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 27, 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 13, 2020, Document 156 and Opinion No. 2020 DNH 005 dismissing Counts against Trump Campaign, Deck, Doucette

Introduction

It appears the Court did not examine the videos and other materials that were included in Plaintiff's complaint. 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. 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 13, 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 Campaign Defendants

Plaintiff respectfully submits that in regard to Plaintiff's claims against Campaign Defendants, the Court misapplied the *Iqbal* standard by choosing Defendant's contentions that Deck is an "independent contractor" over Plaintiff's allegation that Deck is both an "employee" of XMark ***and*** an "employee" of the Trump Campaign, (as clearly alleged in the second amended complaint). The Court holds that, "Webber alleges that the Trump Campaign hired Deck and his company, XMark, to provide security services at the No Labels event and that Deck interacted with Webber in that capacity. Thus, Webber does not allege that Deck was a Trump Campaign employee, but rather that he was an employee of XMark, which the Trump Campaign hired to perform security services. Therefore, Webber alleges that Deck was an independent contractor." The Court misinterprets what Plaintiff actually wrote in the complaint, which was that Deck was, "a security employee employed through the Donald J. Trump for President Campaign, Inc, ***as well as through his own companies*** XMark, LLC, (NC) / XMARK, LLC (AZ) which themselves were hired by Donald J. Trump For President, Inc, (according to FEC records), and possibly through The Trump Organization, Inc. and Trump Organization LLC." Doc 75, ¶7.

(Emphasis added.) Incorporated by reference is the Appendix to Doc. 135 which is "SCHEDULE B ITEMIZED DISBURSEMENTS for DONALD J. TRUMP FOR PRESIDENT, INC." Page 3 shows FEC filings demonstrating Deck is an employee of the Campaign when it states, "EDWARD DECK 47 LAFAYETTE PLACE GREENWICH, Connecticut 06830 10/13/2015 SECURITY SERVICES 6473.50." That is $6,473.50 paid directly to Deck by the Campaign on the day after the attack by Deck on Plaintiff. There is a hyperlink for verification: http://docquery.fec.gov/cgi-bin/forms/C00580100/1047287/sb/ALL/2

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 "employ," or "employee" or whether the Plaintiff may prevail upon the theory of *respondeat superior,* but whether Plaintiff has pled a reasonable inference that Defendant Trump Campaign may have had control over the Defendant Deck; therefore, entitling Plaintiff to discover the extent of that control and, thereby, present to the factfinder that under these particular circumstances that Deck was an "employee" in addition to being an "independent contractor" under New Hampshire law.

First, Plaintiff made several allegations in his Complaint that Deck was an employee of the Trump Campaign. Plaintiff alleged, "Defendant Trump witnessed Defendant Deck ***and other members of his security detail*** assaulting and being unreasonably physical with citizens attending his events**.**" Doc 75 ¶140. (Emphasis added.) "I was approached by ***a Trump Security Officer*** who stated that they said they were going to need help with a disruptive male in the crowd. The security Officer was identified as Edward Deck."Doc. 75 Appendix 16 (Emphasis added.) 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." Plaintiff finds this statement surprising, since in Doc. 75, Appendix 1.N, plaintiff 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." Moreover, Doc. 75, Appendix 1.J includes a hyperlink to additional video of the attack. In the text it reads, "Trumpers fears Bible reading. Police side w Webber." When the link is clicked on, it goes to: https://youtu.be/bN7Dy5r2eeY. This opens the "door" to Plaintiff's "Rod Webber" YouTube channel which is full of videos of the different angles of the attack at the center of the controversy.

Plaintiff also incorporated over ***two dozen*** emails in full. Appendix 1 is frequently referred to as "No Labels Correspondence." In paragraph 102 of the second amended complaint, Plaintiff clearly instructs the reader to, "See Statement of Facts, Appendix 1: No Labels

Correspondence." Appendix 1: No Labels Correspondence is where both of these video link are included. Paragraph 102 also clearly references Deck, stating, "Defendants Deck, Trump Campaign and Trump Companies staff and security and supporters caused Plaintiff apprehension of harmful contact." Plaintiff also instructs the reader to, "see Appendix 1: No Labels Correspondence" in paragraph 171 of Doc 75, referencing Defendant Deck," committing assaults and batteries" upon Plaintiff.

The Plaintiff also submits that the use of radio communication headsets by Defendant Deck and other staff members from the Trump Campaign 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 Trump Campaign. 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 clicked the hyperlinks of the videos at the 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 Trump Campaign. The Court finds that, "Webber provided no videos," and without clicking on a single hyperlink of the event, ruled that the Trump Campaign were independent contractors seemingly arbitrarily.

The Plaintiff listed the titles of articles with videos which would instantly appear when entered on the worldwide web, such as in Doc. 75, ¶69, Jacqueline Alemany's CBS article "More discord than harmony at No Labels presidential forum," (https://www.cbsnews.com/news/more-

discord-than-harmony-at-no-labels-presidential-forum/). An effortless search for “Man Thrown Out During Trump Speech" + “Rod Webber" instantly produces the Washington Post article and video mentioned in Doc. 75, ¶68, (https://www.washingtonpost.com/video/politics/man-thrown-out-during-trump-speech/2015/10/12/2fbf08ac-7109-11e5-ba14-318f8e87a2fc_video.html). The search terms “Manchester Ink Link " + “Rod Webber” immediately brings up the Manchester Ink Link article with accompanying video, (https://manchesterinklink.com/flower-power-thwarted-by-trump-handlers-after-flower-guy-arrested/).

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, one of which (focusing on Trump) contains compelling information on the issue of control and also on the truthfulness of the Defendants Deck, Doucette and the Trump Campaign, (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 members of the Trump Campaign staff offered a ‘continuous prescription’ of what Defendants Deck and Doucette should or should not do while working for both the Trump Campaign and XMark which were both paying him according to FEC records. 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; 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 in right ear; 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; 26:01 Deck onstage using headset; 26:03 Plaintiff, (without a microphone), says in a normal speaking-voice, "Mr. Trump, I was physically assaulted at the rally in Rochester" (setting off a flurry of activity between Trump staff and No Labels staff who can be seen using headsets and walking up and down the path, presumably hatching a plan to prevent Plaintiff from expressing his first amendment rights; 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 Georgevits; @ 26:29 Red-Tie No Labels Staffer can be seen clearly talking into his headset and adjusting with his hand; 26:34 Deck stands next to Plaintiff; @ 26:35 Red-Tie No Labels Staffer bends down to talk to Leadership, turns around and clearly holds hand on headset to speak into it; 26:40 Deck with arms folded listening on headset; @ 26:42 Red-Tie No Labels Staffer talks into a microphone in his sleeve, while using headset. Georgevits can be seen using his headset while

walking toward stage; @ 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 the Trump Campaign was coordinating with Defendants Deck, Doucette and No Labels. All of these inferences regarding communication through headsets, as well as FEC records 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 Trump Campaign over Deck. Considering these issues raised, the Plaintiff questions whether the Trump Campaign has been less than truthful in their pleadings as to whether they instructed, managed or exercised control over Deck and Doucette. In this modern time, physical control is not a necessity when a computer hooked up to the internet, in fact, it may be much more efficient and compatible than any unauthenticated physical video presented with the complaint, considering that plaintiffs allegations and presentations for rule 12b motions should be taken as true. The Court itself uses an ECF system and PACER with hyperlinks in it's own documents, (which seems to set precedent), and even the Manchester Defendants have submitted video hyperlinks, yet the Court has found it impossible to click on a hyperlink in the Plaintiff's complaint. Plaintiff provided this

reasonable method of presenting non-generic formatted information for efficiency of access by the Court and the difficulty of filing such material and, most importantly, because the Plaintiff is required to plead sufficient facts and not required to present unauthenticated evidence that is intended to be uncovered during discovery.

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.

Campaign Defendants in relation to Manchester Police Officers

The Court has held that, "No Labels hired off-duty Manchester police officers to provide security services at the event. Thus, there is no basis to hold the Trump Campaign

vicariously liable for the officers' actions." However, the Campaign paid the Manchester PD shortly after the No Labels event, according to FEC records, creating a reasonable inference of control by the Campaign over the Manchester Defendants. Doc. 139 Appendix 2 (incorporated by reference), spells it out, "FROM: DONALD J. TRUMP FOR PRESIDENT, INC. TO: MANCHESTER POLICE DEPARTMENT 405 VALLEY STREET MANCHESTER, New Hampshire 03103 12/03/2015 FOR: SECURITY SERVICES 896.48." The 896.48 is a dollar amount. (http://docquery.fec.gov/cgi-bin/forms/C00580100/1047287/sb/ALL/3.) Surely it is a matter for a jury or a factfinder.

Campaign Defendants in relation to Doucette and Unidentified Campaign Staff

The Court holds, "the Campaign Defendants' motion to dismiss the state law claims against the Trump Campaign is granted to the extent those claims are based on the Campaign's vicarious liability for the actions of Deck or the police officer defendants." Again, this is a matter of reasonable inference of control. Had the Court been willing to review the videos and other materials submitted, it would have seen that a reasonable inference of control has been made. To ignore them is manifestly unjust.

Campaign in relation to battery

The Court holds that, "Because the second amended complaint does not allege any actions by Trump Campaign staff members that amount to a battery, that claim against the Trump Campaign is dismissed." However, Plaintiff has properly alleged that Deck was an employee of both the Trump Campaign, ***and*** XMark. Previously mentioned FEC records should be sufficient to demonstrate a reasonable inference of control. Relying on the faulty information provided by Defendants would be manifestly unjust.

Campaign Defendants in relation Infliction of Emotional Distress

The Court holds that, "The Campaign Defendants' actions at the No Labels event, as alleged by Webber, do not rise to the level of extreme or outrageous conduct that is actionable as intentional infliction of emotional distress." However in paragraph 128 of the second amended complaint, Plaintiff alleged, "Defendants committed the tort of intentional infliction of emotional distress upon the Plaintiff by their extreme and outrageous conduct, by which they intentionally or recklessly caused severe emotional distress on the Plaintiff. Defendants words and actions were so outrageous in character, and so extreme in degree, that they should be regarded as atrocious, and utterly intolerable in a civilized community such as the City of Manchester." This meets the threshold cited by the Court in the Tessier case. Had the Court been willing to review the videos and other materials submitted, it would have seen that there is valid evidence for this claim. To dismiss this count without considering proper allegations by Plaintiff would be manifestly unjust.

Negligence in relation to Deck and Doucette

The Court holds that, "Webber's negligence claim against Deck and Doucette makes little sense. In essence, Webber contends that Deck and Doucette each owed Webber a duty to protect him from themselves." To the contrary, Plaintiff is evoking the theory of "The Thin Blue Line," the theory that police officers protect each other above all else, contrary to their oath to protect and serve. Deck and Doucette are not police officers, but the theory is similar in that Deck is a former FBI agent, (Federal Law Enforcement), working to police the event with Officer Pittman to violate Plaintiff's rights. Doucette, owed a duty to protect Plaintiff from Deck, just as Deck owed a duty to protect Plaintiff from Doucette. Doucette, knowing of Deck's violent past, should have protected Plaintiff from him. But, just as with "The Thin Blue Line," the entire

group, (comprised of Campaign Defendants, Manchester Defendants and No Labels), got on the same page to violate Plaintiff's rights, just as any street gang protects it's members by coming to a meeting of the minds to further their criminal endeavors. Paragraph 135 of Doc. 75 states alleges that due to Deck's "previous history of assaults and batteries," that Doucette, (and the other Defendants), should have been aware that "Defendant Deck and Trump Campaign security and Trump supporters were prone to commit assault and battery on any person they perceived to be opposed to Defendant Trump." Doc. 75, Appendix 1 I links to an article about Mr. Deck brutalizing Efrain Galicia in New York City, complete with a photo, (http://nypost.com/2015/09/04/trump-security-team-scuffles-with-immigration-protester/). This incident is referenced in paragraph 136 of the complaint, stating, "Trump security staff Schiller, had become infamous for using his dangerous wrestling experience to assault people in in front of Trump Tower which he did along with Defendant Edward Deck." How the Trump Campaign would be unaware of this incident is inconceivable, and for the Court to ignore the evidence is manifestly unjust.

Fraud in relation to Trump Campaign

The Court holds that, "The Campaign Defendants argue that Webber has not alleged facts to show detrimental reliance on any of the alleged misrepresentations. With regard to the second and third categories of misrepresentations, that argument is correct." Respectfully, the fraud in the second and third categories was to get a third party to rely on the misrepresentation, who in turn did the damage to the Plaintiff. In the second category, the Campaign Defendants fraudulently represented themselves as secret service for the purpose of getting the Manchester Defendants to get in line with their desire to have Plaintiff removed. In the third category, Deck

fraudulently represented events to Pittman, which Pittman relied on, writing false information in the affidavit which not only appears to exonerate Deck, but defames Plaintiff. Whether the court chooses to watch the videos or not, it must be stated for the record that Mr. Deck was untruthful when he convinced Pittman to write, "Webber was yelling derogatory remarks about the Trump Security Staff," and "I'm not fucking listening to you." Doc. 75, ¶65. Deck was financially rewarded generously the following day with a personal payment to Deck (the man), by the Trump Campaign for doing their dirty work. The FEC filings are previously mentioned and incorporated by reference in the Appendix to Doc. 135 on page 3.

Plaintiff makes several incorporations by reference to Plaintiff's case number (# 15-017237), regarding his arrest. According to materials submitted to the court, the arrest took place at 11:40AM. Conversely, Pittman claims, "*At approximately 11:40 I was approached by a Trump Security Officer who stated that they said they were going to need help with a disruptive male in the crowd."* How could the arrest take place at the same instant that that Deck approached Pittman? Simple: fraud. How did Deck get from the stage to the far side of the room where Pittman was to talk to Pittman? Simple: He didn't. He used a headset. The headsets create the reasonable inference of control. Again, had the Court been willing to review the videos and other materials submitted, it would have seen that there is valid evidence for this count. To dismiss this count without considering proper allegations by Plaintiff would be manifestly unjust.

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 the dismissed counts in Doc 156, or to permit Plaintiff to conduct limited discovery to discern the facts.

Humbly submitted,

Pro se Plaintiff, Rod Webber