

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3  
4 Kenneth Dinkins,  
5 Plaintiff/Counterdefendant  
6 v.  
7 Geraldine Schinzel,  
8 Defendant/Counterclaimant  
9

2:17-cv-01089-JAD-GWF

**Order Denying Motion to Dismiss  
and Motion for Summary Judgment,  
and Granting in Part Motion to  
Amend Counterclaim**

[ECF Nos. 23, 27, 49]

10 Geraldine Schinzel claims that Kenneth Dinkins defrauded her in a land-sale  
11 deal, and she has colorfully published her theories about Dinkins on the internet.<sup>1</sup>  
12 When Dinkins sued Schinzel, claiming that she has damaged his business  
13 reputation and caused him emotional distress, Schinzel counterclaimed on fraud  
14 and contract theories. Schinzel claims that, after defrauding her in the real-estate  
15 transaction, Dinkins defamed her on YouTube and elsewhere.<sup>2</sup>

16 Dinkins moves to dismiss all of Schinzel's claims, arguing that they are  
17 meritless and offering various evidence for his position.<sup>3</sup> To evaluate his  
18 arguments, I would have to convert this FRCP 12(b)(6) motion into one for  
19 summary judgment, and I decline to do so at this early litigation stage, so I deny  
20 the motion. Dinkins also moves for summary judgment on his own claims. But  
21 because discovery has not been completed, I grant Schinzel's FRCP 56(d) request<sup>4</sup>  
22 and deny the motion without prejudice to its refileing when the record in this case  
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24 <sup>1</sup> ECF No. 1.

25 <sup>2</sup> ECF No. 21.

26 <sup>3</sup> ECF No. 23.

27 <sup>4</sup> ECF No. 42 at 27–28.  
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1 has been better developed. I then turn to Schinzel’s motion to amend her  
2 counterclaim to add a claim for injunctive relief. I grant the request in part:  
3 because injunctive relief is a remedy, not a “claim,” I deny the request to add a new  
4 cause of action; but Schinzel may amend her counterclaim to include injunctive  
5 relief as a component of her prayer for relief.<sup>5</sup>

## 6 Discussion

### 7 A. Dinkins’s Motion to Dismiss Schinzel’s Counterclaims [ECF No. 23]

8 The very first page of Dinkins’s motion highlights the theory behind his  
9 motion for FRCP 12(b)(6) relief: “The Defendant[’]s Counterclaims contain Blatant  
10 false information.”<sup>6</sup> He spends the next 17 pages of his motion explaining why the  
11 transaction that Schinzel claims happened between herself and Dinkins was  
12 actually between an unrelated party and Dinkins, recharacterizing her allegations,  
13 offering counterfactuals and affirmative defenses, and proclaiming that it was really  
14 Schinzel who was engaging in the type of conduct she accuses Dinkins of.<sup>7</sup>

15 Rule 8 of the Federal Rules of Civil Procedure requires a claimant to plead  
16 enough facts to put the subject of her claim on notice of the nature of the claim. A  
17 claim must be dismissed as insufficient under FRCP 12(b)(6) if the claimant has  
18 failed to plead “enough facts to state a claim to relief that is plausible on its face.”<sup>8</sup>  
19 The claimant need not provide detailed factual allegations, but she has to show  
20 “more than a sheer possibility that a defendant has acted unlawfully.”<sup>9</sup> A true  
21 FRCP 12(b)(6) motion to dismiss tests the sufficiency of the complaint on its face,  
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23 <sup>5</sup> I find all of these matters suitable for disposition without oral argument. LR 78-1.

24 <sup>6</sup> ECF No. 23 at 1.

25 <sup>7</sup> *See generally* ECF No. 23.

26 <sup>8</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

27 <sup>9</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 and the court must assume all allegations in the complaint are true. So, “in ruling  
2 on a 12(b)(6) motion, a court may generally consider only allegations contained in  
3 the pleadings, exhibits attached to the complaint, and matters properly subject to  
4 judicial notice.”<sup>10</sup> Otherwise, the motion must be converted into one for summary  
5 judgment.

6 Dinkins’s motion, though captioned as one under FRCP 12(b)(6), does not  
7 challenge the sufficiency of the allegations in Shinzel’s counterclaim; it challenges  
8 their merits. By asking the court to reject Shinzel’s theories and allegations as  
9 false based on outside evidence that he attaches to his motion, Dinkins is not asking  
10 for true FRCP 12(b)(6) relief, he’s asking for summary judgment. Because this case  
11 remains in its early stages with more than two months left in the discovery period  
12 and three months before summary-judgment motions are due, and because the  
13 record is not yet well developed, I do not find that it would be fair at this stage of  
14 the proceedings to convert this motion into one for summary judgment, so I decline  
15 to do so. Shinzel has pled sufficient facts to support plausible claims, and Dinkins  
16 has not demonstrated otherwise. I thus deny Dinkins’s motion to dismiss Shinzel’s  
17 counterclaims. If Dinkins wants to dispute the merits of Shinzel’s claims, he  
18 should bring a motion for summary judgment at the appropriate time.

19 **B. Dinkins’s Motion for Summary Judgment on His Own Claims [ECF No. 27]**

20 Dinkins also moves for summary judgment in his favor on his claims against  
21 Shinzel, arguing that the evidence supports them.<sup>11</sup> In a responsive affidavit,  
22 Shinzel’s counsel asks the court to delay or deny summary judgment under FRCP  
23 56(d) because he was still waiting for Dinkins’s responses to key discovery requests  
24 that are the subject of a pending motion to compel, and because additional, specific  
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27 <sup>10</sup> *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

28 <sup>11</sup> ECF No. 27.

1 discovery is still needed.<sup>12</sup> Issues from that motion to compel are yet to be resolved,  
2 and supplemental briefing was only recently filed.<sup>13</sup> I find that Schinzel has shown  
3 by affidavit “that, for specified reasons,” she “cannot present facts essential to  
4 justify” her opposition to the motion for summary judgment, and that judicial  
5 economy dictates that Dinkins’s motion for summary judgment—filed less than four  
6 months into this contentious litigation—be denied without prejudice under FRCP  
7 56(d). Dinkins may file a new motion for summary judgment between the close of  
8 discovery and the deadline for dispositive motions.<sup>14</sup>

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10 **C. Schinzel’s Motion to Amend Her Counterclaim to Add a Claim for Injunctive  
Relief [ECF No. 49]**

11 Schinzel has also moved to file an amended counterclaim to add a “Sixth  
12 Claim for Relief” entitled “Permanent Injunction.”<sup>15</sup> FRCP 15(a)(2) directs that  
13 “[t]he court should freely give leave when justice so requires.”<sup>16</sup> In determining  
14 whether to grant leave to amend, district courts consider five factors: (1) bad faith,  
15 (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and  
16 (5) whether the movant has previously amended the complaint.<sup>17</sup>

17 This is Schinzel’s first request to amend her counterclaim, and it is timely  
18 because it was filed before the October 8, 2017, deadline to amend pleadings.<sup>18</sup> I

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20 <sup>12</sup> ECF No. 42 at 27–28.

21 <sup>13</sup> *See, e.g.*, ECF Nos. 37, 46, 53, 58 (minutes), 61, and 64.

22 <sup>14</sup> *See* Scheduling Order at ECF No. 13.

23 <sup>15</sup> ECF No. 49.

24 <sup>16</sup> Fed. R. Civ. P. 15(a)(2).

25 <sup>17</sup> *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (internal citation  
26 omitted).

27 <sup>18</sup> *See* ECF No. 13.

1 find no evidence of bad faith, undue delay, or futility of amendment here. And  
2 considering that discovery is still ongoing and various discovery disputes remain  
3 unresolved, amendment will not cause any prejudice to Dinkins.

4 But there is a glaring defect in the request: injunctive relief is not a  
5 claim—it’s a remedy. A permanent injunction is a form of relief that the court may  
6 grant when a plaintiff succeeds on a substantive cause of action that lends itself to  
7 this remedy.<sup>19</sup> So I grant the motion only in part: Schinzel may amend her  
8 counterclaim to add injunctive relief as a component of her prayer for relief; in all  
9 other respects, her motion to amend<sup>20</sup> is denied.

10 **Conclusion**

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 • Dinkins’s Motion to Dismiss Schinzel’s Counterclaim [ECF No. 23] is  
13 **DENIED**;
- 14 • Dinkins’s Motion for Summary Judgment [ECF No. 27] is **DENIED**  
15 under FRCP 56(d) without prejudice to Dinkins’s ability to file a  
16 motion for summary judgment between the close of discovery and the  
17 dispositive-motion deadline; and
- 18 • Schinzel’s Motion to Amend Counterclaims to Add a Claim for  
19 Injunctive Relief [ECF No. 49] is **DENIED**, except that Schinzel has  
20 until November 9, 2017, to file an amended counterclaim (she need

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25 <sup>19</sup> See, e.g., *Fauley v. Washington Mut. Bank FA*, No. 3:13-CV-00581-AC, 2014 WL  
26 1217852, at \*9 (D. Or. Mar. 21, 2014) (“the court is convinced that Fauley’s ‘claim  
27 for injunctive relief’ is actually a prayer for relief which the court may consider only  
after adjudicating her substantive causes of action”).

28 <sup>20</sup> ECF No. 49.

1 not attach it to a restated answer, she can file simply an Amended  
2 Counterclaim) **to add injunctive relief as one of the remedies** sought in  
3 her prayer for relief.

4 DATED: October 30, 2017.

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U.S. District Judge Jennifer A. Dorsey

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