JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-8443-GW(MRWx)	Date	April 19, 2013
Title	*Nadia Naffe v. John Patrick Frey, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER CONFIRMING TENTATIVE RULING

The Court confirms the Tentative Ruling issued this day as its final ruling, with the following additional comments. At oral argument, Plaintiff's counsel directed the Court to the Ninth Circuit's decision in *McDade v. West*, 223 F.3d 1135 (9th Cir. 2000), for support that the allegations here are sufficient to demonstrate that defendant Frey acted under color of state law. Though none of the parties have ever actually cited that decision in their briefing on the current motion, the Court nevertheless considered it when it issued its ruling on the motions to dismiss the original Complaint. *See* Docket No. 29, at 9. It also incorporated that discussion into its present Tentative Ruling. *See* Tentative Ruling, at 2 n.4.

Put simply, *McDade* is not this case. In *McDade*, an employee of the Ventura County District Attorney's office illegally used the office's Medical Eligibility Data System to find information about her husband's ex-wife's location at a battered women's shelter. *See* 223 F.3d at 1137-39. Indeed, the Ninth Circuit specifically noted that it was considering a "case of first impression," presenting "the novel question of whether a state employee who accesses confidential information through a government-owned computer database acts 'under color of state law.'" *Id.* at 1139. There is plainly no equivalent allegation in this case.

At oral argument, Plaintiff's counsel also argued that Frey, by way of his Internet postings, was threatening to prosecute Plaintiff for violation of California Penal Code § 632, due to her involvement in separate instances of nonconsenual recordings of conversations with Congresswoman Maxine Waters and Waters's husband. When the Court first considered the "tweet" at issue for this point, it noted that it was difficult to discern the meaning behind it, but that it appeared Frey was referring to an incident or actions that had taken place out of state, and that he was referring to potential violations of *federal* law.

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See Docket No. 29, at 10. In her briefing in relation to the instant motions, Plaintiff argued that Frey was actually referring to Plaintiff's possession of James O'Keefe's emails. *See* Docket No. 53, at 9:1-3. In the current Tentative Ruling, the Court expressed skepticism concerning what possible violation of California state law that would have entailed for Frey to be threatening prosecution of Plaintiff. *See* Tentative Ruling, at 3-4 & n.8. Now, at oral argument, for the first time, Plaintiff's counsel decided that Frey must have been referencing Penal Code section 632.

The shifting sands of Plaintiff's theory is certainly understandable – the Court remains of the view that it is unclear what Frey is talking about in the communication at issue. But the Supreme Court's view in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is clear. You do not get to discovery with non-fact-based speculation, and conduct that is merely consistent with liability is not enough to get you there either. *See id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hartmann v. Cal. Dep't of Corrections & Rehab.*, 707 F.3d 1114, 1121-22 (9th Cir. 2013). Plaintiff's latest theory does not overcome this problem. As such, the Court confirms its Tentative Ruling and dismisses Plaintiff's Section 1983 claim without leave to amend.

In its present Tentative Ruling, the Court also teed up for the parties the question of whether Plaintiff had done enough to support her allegation that an amount in excess of $75,000 is/was at issue in this case. In response, Plaintiff's counsel said nothing about the subject at oral argument. As such, for the reasons more fully explained in the Tentative Ruling, the Court concludes that Plaintiff has not satisfied her burden of demonstrating that jurisdictional minimum. *See also McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839, 845 (7th Cir. 2009). For that reason, the Court concludes that diversity jurisdiction is not present in this action and dismisses her remaining claims, without prejudice, pursuant to 28 U.S.C. § 1367(c)(3).

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