2022 WL 4242727
United States District Court, S.D. Florida.

HUMAN RIGHTS DEFENSE CENTER, Plaintiff,
v.
Ricky DIXON, et al., Defendants.

CASE NO: 21-81391-CV-MIDDLEBROOKS/Matthewman
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Signed August 18, 2022
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Entered August 19, 2022

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DEFERRING RULING IN PART ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT DEFENDANTS' EXPEDITED MOTION TO STRIKE

Donald M. Middlebrooks, United States District Judge

***1** THIS CAUSE comes before the Court on Defendants Dixon, Inch and Colon's ("Defendants") Expedited Motion to Strike Plaintiff's Only Remaining Claim for Damages, filed August 12, 2022 (DE 129), and Defendants Motion for Summary Judgment, filed June 23, 2022. (DE 103). Plaintiff's Motion to Strike (DE 133; DE 134), and Defendant's Motion for Summary Judgment are fully briefed (DE 112; DE 113). For the reasons set forth below, Defendants' Motion for Summary Judgment is granted in part and a ruling is deferred in part, and Defendants' Expedited Motion to Strike is denied as moot.

I. BACKGROUND

The Human Rights Defense Center ("HRDC") brought this action against several Florida Department of Corrections ("FDOC") officials over FDOC's alleged censorship of HRDC's publications sent to FDOC inmates containing certain advertisements. (DE 39). HRDC brings claims under the First and Fourteenth Amendments and seeks equitable relief and damages. (*Id.*). This matter is currently set for a jury trial on the Court's two-week trial calendar commencing August 29, 2022. The Parties filed cross motions for summary judgment, which are pending. (DE 103; DE 105).

The purpose of this Order is limited to resolving the issue of whether Defendants are entitled to summary judgment on Plaintiff's claim for damages, and thus whether there exists a right to jury trial. The only damages claim that remains is a claim for "loss of [Plaintiff's] actual and potential subscribers and customers" (DE 104 at ¶ 95; DE 112-1 at ¶ 95) against former FDOC Secretary Mark Inch. (DE 126 at 2). Separately, Defendants moved to strike the damages claim so as to determine whether this case will proceed to a jury trial. (DE 129). I agree that this issue warrants expedited treatment in the interests of judicial economy and conservation of resources. However I view this issue of damages—which Defendants raised in their summary judgment motion and which is fully briefed—as more appropriately resolved at the summary judgment stage.

To be clear, in this Order I consider only the evidence submitted at the summary judgment stage and I apply the summary judgment standard. Any ancillary arguments or evidence raised by either Party with respect to Defendants' Motion to Strike are outside the purview of this Order and not considered. I will defer ruling on the remainder of Defendants' summary judgment motion and Plaintiff's cross-motion at this time; a ruling on those motions is forthcoming.[1]

II. LEGAL STANDARD

***2** "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed fact is "material[ ]" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" if it could lead a reasonable jury to return a verdict in favor of the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment. Thus, [the court] do[es] not determine the truth of the matter, but instead decide[s] only whether there is a genuine issue for trial." *Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) (citation omitted).

The moving party bears the "initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal citations omitted). If the non-moving party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial[,]" summary judgment is warranted. *Id.* at 322. "The court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts" in the non-movant's favor. *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1557–58 (11th Cir. 1990) (citation omitted).

III. DISCUSSION

Defendants argue in their Motion for Summary Judgment that HRDC lacks a factual basis for its damages claim, and points to several parts of the record in support thereof.[2] (DE 103 at 27–28; DE 104 ¶¶ 96–98). Defendants first point to the fact that HRDC received a COVID-19-related loan from the federal government that enabled it to offer free or reduced-price subscriptions in 2020 and 2021, and received a $160,000.00 Paycheck Protection Program federal loan that was subsequently forgiven. (DE 104 ¶ 96). This is undisputed. (*See* 112-1 ¶ 96).[3] Additionally, it is undisputed that subscribers to *Criminal Legal News* ("*CLN*") increased during the limitations period. (DE 104 ¶ 97); (DE 112-1 ¶ 97).[4] Conversely, the number of *Prison Legal News* ("*PLN*") subscribers undisputedly decreased during the limitations period, "after HRDC lost its appeal at the Eleventh Circuit as to FDOC's ability to impound [*PLN*]." (DE 104 ¶ 97); (DE 112-1 ¶ 97); (*See also* DE 104-36 at 1). It is undisputed that HRDC's revenue increased from $1,384,686.00 in 2019 to $1,965,645.00 in 2020, and advertising revenue accounted for approximately 10% of its total revenue. (DE 104 ¶ 98) (DE 112-1 ¶ 98). In the five preceding years, HRDC's revenue undisputedly exceeded $100,000, and HRDC undisputedly did not provide revenue figures for 2021. (*Id.*). It did, however, undisputedly award a 35% salary increase to its Executive Director from 2021 to 2022. (*Id.*).

***3** Defendants have met their burden to show an absence of evidence supporting damages, and Plaintiff must now identify record evidence showing that there is a genuine issue for trial. In response to Defendants Motion for Summary Judgment, Plaintiff points to a single piece of evidence—a two-page, twelve-paragraph declaration of HRDC Executive Director Paul Wright. (DE 112 at 19–20). The operative question is thus whether the Wright declaration shows that there is a genuine issue for trial as to Plaintiff's damages for loss of actual and potential customers and subscribers. It does not.

It is worth spelling out in full Wright's pertinent statements: (1) FDOC's censorship "has caused HRDC to lose significant numbers of subscribers and customers” (DE 112-9, Wright Decl. ¶ 3); (2) “[i]n December 2008, the last month before FDOC’s censorship restarted, HRDC had 288 paid subscribers to [PLN] in FDOC facilities” (*Id.* ¶ 4); (3) “[f]rom August 2017 to August 2021, HRDC averaged less than 25 paid subscribers to [*PLN*] in FDOC” (*Id.* ¶ 5); (4) “[b]ased on subscription numbers, FDOC’s censorship has destroyed over 90% of HRDC’s subscriber base in Florida” (*Id.* ¶ 6); (5) HRDC provided “many free subscriptions” to FDOC prisoners “between 2014 and 2018” (*Id.* ¶ 7); (6) *CLN* “averaged 4-5 paid subscribers” in FDOC between December 2017 and August 2017, which “is a much lower number of subscribers than in states with similar, or even smaller prisoner populations” (*Id.* ¶ 8); and (7) Wright identifies the prices of *PLN* ($30.00) and *CLN* ($48.00) annual subscriptions between August 2017 and August 2021. (*Id.* ¶ 10).

“A party seeking to recover lost prospective profits bears the burden of proving ‘the fact of damages and the extent of damages’ with reasonable certainty.” *Kaplan v. Nautilus Ins. Co.*, 861 F. App’x 798, 804–05 (11th Cir. 2021) (quoting *Nebula Glass Int’l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1214 (11th Cir. 2006)); *see also Royal Typewriter Co., a Div. of Litton Bus. Sys. Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1105 (11th Cir. 1983) (“In order to recover lost profits, [a plaintiff] must prove damages with reasonable certainty.”).

The problem here is two-fold. First, the Wright declaration provides next to no information from which lost profits could be calculated. Wright points to the 288 subscribers *PLN* had in December 2008 compared with the “less than 25” subscribers on *average PLN* had between August 2017 and August 2021. (DE 112-9 ¶ 5). He also points to the 4 to 5 *average* subscribers to *CLN* during the limitations period, which he opines is “much lower” than “in states with similar, or even smaller, prison populations.” (*Id.* ¶ 8). For one, it is unclear why 2008, which is around ten years prior to the commencement of the limitations period, is a pertinent date of comparison, let alone the only pertinent date of comparison for *PLN.* Moreover, the average number of subscribers each publication maintained is largely unhelpful in assessing whether subscribers were gained or lost. The operative metric is the increase or decrease in subscribers, which Wright does not discuss.

Plaintiff points to no other record evidence—financial records, invoices, internal records or other documentary evidence, expert testimony, testimony of former subscribers or nonsubscriber inmates, or anything else for that matter—aside from the Wright declaration. (DE 112 at 19–20). Plaintiff does not identify even a rough number of subscribers it contends it lost as a result of FDOC’s censorship as a general matter, or the number of subscribers with respect to each publication, which are priced differently. Plaintiff also does not, for example, identify its production costs, its revenue from the publications at issue, or any metric by which its lost profits could or should be measured. *See G.M. Brod. & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1538–59 (11th Cir. 1985) (explaining two “generally recognized methods of proving lost profits:” the “before and after” approach and the “yardstick” approach).

***4** Second, Wright’s testimony that this loss was caused by FDOC is entirely speculative and lacks factual support. There is no evidence linking lost subscribers to any censorship. To reiterate, the sole evidence Plaintiff contends supports its lost subscriber damages is Wright’s testimony that FDOC’s censorship caused lost subscribers, i.e., that FDOC’s censorship led prisoners in FDOC facilities to cancel their subscriptions or decide not to subscribe to Plaintiff’s publications. Although a declaration submitted in support of a summary judgment motion can be self-serving, it cannot be conclusory and it must be based on personal knowledge. *United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018). Wright’s personal knowledge as to why HRDC’s subscriber base purportedly shrunk in FDOC prisons has not been established in this three-page, twelve paragraph declaration. There simply must be *some* evidence aside from Plaintiff’s Executive Director’s assertion that Plaintiff did indeed lose profits *because of* FDOC’s actions. Wright’s bare assertions of that fact are conclusory, and the Eleventh Circuit “has consistently held that conclusory allegations without specific supporting facts have no probative value.” *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) (citing *Gordon v. Terry*, 684 F.2d 736, 744 (11th Cir. 1982)).

Plaintiff’s burden at this stage is worth repeating: it must “*go beyond the pleadings*” and submit record evidence to “ ‘designate’ *specific facts* showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324 (emphasis added) (citation omitted). Conclusory assertions of lost subscribers and damage without evidentiary support can hardly be said to go beyond the pleadings. (*See* DE 39 ¶ 35) (“FDOC’s arbitrary impoundments have cost HRDC hundreds of subscribers. In December 2008, Plaintiff had 239 subscribers within Florida prisons. Following the resumption of FDOC’s censorship of Plaintiff’s publications, Plaintiff has only 45 subscribers....);[5] (*see id.* ¶ 43) ("The FDOC's impoundments have caused substantial harm to Plaintiff ... [by] reducing subscribership. As a result of FDOC's censorship, Plaintiff has suffered the loss of numerous subscribers to its magazines.").

To be clear, I acknowledge my obligation at the summary judgment stage to draw all reasonable inferences in non-movant's (Plaintiff's) favor. However, any inference to be drawn from the Wright declaration pertaining to a potential causal link between Defendants' actions and Plaintiff's lost subscribers (both actual and prospective) would be overly speculative and therefore unreasonable. When evidence submitted at the summary judgment stage "is merely colorable or is not significantly probative, summary judgment may be granted." *Likes v. DHL Express (USA), Inc.*, 787 F.3d 1096, 1098 (11th Cir. 2015) (quoting *Anderson*, 477 U.S. at 248).

The jury's task here, should there be a jury trial, would be to come up with a dollar figure based upon the evidence presented at trial. Defendants pointed to an absence of evidence in the record from which that determination could be made, in response to which Plaintiff says it need only put Wright on the stand to testify to the facts in his declaration. As a matter of law, this testimony is insufficient to establish Plaintiff's lost profits from actual and potential subscribers with any degree of reasonable certainty.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED and ADJUDGED** that:

> (1) Defendants' Motion for Summary Judgment (DE 103) is **GRANTED IN PART** and a ruling is **DEFERRED IN PART**. Summary judgment is granted to Defendant Mark Inch on Plaintiff's sole remaining damages claim for loss of actual and potential subscribers and customers. A ruling is deferred on the remainder of this Motion.
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> ***5** (2) Defendants' Expedited Motion to Strike Plaintiff's Only Remaining Claim for Damages (DE 129) is **DENIED AS MOOT**.

All Citations

Slip Copy, 2022 WL 4242727, 29 Fla. L. Weekly Fed. D 81

Footnotes

1 I note that Defendant Inch also raises qualified immunity in his summary judgment briefing, which would be a potential alternative ground on which to grant summary judgment as to the individual capacity damages claim. As explained above, I am cognizant of the proximity to the trial date and the Parties' interest in knowing as soon as practicable whether any trial in this matter will be a jury trial. I answer that question here for expediency, but I also intend to speak to the qualified immunity argument in my forthcoming Order on the Parties' cross-motions for summary judgment.

2 HRDC does not seek summary judgment on its damages claim. (*See generally* DE 105-1).

3 I note that this particular fact is *procedurally* undisputed by operation of this Court's Local Rules. All statements of material facts must include pinpoint citations with *specific references.* S.D. Fla. L.R. 56.1(b)(1)(B). "When a material fact requires specific evidentiary support, a general citation to an exhibit without a page number or pincite (e.g., 'Smith Affidavit' or 'Jones Deposition' or 'Exhibit A') is non-compliant." *Id.* Plaintiff does exactly that. It responds: "Disputed. Plaintiff disputes the factual allegations in this paragraph to the extent they contradict the Declaration of Paul Wright in opposition to Defendants' Motion for Summary Judgment." (DE 112-1 ¶ 96). Even if I combed

through the Wright declaration and endeavored to deduce the portion(s) of the declaration Plaintiff suggests contradict Defendants' Fact 96, (which is exactly the type of unnecessary expenditure of judicial labor the Local Rules endeavor to avoid), I find no substantive disagreement. Wright agrees that HRDC received grants to sell *PLN* and *CLN* subscriptions to prisoners for $1.00, and agrees that HRDC received a PPP loan. (112-9, Wright Decl. ¶¶ 11–12). He does not dispute the $160,000.00 figure, or that the PPP loan was forgiven. (*See id.*). He does dispute the implication of these facts, i.e., "[t]he [PPP] loan did not reimburse HRDC for its losses due to FDOC's censorship." (*Id.* ¶ 12).

4 Again, Defendants' Fact 97 is undisputed by virtue of Plaintiff's non-compliant effort to dispute it in the same manner as Defendants' Fact 96. (DE 112-1 ¶ 97). Even so, Wright does not substantively dispute this fact in his declaration. He asserts that *CLN* subscribers averaged 4 to 5 during the limitations period, which is wholly separate from the rate of increase or lack thereof.

5 Note that the figures pled are different than the figures Wright asserts in his declaration. The factual bases for the numbers contained in the Wright declaration are not identified in the declaration, nor does Wright explain the difference between the pleading and his present statements.