

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LANCE SLIZEWSKI,

Plaintiff,

v.

JIM SCHWOCHERT, JOHN SHANDA
DANIEL WESTFIELD and GARY KASZA

Defendants.

ORDER

10-cv-665-bbc

Pro se plaintiff Lance Slizewski is proceeding on a claim that defendants Jim Schwochert, John Shanda, Daniel Westfield and Gary Kasza recorded a telephone conversation plaintiff had with his lawyer at the Dodge Correctional Institution, in violation of the First Amendment, Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Three motions for summary judgment are before the court, one filed by plaintiff, one filed by defendant Kasza and one filed by defendants Scwochert, Shanda and Westfield. I am granting defendants' motions and denying plaintiff's.

Plaintiff's claim fails because he has not adduced any evidence that defendants are responsible for recording the telephone conversation or that any of them ever listened to it. It is undisputed that a third party, a company called CenturyLink, installed the telephone

system and that defendants Westfield and Shanda instructed CenturyLink “to design the system so that it would not record a properly placed attorney telephone call.” Dfts.’ PFOF ¶ 23, dkt. #50; Plt.’s Resp. to Dft.’s PFOF ¶ 23, dkt. #63. In June 2010, CenturyLink informed the Department of Corrections that “properly placed telephone calls were inadvertently recorded between February 25, 2010 through June 14, 2010 at some facilities as a result of CenturyLink not activating the feature to block recording of properly placed attorney telephone calls.” Dfts.’ PFOF ¶ 29, dkt. #50, Plt.’s Resp. to Dfts.’ PFOF ¶ 29, dkt. #63. Two of these phone calls were conversations between plaintiff and his lawyer. Plt.’s PFOF ¶ 2, dkt. #44. Dfts’ Resp. to Plt.’s PFOF ¶ 2, dkt. ##51 and 60. However, all of the calls that were recorded improperly have been “purged from the system by CenturyLink representatives.” Dfts.’ PFOF ¶ 50, dkt. #50; Plt.’s Resp. to Dfts.’ PFOF ¶ 50, dkt. #63.

Plaintiff seems to believe that defendants should be held liable because they were involved in the initial installation of the telephone system, but that is not enough. With respect to plaintiff’s constitutional claims, “[o]nly persons who cause or participate in the violations are responsible.” George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007). In other words, a defendant “must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye.” Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). With respect to his statutory claim, plaintiff must show that each defendant “intercept[ed], endeavor[ed] to intercept, or procure[ed] any other person to intercept or endeavor to

intercept” his conversation. 18 U.S.C. § 2511(1)(a). Without evidence that any of the defendants directed the recording to take place or even had any reason to believe that any of plaintiff’s conversations were being recorded, plaintiff cannot prevail. Even if defendants were somehow negligent in failing to prevent the recording, that would not be enough to hold them liable for any of plaintiff’s claims. Loubser v. Thacker, 440 F.3d 439, 442 (7th Cir. 2006) (“Section 1983 claims cannot be founded on negligence.”); 18 U.S.C. § 2511(1)(a) (limiting statute to “intentiona[l]” acts).

Plaintiff disputes defendants’ proposed finding of fact that they did not listen to the recording on the ground that they “have not shown any documentary evidence” to prove the fact, but instead rely on the affidavit of defendant Westfield. Plt.’s Resp. to Dfts.’ PFOF ¶ 33, dkt. #63. However, it is plaintiff’s burden to prove his claim, not defendants’ burden to disprove it. “When a plaintiff fails to produce evidence, the defendant is entitled to judgment; a defendant moving for summary judgment need not produce evidence of its own.” Marion v. Radtke, 641 F.3d 874, 876-77 (7th Cir. 2011). Plaintiff’s status as a prisoner or a pro se party does not change that basic rule. Id. Accordingly, because plaintiff has failed to adduce any evidence that any of the defendants recorded or listened to a telephone conversation with his lawyer, defendants’ motion for summary judgment must be granted.

ORDER

IT IS ORDERED that the motions for summary judgment filed by defendant Gary Kasza, dkt. #57, and defendants Jim Schwochert, John Shanda and Danie Westfield, dkt. #48, are GRANTED. Plaintiff Lance Slizewski's motion for summary judgment, dkt. #42, is DENIED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 26th day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge