Exhibit 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT STEINBUCH,	Docket No. CA-05-970 (PLF)
Plaintiff,	
v.	Washington, D.C. May 16, 2007 3:00 p.m.
JESSICA CUTLER,	
Defendant.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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I corrected the mistake in the most reasonable and expeditious fashion that I thought appropriate given the pending motion to dismiss, even though there was a long period of time in between the decision. And I want to state for the record that the mistake was my mistake as an attorney reviewing the complaint, and not a change in legal strategy whatsoever. Thank you.

THE COURT: Okay. Why don't we take a 15 minute break, and I'll see whether or not I can give you a ruling this afternoon.

(Recess taken)

THE COURT: I think both sides asked for an oral argument on this motion, and sometimes when I have an oral argument it actually saves me time, because sometimes when I have an oral argument it's possible to rule orally after considering the briefs, which I read before today, and the relevant case law, which I read before today, and having the arguments of the lawyers, which is always very helpful.

The down side to an oral opinion is it's not as coherent, organized and lucid as a written opinion, but it's still an opinion, and it takes less time.

So what I'm about to say will be my opinion on the case. The docket will simply have an order stating for the reasons stated in open court. If anybody wants to appeal, assuming this is an appealable order, you can get the

transcript from Ms. Russo.

This matter, as we all know, is here on the motion of the defendant, Ana Marie Cox, to dismiss the complaint in its entirety against her, so that we would be back with a single defendant. And I have her motion, and the plaintiff's response, and Ms. Cox's reply.

As we all know from the record in this case, and as Mr. Rosenfeld usefully summarized it the beginning of his argument, the relevant facts, and this is set forth in my earlier opinion which is found in the transcript of the motions hearing on April 5, 2006. The relevant events began on May 5th, 2004, and ended on May 18, 2004, which is the period of time when Jessica Cutler published this stuff on her blog.

It was on May 17th or 18th, 2004, that Ms. Cox excerpted material from Ms. Cutler's blog and the postings from Ms. Cutler and put it out on her Washingtonienne, I guess it is. The lawsuit originally was filed naming only Ms. Cutler as the defendant, and the only defendant, and that complaint was filed on May 16, 2005.

The issue on the earlier motion to dismiss, namely that of Ms. Cutler, revolved around a number of issues including whether or not the plaintiff had adequately stated claims under either a claim of intentional or reckless infliction of emotional distress, and/or invasion of privacy.

And in the course of my oral opinion -- I guess it

was intentional infliction of emotional distress. In the course of my oral opinion on April 5th, 2006, I went through the elements of those claims, including the fact that the invasion of privacy is four separate torts under the restatement as adopted in the District of Columbia, and my conclusion that the plaintiff had adequately set out one and possibly two of those claims and had set out, at least for present purposes, a claim of intentional infliction of emotional distress. Whether or not they will be able to prove that is another question.

Having decided the claims were adequately set out, I then had to determine what the appropriate statute of limitations was, and did that beginning on page 56 of that transcript. And I concluded that the statute of limitations under each of those claims, intentional infliction of emotional distress and invasion of privacy, false light, was a one year statute of limitations. I rejected the argument that the plaintiff made that it was a three year statute of limitations, and found it inappropriate to rely on a case from the district of Maryland, Smith versus Esquire, in light of the fact that two of my colleagues, I think two of my colleagues at least, had concluded it was a one year statute of limitations. Judge Harris in Doe versus Southeastern University, at 732 F. Supp 7, and Judge Kessler in Grunseth versus Marriott Corp, 872 F. Supp 1069, and they had some discussion of earlier cases, Thomas

versus New World Communications, 681 F. Supp 55, and Dooley versus United Technologies Company.

And I discussed those cases and concluded it's a one year statute of limitations. And since the lawsuit was filed on May 16, 2005, that decision means that the claims may go back only to May 16, 2004, and not all the way back to May 5th, 2004. If it was a one year statute of limitations for Ms. Cutler, then on my reading of it, it was also a one year statute of limitations for Ms. Cox, unless there's some way around that one year statute of limitations, which I'll get to in a minute.

Mr. Steinbuch through Mr. Rosen moved for leave to amend on July 9, 2006, which is more than two years after the events in question, and more than one year after the statute of limitations had run, if I'm right that it's only a one year statute of limitations. And, therefore, Mr. Steinbuch is out of luck, unless this amendment relates back to the claims against Ms. Cutler.

Mr. Rosen makes a number of arguments. First he argues that all he was doing really was adding a defendant, that all the claims against Ms. Cox were already set forth in the complaint, the original complaint, that he was fixing a mistake of not having included it in the caption, but on questioning he acknowledged that there was more than just the caption. The listing of the parties did not list her as a

party, in discussing venue and jurisdiction it did not list Ms. Cox.

He goes on to argue that she nevertheless had full notice back in May of 2005 when Ms. Cutler was sued, that that's clear from her statements on her own site and in other context. And that any mistake that was made was one by Mr. Rosen, not by his client, in not naming her in the caption and otherwise seeking relief from her. He says the complaint was virtually identical, the old one and the amended one, that there is no prejudice to her, she was well aware that she might have been sued, and so forth, and that his client should not be prejudiced for his mistake, and because in general lawsuits should be decided on the merits. And in general that's true.

But the question is whether or not he has a right to add Ms. Cox more than two years after the events in question when the statute of limitations is one year. I expressed doubts when I granted his motion to amend back on October 30, 2006, and those doubts are set forth in that opinion. But because of the liberal amendment philosophy behind Rule 15, I permitted it, but obviously that did not preclude a motion to dismiss.

This is a footnote before I move on to 15(c). The other thing that Mr. Rosen said was that it would have been futile to seek to amend before I ruled on Ms. Cutler's motion to dismiss for a variety of reasons, including presumably that

I might have thrown the whole case out. I might have said there's a three year statute of limitations, and then we wouldn't be here today. And that he learned some things during the course of that briefing, and that the oral argument that made him decide it was a mistake not to have included her originally.

The futility argument is not to me persuasive. First of all, while futility is a concept that is discussed in some of the cases and maybe even in the rule itself with respect to amendments, there's nothing futile about moving to amend a complaint while a motion to dismiss is being briefed. It happens all the time. It happens all the time in this courthouse. And, in fact, one of the arguments that is sometimes made is, I've spent all this time and effort briefing a motion to dismiss and now the other side wants to move the goal post, so it's not fair. But it's not futile to move to amend in the course of briefing, and it's done frequently and sometimes for good and sufficient reasons.

Back to Rule 15(c). Rule 15(c) says that, "An amendment of a pleading relates back to the date of the original pleading when," and then the relevant part is 15(c)(3), when "the amendment changes the party or the naming of the party against whom a claim is asserted" so long as it grows out of the same occurrence, transaction, et cetera, and within the period provided by Rule 4(m), 120 days, "for service

of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

In this case it's clear that Ms. Cox had notice, but that's not to say that she would not have been prejudiced in maintaining a defense, and indeed the more time that elapses, the more prejudiced she would be.

If one moves early in the time frame, one could argue there's less prejudice. The fact that your name is in a complaint doesn't mean that you expect to be sued. In fact, the fact that your name is in a complaint and you're not sued suggests that you're probably not going to be sued. While because of all of the discovery disputes in this case, which Judge Facciola has been happily dealing with, happily from my perspective I think, not from his, there hasn't been any discovery. But in the normal course, one could see somebody thinking that he or she is a mere witness going through depositions, third party discovery, and then being named a defendant. That would be prejudice. Thinking that you are not going to be named as time goes on, there is prejudice from mere passage of time.

I'll say more about the prejudice thing maybe in a

minute or two, but the key language is knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought. So it's not just any mistake by the language of the rule. It's not just any error. It's a mistake about identity.

As I suggested earlier, and I'm looking at Moore's and Federal Practice, it's a certain kind of mistake, and it's a mistake in the identity of a party. The classic example, says Moore, is when a plaintiff misnames or misidentifies, but correctly serves a party.

In this case the defendant is already before the Court. For example, a court may find the type of mistake that justifies relation back when the proper corporate name is not easily attainable, and the name used is close enough to the correct corporate name for the newly named defendant to know that it was being sued. But in contrast, when the amendment changes the person or entity sued, the Court should not consider it a misnomer because the amendment substitutes, or in this case would add, a new party rather than correct the identification of an existing party. A conscious choice to sue one party rather than another does not constitute mistake in identity.

And even when there's a mistake in identity, says Moore, a plaintiff must allege a reason for the mistake in order to substitute one legal entity for the other legal entity

when the plaintiff knew the existence of the second legal entity at the time the original complaint was filed. I think the cases cited there are still corporate cases, not individual cases, but that theme, what's the reason for the mistake when you knew that the other person existed.

If the plaintiff, Moore's again, if the plaintiff actually knew the defendant's identity, relation back would be improper because there would be no mistake.

I don't know whether either of you cited this case. I can't remember, but I looked at it this morning and it struck me as I was listening to the arguments that it's quite relevant. It's a Supreme Court decision, called Nelson versus Adams U.S.A. Inc, 529 U.S. 460. And in footnote number one, that's actually a discussion, there are other aspects of Rule 15, but in footnote number one, Justice Ginsburg says, "Even when an amendment relates back to the original date of pleading under Rule 15(c) the relation back cannot, consistently with due process, deny a party all opportunity to be heard in response to the amendment. We also note in this regard that the instant case does not fall under Rule 15(c)(3) which deals with amendments that change the party or the name of the party against whom claims are asserted. That subsection," she says, "applies only in cases involving a mistake concerning the identity of the proper party. Respondent Adams made no such mistake. It knew of Nelson's role and existence, and until it

moved to amend its pleading, chose to assert its claim only against O.C.P."

That's this case, it seems to me, and that's what Justice Ginsburg was talking about.

Now, the other authority, if one needs any, are the cases of the D.C. Circuit, Rendall-Speranza v. Nassim, 107 F.3d 913. Judge Douglas Ginsburg, I think. Yes. He talks first about the prejudice question and says, a potential defendant who has not been named in a lawsuit by the time the statute of limitations has run, is entitled to repose unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were. So he's really talking about prejudice and the mistake language. Under Rendall-Speranza approach, however, one would not be sure that he could rely upon the repose promised by the statute of limitations until all litigation was over. We are reluctant to adopt so expansive an interpretation.

He then talks about the Advisory Committee notes that states that Rule 15(c) was intended to deal with the problem of a misnamed defendant, that it was intended to be a means for correcting the mistakes in suing the wrong party, like the wrong governmental agency or the wrong corporation. Nothing in the rule or the notes indicates, says Judge Ginsburg, that the provision applies to a plaintiff who was fully aware of the potential defendant's identity, but not of its responsibility

for the harm alleged. An error of judgment about whether an employer is liable for the act of an employee is not a mistake sufficient.

There is Judge Kearse's opinion in the Second Circuit in Cornwell versus Robinson, 23 F.3d, 694, to the same effect. There's my own opinion in Stith versus Chadbourne and Parke, LLP, 160 F.Supp 2d, page 1, although it's not discussed at great length. There is Judge Robertson's opinion in Sparshott versus Feld Entertainment at 89 F. Supp 2d, page 1. He quotes, I guess he's quoting, he says, "In this circuit the word 'mistake' is narrowly interpreted to preclude relation back of amendments where a plaintiff was fully aware of the defendant's identity during the limitations period," and then he quotes Rendall-Speranza, like nothing in the rule was intended to apply to a plaintiff who was fully aware of the defendant's identity but not of its responsibility for the harm alleged.

And Judge Facciola's opinion in Gipson versus Wells Fargo Corporation.

So for all of those reasons, it seems to me that the defendant's right, that the claims, all of the claims, against Ms. Cox and the First Amendment complaint are time barred because there is no relation back.

Having said that, I don't think I have to get into the Section 230 question again and decide whether or not anything Judge Kozinski says changes anything I said in

Blumenthal versus Drudge, or whether I care. But I do. He is a friend of mine and I do care, and he's very smart.

And the other question is whether or not there are any factual wrinkles here that one would have to consider in looking at the Section 230 question. And on a motion to dismiss, I can't do that and shouldn't do that. But I don't think I have to deal with the Communications Decency Act question because it seems to me that the statute of limitations question and the question under Rule 15(c) is as clear as it is, and nothing that I read in the papers or heard today has persuaded me otherwise.

So for these reasons, I'm going to grant defendant Ana Marie Cox's motion to dismiss, and she will no longer be a defendant in this case.

Is there anything I missed or that I need to say to complete the record?

MR. ROSENFELD: No, Your Honor.

THE COURT: So that's it. And we will wait and see what happens next, Mr. Rosen, with you and Ms. Cutler's lawyer and your clients and Judge Facciola, but I still hope that some day we will get through the discovery and that maybe it's, I don't know if it's ever a case that could be settled, but I don't know where it's going to wind up at the end of a very long road. But I'll leave it to Judge Facciola to sort it out until I need to see you all again. Thank you.

(Proceedings concluded.)

CERTIFICATE

I, LINDA L. RUSSO, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Linda L. Russo, RPR
Virginia CCR No: 0313102