UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Rod Webber	)	Case 1:18-cv-00931-LM
v.	)	(Chief Judge Landya McCafferty)
Deck, Trump, et al.	)	Jan 20, 2020
	)	

Rule 59(e) MOTION TO RECONSIDER ORDER

Coming before the court Pro Se, Plaintiff, humbly and with good cause, requests that the Court reconsider its Order of January 6, 2020, Document 155 and Opinion No. 2020 DNH 002 dismissing Counts against No Labels, Trump Organizations and Donald J. Trump.

Introduction

Respectfully, it appears the Court did not examine the videos and other materials that were included in Plaintiff's complaint as well as those incorporated by reference, presumably believing since the Plaintiff is a pro se complainant, it was not required to do so. Had the Court done so, it would have found a reasonable inference of control. Even if the Court finds that the Court is not required to examine those materials either as incorporated by reference or exterior documents, the Court applied a more strict and incorrect standard to the reasonable inference standard. Plaintiff has alleged information significant enough to create a reasonable inference of control by No Labels over the Manchester Defendants as well as by the Trump Organizations and Donald J. Trump over their underlings. The Court's Opinion seems to demonstrate a disregard for seeking the truth and the decisions on what Defendants and what Counts would be dismissed and have decided to proceed without examining the full record as is its duty and purpose.

Standard For Motion For Reconsideration

Rule 59 of The Federal Rules of Civil Procedure provides that motion for reconsideration may only be granted in very narrow circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. Plaintiff contends that the Court should reconsider its ruling to correct a clear error of law and to prevent manifest injustice as provided by Rule 59(e)(3) and to account for new evidence as provided by Rule 59(e)(2).

12(b)(6)Standard

In its order and opinion of January 6, 2020, the Court held that the standard for deciding 12(b)(6) motions to dismiss is the *Iqbal* and *Twombly* "plausibility" standard. The Court states that a claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant's liable for the misconduct alleged," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Dismissal of Counts Against Defendant No Labels

Plaintiff respectfully submits that Plaintiff's claims against Defendant No Labels, the Court misapplied the *Iqbal* standard by choosing Defendant's contentions that Manchester Defendants were "independent contractors" over Plaintiff's allegation that they were "employees" based on the premise that Plaintiff's allegations of hiring indicate their status as "independent contractors." In the Court's ruling, the Court first states, "Although Webber refers to the defendant police officers as No Labels' 'employees or agents,' the second amended complaint

contains no allegations that the officers were No Labels employees." Then the Court contradicts itself and says, "At most, there is an allegation that No Labels paid the officers to act as security guards for the event. Such an arrangement does not make the officers No Labels employees, but instead makes them independent contractors."

The Second Circuit has admonished the lower courts that where there are two plausible inferences that may be drawn from the factual allegations in the complaint, a Court may not properly dismiss a complaint that states a plausible version of the events merely because the Court finds a different version more plausible. Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013). Contrary to what the Court has opined, the dispositive question here, at this preliminary stage, where the Plaintiff does not have access to the private oral and written agreements, conversations, radio communications, and other private words and actions between the Defendants, is not the label placed upon the Defendants by Defendants counsel, or how the Court might interpret the word "hire," or whether the Plaintiff may prevail upon the theory of *respondeat superior,* but whether Plaintiff has pled a reasonable inference that Defendant No Labels may have had control over the Defendant Police Officers; therefore, entitling Plaintiff to discover the extent of that control and, thereby, present to the factfinder that under these particular circumstances the Manchester Defendants were "employees" rather than "independent contractors" under New Hampshire law.

First, Plaintiff did make several allegations in his Complaint that the Manchester Defendants were employees of No Labels. Plaintiff alleged, "No Labels hired Manchester Defendants to do security for the event, and as such are liable for the battery that took place while in the employment of No Labels," Doc. 75. ¶123. Plaintiff further alleged that No Labels'

agent Ryan Clancy, stated "it was our event—We were hosting it. And we had security." Doc 75 ¶186. It appears that the Court may have overlooked those allegations as well as the video and documentary evidence that Plaintiff incorporated by reference in his pleadings supporting his allegations that provide a reasonable inference of control.

The Court stated, "Webber did not provide copies of emails, videos, photos, articles, or documents." The Court further held (regarding Plaintiff's civil rights claims), that, "Webber does not explain what is on the videotape." However, In Doc 75, Appendix 1.N, plaintiff clearly included a hyperlink to a video of the attack, (https://vine.co/v/eElaxhDp3Xl), and described, "I was physically attacked by a Trump campaign staff member as well as officers Pittman and Cosio at your No Labels Problem Solvers event in Manchester, NH on Oct 12th I was thrown over a table and dragged across the floor, and thrown again." Plaintiff also incorporated over a dozen emails in full, and in Doc. 75, Appendix 1.O, Plaintiff clearly alleges the Manchester Defendants are hired by No Labels in an email to No Labels' Sam Boswell, which states of the Police Defendants, "we know they're hired by No Labels."

Most unusual in the Court's ruling, however, is where the Court stated that, "Staff members brought out megaphones," (page 4). Plaintiff does not find anywhere in the case record any use of "megaphones"; and, if the Court had referenced the seminal videos of the event presented by the Plaintiff and those incorporated by reference by the Manchester Defendants, the Court would not have found any staff members using any megaphones.

Significant, however, is Plaintiff's allegation where No Labels agent Ryan Clancy states, "I saw what happened to you while you were there, which sucks and I'm sorry that that happened." Doc. 75 at ¶ 86. And where Clancy states "Rod I'm really sorry all this has

happened to you, and it isn't right." Doc 75 at ¶ 86. The Merriam Webster Dictionary is instructive on this point. Webster defines "sorry" as: "feeling sorrow, regret, or penitence." Webster defines "right": as 1.: righteous, upright 2 : being in accordance with what is just, good, or proper right conduct 3 : conforming to facts or truth. The issue is not whether or not Mr. Clancy was expressing sorrow, but that Mr. Clancy was apologetic and remorseful and clearly taking responsibility for the actions of the Manchester Defendants who they had employed. This admission of guilt by the agent of Defendant No Labels creates a reasonable inference that No Labels' likely exercised control over the Manchester Defendants. If Mr. Clancy felt no responsibility for the Manchester Defendants, he would have said, "Sorry Rod, but we didn't tell the police how to handle the crowd, we hired them, but they were independent contractors, who went completely rogue." The fact that Clancy considered making a public statement per request of Plaintiff illustrates acknowledgment of guilt. But it would also be reasonable to surmise that since Mr. Clancy ultimately chose not to make a statement *publicly* accepting responsibility, that he was aware that No Labels would be liable, and as discovery would uncover, No Labels had given instruction or direction to the Manchester Defendants.

The Plaintiff also submits that the use of radio communication headsets by Defendant No Labels and the Manchester Defendants at the same time and in the same place and in the manner of use as alleged in Plaintiff's complaint also create a reasonable inference of control by the Defendant No Labels.

Courts have held that, "Extrinsic evidence may be considered part of a complaint when it is (1) attached to the pleading, (2) incorporated by reference in the pleading, or (3) the court deems the evidence integral to at least one claim in the pleading." Bank of New York Mellon

Trust Co. v. Morgan Stanley Mortg. Capital, Inc., No. 11 Civ. 0505, 2011 WL 2610661, at *3 (S.D.N.Y. June 27, 2011). Had the Court found the opportunity to click the relevant hyperlinks of the videos at the very center of this controversy as incorporated by reference in the Plaintiff's complaint, the Court may have seen how the constant use of radio headsets, creating a reasonable inference of control by No Labels. The Plaintiff states the word "video" 97 times in his Complaint; yet, the Court, without clicking on a single hyperlink of the event, ruled that the Manchester Defendants were independent contractors seemingly based on the word "hire."

In his Complaint, Plaintiff incorporated by reference several C-SPAN videos of the event, which seemingly were overlooked by the Court. (At paragraph 114, and three times in the appendix.) The Manchester Defendants have incorporated by reference C-SPAN videos of the event in their answer; and of the C-SPAN videos incorporated by Plaintiff. Manchester Defendants linked to three of them, two of which contain compelling information on the issue of control and also on the truthfulness of the Defendant No Labels. The first C-SPAN video focuses on then Governor Of New Jersey, Chris Christie, speaking on behalf of Defendant No Labels, (Doc. 101, ¶ 36), (https://www.c-span.org/video/?328623-7/presidential-candidate-chris-christie-labels-convention). From 3:39 to 04:07 Defendant Daniel Craig can be seen standing near Christie at the far right end of the hall, (stage left); 03:54 No Labels Staffer with a pink tie and a headset; 23:01 Craig can be seen chatting (in same location) with the No Labels Pink Tie Staffer; 23:59 Craig and Pink Tie chat again. At 29:09 Christie warns an audience member, "they're either going to give you a microphone or arrest you." In sum, Christie's confirmation that Defendant No Labels' has control over Officer Craig, who is standing in the background, creates a further reasonable inference of control by No Labels over the Manchester Defendants. And

Plaintiff alleged this exact interaction in his second amended complaint at Doc. 75, ¶ 38. The Court should not find it coincidental that exactly what Christie says, is exactly what happened to Plaintiff.

In another part of the C-SPAN video referenced by both Plaintiff and Manchester Defendants is one focusing on Defendant Trump. (Doc. 101, ¶ 38, https://www.c-span.org/video/?328623-6/presidential-candidate-donald-trump-labels-convention). That video shows a delay between the time when the Plaintiff is "kettled," and when he was attacked. The communications between Defendants using their headsets seemed so important to producers at C-SPAN, that they cut away from Mr. Trump to focus on it. Though demonstrating *ANY* amount of control is all Plaintiff is required to do at this stage, this video is instructive in demonstrating that No Labels offered a 'continuous prescription' of what the officers should or should not do while acting as security guards. TRUMP C-SPAN VIDEO, (Doc. 101, ¶ 38). At 00:33 Officer Pittman is visible at the far right end of hall near Trump as Trump walks in; 02:48 Trump staff using headset; 04:06 Trump security using headset; 04:13 Trump security Keith Schiller and Gary Uher using headsets; 04:15-04:49 Officer Pittman is visible on the far right side of the hall, (in the same spot Officer Craig stood in the Christie video); 04:27 No Labels using headset; 04:30 Trump staff Andrew Georgevits using headset; 04:46 Trump security using headset; 04:47 Trump security using headset; 04:52 Trump security using headset; 04:53 Deck using headset; 14:28 Pittman is visible in wide-shot appearing as barely a speck, the equivalent of a city-block away from Plaintiff; 21:13 No Labels staff using headset; 21:14 Plaintiff visible crouching down low to the left of the stage, with 1000 people separating him from Officer Pittman and out of his field of view; 22:34 No Labels checkered shirt using headset; 25:54 Trump says, "Go ahead sir."

No response; 25:58 Plaintiff crouching; 26:00 Trump again says, "go ahead," and no response; 26:03 Plaintiff, (without a microphone), says in a normal speaking-voice, "Mr. Trump, I was physically assaulted at the rally in Rochester"; 26:08 Trump says, "You look healthy to me"; 26:14 No Labels Staffer with Red Tie and headset walks by Doucette; @ 26:22 Doucette communicates with Georgvits; @ 26:29 Red-Tie No Labels Staffer can be seen clearly talking into his headset and adjusting with his hand; @ 26:35 Red-Tie No Labels Staffer bends down to talk to Leadership; @ 26:42 Red-Tie No Labels Staffer talks into a microphone in his sleeve, while using headset. Georgevits can be seen using his headset; @ 27:26 Doucette walks by; 30:00 Trump complains no mic, (as alleged in Doc. 75); 30:10 A young woman wearing a tiara identifies herself as Ali Nault, "Miss America's Outstanding Teen."; 30:31 Plaintiff being assaulted and battered and his calls for help can be heard in the background as Deck shouts, "I don't give a shit," (as alleged in Doc. 75); No Labels staffer holding microphone for Nault clearly turns his head to see the commotion caused by Plaintiff being brutalized.

From the moment Plaintiff asks his question, (at 26:03), to the moment he can be heard being attacked, (at 30:31) there are roughly four and a half minutes of communications via headset, (and otherwise), documented by C-SPAN which create a reasonable inference that No Labels was coordinating with Manchester Defendants and Deck. Another compelling demonstration of control can be seen in Defendant Pittman's position relative to the stage. His position would make it impossible for the Officer, (or the other officers positioned on the outskirts), to hear or see Plaintiff who was crouched low in the front of the stage when Plaintiff asked his question of Mr. Trump. When Plaintiff walked to the back of the room, a row of cameramen were blocking Defendant Pitttman's view of the Plaintiff, and Plaintiff's voice is

barely raised and barely audible across the massive hall. Thus, there is a reasonable inference that Defendant No Labels agents radioed or told the Manchester Defendants to remove Plaintiff. Nowhere in any video submitted by Plaintiff or Defendants shows an officer near to Plaintiff, except when Officers were called over to attack him.

All of these inferences regarding communication through headsets and the admission of guilt by Mr. Clancy create an important question whether the Court applied the proper standard of review and whether the Court evaluated the allegations properly to find no control by Defendant No Labels. Considering these issues raised, the Plaintiff questions whether Defendant No Labels has been less than truthful in their pleadings as to whether they instructed, managed or exercised control over Manchester Defendants. The Court holds that, "Webber provides no allegations that show it was reasonably foreseeable to No Labels that he would be forcibly removed from the event by the defendant police officers and other security staff, and that he would be assaulted during that removal." However, these disregarded videos show that not only was it foreseeable, but that No Labels likely was very much in control.

The Supreme Court has held that in determining whether a complaint states a plausible claim for relief under this standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. at 679. Throughout the history of the judiciary, courts have used their "common sense" and have examined information in the public domain referenced by Plaintiffs and Defendants at preliminary stages. In Khoja v. Orexigen Therapeutics, Inc., No. 16-56069, __ F.3d __, 2018 WL 3826298 (9th Cir. Aug. 13, 2018), the Ninth Circuit held that The Supreme Court has made clear that while "a Rule 12(b)(6) motion to dismiss a § 10(b) action" requires that the court "accept all

factual allegations in the complaint as true," courts also "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." These two procedures—judicial notice and incorporation by reference—are similar in some respects. Both allow the court to look beyond the four corners of the complaint without converting the motion to dismiss into one for summary judgment. The two procedures differ in other respects, however. Judicial notice is expressly permitted by Federal Rule of Evidence 201 and provides that the court may, on its own or at the request of a party and at any stage of the proceeding, consider "a fact that is not subject to reasonable dispute because" it either (1) is "generally known within the trial court's territorial jurisdiction," or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." In contrast, incorporation by reference is a judicially created doctrine that allows the court to treat certain documents as though they are part of the complaint itself if the complaint refers extensively to the document or the document forms the basis. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.); cf. Fed. R. Civ. P. 12(d) (generally requiring conversion of motion to dismiss to motion for summary judgment where "matters outside the pleadings are presented to and not excluded by the court"). Fed. R. Evid. 201(b). See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).of the plaintiff's claim. See https://www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/when-is-a-motion-to-dismiss-not-a-motion-to-dismiss/.

Accordingly, the Plaintiff asks the Court to use common sense to review the video

materials and other information presented as part of his complaint as well as the video material presented by Manchester Defendants. In a large organized event featuring sitting heads of state run by a business like No Labels, nothing happens in a vacuum. You would be hard-pressed to find an organization of this magnitude not having a plan to minimize liability and just leave security in a charged atmosphere of thousands to four off-duty police officers without giving them any instructions. Presumably, the attending Senators and Governors would be upset to discover security had received no instructions or supervision.

Just as the Second Circuit admonished the Courts not to choose one plausible interpretation over another, such as interpreting “hire” to infer the complex requirements of independent contractor status, that Court also held that although “defendant's words, gestures, or conduct” is innocuous does not mean that plaintiff's allegation that conduct was culpable is not also plausible." Anderson News, L.L.C. v. Am. Media, Inc., 680 F. 3d 162 at 189-90, The Court also held that, “in determining whether a complaint states a claim that is plausible, the court is required to proceed 'on the assumption that all the [factual] allegations in the complaint are true[,'] [e]ven if their truth seems doubtful." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162 at 185 (court's emphasis) (quoting Twombly, 550 U.S. at 556).

A motion to dismiss cannot be used as a cudgel for the Defendant to cover up any untruth or prevent the Plaintiff from discovering the truth. The Plaintiff asks that the Court reconsider and reverse its order of January 6, 2020 or considering Mr. Clancy’s admission of guilt/ remorseful apology and the evidence incorporated by the Plaintiff and the Defendant, the Plaintiff asks the Court to permit limited discovery for the purpose of discerning whether Defendant No Labels has been disingenuous in its defense regarding the control it may have

exercised over the Manchester Defendants and to determine whether Defendant No Labels did, indeed, manage, instruct, or direct the Manchester Defendants. Additionally, should the Court rule that the Plaintiff has met his burden in demonstrating a reasonable inference of control by Defendant No Labels, Plaintiff respectfully ask the Court to also reverse its decision on Counts IV and V for negligence and negligent hiring and Civil Rights Counts VIII, X, XI, XII, XIII, XV, XVI, and XVII against Defendant No Labels.

Dismissal of Counts Against Defendant Trump Organizations

The Court's dismissal of the Plaintiffs claims against the Defendant Trump Organizations on personal jurisdiction grounds also revolve around the relationship between the Defendants, in this case Defendant Trump Organizations, Defendant Trump, and Defendant Trump Campaign. In its ruling, the Court states, "Webber points to no facts to show that Trump promoted the Trump Organizations while campaigning in New Hampshire, or that Trump's activities can be attributed to the Trump Organizations." However, in Doc 75, ¶ 140, Plaintiff alleges that, "Defendant Trump promoted himself on World Wrestling Entertainment as 'Chairman of The Trump Organization,' just the same as Trump promoted himself at No Labels Problem Solvers." (No Labels Problem Solver was held in New Hampshire.) This is bolstered by the Manchester Defendants' answer, Doc 101, ¶ 38, in which Defendants provide a video link, showing Mr. Trump billed as "Chairman of The Trump Organization," at the No Labels event, (as discussed previously in this motion). This video provides ample evidence making a reasonable inference that Mr. Trump was promoting the Trump Organizations in New Hampshire.

At the New Hampshire event in question, Trump spends roughly half of his twenty minute speech talking about the Trump Organizations. In the TRUMP C-SPAN Video referenced by Manchester Defendants in their answer (Doc 101, ¶ 38), from 9:00-13:30 Trump, (billed on-screen as "Trump Organization Chair & President") talks about the Trump Organizations' property the Wollman ice-skating rink. At 14:00 Trump talks about his many business partnerships. At 14:35-16:20 Trump talks about the Trump Organizations' golf course in the Bronx.

Lastly, the sixth paragraph of the complaint states, "The Trump Organization, Inc. or Trump Organization, LLC had been making payments to Defendant Deck just previous to the No Labels Problem Solvers event for security." The repeated mention of FEC records is an incorporation by reference. There are countless mentions as well as detailed charts in this case, and FEC records listed in several appendices in the various briefs of this case. Specifically, Doc. 139 shows FEC filings that the Trump Campaign pays The Trump Corporation. Document 137 shows that The Trump Corporation writes checks on behalf of The Trump Organization. Doc 135 shows that The Trump Organization pays Deck, specifically stating, (on page 8), "Deck also testified in the same case that he was 'hired to preform [sic] security services for the Trump Organization.'" INDEX NO. 24973/2015E NYSCEF DOC 342, Page 20. Where does one company end and the other begin? They're all the same. To ignore the clear intermingling of funds apparent in the record is also to ignore the method of control. Just the fact that they are exchanging funds is enough to examine those contacts and create a reasonable inference that Trump and the Trump Organizations are exercising control over Deck and the campaign, or as Plaintiff theorizes (and Judge Tapia has opined), that there is no distinction between any of these

companies. Yet, the Court decided to not even examine that in all of its analysis, as if it had decided beforehand what Defendants and counts would proceed and which would not.

Should the Court rule that the Plaintiff has met his burden in demonstrating personal jurisdiction, Plaintiff respectfully ask the Court to reinstate his state law claims on Counts I, II, III, IV, V, VI and VII and Federal Civil Rights Counts VIII through Count XIII and Counts XV through Count XVII against Defendants Trump Organizations.

Dismissal of Counts Against Defendant Trump

As discussed previously regarding the other Defendants in this motion, the personal jurisdiction issue is one of control. The Court holds that Plaintiff's reference to the Galicia case, "does not provide the needed evidence to support his allegations." Plaintiff respectfully disagrees, as the repeated mention of the case as well as FEC filings is an incorporation of these cases and records by reference. The case describes the intermingling of funds between Trump, the Trump Campaign and Trump Organizations. Doc 135, (page 8) states, "Judge Tapia found Trump was in fact no different that The Trump Organizations, stating, 'there is ample evidence of Defendant Trump's dominion and control over the other defendants: In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign.'" Galicia v Trump, INDEX NO. 24973/2015E, Doc. 342.

Plaintiff respectfully ask the Court to reinstate his state law claims on Counts I, II, III, IV, V, VI and VII and Federal Civil Rights Counts IX through Count XIII and Counts XIV through Count XVII against Defendant Trump.

CONCLUSION

The question before the Court is not whether Defendants have committed the torts, the question before the Court is whether Defendants had control. The question is whether the documents the court declined to review illustrated a reasonable inference that Defendants may have been exercising control, providing instruction, or giving direction to their respective employees. For the Court to hold that the combined allegations do not create a reasonable inference of possible control is clearly an error and manifestly unjust and grounds for overruling the Court's initial order and opinion. To do otherwise, would demonstrate that the Court, as the gatekeeper, had decided the issue of Defendant's culpability rather than the issue of whether the allegations create a reasonable inference that Defendant may have exercised control over another Defendant. The Court's decision to not examine relevant documents and videos which are at the very center of the controversy at hand, to say the least is unprecedented. Surely, the Appeals Court will not look favorably upon this Court's analysis, and dismissal of readily available documents and information illustrating reasonable inference of control.

Plaintiff asks the Court to reverse its holdings regarding No Labels, Trump, and the Trump Organizations, or to permit Plaintiff to conduct limited discovery to discern the facts.

Humbly submitted,

Pro se Plaintiff, Rod Webber