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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRIAN KNIGHT,)	
)	
Plaintiff,)	3:11-CV-0146-LRH-RAM
)	
v.)	
)	<u>ORDER</u>
CLIMBING MAGAZINE; et al.,)	
)	
Defendants.)	

Before the court is defendants SKRAM Media, LLC (“SKRAM”) and Climbing Magazine’s (“CM”) renewed motion to dismiss. Doc. #56. Pro se plaintiff Brian Knight (“Knight”) filed an opposition (Doc. #58) to which defendants replied (Doc. #59).

Also before the court is Knight’s motion to strike defendants’ reply. Doc. #60.

I. Facts and Background

In its January 2009 edition, defendant CM published an article entitled “The Tao of Mr. Way,” written by non-party Cedar Wright. Plaintiff Knight alleges that he is identified by name as the “Mr. Way” discussed in the article and that the article has subjected him to ridicule from the climbing community.

On December 23, 2010, Knight filed a complaint against defendants for libel and intentional infliction of emotional distress. Doc. #1, Exhibit A. On June 29, 2011, Knight filed an amended complaint. Doc. #24. The court, on motion by defendant, dismissed the amended complaint but

1 granted Knight leave to file another amended complaint setting out specific causes of action. *See*
2 Doc. #54.

3 On June 25, 2012, Knight filed a second amended complaint. Doc. #55. In his second
4 amended complaint, Knight alleges six causes of action: (1) defamation; (2) false light; (3) public
5 disclosure of private facts; (4) appropriation of publicity; (5) intentional infliction of emotional
6 distress; and (6) negligent infliction of emotional distress. *Id.* Thereafter, defendants filed the
7 present renewed motion to dismiss. Doc. #56.

8 **II. Legal Standard**

9 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
10 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
11 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
12 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
13 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
14 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
15 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
16 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.
17 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

18 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
20 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
21 the court to draw the reasonable inference, based on the court’s judicial experience and common
22 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
23 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
24 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
25 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
26 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

1 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
2 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
3 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
4 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
5 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
6 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
7 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
9 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

10 **III. Discussion**

11 **A. Defendant Climbing Magazine**

12 In their motion, defendants argue that defendant CM is not a separate legal entity capable of
13 being sued. The court agrees. Defendant CM is merely a magazine publication owned by defendant
14 SKRAM. As such, it is not a separate legal entity capable of being sued in its own capacity. Rather
15 it is an intellectual property asset. Accordingly, the court shall dismiss CM as a defendant.

16 **B. Defamation and False Light**

17 In Nevada, when a cause of action arises in another state, that state’s statute of limitations
18 provision applies. *See* NRS 11.020. Knight’s claims for defamation and false light occurred in
19 California, where he resides. *See McGuire v. Brightman*, 79 Cal. App. 3d 776, 785 (1978) (holding
20 that “the essence of defamation is injury to the reputation of the plaintiff in his home area where he
21 is known”). California has a one-year statute of limitation for defamation and false light claims. *See*
22 California Code of Civil Procedure 340(c).

23 Here, Knight’s claims for defamation and false light claims are barred by the applicable
24 statute of limitations. Knight did not file a complaint asserting defamation or false light claims until
25 December 23, 2010 (Doc. #1, Exhibit 1), almost two years after the publication of the article in
26 January 2009. Accordingly, Knight’s defamation and false light claims shall be dismissed.

1 **C. Public Disclosure of Private Facts**

2 To allege a claim for public disclosure of private facts a plaintiff must allege: (1) a public
3 disclosure; (2) of a private fact; (3) which would be offensive or objectionable to a reasonable
4 person; and (4) which is not of a legitimate public concern. *See Shulman v. Group W. Prods., Inc.*,
5 955 P.2d 469, 478 (Cal. 1998).

6 The court has reviewed Knight’s second amended complaint and finds that he does not
7 allege the disclosure or dissemination of a private fact. In his second amended complaint, Knight
8 alleges that non-party Wright wrote about conversations he had with Knight and actions he
9 witnessed in various restaurants. These statements and actions were made in public places where
10 Knight did not have an expectation of privacy. Therefore, the court finds that Knight has not
11 alleged any private facts disclosed by the defendants. Accordingly, the court shall dismiss this
12 claim.

13 **D. Appropriation of Publicity**

14 To state a claim for appropriation of a name or likeness, a plaintiff must allege: (1) the
15 defendant used the plaintiff’s name, likeness, or identity; (2) without the plaintiff’s consent; (3) for
16 the use of advertising or solicitation of commercial advantage; and (4) injury. *See White v. Samsung*
17 *Electronics Am.*, 871 F.2d 1395, 1397; *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417
18 (Cal. 1983). Further, it is sufficient to allege that a plaintiff’s name or likeness was used to motivate
19 a decision to purchase a particular product or service. *Lee v. Penthouse Int’l*, 1997 U.S. Dist.
20 LEXIS 23893, *7 (CD Cal. 1997).

21 In his second amended complaint, Knight alleges that defendant Skram used his name and
22 likeness in the article without his permission. Knight further alleges that, because he is a well
23 known fixture in the climbing community, the appearance of this name in the magazine article
24 increased the magazine’s circulation and popularity which ultimately led to increased advertising
25 revenue. The court finds that these allegations are sufficient to allege a claim for appropriation of
26

1 publicity.¹

2 **E. Infliction of Emotional Distress**

3 To establish a claim for either intentional or negligent infliction of emotional distress, a
4 plaintiff must show both (1) extreme or outrageous conduct by defendant; and (2) severe emotional
5 distress. *Dillard Dept. Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999). Extreme and
6 outrageous conduct is that which is “outside all possible bounds of decency” and is intolerable in
7 civil life. *Maduikie v. Agency Rent-A-Car*, 953 P.2d 24, 25 (Nev. 1998).

8 In his second amended complaint, Knight alleges that the published article presented him in
9 a bad light and that he has received ridicule from the climbing community as a result. The court
10 finds that these allegations are insufficient to state a claim for intentional and negligent infliction of
11 emotional distress. First, there are no allegations that defendants acted in a manner that was outside
12 all possible bounds of decency in publishing an article concerning Knight’s activities carried out in
13 a public space including a public restaurant, nor does the court find that the publishing of such an
14 article is extreme or outrageous conduct that cannot be condoned in civil life. Second, Knight has
15 failed to allege any actual emotional distress or physical harm that resulted from the article.
16 Therefore, the court finds that Knight has failed to allege a claim for either intentional or negligent
17 emotional distress. Accordingly, the court shall dismiss these claims.

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24 ¹ The court notes that Knight’s claim for appropriation of publicity may be subject to several
25 affirmative defenses including the defense of newsworthiness as Knight alleges to be a well known personality
26 in the climbing community. However, as defendant Skram has not raised any affirmative defenses at this point
in the litigation, the court makes no findings or conclusions regarding any defense’s merits or applicability to
this claim.

1 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #56) is
2 GRANTED in-part and DENIED in-part. Plaintiff's first cause of action for defamation; second
3 cause of action for false light; third cause of action for public disclosure of private facts; fifth cause
4 of action for intentional infliction of emotional distress; and sixth cause of action for negligent
5 infliction of emotional distress are DISMISSED from plaintiff's second amended complaint
6 (Doc. #55). Plaintiff's fourth cause of action for appropriation of publicity is NOT DISMISSED.

7 IT IS FURTHER ORDERED that plaintiff's motion to strike (Doc. #60) is DENIED.

8 IT IS SO ORDERED.

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10 DATED 18th day of December, 2012.



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LARRY R. HICKS
13 UNITED STATES DISTRICT JUDGE
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