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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STAN LACKEY, A.K.A. JOHN LONDON,
JOHN LONDON, LTD., DENNIS CRUZ,
CHRIS TOWNSEND,

No. C 06-03987 MHP

Plaintiffs,

v.

CBS RADIO INC., PENN JILLETTE, DOES
3-10,
Defendants.

MEMORANDUM & ORDER
**Re: Defendant Penn Jillette's Motion
for Summary Judgment**

_____ /
Plaintiffs Stan Lackey, aka "John London" ("London"), John London, Ltd., Dennis Cruz ("Cruz"), and Chris Townsend ("Townsend") bring this diversity action against defendants CBS Radio, Inc. ("CBS"), CBS Radio Stations, Inc. and Penn Jillette. On August 24, 2007, the court dismissed CBS Radio Stations, Inc. Docket Entry 98. The remaining defendants are CBS Radio, Inc. and Penn Jillette. Now before the court is defendant Penn Jillette's motion for summary judgment against the plaintiffs who assert three causes of action: 1) interference with contract, 2) interference with prospective economic advantage, and 3) intentional infliction of emotional distress. Having considered the parties' arguments and for the reasons set forth below, the court enters the following memorandum and order. In addition to defendant Penn Jillette's motion, plaintiffs and defendant CBS have filed cross-motions for summary judgment which are also before the court. A separate memorandum and order is issued on that motion.

1 BACKGROUND

2 The court references its accompanying order ruling on plaintiffs’ and defendant CBS’s
3 cross-motions for summary judgment. Many of the facts underlying this motion are described in
4 that order and are not repeated here. To summarize, plaintiff John London and defendant Penn
5 Jillette are talk-radio personalities who hosted back-to-back shows broadcast on a CBS-owned San
6 Francisco radio station KIFR-FM. London, whose show used a violent and confrontational format,
7 frequently attacked Jillette and on more than one occasion called for his death. See *Inferno Tracks*
8 *CD*, Track 3. Jillette’s management team was aware of London’s show and they received emails
9 from Jillette’s listeners reporting London’s attacks. See *Barnhart Dec. Exh. O*. On April 6, 2006,
10 London opened his show with the following “audience promotion”: “I’m offering . . . \$5,000 for the
11 person who kills Penn Jillette. Now, I’ll add \$2,000—that’s a total of \$7,000—if there is some
12 suffering involved. If it’s a clean kill, five grand.” *Cruz. Dec. ¶ 20, Exh. C*. The next day, on April
13 7, CBS terminated all three plaintiffs. Plaintiffs have now brought this action against defendant
14 Penn Jillette, asserting that Jillette and his management team tortiously interfered with their
15 employment contracts and economic relations and caused them to suffer emotional distress.
16 Plaintiffs’ theory of the case is that CBS’s decision to terminate the plaintiffs was driven by Jillette’s
17 demands that they be fired.

18
19 LEGAL STANDARD

20 Summary judgment is proper when the pleadings, discovery and affidavits show that there is
21 “no genuine issue as to any material fact and that the moving party is entitled to judgment as a
22 matter of law.” Fed. R. Civ. R. 56(c). Material facts are those which may affect the outcome of the
23 case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is
24 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving
25 party. Id. The party moving for summary judgment bears the burden of identifying those portions
26 of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of
27 material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the
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1 opposing party will have the burden of proof at trial, the moving party need only point out “that
2 there is an absence of evidence to support the nonmoving party’s case.” Id.

3 Once the moving party meets its initial burden, the nonmoving party must go beyond the
4 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
5 genuine issue for trial.” Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving
6 party’s allegations. Id.; Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir.
7 1994). The court may not make credibility determinations, and inferences to be drawn from the
8 facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New
9 Yorker Magazine, 501 U.S. 496, 520 (1991); Anderson, 477 U.S. at 249.

10 The moving party may “move with or without supporting affidavits for a summary judgment
11 in the party’s favor upon all or any part thereof.” Fed. R. Civ. P. 56(a). “Supporting and opposing
12 affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in
13 evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated
14 therein.” Fed. R. Civ. P. 56(e).

15
16 DISCUSSION

17 I. Interference With Contract

18 The tort of interference with contract requires the following elements: (1) a valid contact
19 between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s
20 intentional acts designed to induce a breach or disruption of the contract; (4) actual breach or
21 disruption; and (5) resulting damage. Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26,
22 55 (1998). In the court’s companion order ruling on plaintiffs’ and defendant CBS’s cross-motions
23 for summary judgment, the court finds that there is no dispute that all three plaintiffs had valid
24 employment contracts with CBS. Second, construing the evidence in the light most favorable to the
25 plaintiffs, it is reasonable to infer that since Jillette’s management team was aware of the London
26 show and, thus, his contract with CBS prior to April 7, so too was Jillette himself. It is also
27 reasonable to infer that Jillette’s management team discussed with Jillette the attacks London made
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1 in January, February and March calling for his death. As to the fourth and fifth elements it is
2 undisputed that plaintiffs’ contracts were disrupted when they were terminated and as a result, they
3 suffered damage.

4 Regarding the third element requiring intentional acts designed to induce a breach of
5 contract, defendant Jillette has testified that on the day plaintiffs were fired, Jillette was in contact
6 with CBS executive Rob Barnett because he was concerned for his safety and the safety of his
7 family and his on-air co-host. Jillette Dep. 106–107, 111–112. Jillette testified that he never wanted
8 the plaintiffs fired and never told Barnett or any other CBS executive to fire the plaintiffs. Id.
9 346–347. The defendant has met his initial burden to point out that there is an absence of evidence
10 to support the plaintiffs’ case. The plaintiffs, as the nonmoving parties who bear the burden of proof
11 at trial, must therefore go beyond the pleadings to set forth specific facts showing that there is a
12 genuine issue for trial. Plaintiffs point to an April 7 email sent from Michael Goudeau, Jillette’s on-
13 air co-host, in response to one of Jillette’s listeners concerned about London’s solicitation. The
14 email states, “[w]e’ve sent it on to the boss at CBS and I [Goudeau] expect there will be something
15 done about it.” Barnhart Dec., Exh. K, JIL 031. The testimony of the local station manager Ken
16 Kohl indicates that Barnett first learned of the on-air solicitation from Jillette’s management team.
17 Kohl testified that Barnett first heard about the incident from “Penn Jillette’s people.” Kohl Dep.
18 226, 228. Plaintiffs also point out that Jillette directed his managers Ken “Krasher” Lewis and Peter
19 “Spicoli” Golden to communicate with CBS and to “take care of this.” Jillette Dep. 121–122,
20 143–144, 147, 149. The record, however, does not contain any deposition testimony or declaration
21 from either Krasher or Spicoli, and therefore, does not reflect what they may have communicated to
22 CBS. The record is also unclear as to Krasher’s and Spicoli’s authority in dealing with matters
23 related to Jillette and his relationship with CBS. See id. 469–470. Plaintiffs bear the burden of
24 proof at trial, and therefore, it is plaintiffs’ burden to come forward with deposition testimony or
25 other evidence establishing the content of the communications between Krasher, Spicoli, and CBS
26 executives. In the absence of this kind of additional evidence, the current record shows that Jillette
27 and his management team communicated with CBS in order to convey their understandable concern
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1 for the safety of Jillette and his family. Plaintiffs have failed to oppose defendant’s motion for
2 summary judgment with “significant probative evidence” that the communications between Jillette,
3 Jillette’s management team, and CBS were designed to induce a breach of contract. Bias v.
4 Moynihan, 508 F.3d 1212, 1218 (9th Cir. 2007). Accordingly, defendant is entitled to summary
5 judgment as to this cause of action.

6
7 II. Interference With Prospective Economic Advantage

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9 The elements of intentional interference with prospective economic advantage are similar to
10 the elements of inducing breach of contract¹, with the exception that unlike interference with
11 contract, liability is contingent upon an additional showing that defendant’s conduct was “wrongful
12 by some legal measure other than the fact of interference itself.” Korea Supply Co. v. Lockheed
13 Martin Corp., 29 Cal. 4th 1134, 1154 (2003). In other words, there must be some “independently
14 wrongful conduct.” Id. “An act is not independently wrongful merely because defendant acted with
15 an improper motive.” Id. at 1159. Rather, “an act is independently wrongful if it is unlawful, that is,
16 if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable
17 legal standard.” Id. (through bribes and sexual favors, defendants engaged in unlawful behavior in
18 order to secure a contract and therefore, defendants’ acts, in addition to interfering with plaintiffs’
19 business expectancy, were wrongful in and of themselves).

20 In this instance, plaintiffs’ prospective economic advantage claim involves the same alleged
21 conduct with the same economic relationship as plaintiffs’ claim for inducing breach of contract.
22 Jillette’s alleged interference with plaintiffs’ employment at CBS is simply “interference” and
23 cannot be independently wrongful other than the fact of interference itself. Moreover, as the court
24 has already discussed, plaintiffs have not come forth with sufficient evidence to demonstrate that
25 defendant’s conduct was designed to interfere with plaintiffs’ contracts or otherwise disrupt their
26 economic relationship with CBS. Accordingly, defendant is entitled to summary judgment on this
27 cause of action.

1 III. Intentional Infliction of Emotional Distress

2 The tort of intentional infliction of emotional distress requires extreme and outrageous
3 conduct that results in severe emotional distress. Extreme and outrageous conduct is defined as
4 conduct “so extreme as to exceed all bounds of that usually tolerated in a civilized community.”
5 Christiansen v. Superior Court, 54 Cal. 3d 868 (1991). The conduct alleged in this case involves
6 statements Jillette made to various people including his management team and CBS executives.
7 These statements expressed Jillette’s concern for his personal safety. The court concludes that no
8 reasonable jury could find that these statements are extreme and outrageous. Indeed, they are a
9 natural reaction to plaintiff London’s extreme and outrageous murder solicitation. As for severe
10 emotional distress, London states that his termination was “very distressing and surprising and
11 shocking” and that he is concerned about his ability to secure future employment. London Dep.,
12 262:19-263:3. The court also concludes that based on this evidence, no reasonable jury could find
13 that plaintiffs have suffered severe emotional stress beyond the strain normally associated with
14 losing a job. Accordingly, defendant is entitled to summary judgment as to this cause of action.

15
16 CONCLUSION

17
18 Defendant’s motion is GRANTED as to all three causes of action for 1) interference with
19 contract, 2) interference with prospective economic advantage, and 3) intentional infliction of
20 emotional distress.

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22 IT IS SO ORDERED.

23 Dated: January 31, 2008

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25 
26 MARILYN HALL PATEL
27 United States District Court Judge
28 Northern District of California

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ENDNOTES

1. The elements are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. [Korea Supply Co. v. Lockheed Martin Corp.](#), 29 Cal. 4th 1134, 1153 (2003).