IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CATHERINE CONRAD,

OPINION AND ORDER

Plaintiff,

13-cv-475-bbc

v.

DAVID BATZ, SHARON BATZ
and SHANAUBA PRODUCTIONS,

Defendants.

- -

Pro se plaintiff Catherine Conrad is a self-employed entertainer who performs as the "Banana Lady," singing and dancing in a banana costume. In this case, plaintiff is suing the host for her website http://www.bananalady.com, along with the host's owners, for allegedly taking down her website and offering her domain name for sale. She is asserting numerous violations of state and federal law, including copyright, trademark, trade dress, "cybersquatting," misappropriation, defamation, conversion, "bank fraud" and even "tax evasion." In an order dated August 16, 2013, I noted that plaintiff had alleged in her complaint that she had sued the same defendants in a state court case and that the circuit court judge had dismissed the case for lack of personal jurisdiction. Conrad v. Batz, No. 2012CV4772 (Dane Cty. Cir. Ct.). Although plaintiff said that she had raised different legal theories in the state court case, she also said that both cases arose out of the same set of facts, raising the question whether the doctrine of issue preclusion would require this court

to dismiss the case for lack of personal jurisdiction as well. Perry v. Sheahan, 222 F.3d 309, 318 (7th Cir. 2000) ("A dismissal for lack of jurisdiction precludes relitigation of the issue actually decided, namely the jurisdictional issue."). Accordingly, I directed plaintiff to show cause why this case should not be dismissed under the doctrine of issue preclusion.

Much of what plaintiff included in her response is not helpful, but there is one sentence in which she says that the state court dismissed the case "for lack of personal jurisdiction because the Defendants' were not personally served in their hometown in Virginia." Dkt. #5 at 2. This suggests that the court dismissed the case not because it concluded that defendants lacked sufficient contacts with the state of Wisconsin, but simply because plaintiff did not properly serve defendants. If that is the case, it seems unlikely that issue preclusion would be a problem. Although I would be bound by the circuit court's conclusion that defendants were not properly served in the state court case, that finding would not necessarily prohibit plaintiff from trying to serve defendants properly in this case.

Plaintiff did not file a written decision from the circuit court (and it is not clear that there is one), but the court's online docket states that the case was dismissed for multiple reasons, including "lack of personal jurisdiction, lack personal service, failure to state a claim." Conrad v. Batz, No. 2012CV4772 (Dane Cty. Cir. Ct.), dkt. #32, available at wcca.wicourts.gov. Because it is impossible to tell at this stage what the scope of the circuit court's ruling was, I decline to apply issue preclusion at this time. Accordingly, I will screen her complaint under 28 U.S.C. § 1915(e)(2) to determine whether it states a claim upon which relief may be granted.

I will start with plaintiff's federal claims. In addition to copyright and trademark law, plaintiff says that defendants violated 15 U.S.C. § 1129 (which has been renumbered as 15 U.S.C. § 8131) and 18 U.S.C. § 1344 and that they committed "tax evasion" and "inducement to securities fraud or investment fraud."

With respect to her trademark claims, plaintiff relies on two provisions. Under 15 U.S.C. § 1125(d) (called the Anti-Cybersquatting Consumer Protection Act), a person may be held liable if he

> (i) has a bad faith intent to profit from [a trademark], including a personal name which is protected as a mark under this section; and
>
> (ii) registers, traffics in, or uses a domain name that—
>
> (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;
>
> (II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or
>
> (III) is a trademark, word, or name protected by reason of section 706 of Title 18 or section 220506 of Title 36.

I conclude that plaintiff has stated a claim upon which relief may be granted under this statute because she says that she owns a trademark for the name "Banana Lady" and that defendants violated her rights by trying to sell the domain name www.bananalady.com to a third party. Accordingly, I will allow her to proceed on a claim under § 1125(d).

Under 15 U.S.C. § 1125(a)(1), a violation occurs when the defendants' use of the plaintiff's trademark is likely to cause confusion among consumers. Packman v. Chicago Tribune Co., 267 F.3d 628, 638 (7th Cir. 2001). In her complaint, plaintiff alleges that

"Defendants' actions . . . likely caused confusion in the marketplace (in the case the internet) because the infringers[']' use of Plaintiff['s] trade dress would cause a reasonable purchaser to be confused on the source of the alleged infringers[']' banana lady service and product or the connection the Plaintif[f] had with them." Dkt. #1 at ¶ 20. However, plaintiff does not explain how anyone would be confused and she does not identify any examples of the alleged confusion. Plaintiff's allegation is that defendants took her website down and tried to sell her domain name, not that they used her trademark to try to sell a product or service that was similar to plaintiff's. Without more specific allegations, it is not plausible to infer that defendants violated plaintiff's trademark rights under § 1125(a). Eastland Music Group, LLC v. Lionsgate Entertainment, Inc., 707 F.3d 869, 871-72 (7th Cir. 2013) (affirming dismissal of trademark claim because plaintiff "does not allege that the use of [plaintiff's film title] has caused any confusion about the [defendant's] film's source—and any such allegation would be too implausible to support costly litigation").

Under 15 U.S.C. § 8131, "[a]ny person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party, shall be liable in a civil action by such person." The obvious problem with this claim is that plaintiff's name is Catherine Conrad, not the "banana lady," so any use by defendants' of plaintiff's domain name is not use of "the name of another living person."

With respect to her copyright claim, plaintiff alleges that defendants "stole" her

website domain name and the content of her website, which included copyrighted material. However, plaintiff does not allege that defendants ever copied any of that material, which is an element of a copyright claim, Feist Publications Inc. v. Rural Telephone Servive Co., 499 U.S. 340, 361 (1991), so this claim must be dismissed as well.

Plaintiff's remaining federal claims are frivolous. 18 U.S.C. § 1344 is a criminal statute, which plaintiff has no standing to enforce. United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Similarly, plaintiff has no standing to enforce the federal tax code or protect the rights of defendants' investors. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

Plaintiff raises a number of state law claims as well. With respect to the tort of conversion, plaintiff alleges that defendants took the content of her website and prevented her from using it for six weeks. That is sufficient to state a claim. Bruner v. Heritage Companies, 225 Wis. 2d 728, 736, 593 N.W.2d 814, 818 (Ct. App. 1999) ("The elements of tortious conversion comprise: (1) intentionally controlling/taking property belonging to another; (2) controlling/taking property without the owner's consent; and (3) those acts resulting in serious interference with the rights of the owner to possess the property.").

Plaintiff's remaining state law claims must be dismissed. With respect to plaintiff's

claim for theft, that applies only to "movable property," Wis. Stat §§ 895.446 and 943.20, and plaintiff has not identified any movable property that defendants allegedly took. With respect to defamation, plaintiff does not identify any false statements that defendants made about plaintiff. Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 534, 563 N.W.2d 472, 477 (1997) (defamation requires a statement that "(1) was spoken to someone other than the person defamed, (2) is false, (3) is unprivileged and (4) tends to harm the defamed person's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him").

With respect to plaintiff's claim for a violation of the right of publicity, Wisconsin recognizes both a statutory and a common law cause of action related to that right. Wis. Stat. § 995.50(2)(b) prohibits the "use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person." Similarly, the common law tort of misappropriation protects the "property interest in the publicity value" of one's identity (name, portrait or picture) from commercial exploitation by others. Hirsch v. S.C. Johnson & Son, Inc., 90 Wis.2d 379, 397–98, 280 N.W.2d 129, 138 (1979). Plaintiff's allegations do not state a claim upon which relief may be granted under either theory. Although plaintiff alleges that defendants stole content from her website, including images of her, she does not allege that defendants displayed those images to anyone for a commercial purpose. Rather, plaintiff says that defendants took her website down so that no one could see it.

Finally, with respect to unfair competition, plaintiff does not identify a particular

provision of Wis. Stat. § 100.20 that defendants violated. In any event, this claim fails for the same reason as plaintiff's trademark claim, which is that plaintiff has not identified a product or service of defendants that competed with plaintiff's.

ORDER

IT IS ORDERED that

1. Plaintiff Catherine Conrad is GRANTED leave to proceed on her claims that defendants David Batz, Sharon Batz and Shanauba Productions (1) tried to sell a domain name for www.bananalady.com, in violation of 15 U.S.C. § 1125(d); and (2) interfered with plaintiff's rights to the content of her website, in violation of the tort of conversion.

2. Plaintiff's complaint is DISMISSED with respect to all other claims for plaintiff's failure to state a claim upon which relief may be granted.

3. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that she files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that she has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for her own files. If she is unable to use a photocopy machine, she may send out identical handwritten or typed copies of her documents.

5. Summonses and copies of plaintiff's complaint and this order are being forwarded

to the United States Marshal for service on defendants.

Entered this 22d day of October, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge