

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/21/15

DEPT. 86

HONORABLE JOANNE O'DONNELL

JUDGE

N DIGIAMBATTISTA

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

J DE LUNA/COURTROOM ASST

ELECTRONIC RECORDING MONITOR

3

NONE

Deputy Sheriff

BUFORD J. JAMES/CSR 9296

Reporter

9:30 am

BC589145

Plaintiff

CHARLES E. WEIR (X)

Counsel

GREGORY R. JONES (X)

STEMEXPRESS LLC ET AL

VS

Defendant

THE CENTER FOR MEDICAL PROGRESS
AL

Counsel

CHARLES S. LIMANDRI (X)

PAUL M. JONNA (X)

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Matter comes on for hearing and is argued. The court takes the matter under submission.

LATER: The court rules as follows:

Plaintiffs' evidentiary objections to the Declaration of David Daleiden are sustained.

Plaintiffs' application for further injunctive relief is denied. The temporary restraining order is dissolved.

The Court's fundamental consideration when it assesses the propriety of injunctive relief is the balancing of equities. Robbins v. Superior Court of Sacramento County (County of Sacramento) (1985) 38 Cal.3d 199, 205; see also Linthicum v. Butterfield (2009) 175 Cal.App.4th 259, 266-267 (a claim for injunctive relief is an action in equity, resolved upon equitable principles). In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the likelihood that the petitioner will prevail on the merits of its case at trial, and (2) the interim harm that the petitioner is likely to sustain if the injunction is denied as compared to the harm that the respondent is likely to suffer if the court grants a preliminary

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injunction. Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal.App.4th 1279, 1283; Huong Que, Inc. v. Luu (2007) 150 Cal.App.4th 400, 408. Additionally, an injunction will generally not issue unless the moving party establishes both a real threat of immediate and irreparable interim harm (Choice-in-Education League v. Los Angeles Unified School Dist. (1993) 17 Cal.App.4th 415, 431) and the inadequacy of legal remedies (Triple A Machine Shop v. California (1989) 213 Cal.App.3d 131, 138). The party seeking the injunction bears the burden of proof. O'Connell v. Superior Court of Alameda County (Valenzuela) (2006) 141 Cal.App.4th 1452, 1481.

Proposed Injunction. Plaintiffs seek is an order that Defendants and parties acting in concert with them:

refrain from (i) any manner of releasing, publishing, disclosing, posting, sharing, uploading, downloading, transferring, or any other means of disseminating, including on the website of The Center Medical Progress, located at <http://www.centerformedicalprogress.org>, (ii) any file, media, device, or document be it electronic, digital, analog, or physical in nature (iii) that contains or represents a recording of any portion (in whole or part) of (iv) any communication (verbal and non-verbal) (v) made by Catherine Dyer, Kevin Cooksy, or Megan Barr (vi) on the evening of May 22,

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2015 at approximately between 4:30 p.m. PST and 6:45 p.m. PST (vii) that occurred at, near, or in the restaurant known as Bistro 33, located at 4364 Town Center Boulevard, El Dorado Hills, California

This is a sufficiently definite, specific and clearly prohibitory injunction.

Probability of Prevailing. Plaintiffs attempt to establish that Defendants' conduct constitutes an invasion of privacy under California Penal Code Section 632. Section 632 prohibits unauthorized recording of confidential conversations, imposing liability for:

intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device record[ing] the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio Penal Code § 632(a)

Plaintiff Dyer testifies that Defendant Daleiden, using the false identify of "Robert Sarkis," invited Defendants to a business meeting (Dyer Decl., 15-18). Plaintiff Dyer states that she selected the meeting place and chose Bistro 33 because its seating arrangement increases its privacy (id. 19).

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She also states that she scheduled the meeting for 4:30 p.m. because the restaurant is less crowded at that time (id.). Dyer testifies that on May 22 the parties were seated in a comparatively isolated booth in the restaurant, and the restaurant was not crowded: "We were seated in a remote area of the restaurant situated on a segregated floor that had no other diners . . . [and] the main dining area was virtually empty [except] for us" (id., 20). Dyer testifies that "Tennenbaum" positioned herself "awkwardly" during the conversation and that Daleiden "appeared nervous [and] was visibly perspiring (id., 21). Dyer also testifies that Defendants' line of questioning was unusual, in that their questions emphasized Plaintiffs' fetal tissue procurement business to the exclusion of more frequently used procurement types (id., 22, 23). Dyer also testifies that she attempted to keep the conversation confidential, stopping the conversation when restaurant staff approached (id., 24) and specifically instructing Tennenbaum to keep her voice down during the conversation so that they would not be overheard (id., 25). Dyer testifies that she informed Defendants that Plaintiffs would prepare a comprehensive confidentiality agreement that would cover the conversation (id., 26). Dyer testifies that she later identified "Sarkis" as Defendant Daleiden when she heard Daleiden's voice in a covert video of his conversation with Ds. Deborah Nucatola of Planned Parenthood that

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Defendant Center for Medical Progress released on or about July 14, 2015 (id., 40).

Plaintiff also submits the declarations of Megan Barr and Kevin Cooksy, both of whom were also present at the May 22, 2015 meeting. The Barr and Cooksy Declarations echo Dyer's statements with respect to the seclusion of the conversation, the unusual positioning of Daleiden and Tennenbaum, the content of the conversation, and the measures undertaken to keep the conversation private (Barr Decl., 10-15; Cooksy Decl., 3-7).

Opposing the application, Defendant Daleiden admits that he recorded the conversation (Daleiden Decl., 6, 15). Daleiden, however, disputes that the conversation was confidential, essentially contradicting the statements of Barr, Cooksy and Dyer (id., 9-11, 13).

The implication of both the moving and responsive declarations is that Plaintiffs were not aware that their conversation was being recorded. This evidence sufficiently establishes the elements of a "record[ing]" undertaken "intentionally and without the consent of all parties." Penal Code § 632(a). The Court thus must determine whether the communication was confidential. The Penal Code defines that term as follows:

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The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. Penal Code § 632(c)

The test of whether a conversation is "confidential" is an objective one. *Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929. Plaintiffs' testimony that the parties were "seated in a remote area of the restaurant situated on a segregated floor that had no other diners" and that "[t]he main dining area was virtually empty [except] for [them]" is fundamentally undisputed. The sole point of contention between Dyer's and Daleiden's testimony is whether Dyer exhibited concern for the confidentiality of the conversation when the restaurant began to fill up, taking steps to modify the conversation's volume and content, particularly when wait staff approached. Daleiden essentially denies that this happened. Based solely on the factual content of the declarations, the Court cannot determine which party is telling the truth. Although Daleiden's testimony is self-serving, so is the testimony of Plaintiffs' witnesses. However, Daleiden's concealment of his identity during the

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May 22, 2015 conversation and his admission that he was surreptitiously recording the conversation render his testimony less worthy of credence than Dyer's. The Court finds that the conversation was confidential within the meaning of Penal Code Section 632(c).

Defendants seek to avail themselves of the exception to Penal Code Section 632 concerning the recordation of certain crimes. That exception provides as follows, in relevant part:

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person Penal Code § 633.5

Defendants contend that they "reasonably believed" that they were recording evidence related to the commission of "felon[ies] involving violence against the person," to wit, fetal murder under Penal Code § 187(a) and partial-birth abortion under 18 USC § 1531. The argument is poorly taken. California's murder statute applies to fetal humans, but contains an exception for an act that "was solicited, aided, abetted, or consented to by the mother of the

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fetus." Penal Code § 187(a)(3). Defendants offer no evidence that any of Plaintiffs' tissue procurement technicians were acting without maternal consent. Defendants also provide no evidence that they reasonably believed that partial-birth abortions were being conducted or that violation of the federal statute is a "felony involving violence." Defendants' apparent ideological conviction that fetal tissue procurement is a violent felony does not, without more, rise to the level of a "reasonable belief" within the meaning of Penal Code Section 633.5. Accordingly, Defendants have not established the existence of a defense to Plaintiffs' cause of action under Penal Code Section 632.

For the foregoing reasons, Plaintiffs have established the probability that they will prevail on their claim based on Penal Code § 632. This showing, however, does not entitle Plaintiffs to injunctive relief. Although Penal Code Section 637.2 provides a civil litigant a private right of action and expressly authorizes injunctive relief "to enjoin and restrain any violation of this chapter," nothing in section 632 and its related statutes prevents the publication of information unlawfully procured through unlawful privacy violations. *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 167 ("Penal Code section 632 does not prohibit the disclosure of information gathered

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in violation of its terms."). Plaintiffs' probability of prevailing on their Penal Code Section 632 cause of action, therefore, does not entitle them to the requested injunctive relief.

Equitable Assessment and Balancing of Harms. In addition to establishing the likelihood of prevailing, Plaintiffs also must establish that the interim harm they are likely to sustain if the injunction is denied is greater than the harm Defendants will suffer if the preliminary injunction is granted. *Huong Que, Inc., supra*, 150 Cal.App.4th at 408. On this point, Plaintiffs' application comes into direct conflict with Defendants' free speech rights. Plaintiffs' proposed injunction would prevent Defendants from publishing the recorded material from the May 22, 2015 meeting. This proposed injunction would be a prior restraint on Defendants' right to free speech under the First Amendment. *Wilson v. Superior Court of Los Angeles County (Watson)* (1975) 13 Cal.3d 652, 658; see also *San Diego Unified Port District v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 970 (California's free-speech protections are "more protective, definitive and inclusive of rights to expression of speech than their federal counterparts."). This significantly tilts the balance of harms in favor of Defendants. *Elrod v. Burns* (1976) 427 U.S. 347, 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

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irreparable injury."). This is true even where the speech is false, defamatory, violative of privacy rights or otherwise tortious in character. Gilbert v. National Enquirer, Inc. (1996) 43 Cal.App.4th 1135, 1147-1148 ("The threatened invasion to [the] right of privacy and the threatened harm to reputation are not the sort of 'extraordinary circumstances' required to justify a prior restraint."); Evans v. Evans (2008) 162 Cal.App.4th 1157, 1168. The harms Plaintiffs assert in their moving papers are generally the harms discussed in Gilbert and are thus insufficient to counterbalance the constitutional harms that the injunction would cause Defendants. Gilbert, 43 Cal.App.4th at 1147-1148.

Plaintiffs also assert that there is a potential safety risk involved in releasing the information (Dyer, 46-47, 51). In support of this assertion, Plaintiff Dyer declares that she fears for her safety if the video is published, and, specifically, that her personal security staff recently indicated that an unknown person had been conducting surveillance of her property from the street and her property boundary (id., 47). Dyer's concerns for her personal safety appear to be based in observable fact. However, as Defendants observe, those threats apparently exist independent of the publication of the videotape as it has not yet been published. Therefore, the potential jeopardy to Dyer and

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Stemexpress employees does not outweigh Defendants' First Amendment rights.

A copy of this minute order is faxed to counsel of record as set forth below:

CHARLES E. WEIR: 310-277-4730

CHARLES S. LIMANDRI: 858-759-9938

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