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United States District Court,
C.D. California.

Robert ROSS
v.
Shaquelle ONEAL et al.

No. 2:11–cv–06124–JHN–Ex.
|
Oct. 17, 2011.

Attorneys and Law Firms

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Proceedings: (In Chambers) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [5]

JACQUELINE H. NGUYEN, Judge.

***1** Chris Silva, Deputy Clerk.

This matter is before the Court on Defendant Shaquille O'Neal's ("O'Neal") Motion to Dismiss Plaintiff's Complaint, filed on August 15, 2011. ("Motion"; docket no. 5.) Plaintiff filed an Opposition on August 23, 2011. (Docket no. 8.) O'Neal filed a Reply. (Docket no. 12.) On September 19, 2011, the Court heard oral argument on the Motion and took the matter under submission. For the following reasons, the Court GRANTS O'Neal's Motion.

I. Background

Plaintiff Robert Ross ("Plaintiff") brings this lawsuit against O'Neal and Defendant Mark Stevens ("Stevens") (collectively, "Defendants"), for claims arising out of an alleged kidnaping incident and an alleged breach of contract.

Plaintiff alleges that on or about February 11, 2008, O'Neal and Stevens directed members of the Main Street Mafia Crips gang to kidnap, attack, rob, and threaten him. (Compl.¶ 15.) Plaintiff alleges that due to the kidnaping incident, he suffered physical injuries and emotional distress. (*Id.* ¶ 17.)

Plaintiff also alleges that on or about August 21, 2007, he entered into an oral contract with Defendants, whereby Plaintiff would locate artists for Defendants' record label in exchange for one-half of the profits generated by the artists. (*Id.* ¶ 12.) Sometime prior to February 11, 2008, Plaintiff delivered an artist to Defendants who signed the artist to a contract, but then Defendants refused to pay Plaintiff. (*Id.*)

On July 15, 2011, Plaintiff filed a Complaint in Los Angeles Superior court against Defendants, alleging the following: (1) False Imprisonment; (2) Assault and Battery; (3) Robbery–Conversion of Personal Property; (4) Intentional Infliction of Emotional Distress; (5) Breach of Contract. On July 25, 2011, O'Neal removed the case to federal court. [1]

II. Judicial Notice

Along with his Motion, O'Neal filed a Request for Judicial Notice ("RJN") pursuant to Federal Rule of Evidence 201. Defendant seeks judicial notice of the following document:

> *Exhibit A:* a true and correct copy of a record of O'Neal's professional basketball playing statistics obtained from the official website of the NBA, www.nba.com.

Plaintiff has not opposed O'Neal's Request for Judicial Notice, and does not dispute the accuracy of the document. The Court finds that the document constitutes matters appropriate for judicial notice, as it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). Moreover, because O'Neal has requested judicial notice and supplied the Court with the necessary information, the Court must take judicial notice under Federal Rule of Evidence 201(d). Accordingly, the Court GRANTS Defendant's Request for Judicial Notice.

III. Legal Standard

Rule 12(b)(6) permits a party to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In evaluating a motion to dismiss, courts generally cannot consider material outside the complaint, such as facts presented in briefs, affidavits, or discovery materials, unless such material is alleged in the complaint or judicially noticed. *McCalip v. De Legarret,* No. CV–08–2250, 2008 U.S. Dist. LEXIS 87870, at *4 (C.D.Cal. Aug. 18, 2008); *see Jacobson v. AEG Capital Corp.,* 50 F.3d 1493, 1496 (9th Cir.1995). Courts must accept as true all material factual allegations in the complaint and construe them in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.,* 380 F.3d 1226, 1229 (9th Cir.2004). However, this tenet is inapplicable to legal conclusions. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Courts need not accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* Based on judicial experience and common sense, courts must determine whether a complaint plausibly states a claim for relief. *Id.* at 1950.

***2** Part of the Court's determination as to whether a claim plausibly states a claim for relief involves an analysis of a pleading's factual specificity. Asserting more than mere conclusory statements, a complaint must provide a factual basis showing that a plaintiff is entitled to relief and giving the defendant fair notice of claims and relief asserted. *Id.* at 1950–51; *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); Fed.R.Civ.P. 8(a)(2). Although a lengthy factual background is unnecessary, dismissal of a complaint is warranted where the plaintiff fails to allege specific facts needed to support the plausibility of a claim or provide fair notice to the opposing party. *See id.*

IV. Discussion

O'Neal argues that Plaintiff's claims are all time-barred because the statute of limitations has run on all of his claims. (Motion at 6.) Plaintiff counters that the statutes of limitations are tolled by California Code of Civil Procedure Section 351 because Defendants lived outside of the state of California from the time the causes of action accrued.

"A motion to dismiss based on the running of the statute of limitations period may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Supermail Cargo, Inc. v. United States,* 68 F.3d 1204, 1206 (9th Cir.1995) (internal quotation marks omitted). The statute of limitations for false imprisonment, assault and battery, and intentional infliction of emotional distress is two years. Cal.Code Civ. Pro. § 335.1. The statute of limitations for breach of oral agreement is also two years. Cal.Code Civ. Pro. § 339. The statute of limitations for Plaintiff's conversion and robbery claims is 3 years. Cal.Code Civ. Pro. § 338(c)(1).

All of Plaintiff's claims, including the breach of oral contract, accrued on or before February 11, 2008, the date on which he was allegedly kidnaped. [2] However, this action was not filed until July 15, 2011, well over three years later. Therefore, all of Plaintiff's claims are time-barred by the two and three year statutes of limitations unless they are tolled.

Plaintiff alleges that because Defendants were absent from and resided outside the state of California since before the claims accrued, Section 351 of the California Code of Civil Procedure ("Section 351") tolls all statutes of limitations that would have otherwise applied to his claims. (Compl.¶ 7.) Section 351 provides:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Cal.Code Civ. Pro. § 351.

O'Neal argues that Section 351cannot be constitutionally applied in this case because of the burden it would pose on interstate commerce. (Motion at 13.) "Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the State law will be reviewed under the Commerce Clause to determine whether denial is discriminatory on its face or an impermissible burden on commerce."

Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988). While Section 351 is facially nondiscriminatory, the statute is unconstitutional as applied where the burden imposed on interstate commerce outweighs the State's articulated interest. *See Abramson v. Brownstein,* 897 F.2d 389, 392 (9th Cir.1990). In *Abramson,* the Ninth Circuit found "[o]n the burden side, [section 351] requires a person engaged in interstate commerce outside of California to be in California for the appropriate limitations period in order to avoid the application of the tolling statute." *Id.* The court weighed this interest against the State's articulated interest in alleviating the hardship of compelling a plaintiff to pursue an out-of-state defendant, and concluded that the state's interest "did not support the burden created by § 351." *Id.* at 393.

***3** Plaintiff argues that applying the tolling statute in this case does not burden interstate commerce because the claims do not arise from Defendants' interstate commerce activities. (Opp'n at 3.) However, a California appellate court recently held that *even if* the alleged claims do not arise out of the defendant's interstate commerce activities, the application of Section 351 to toll the statutes of limitation violates the commerce clause by "penaliz [ing] people who move out of state by imposing a longer statute of limitations on them than on those who remain in state." *Heritage Marketing & Ins. Services, Inc. v. Chrustawka,* 160 Cal.App.4th 754, 763, 73 Cal.Rptr.3d 126 (2008). The court in *Heritage* explained that the "commerce clause protects [people] from such restraints on their movements across state lines." *Id.* Therefore, "by creating disincentives to travel across state lines and imposing costs on those who wish to do so, the statute prevents or limits the exercise of the right to freedom of movement." Thus, the application of Section 351 to penalize defendants for moving out of state violated the commerce clause.

Here, it follows from the reasoning in *Abramson* and *Heritage* that the application of Section 351 would impose an impermissible burden on interstate commerce. In this case, even if Plaintiff's claims do not arise out of O'Neal's interstate commerce activities, the burden imposed on interstate commerce outweighs the State's interest in alleviating the hardship imposed on a plaintiff when serving an out-of-state defendant. Between February 11, 2008, and February 11, 2011, O'Neal was engaged in interstate commerce as a professional basketball player in the NBA. (RJN, Ex. A.) Thus, the application of Section 351 would require O'Neal to choose between continuing his employment with the NBA or remaining in California for three years to wait for the statutes of limitation to expire, thereby creating an impermissible burden on interstate commerce. *See Papenthien v. Papenthien,* 1995 WL 819033 (S.D.Cal.1995), *rev'd on other grounds by* 120 F.3d 1025 (9th Cir.1997) (finding that Section 351 could not be constitutionally applied to a defendant who was required to fly throughout the United States for his job as During oral argument, Plaintiff argued that O'Neal was only required to play in basketball games for 226 days out of the year. Plaintiff argued that O'Neal provides no evidence that he was engaged in interstate commerce for the 139 days of the year when he was not playing in basketball games. However, common sense dictates that even if O'Neal was not actually playing in basketball games, he was practicing, training, and otherwise engaged in his employment with the NBA. Further, O'Neal argues, and Plaintiff does not deny, that the State's interest is weakened by that fact that O'Neal could have been served pursuant to California's long arm statute. (Motion at 15; Reply at 5.) Moreover, even if the long arm statute were not invoked, Plaintiff could have easily served O'Neal on one of his many visits to California for professional basketball games, which were published months in advance. (Reply at 5.)

***4** Accordingly, the burden on interstate commerce imposed by Section 351 outweighs the articulated state interest in this case, and the application of Section 351 to toll the statutes of limitations on Plaintiff's claims would violate the commerce clause. Therefore, all of Plaintiff's claims are barred by the applicable statute of limitations and the Complaint is dismissed.

V. Conclusion

The Court GRANTS O'Neal's Motion (docket no. 5) and dismisses Plaintiff's Complaint with prejudice. [3]

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5041967

Footnotes

1 The Notice of Removal states that Stevens was never served with the Summons and Complaint, and therefore, his consent to removal was not required. (Notice at 1.)

2 Plaintiff alleges that the breach of oral agreement occurred "prior to February 11, 2008." (Compl.¶ 12.)

3 Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir.2005). In this case, because all of Plaintiff's claims are barred by the statutes of limitations, the Court concludes that Plaintiff's Complaint cannot be saved by any amendment.

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