IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. 2010 CA 764 (35)

VANESSA LOPEZ,

Plaintiff,

v.

SHAQUILLE O'NEAL,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS

Plaintiff's Complaint spins a fanciful tale that has absolutely no basis in fact or law. In order to avoid wasting any more time or resources on this baseless action, Defendant Shaquille O'Neal moves to dismiss Plaintiff's Complaint in its entirety pursuant to Florida Rules of Civil Procedure 1.140. As shown below, each count in the Complaint fails to allege any legally cognizable claim and, therefore, should be dismissed as a matter of law for the following reasons:

(1) Count I for assault fails as a matter of law because Plaintiff merely alleges verbal threats with no reasonable expectation of harm;

(2) Count II for intentional infliction of emotional distress fails as a matter of law to allege conduct sufficient to establish such a claim;

(3) Count III for invasion of privacy fails as a matter of law because Plaintiff has not alleged the publication of any private information, which is required by Florida law in order to maintain such a claim;

(4) Count IV for conversion fails as a matter of law because the Complaint does not allege that Defendant took any action to deprive Plaintiff of personal property, and does not allege Plaintiff suffered any damage; and

(5) Count V under the Florida Civil RICO statute, Fla. Stat. §§ 772.103 et seq., also fails as a matter of law because the Complaint does not allege the factual predicate with the required specificity.

Accordingly, Defendant respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

BACKGROUND

Plaintiff Vanessa Lopez ("Lopez") has sued Defendant alleging claims for (1) assault, (2) intentional infliction of emotional distress, (3) invasion of privacy, (4) conversion and (5) Florida Civil RICO. The central focus of the Complaint is Plaintiff's assertion that she was involved in a relationship with Defendant that terminated. Compl. at ¶5. Thereafter, Plaintiff alleges that she was contacted by O'Neal or third parties on a number of occasions. She also alleges that O'Neal improperly interfered with her cell phone and email accounts. ¶¶28, 29, 36, 39 – 44, 47, 48 & 50.

DISCUSSION

Based on these allegations, all Plaintiff's claims fail as a matter of law.

I. PLAINTIFF'S CLAIM FOR ASSUALT FAILS AS A MATTER OF LAW.

An assault is an intentional, unlawful offer of corporeal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented. *Colony Ins. Co. v. Barnes*, 410 F. Supp. 2d 1137, 1141 (N.D. Fla. 2005) (citing *Winn and Lovett Grocery Co. v. Archer*, 126 Fla. 308, 314, 171 So. 214, 217 (1936)); *Lay v. Kremer*, 411 So. 2d 1347 (Fla. 1st DCA 1982). "A mere threat that is not followed by any attack, or attempt to attack, is not an assault." FLJUR ASSAULT § 2 (citing *Gelhaus v. Eastern Air Lines*, 194 F.2d 774 (5th Cir. 1952)). Under Florida law, "mere words do not constitute an assault." *Lay*, 411 So. 2d at 1349.

Claims for assault fail as a matter of law where there is no allegation or evidence of a well-founded fear of imminent harm or the apparent present ability to effectuate the attempt if

not prevented. For example, in *Boschetti v. Landon*, 660 So. 2d 365, 366 (Fla. 3d DCA 1995), the court held that a claim for assault failed as a matter of law because the plaintiff could not have had a reasonable apprehension of imminent harm where the threats made by the defendant were conditional and the defendant did not have any weapon on his person or display any weapon to the plaintiff. *Id.* (citing *Newman v. Gehl Corp*., 731 F. Supp. 1048, 1051 (M.D. Fla. 1990); *see also See Perez v. Siegel*, 857 So. 2d 353, 354-55 (Fla. 3d DCA 2003) (explaining that verbal threats without an overt act creating a well-founded fear that violence was imminent were insufficient to qualify as assault); *Bell v. Anderson*, 414 So. 2d 350 (Fla. 1st DCA 1982) (finding allegation of verbal threat made form 30 to 40 feet away was insufficient to establish assault).

In this case, Plaintiff's claim fails as a matter of law because she does not allege Defendant made any threats. To the extent Plaintiff attempts to impute the conduct of others to Defendant her claim fails because she has not alleged a conspiracy or apparent agency. Furthermore, the Complaint merely alleges oral threats and provides no facts establishing that she had a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented. Plaintiff does not allege facts indicating that any of the individuals she claims made such threats had the apparent ability to act imminently. Accordingly, Plaintiff's claim for assault fails as a matter of law.

II. PLAINTIFF FAILS TO ALLEGE CONDUCT SUFFCIENT TO ESTABLISH INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A MATTER OF LAW.

Plaintiff failed to state a claim for intentional infliction of emotional distress since she has not and cannot allege conduct that is outrageous as a matter of law. In order to bring a claim for intentional infliction of emotion distress, Plaintiffs must allege that (1) Defendant's conduct was intentional or reckless; (2) Defendant's conduct was outrageous; (3) Defendant's conduct caused emotional distress; and (4) Plaintiff suffered severe emotional distress. *Metropolitan Life Ins.*

Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). To allege a claim the conduct must be "so outrageous in character and extreme in degree as to exceed all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *House of God Which is the Church of the Living God, the Pillar and Ground of the Truth Without Controversy, Inc. v. White*, 792 So. 2d 491, 493 (Fla. 4th DCA 2001) (internal citations omitted). The Court may dismiss a complaint that fails to allege conduct rising to this level as a matter of law. *Ward v. Fla. Bd. Of Educ.*, 822 So. 2d 518 (Fla. 1st DCA 2002) (dismissing with prejudice a claim for intentional infliction of distress based on that allegations that a university erroneously represented the availability of a specific degree program).

For example, in *Kent v. Harrison*, 467 So. 2d 1114, 1114 (Fla. 2d DCA 1983), the court found that evidence of "a campaign of telephonic harassment" was insufficient to establish intentional infliction of emotional distress as a matter of law. In addition, Florida courts have been reluctant to find claims for intentional infliction of emotional distress based on allegations of oral abuse. *Ponton v. Scarfone*, 468 So. 2d 1009 (Fla. 2d DCA 1985) (statements made to induce employee to join sexual liaison did not establish intentional infliction of emotional distress); *Lay v. Roux Labs., Inc.*, 379 So. 2d 451 (Fla. 1st DCA 1980) (threatening plaintiff with job, using humiliating language, vicious verbal attacks and racial epithets deemed insufficient to serve as predicate for claim of intentional infliction of emotional distress). The allegations here similarly fail to establish intentional infliction of emotional distress as a matter of law.

III. PLAINTIFF'S CLAIM FOR INVASION OF PRIVACY FAILS BECAUSE SHE DOES NOT ALLEGE ANY PRIVATE INFORMATION WAS DISCLOSED TO THE PUBLIC.

Plaintiff's claim for invasion of privacy fails as a matter of law because she does not allege that any private information was published to the public.

Florida decisions have recognized a tort of invasion of privacy including: (1) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name. *Allstate Insurance Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) (citing *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944)). Each type of invasion requires an element of publication to the public at large. *Rivers v. Dillards Dep't Store, Inc*., 698 So. 2d 1328, 1331 (Fla. 1st DCA 1997) (granting summary judgment on claim for invasion of privacy and intrusion where there was "no evidence of publication of any facts to the public at large"); *Ponton v. Scarfone*, 468 So. 2d 1009 (Fla. 2d DCA 1985) (employer's utterances designed to induce employee into sexual liaison are insufficient to come within zone of conduct constituting unlawful invasion of employees right of privacy), *review denied*, 478 So. 2d 54 (Fla.1985); *Steele v. Offshore Shipbuilding, Inc*., 867 F.2d 1311 (11th Cir.1989) (employee's invasion of privacy action against employer fails because employee did not prove publication of suggestive comments); *Sacco v. Eagle Fin. Corp. of North Miami Beach*, 234 So. 2d 406, 408 (Fla. 3d DCA 1970) (requiring evidence of publication). The Florida Supreme Court has rejected lower court opinions suggesting that a plaintiff can bring a claim for invasion of privacy where there is no publication. *Allstate*, 863 So. 2d at 162.

For example, in *Allstate* the Florida Supreme Court concluded that the tort of invasion of privacy including "(2) intrusion-physically or electronically intruding into one's private quarters," is not broad enough to include unwelcome conduct including touching someone in a sexual manner and making sexually offensive comments. *Id*. The Supreme Court concluded that "[t]he intrusion to which this refers is into a 'place' in which there is a reasonable expectation of privacy and is not referring to a body part. As we noted at the time we first recognized this tort in

Cason, the tort of invasion of privacy was not intended to be duplicative of some other tort. Rather, this is a tort in which the focus is the right of a private person to be *free from public gaze*." *Id.* (emphasis added). Here, as in *Allstate*, there is no allegation that any private information was published to the public. Accordingly, Plaintiff's claim for invasion of privacy fails as a matter of law.

IV. PLAINTIFF'S CLAIM FOR CONVERSION FAILS AS A MATTER OF LAW.

It is well settled that a conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. *Mayo v. Allen*, 973 So. 2d 1257, 1258-59 (Fla. 1st DCA 2008) (citing *Star Fruit Co. v. Eagle Lake Growers, Inc.,* 33 So. 2d 858 (1948); *General. Fin. Corp. of Jacksonville v. Sexton,* 155 So. 2d 159 (Fla. 1st DCA 1963)). Conversion may be demonstrated by a plaintiff's demand and a defendant's refusal. *See Goodrich v. Malowney,* 157 So. 2d 829, 832 (Fla. 2d DCA 1963) ("The purpose of proving a demand for property by a plaintiff and a refusal by a defendant to return it in an action for conversion is to show the conversion. The generally accepted rule is that demand and refusal are unnecessary where the act complained of amounts to a conversion regardless of whether a demand is made.").

Here, the Complaint does not allege any unauthorized conduct of Defendant that deprived Plaintiff of any property. Defendant's alleged conduct in accessing voicemail and text messages on her telephone and deleting text messages is insufficient as a matter of law. First, voicemail messages and text messages are not personal property capable of conversion. *Teleco, Inc. v. Southwestern Bell Telephone Co.*, 392 F. Supp. 692, 697 (D.C. Okl. 1974) (holding that "[t]he right to telephone service is not personalty or personal property which is capable of being converted"); *see also Express One International, Inc. v. Steinbeck*, 53 SW.3d 895, 900-01 (Tx. Ct. App. 2001) (holding that using a screen name to impersonate someone on the internet fails to establish conversion as a matter of law because a screen name is not personal property). Second,

even if they were personal property, allegedly accessing voicemail messages and text messages would not deprive Plaintiff of any property interest. Nor has she alleged any damages as a result of any alleged deletion of her text messages. As such, Plaintiff's claim for conversion fails as a matter of law.

III. PLAINTIFF'S CLAIM UNDER FLA. STAT. §§ 772.103 ET SEQ. SHOULD BE DISMISSED BECAUSE IT IS NOT PLEAD WITH PARTICULARITY.

A Plaintiff asserting Florida RICO claims pursuant to Fla. Stat. §§ 772.103 et seq. must plead, among other things: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989)[1] (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, (1985)). In addition to those elements, a RICO conspiracy claim requires the Plaintiff to allege with specificity how the Defendant conspired to violate one of the RICO substantive provisions. *See Salinas v. United States*, 522 U.S. 52 (1997). The Florida RICO claims here should be dismissed because none of these elements are adequately pled.

A RICO Plaintiff must allege specific facts establishing the existence of an "enterprise." *See United States v. Turkette*, 452 U.S. 576 (1981). To plead a viable RICO enterprise, the plaintiff must allege: (1) "an ongoing organization, formal or informal;" (2) that "the various associates function as a continuing unit;" and (3) "an entity separate and apart from the pattern of activity in which it engages." *Id.*, at 583. A RICO plaintiff must plead specific facts, not mere conclusions, which establish the existence of an enterprise. *Elliot v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989); *Gellert v. Richardson*, 1996 WL 107550 at *4 (M.D. Fla. Jan. 26, 1996)

[1] The Florida RICO statute was patterned after the Federal RICO statute, and Florida courts routinely look to Federal RICO decisions as persuasive authority in interpreting Florida's RICO statute. *See Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1263-64 (11th Cir. 2004); *Florida Evergreen Foliage v. E.I. Dupont De Nemours and Co.,* 336 F. Supp. 2d 1239 (S.D. Fla. 2004); *Bortell v. White Mountains Ins. Group, Ltd.*, 2 So. 3d 1041, 1046-47 (Fla. 4th DCA 2009).

("Besides lumping these Defendants together and using the terms conspiracy and enterprise, Plaintiff has not indicated how these Defendants form an enterprise") *aff'd*, 124 F.3d 1329 (11th Cir. 1997) (table). The Complaint here does not advance any enterprise theory whatsoever.

Moreover, Plaintiff has not alleged that she suffered any actual injuries. To establish standing, a Plaintiff must also allege that the RICO violation was both: (a) a "but for" cause of the injury, and (b) the direct and proximate cause of the injury. *See Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 265-70 (1992). Plaintiff has not shown that she has been injured by any actionable conduct of Defendant, and she cannot meet the "but for" or "proximate cause" tests. For the same reasons, Plaintiff's RICO conspiracy claims also fail. *See Grider v. Texas Oil & Gas Corp*., 868 F.2d 1147, 1150 (10th Cir. 1989) ("Because [plaintiff] has not alleged injury from the substantive violations, he has failed to show how the alleged conspiracy to commit those violations caused him injury").

WHEREFORE, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice and award Defendant his attorney's fees and costs pursuant to Fla. Stat. § 772.104(3).

Dated: March 5, 2010

Respectfully submitted,

s/Benjamine Reid

Benjamine Reid, Esq.
Florida Bar No. 183522
E-mail:breid@carltonfields.com
CARLTON FIELDS, P.A.
100 SE Second Street, Suite 4000
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

Charles Cacciabeve, Esq.
Florida Bar No. 329908
E-mail: ccacciabeve@carltonfields.com
CARLTON FIELDS, P.A.
CNL Center at City commons
450 South Orange Avenue, Suite 500
Orlando, FL 32801
Telephone: (407) 849-0300
Facsimile: (407) 849-9191

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send notification of such filing to Counsel for Plaintiffs: Hal K. Litchford, Esq., **Litchford & Christopher, P.A.,** 390 North Orange Avenue, P.O. Box 1549, Orlando, Florida 32802; Deborah S. Chames, Esq., **Heller and Chames, P.A.,** 261 Northeast First Street, 6th floor, Miami, Florida 33132; and Gloria Allred, Esq., Allred, **Maroko & Goldberg,** 6300 Wilshire Boulevard, Suite #1500, Los Angeles, California 90048. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to each of the foregoing counsel.

s/Benjamine Reid
BENJAMINE REID