

Jeffrey B. Smith
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
jbsmith@garlington.com
Attorneys for Defendant, Lee Enterprises, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY,

Plaintiff,

v.

BITTERROOT PUBLIC LIBRARY,
CITY OF HAMILTON, LEE
ENTERPRISES, INC., and BOONE
KARLBERG P.C.,

Defendants.

Cause No. CV-11-064-M-DWM

DEFENDANT LEE ENTERPRISES,
INC.'S REPLY BRIEF IN SUPPORT
OF MOTION TO DISMISS

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"),
through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully
files its reply brief in support of its Motion to Dismiss.

I. INTRODUCTION

In his response brief, Plaintiff Michael Spreadbury ("Spreadbury") argues
Lee Enterprises' Motion to Dismiss and Brief in Support should be set aside.

However, like Plaintiff's Amended Complaint, Spreadbury fails to set forth sufficient facts to establish a claim against Lee Enterprises upon which relief can be granted. Rather, he continues to make conclusory allegations with no factual basis. As such, Plaintiff's allegations should not be taken as truth. Moreover, even if taken as true, all Counts against Lee Enterprises in Plaintiff's Amended Complaint should be dismissed for failing to state a claim upon which relief can be granted.

Further, Lee Enterprises notes that Plaintiff has subsequently filed a Motion for Leave to File a Second Amended Complaint (Dkt. 21). Since Plaintiff's motion has not been granted by the Court, portions of Plaintiff's response brief which discuss allegations of his Second Amended Complaint are not applicable to Lee Enterprises' Motion to Dismiss Plaintiff's Amended Complaint.¹

II. ARGUMENT

A district court has the authority to dismiss a claim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss, "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1954 (2009).

¹ Co-Defendants City of Hamilton and Bitterroot Public Library have filed a Brief in Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint (Dkt. 24) and Lee Enterprises has joined in the Brief (Dkt. 34)

A. 42 U.S.C. § 1983

Any § 1983 claims alleged against Lee Enterprises should be dismissed. In its opening brief, Lee Enterprises argued Plaintiff's claims under 42 U.S.C. § 1983 should be dismissed since no Counts in Plaintiff's Amended Complaint alleged Lee Enterprises violated any of Spreadbury's constitutional rights and, alternatively, because Spreadbury fails to allege Lee Enterprises acted under color of state law. (Dkt. 7 at 6-8.) In Plaintiff's Response Brief, Spreadbury recognizes Lee Enterprises must have acted under "color of law" for a § 1983 claim to apply. *See* Dkt. 23 at 2.

However, Plaintiff has not alleged facts sufficient to show Lee Enterprises acted under the color of law. "To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown." *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) (citation omitted). Spreadbury fails to show Lee Enterprises had any sort of an agreement and/or plan with the government.

Further, Plaintiff does not dispute Lee Enterprises' argument that they cannot be included in any § 1983 claims since no Counts in Plaintiff's Amended Complaint allege Lee Enterprises violated any of Spreadbury's constitutional rights. Instead, Plaintiff now argues he has "... allege[d] several constitutional deprivations in [his] complaint, ..." Dkt. 23 at 2. However, this does not negate

the fact that Plaintiff's Amended Complaint does not include such Counts against Lee Enterprises. Accordingly, any § 1983 claims against Lee Enterprises in Plaintiff's Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

B. Count 8 - Intentional Interference with Prospective Business Advantage

Count 8 of Spreadbury's Amended Complaint should be dismissed. In a cause of action for intentional interference with prospective economic advantage "the focus of the legal inquiry is on the intentional acts of the 'malicious interloper' in disrupting a business relationship." *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 42, 298 Mont. 213, 994 P.2d 1124 (citation omitted). Spreadbury fails to allege any facts regarding economic relationships or prospective relationships which were disrupted by Lee Enterprises' alleged conduct. Further, he fails to allege Lee Enterprises took any action without right or justification. In fact, Spreadbury's Brief completely fails to respond to Lee Enterprises' arguments regarding the claim of intentional interference with prospective business advantage. Since Spreadbury's Amended Complaint does not provide sufficient information to raise the issue of intentional interference with prospective business advantage, Count 8 should be dismissed.

C. Count 18 - Negligence/Negligence Per Se

Count 18 of Spreadbury's Amended Complaint fails to state a claim upon

which relief can be granted. “The question of whether a duty exists is one of law. Absent a duty, breach of duty cannot be established and a negligence action cannot be maintained.” *Sikorski v. Johnson*, 2006 MT 228, ¶ 13, 333 Mont. 434, 143 P.3d 161. Spreadbury’s Amended Complaints fails to allege Lee Enterprises breached a duty owed to Spreadbury. Spreadbury’s Response Brief alleges Lee Enterprises “had [a] duty to Plaintiff to not violate, or participate with unlawful actions of City of Hamilton.” Dkt. 23 at 3-4. However, this is simply a legal conclusion, and like the rest of his Response Brief and Amended Complaint, Spreadbury fails to allege sufficient factual allegations to support his claim for negligence.

Moreover, Spreadbury’s claim of negligence per se should be dismissed since he fails to cite to a particular statute allegedly violated by Lee Enterprises. In order to establish negligence per se, plaintiff must prove that:

- (1) defendant violated the particular statute;
- (2) the statute was enacted to protect a specific class of persons;
- (3) the plaintiff is a member of that class;
- (4) the plaintiff’s injury is of the sort the statute was enacted to prevent; and
- (5) the statute was intended to regulate members of defendant’s class.

Prindel v. Ravalli County, 2006 MT 62, ¶ 27, 331 Mont. 338, 133 P.3d 165. Lee Enterprises’ initial brief pointed out that Spreadbury’s Amended Complaint fails to allege sufficient facts to support his claim for negligence per se, because Spreadbury did not allege Lee Enterprises violated a statute. Dkt. 7 at 10-12. Spreadbury’s brief fails to respond to Lee Enterprises on this point. As such,

Spreadbury's negligence per se claim should be dismissed.

D. Count 19 - Defamation/Defamation Per Se

Similarly, Count 19 of Spreadbury's Amended Complaint should be dismissed since it fails to support his claim for defamation or defamation per se.

Lee Enterprises' initial brief provided Count 19 should be dismissed because any publications made by Lee Enterprises were privileged pursuant to Montana Code Annotated § 27-1-804(4). Dkt. 7 at 12-17.

Spreadbury does not dispute the articles published by Lee Enterprises (based on the judicial proceedings of criminal trespass charges against Spreadbury) were privileged. Instead, Spreadbury claims "[t]here is no privilege for Defendant Lee Enterprises articles when the court proceeding violated a clearly established right of the Plaintiff under 42 USC§ 1983 [sic]." Dkt. 23 at 7. However, Spreadbury makes this assertion without citing to any authority. As a result, Spreadbury has failed to assert sufficient facts to support his claim for defamation and/or defamation per se, and Count 19 should be dismissed.

E. Count 20 - Intentional Infliction of Emotional Distress

Spreadbury's Amended Complaint fails to set forth sufficient facts to establish a claim for intentional infliction of emotional distress ("IIED"). The trial court must determine "whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress." *Sacco v.*

High Country Indep. Press, Inc., 271 Mont. 209, _____, 896 P.2d at 411, 427. If the evidence presented by the plaintiff is insufficient as a matter of law, his claim must fail. See *McConkey*, ¶ 54.

Lee Enterprises' initial brief argued Count 20 of Spreadbury's Amended Complaint should be dismissed since it fails to show he suffered from severe emotional distress. Dkt. 7 at 17-21. Instead of responding to Lee Enterprises brief, Spreadbury argues "Defendant Lee Enterprises avers incorrectly that physical or psychological evidence of harm must be produced to inact [sic] ED." Dkt. 23 at 6 (citing *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984)). However, Spreadbury misinterprets the Court's holding in *Johnson* (which dealt with emotional distress damages rather than an independent cause of action) and fails to recognize the opinion was overruled by *Jacobsen v. Allstate Insurance Co*, 2009 MT 248, 351 Mont. 464, 215 P.2d 649 (finding a plaintiff did not need to meet the threshold requirement of showing serious or severe emotional distress to recover emotional distress damages, but upholding the threshold requirement of showing serious or severe emotional distress as set forth in *Sacco* for independent causes of action for emotional distress). Regardless, Lee Enterprises has not claimed Spreadbury must allege physical damages to support his claim for emotional distress. Instead, Spreadbury's claim for IIED should be dismissed because his Amended Complaint simply recites the elements for an IIED claim,

and fails to allege sufficient facts to support he suffered emotional distress, whether physical or otherwise.

F. Count 21 - Negligent Intentional Infliction of Emotional Distress

Similarly, Count 21 of Plaintiff's Amended Complaint should be dismissed. First, as expressed above, Spreadbury's Amended Complaint fails to allege Lee Enterprises owed him a duty. Therefore, his claim for negligent infliction of emotional distress fails. *See Wages v. 1st Natl. Ins. Co. of Am.*, 2003 MT 309, ¶ 23, 318 Mont. 232, 79 P.3d 1095 (noting duty and foreseeability are inextricably linked in a negligent infliction of emotional distress claim); *Sacco*, 896 P.2d at 422-423 (in the absence of foreseeability, there is no duty; in the absence of duty, there is no negligence).

Furthermore, Spreadbury fails to allege sufficient facts showing he suffered from emotional distress. Like his claim for IIED, he simply recites the legal elements of a claim for negligent infliction of emotional distress without any factual support. Accordingly, Count 21 of Spreadbury's Amended Complaint should be dismissed.

G. Count 23 - Injunctive Relief

Spreadbury fails to provide sufficient information to support his claim for Injunctive Relief and for Civil Arrest as requested in Count 23 of his Amended Complaint. An injunction is only proper if the applicant is entitled to the relief

demanded. *See* Mont. Code Ann. § 27-19-201 (2009). Spreadbury is not entitled to injunctive relief because his Amended Complaint fails to support any of his claims against Lee Enterprises with the proper factual allegations. Therefore, pursuant to § 27-19-201, an injunction is not proper.

Moreover, Spreadbury is not entitled to an injunctive relief for alleged wrongs committed in the past. “Injunction is not an appropriate remedy to procure relief for past injuries, it is to afford preventive relief only.” *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 456 (internal citation omitted). Spreadbury’s response brief fails to respond to Lee Enterprises’ arguments in this regard. Instead, Spreadbury focuses on his request for civil arrest of Lee Enterprises’ employee and reporter, Perry Backus. Spreadbury argues Montana Code Annotated § 27-16-102(2) “entitles Plaintiff to request the arrest of Perry Backus due to calculated, malicious acts which disabled Plaintiff[’s] ability to work.” Dkt. 23at 5. However, nothing in § 27-16-102(2), gives Spreadbury the authority to civilly arrest anyone. Accordingly, Count 23 of Spreadbury’s Amended Complaint should be dismissed.

H. Count 26 - Punitive Damages

Finally, Plaintiff’s claim for punitive damages should be dismissed for failing to provide sufficient information for such a claim. First, Spreadbury’s claim for punitive damages should be dismissed if the rest of his Counts are dismissed.

“[N]o plaintiff is ever entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts.” *Maulding v. Hardman*, 257 Mont. 18, 26-27, 847 P.2d 292, 298 (1993) (internal quotations and citations omitted) (finding an award of punitive damages was improper since there was no evidence to support plaintiff’s claim).

Further, even assuming the rest of his Counts are not dismissed, Spreadbury fails to allege sufficient facts for a claim of punitive damages. “All elements of punitive damages must be supported by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Trifad Ent., Inc. v. Anderson*, 2001 MT 227, ¶ 54, 306 Mont. 499, 36 P.3d 363; Mont. Code Ann. § 27-1-221(5) (2009). Spreadbury alleges Lee Enterprises acted with actual malice. However, like the rest of his Amended Complaint, he fails to provide any evidence to support his allegations. Count 26 of Spreadbury’s Amended Complaint fails to provide any evidence, let alone clear and convincing evidence, to support his claim for punitive damages. It should be dismissed accordingly.

III. CONCLUSION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the various counts against Lee Enterprises contained in Spreadbury’s Amended Complaint (Counts 8,

18-21, 23 and 26) should be dismissed. The allegations should not be taken as truth for purposes of this motion, since they are simply legal conclusions with no factual basis. Even if taken as truth, the Counts against Lee Enterprises should be dismissed because they fail to state a claim upon which relief can be granted.

DATED this 17th day of May, 2011.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Defendant Lee Enterprises, Inc.'s Reply Brief in Support of Motion to Dismiss is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 2175 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

