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

MICHAEL E. SPREADBURY,

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

Plaintiff,

v.

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

DEFENDANT LEE ENTERPRISES,
INC.'S RESPONSE TO PLAINTIFF'S
OBJECTIONS TO FINDINGS AND
RECOMMENDATIONS OF U.S.
MAGISTRATE JUDGE RE LEE
ENTERPRISES' MOTION TO
DISMISS

Defendants.

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully files its Response to Plaintiff's Objections to Court Findings; In Re: Defendant Lee Enterprises, Inc. (Dkt. 87.)

INTRODUCTION

On July 28, 2011, the U.S. Magistrate Judge entered Findings and

Recommendations (Dkt. 75) regarding Lee Enterprises' Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Plaintiff, Michael Spreadbury's ("Spreadbury") Amended Complaint (Dkt 1-1) for failure to state a claim upon which relief can be granted, and Findings and Recommendations regarding Spreadbury's Motion for Partial Summary Judgment against Lee Enterprises.

The U.S. Magistrate recommended Lee Enterprises' Motion to Dismiss be granted in part, and denied in all other respects. Specifically, the Court recommended dismissal of Spreadbury's defamation claim with respect to the articles published by Lee Enterprises, dismissal of Spreadbury's defamation per se claim, dismissal of Spreadbury's 42 U.S.C. § 1983 claim, and dismissal of Spreadbury's claim of negligence per se. (Dkt. 75.) The U.S. Magistrate also recommended Spreadbury's Motion for Partial Summary Judgment be denied.

Spreadbury objected to the Court's Findings and Recommendations. (Dkt. 87.) However, Spreadbury's objections are without merit and it would be an abuse of discretion for the Court to reject or modify the U.S. Magistrate Judge's recommendations.

ARGUMENT

I. The U.S. Magistrate's Findings and Recommendations Regarding Lee Enterprises' Motion to Dismiss.

"A cause of action may be dismissed under Rule 12(b)(6) either when it asserts a legal theory that is not cognizable as a matter of law, or if it fails to allege

sufficient facts to support an otherwise cognizable legal claim.” (Dkt. 75:5.) Since Spreadbury’s Complaint failed to set forth sufficient facts to support his claims of: defamation (as to the articles published by Lee Enterprises), defamation per se, 42 U.S.C. § 1983, and negligence per se, the U.S. Magistrate correctly recommended dismissing these claims.

A. The U.S. Magistrate Correctly Recommended Dismissal of Spreadbury’s Defamation Claim, As It Pertains to the Articles Published By Lee Enterprises, and Spreadbury’s Claim of Defamation Per Se.

As articulated in the U.S. Magistrate’s Findings and Recommendations, Spreadbury’s claim of defamation regarding the article published by the *Ravalli Republic* and Spreadbury’s claim of defamation per se should be dismissed because the articles were privileged.

Section 27-1-804(4) “makes a fair and true report without malice of a judicial proceeding a privileged publication.” *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529, 723 P.2d 238, 239-240 (1986). Spreadbury’s Amended Complaint basically claims Lee Enterprises defamed Spreadbury by publishing articles about or pertaining to the criminal trespass charges brought against him, which were subsequently dropped by the City. (Dkt. 1-1 at ¶¶ 181-189.) However, Spreadbury’s allegations establish that these matters occurred in the judicial proceedings. Therefore, Lee Enterprises’ reports of the judicial proceedings were privileged and Spreadbury’s claim of defamation (as it pertains to the articles

published by Lee Enterprises) and Spreadbury's claim of defamation per se should be dismissed.

Likewise, Spreadbury's Complaint fails to set forth sufficient facts to show Lee Enterprises published the articles with malice. The U.S. Magistrate correctly pointed out Spreadbury's allegations of malice were purely conclusory and, accordingly, should be dismissed.

Spreadbury's objections to the U.S. Magistrate's recommendation are without merit. Spreadbury argues he was on public property when charged with trespass and Lee Enterprises should have known he could not be charged with criminal trespass on peaceful assembly. (Dkt. 87:7-8.) However, Spreadbury fails to recognize Lee Enterprises simply published articles based on the judicial proceedings brought against him. As such, the articles are privileged and Spreadbury's claim of defamation as to the articles published by Lee Enterprises and his claim of defamation per se should be dismissed.

B. The U.S. Magistrate Correctly Recommended Dismissal of Spreadbury's 42 U.S.C. § 1983 Claims Against Lee Enterprises.

Spreadbury's 42 U.S.C. § 1983 claims against Lee Enterprises should be dismissed because Spreadbury's Complaint fails to set forth sufficient facts to establish Lee Enterprises conspired and/or acted jointly with the government to deprive him of any rights.

In order to recover under § 1983 for conduct by the defendant, a

plaintiff must show that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. The state-action element in § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.

...

[s]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.

Caviness v. Horizon Community Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (internal quotations and citations omitted). The Ninth Circuit Court of Appeals recognizes four tests to determine whether private action qualifies as state action: “(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.” *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotations and citations omitted).

Spreadbury argues Lee Enterprises acted in concert with, or conspired with other Defendants to deprive him of his constitutional rights. However, his Complaint fails to set forth sufficient factual allegations to support his claim. Specifically, Spreadbury fails to show Lee Enterprises had any sort of agreement and/or plan with the government.

Spreadbury objects to the U.S. Magistrate’s recommendations, arguing Lee Enterprises came to an agreement with Defendant City of Hamilton to ask Spreadbury to not enter Lee Enterprises’ store front. (Dkt. 87:8.) However, as correctly pointed out by the U.S. Magistrate, “[a] private party’s conduct in

summoning police to address an individual perceived as threatening does not arise to the level of joint action or a conspiracy.” Dkt. 75:16. (citing *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 899-900 (9th Cir. 2008)).

Spreadbury also asserts the events surrounding his ban from Lee Enterprises’ store front “speak to civil conspiracy.” Dkt. 87:6. However, like his claim of joint action, his Complaint fails to set forth sufficient factual allegations for a conspiracy claim and, accordingly, should be dismissed.

Similarly, Spreadbury’s claim that Lee Enterprises conspired against him by publishing various newspaper articles is made without any support. As described in greater detail herein, articles published by Lee Enterprises were based on official Ravalli County Court documents. They, accordingly, are privileged. Spreadbury essentially claims Lee Enterprises’ act of publishing articles about Spreadbury’s charge of criminal trespass and subsequent conviction amount to a conspiracy against him because the trespass charges were later dropped by the City, and Lee Enterprises should have known “peaceful assembly” on public property is a protected property right. Spreadbury’s description of the charges brought against him is inaccurate. Plus, Spreadbury offers no factual support of a conspiracy or otherwise agreement to deprive him of his rights, and he offers no support that the articles published by Lee Enterprises’ newspapers were false or otherwise not privileged.

Finally, Spreadbury argues Lee Enterprises conspired to interfere in his election and assisted in depriving his library privileges. However, like his other claims, Spreadbury offers no supporting factual allegations, and the U.S. Magistrate correctly noted that “[b]are allegations of joint action are insufficient to overcome a motion to dismiss.” Dkt. 75:16.

Since Spreadbury has offered no factual support for his allegations that Lee Enterprises acted jointly and/or conspired with the other Defendants to deprive him of his rights, the U.S. Magistrate correctly recommended dismissing Spreadbury’s § 1983 claims.

C. The U.S. Magistrate Correctly Recommended Dismissal of Spreadbury’s Claim of Negligence Per Se.

Spreadbury’s Complaint fails to set forth any factual support for his claim of negligence per se.

In order to establish negligence per se, a 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 (internal quotation and citation omitted).

In his objection to the U.S. Magistrate’s recommendations, Spreadbury again

fails to support his claim of negligence per se with any factual allegations. Most significantly, Spreadbury has yet to cite a particular statute allegedly violated by Lee Enterprises in support of his claim for negligence per se.

Since Spreadbury's Complaint fails to assert any facts in support of any of the elements of negligence per se, the U.S. Magistrate correctly recommended dismissal of Spreadbury's claim of negligence per se.

II. Spreadbury's Motion for Partial Summary Judgment Against Lee Enterprises.

Federal Rule of Civil Procedure 56 governs the standard for awarding summary judgment.

Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal quotations omitted).

The moving party bears the burden of showing an absence of material issues of fact and entitlement to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323. Since Spreadbury, the moving party, failed to establish an absence of material issues of fact and an entitlement to judgment as a matter of law, the U.S. Magistrate correctly recommended Spreadbury's Motion for Summary Judgment be denied.

It does not appear that Spreadbury has filed objections to the U.S.

Magistrate's recommendation of dismissing his Motion for Partial Summary Judgment against Lee Enterprises, as his objections regarding Lee Enterprises (Dkt. 87) do not address the U.S. Magistrate's recommendations in this regard. However, any objections would be without merit and the U.S. Magistrate correctly concluded Spreadbury is not entitled to such relief.

First, as articulated above, Spreadbury cannot be entitled to summary judgment on his claims of defamation (as to the articles published by Lee Enterprises), defamation per se, 42 U.S.C. § 1983, and negligence per se because these claims fail to state a claim upon which relief can be granted.

Further, Spreadbury is not entitled to summary judgment as to his remaining claims since he has not identified any facts to support his motion for summary judgment and failed to establish an absence of genuine issues of material fact to these claims. As such, the U.S. Magistrate's Recommendations are correct and should be affirmed.

CONCLUSION

The U.S. Magistrate's Findings and Recommendations regarding Lee Enterprises' Motion to Dismiss and Spreadbury's Motion for Summary Judgment are correct and should be affirmed. Like Spreadbury's Complaint, his objections to the U.S. Magistrate's Recommendations regarding Lee Enterprises' Motion to Dismiss fail to set forth sufficient factual allegations and, therefore, should be

rejected by the Court.

Likewise, although Spreadbury's objections did not address the U.S. Magistrate's Recommendations regarding Spreadbury's Motion for Partial Summary Judgment against Lee Enterprises, any objection would be without merit since Spreadbury failed to set forth any facts to support his Motion for Partial Summary Judgment and failed to establish an absence of genuine issue of fact. The U.S. Magistrate's Recommendations are correct and should be affirmed.

DATED this 17th day of August, 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 Response to Plaintiff's Objections to Findings and Recommendations of U.S. Magistrate Judge Re Lee Enterprises' 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 1874 words long, excluding Caption, Certificate of Service, and Certificate of Compliance.

/s/ Jeffrey B. Smith

Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2011, a copy of the foregoing document was served on the following persons by the following means:

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/s/ Jeffrey B. Smith

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