

COMMONWEALTH OF MASSACHUSETTS

Norfolk, SS

Superior Court

Brooks-Davis,
<i>Plaintiff,</i>
v.
Tokarowski <i>et al,</i>
<i>Defendants.</i>

Case No. 1982CV00771

Memorandum of Law in Support of Motion for Summary Judgment of Liability for Count I

Plaintiff Jair A. Brooks-Davis ("Davis") respectfully requests that the Court, pursuant to Rule 56(c), grant his Motion for Summary Judgment of Liability for Count I against Defendants Duranjay Dobson, Kessler Bonheur, Marcus Andre, and Daniel Dorinvil (the "Defendants")¹ because they secretly recorded Davis's oral communications in violation of M.G.L. c. 272, § 99Q. They used the secret recordings to make a video for YouTube called "To Catch a College Predator" (the "Video").

The Video falsely portrayed Davis as a sexual predator simply because he had accepted a woman's invitation to come to her room to engage in romantic activities. After luring Davis to her room, Defendants confronted him. They refused to let him leave. They accused him of heinous crimes.

¹ The two other Defendants have apologized to Davis and quickly resolved their respective cases amicably.

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A few weeks later, on May 26, 2019, Defendants posted the Video where they falsely depicted him as a rapist. On June 20, 2019, this Court entered a stipulated preliminary injunction that required that the Defendants remove the Video during the duration of the case.

Davis now seeks partial summary judgment of liability for Count I to ensure that the Defendants are permanently enjoined from posting the Video so that Davis may move on with his life.²

Facts

On or before April 24, 2019, Duranjay Dobson, Kessler Bonheur, Marcus Andre, and Daniel Dorinvil formed a collective group known as the Unkut Kings ("Defendants" or "Kings"). Statement of Material Facts ("SAMF"), at 1. The Kings produce video content to post online through various social media accounts, including Twitter, Instagram, and YouTube, under the screen name Unkut Kings. *Id.*, at ¶ 2. The Defendants take turns maintaining these social media accounts. *Id.*, at ¶ 3. As a collective, they purchased two cameras that were used to make the secret recordings that they subsequently edited to post on social media under the Unkut Kings name. *Id.*, at ¶ 4. The Defendants acted as a collective group when they planned, recorded, edited, and produced the Video. *Id.*, at ¶ 5.

² If Davis's motion is granted, he plans to dismiss the remaining counts to streamline this matter because the relief available for those claim appears to be duplicative of the relief available under Count I.

On or around May 1, 2019, the Kings decided to create a video titled "To Catch a College Predator" (the "Video") which was inspired by a reality television series called "To Catch a Predator" that depicts sting operations that target pedophiles. SAMF, at ¶ 6; Answer, at ¶ 30. That evening, Tokarowski invited Davis to her dorm room emphasizing to Davis that she desired to be intimate. *Id.*, at ¶ 7; Verified Complaint, at ¶¶ 17-27. Tokarowski told Davis that he needed to hurry to her room because her roommate was not there. *Id.*, at ¶ 8.

When he arrived at Tokarowski's dorm room, Davis thought that he and Tokarowski were alone. SAMF, at ¶ 9. Without his knowledge nor his authorization, the Kings had set up two hidden cameras that they used to secretly record him while he was in Tokarowski's room. *Id.*, at ¶ 10. The Kings also secretly recorded Davis using a smartphone camera. *Id.*, at ¶ 11. Davis did not consent to being secretly recorded. *Id.*, at ¶ 12.

From on or about May 1, 2020 to on or about May 26, 2020, the Kings used Final Cut Pro to collectively edit the secret recordings of Davis to produce the Video. SAMF, at ¶ 13. Before May 26, 2020, they promoted the Video with paid advertisements that contained snippets of the Video. *Id.*, at ¶ 14. The Kings marketed the Video to increase its exposure with the goal of increasing its channel's viewership so they could earn advertising revenue. *Id.*, at ¶ 15.

On May 23, 2020, Davis wrote to Andre that he did not want the Video posted:

Dude. *Don't post the video.* This is going to damage me, and damage everything that I worked for so far

This is going to literally ruin everything and all my values ...

Id., at ¶ 16; Ex. A (emphasis added) (see Declaration of Jair A. Brooks-Davis (the "Davis Dec."), at ¶¶ 6-7).

On May 26, 2019, at around 6:00 p.m., the Kings published the Video. SAMF, at ¶ 17; Answer, at ¶ 52; Ex. E (Davis Dec., at ¶ 11). Throughout the Video, the Kings and others called Davis by his given name, Jair, or his nickname, JB. His surname "Brooks-Davis" was shown prominently in the video because it printed on the back of his shirt. SAMF, at ¶ 18; Davis Dec., at ¶ 2. The Kings used Davis's name image and likeness in the Video and in the snippets to promote the Video. SAMF, at ¶ 19; Ex. B (Davis Dec., at ¶ 2), Davis Dec., at ¶ 8. Davis did not provide written consent to the Kings to use his name or picture in the Video or in any advertising thereof. SAMF, at ¶ 20.

The Video was posted on YouTube from March 26, 2019 to June 20, 2019. SAMF, at ¶ 21; Ex. D (Davis Dec., at ¶ 10), Paper No. 5, Order. Before this Court ordered that the Video be taken down, the Kings disclosed the Video to at least 1,000 YouTube viewers. SAMF, at ¶ 22 Andre Dep., at 67:2-15.

Legal Standard

Under Rule 56(c), summary judgment is warranted where:

[T]he pleadings, depositions, answers to interrogatories, and responses to requests for admission [], 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."

See Mass. R. Civ. P. 56(c).

The Rule further states that "summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.*

Summary judgment of liability on Count I against the Defendants is appropriate here because there is no genuine dispute that Defendants intercepted Davis's oral communications. See M.G.L. c. 272, § 99(Q). There is also no genuine issue of material fact that Defendants violated the Wiretapping Statute when they posted the Video on YouTube because it contained oral communications that were secretly recorded. See *id.*

Davis did not consent to any use or disclosure of the unauthorized recordings. In fact, Plaintiff sent Defendants a written communication on May 23, 2019 stating that he did not consent to the Video being posted. Axiomatically, Davis never provided written consent which was required under M.G.L. c. 214, § 3A because the Video and its promotional materials used

Davis's name and likeness. Finally, no rational person would believe that Davis consented to the posting of a video that falsely portrayed him as a "college predator". *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006) (summary judgment is appropriate if materials show that there is no genuine issue as to any material fact and that moving party is entitled to judgment as matter of law).

Argument

I. The Kings Violated the Wiretapping Act

A person is liable under M.G.L. c. 272, § 99(Q) (the "Wiretapping Act") if he, she, or they intercepts, discloses, or uses - without permission or authorization - an oral communication of another person. A person who secretly records another person without their knowledge violates the act. *Com. v. Hanedanian*, 51 Mass.App.Ct. 64 (2001). Likewise, a person who discloses an unauthorized recording or uses it in any manner violates the statute. *Pine v. Rust*, 404 Mass. 411, 414 (1989). Liability arises even if the violation is unintentional. *Id.* A person is separately liable for each interception, disclosure, or use even if that results in multiple people being independently liable for a single violation. *Id.*

a. The Kings Secretly Recorded Davis's Oral Communications

The Kings concede that they secretly recorded Jair's oral communications. They used three different devices to make three different unauthorized recordings. They concede that Jair was unable to consent to the secret recordings because he had knowledge of them. They are thus each liable under the Wiretapping Act for intercepting Davis's oral communications by secretly recording him. *Hanedanian*, 51 Mass.App.Ct. 64.

b. The Kings Disclosed and Used the Unauthorized Recordings

There is also no dispute that the Kings used the three secret recordings to make the Video, used them to make advertisements to promote the Video, and posted the Video on YouTube causing it to be disclosed it to at least 1,000 YouTube users. As a result, summary judgment against each defendant on Count I is warranted.

c. The Kings Did Not Obtain Davis's Consent to Post the Video or Otherwise Use or Disclose the Unauthorized Recordings

Davis did not consent to the disclosure or use of the unauthorized recordings. He did the opposite. On May 23, 2019, Davis sent a written message to Andre telling him "Don't post the Video." There is no evidence that Davis provided consent between May 23, 2019 (when the message was sent) and May 26, 2019 (when the Defendants posted the Video on YouTube).

No matter what occurred before May 23, 2019, Davis's unequivocal statement that he did not consent to the posting of the video controls the issue. *Donoghue v. IBC/USA (Publ.), Inc.*, 886 F. Supp. 947, 954 (D. Mass.), *aff'd sub nom. Donoghue v. IBC USA (Publ.), Inc.*, 70 F.3d 206 (1st Cir. 1995). That is, without evidence that Davis provided consent after he had sent this message, the Kings did not have consent as a matter of law. *Id.*

The Kings also needed Davis's written consent to post the Video because it used Davis's name and his likeness. See G.L. c. 214, § 3A. Davis never provided written consent.

d. A Rational Person Would Roundly Reject the Notion that Davis Consented to Being Falsely Portrayed as a Predator

Finally, no genuine issue of fact exists because no reasonable person would consent to being falsely portrayed as a "college predator" like Davis was portrayed in the Video.

Dorinvil Dep., at 22:15-23:10. Dorinvil acknowledged as such:

Q. But there's probably no one who would be fine with being falsely depicted as a sexual predator, right?

A: Yes, of course.

Id. (objections omitted). Dobson similarly averred that he would not have posted the Video if he realized that it falsely portrayed Davis as a predator:

Q: Do you see how [] a third party could see the video as portraying Jair as a predator or rapist?

A: [] if I thought that's what people were going to take away from it after seeing the whole video or at least just reading the description, I wouldn't have done that because I wouldn't like anyone to do that to me.

Dobson Dep., at 66:11-23 (edited for clarity). Andre was asked if he knew of "any particular people who you think would volunteer to be made to look like a sexual predator?" - his answer was "No". See Andre Dep., at 39:10-13.

A genuine dispute regarding consent does not exist because it is unreasonable to believe that Davis would have provided consent to be falsely depicted as a sexual predator in a video that shares the name with and was inspired by the series "To Catch a Predator". See *Brooks v. Peabody & Arnold, LLP*, 71 Mass. App. Ct. 46, 50 (2008) (stating that "[a]n issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.").

Conclusion

For the aforementioned reasons, Plaintiff Jair Brooks-Davis respectfully requests that his Motion for Partial Summary Judgment of liability for Count I be granted.

February 16, 2021

Jair Brooks-Davis,

By his attorney,

/s/ Brian K. Wells

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Certificate of Service

I hereby certify that the foregoing will be served by mail on all parties or their counsel on February 16, 2021.

/s/ Brian K. Wells

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