to Plaintiff's Motion for Leave to File a First Amended Complaint, filed February 28, 2012.

² Plaintiff's most recent filing suggests—for the first time—that he competes with Columbia. Pl.'s Reply at 8. This suggestion is immaterial because plaintiff has dropped his Lanham Act Claims against Columbia in the proposed amended complaint. Pl.'s Mot. for Leave to Am. at ¶ 9.

scene in the film portraying different characters (the Winklevoss twins) meeting with Larry Summers regarding a different subject matter “exhibits a substantially similar total feel and experience” as a scene from plaintiff’s book where he meets with Larry Summers. Am. Compl. ¶ 78. But this allegation is merely conclusory, and falls far short of the allegations that plaintiff would need to rescue his copyright claim based on Columbia’s film.

With respect to plaintiff’s defamation claim against Columbia, the proposed amended complaint adds various new factual allegations including: (1) the disclaimer at the end of the film is allegedly false and too late for the audience to view it (2) Sony was aware of the alleged shortcomings in Mezrich’s book, (3) the soundtrack lyric “I want you to notice / When I’m not around” somehow demonstrates the harm of not depicting plaintiff in the movie, (4) an actor’s commentary on the film DVD somehow indicates that Columbia should have been more careful in how it portrayed the individuals involved, and (5) plaintiff allegedly has suffered scorn at the hands of persons who have heard his version of the Facebook story. Am. Compl. ¶¶ 82-90, 96-106. None of these new allegations do anything to bolster plaintiff’s defamation claim against Columbia. Despite plaintiff’s recent claim that he was “clearly ‘hit’ by the impact of The Film,” Pl.’s Reply at 11, Plaintiff is not in the film in any way. Plaintiff continues to acknowledge this fact. Am. Comp. ¶ 84 (“Plaintiff does not appear explicitly by name in The Film, nor is any character intended to represent Plaintiff.”). The film is simply not “of and concerning” plaintiff, and should be dismissed for the reasons given in Columbia’s motion to dismiss. As the amended complaint demonstrates, plaintiff cannot allege otherwise. The defamation count fails to state a claim against Columbia and should be dismissed with prejudice.

II. Plaintiff's New Claims Against Columbia Are Not Supported by Factual Allegations

The proposed amended complaint asserts new claims for unjust enrichment, fraud, and RICO. These claims merely rehash the complaint. In any event, the factual allegations in the proposed amended complaint do not state a claim for unjust enrichment, fraud, or RICO.

A. Plaintiff Fails to State a Claim for Unjust Enrichment Against Columbia

Plaintiff's unjust enrichment count purports to state a claim against all defendants, but alleges new facts that pertain only to Mezrich and his wife. Am. Comp. ¶¶ 168-71. To the extent the unjust enrichment claim is distinct from his copyright allegations, plaintiff alleges (1) the Mezrichs are responsible for five-star Amazon reviews of Mezrich's book that were allegedly authored by Mezrich's employees and wife, *id.* at ¶ 170, and (2) Mezrich earned speaking fees for events that publicized his book. *Id.* at ¶ 171. None of these allegations relate to Columbia, and the proposed amended complaint fails to state an unjust enrichment claim against Columbia.

Moreover, plaintiff's allegations are insufficient to state a claim for unjust enrichment against any defendant. "To satisfy the elements of unjust enrichment, a plaintiff must show: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) an absence of justification and (5) the absence of a remedy provided by law." *Massachusetts v. Mylan Labs.*, 357 F. Supp. 2d 314, 324 (D. Mass 2005). Plaintiff does not allege that he suffered an impoverishment relating to reviews of Mezrich's book, or relating to Mezrich's speaking engagements.

B. Plaintiff Fails to State a Claim for Fraud Claim Against Columbia

Plaintiff's fraud claim likewise falls far short of stating a claim against Columbia. To begin with, fraud is subject to a heightened pleading standard under Rule 9(b). Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances

constituting fraud or mistake.”). Indeed, “Rule 9(b) is the exception to the rule that on a 12(b)(6) motion to dismiss, a plaintiff is to be given the benefit of the doubt.” *Smith v. Jenkins*, 626 F. Supp. 2d 155, 165 (D. Mass. 2009).

Plaintiff’s proposed amended complaint is not close to meeting the pleading requirements of Rule 9(b). “To state a claim for fraud in Massachusetts, a plaintiff must allege that (1) the defendant made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act in reliance thereon, (4) the plaintiff relied upon the representation, and (5) the plaintiff acted to his detriment.” *Id.* at 164-65 (internal quotation marks omitted). The vast majority of the allegedly false statements discussed in the complaint are attributed to Mezrich. The plaintiff himself contrasts Mezrich’s and Columbia’s statements. *See* Am. Compl. ¶ 80 (“Mr. Sorkin [Columbia’s screenwriter], unlike Defendant Mezrich, at least made it clear that The Film was not intended to be true.”).

The only allegedly false statement attributed to Columbia is the film’s disclaimer. *Id.* at ¶ 82. Plaintiff objects that the disclaimer appears at the end of the film, states the film is about “actual events,” and “fails to mention that key facts and character were omitted from the story completely.” *Id.* But the plain language of the disclaimer, as quoted by plaintiff, belies these objections. The disclaimer says the film is merely “inspired by actual events” and notes that “[c]ertain characters, characterizations, incidents, locations and dialogue were fictionalized or invented for purposes of dramatization.” *Id.* The plain language of the disclaimer is incompatible with the allegation that it pretends to represent reality with complete accuracy.

Moreover, plaintiff has not alleged additional elements of a fraud claim. He does not allege that Columbia’s alleged false statement was for the purpose of inducing plaintiff to act in reliance on the disclaimer, nor that plaintiff relied on the disclaimer or acted to his detriment.

C. Plaintiff Fails to State a RICO Claim Against Columbia

Plaintiff's RICO claim is his least plausible yet. Plaintiff's theory is that Mezrich, his wife, major publisher Random House, and major film distributor Columbia, have conspired together "through a multi-faceted, coordinated campaign of lies, fraud, and implied threats, to coerce Plaintiff into waiving his right to earn profits from the true and accurate telling of the circumstances of Facebook's origins." Am. Comp. ¶ 148. To state a RICO claim, plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *N. Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 42 (1st Cir. 2001). To point out just one of the absurdities of plaintiff's theory here, he has failed to allege a pattern of racketeering activity. On this point, plaintiff alleges defendants "instill[ed] fear that failure to cooperate would result in omission from or reckless disregard for the truth in a widely distributed fictional retelling of history, resulting in harm to Plaintiff's business, financial condition and reputation." Am. Comp. ¶ 152. Plaintiff's theory boils down to this: Mezrich's first book was subject to criticism for its fictionalized style. When Mezrich emailed plaintiff to see if he would be willing to cooperate on a book about Facebook, plaintiff somehow saw this email as an "unwritten" threat to his reputation that presented a dilemma—either cooperate and "sacrifice [plaintiff's] right to control how the public perceived him" or "he might be left out of the story entirely." *Id.* at ¶¶ 35-43. Plaintiff does not explain how a simple email request for cooperation rises to the level of threats or coercion, and certainly does not explain how this email constitutes an indictable criminal offense as required by the RICO statute. *See* 18 U.S.C. § 1961(1).

Plaintiff further alleges that defendants engaged in mail and wire fraud by shipping copies of supposedly inaccurate movies and books. But neither shipping allegedly inaccurate materials nor shipping materials that allegedly violate plaintiff's copyright constitute

predicate acts under the RICO statute.³ *See Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996) (finding mail and wire fraud allegations that “do no more than allege copyright infringement” are not predicate acts under RICO); *Barker v. Default Resolution Network*, No. 08 Civ. 2898, 2009 WL 593634, at *3 (N.D. Cal. Mar. 5, 2009) (dismissing RICO claim where plaintiff alleged defendants filed inaccurate notice of default in conclusory manner).

CONCLUSION

Because plaintiff’s proposed amended complaint fails to state a claim against Columbia, plaintiff’s motion for leave to amend should be denied and the pending complaint should be dismissed with prejudice.

Respectfully submitted,

COLUMBIA PICTURES INDUSTRIES, INC.

By its attorneys,

/s/ Dustin F. Hecker

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Dated: March 5, 2012

³ As discussed *supra*, plaintiff has not stated a claim for fraud in any event.

CERTIFICATE OF SERVICE

I, Dustin F. Hecker, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Dustin F. Hecker _____

Dustin F. Hecker

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