

Re: *Motion to Strike*

Date: **February 15, 2018**

Plaintiff Denise M. Lopez aka Denise Macias (“Plaintiff”) brings this action against defendants Ilan M. Funke-Bilu (“Funke-Bilu”), Center for Health & Prevention, Community Action Partnership of San Luis Obispo, Inc., and Chad P. Oliveira (“Oliveira”). Plaintiff’s First Amended and Supplemental Complaint (“FAC”) was filed on November 29, 2017 and alleges four causes of action. Only the first two, for invasion of constitutional right of privacy and common law invasion of privacy are alleged against defendant Funke-Bilu.

This action arises from an underlying criminal prosecution where Plaintiff complained that she was sexually assaulted by her employer, Oliveira. Funke-Bilu served as counsel for Oliveira in a criminal prosecution where Oliveira was charged with felony counts for sexual assault, false imprisonment and criminal threats.

During the course of the underlying criminal matter, Plaintiff alleges that Funke-Bilu’s office subpoenaed medical records directly from Plaintiff’s health care providers without notice to Plaintiff. The health care providers supplied a copy of the medical records (that included Plaintiff’s sexual history) directly to Funke-Bilu. Funke-Bilu is alleged to have knowingly read, kept, transmitted and used plaintiff’s records to intimidate, embarrass and humiliate plaintiff. (FAC at ¶¶ 26-29.)

In the criminal proceedings, Plaintiff joined in the District Attorney’s motion to quash the subpoenas that sought her health care records after they had been provided to Funke-Bilu. On October 5, 2016, the criminal court conducted an in camera review of the records finding that none of them should be produced. On October 6, 2016, court quashed the subpoenas and ordered any copies of records in defense counsel’s possession destroyed with a prohibition from distributing any of the records. Plaintiff alleges that despite the order quashing the subpoena and ordering destruction of the information, Funke-Bilu used the confidential information to concoct perjured testimony on the part of Oliveira. (FAC at ¶¶ 30-32.)

Funke-Bilu moves here to strike portions of Plaintiff’s FAC pursuant to Code of Civil Procedure sections 435 and 436.¹ Plaintiff opposes the motion.

Pursuant to Code of Civil Procedure section 436, the Court may, in its discretion and upon terms it deems proper, strike out any irrelevant, false or improper matter in any pleading, or strike out all or any part of any pleading not drawn in conformity with the

¹ Plaintiff objects that Funke-Bilu’s notice of motion cites only Code of Civil Procedure section 436, not section 435. However, Plaintiff was able to fully oppose the motion, and has not shown prejudice from the omission.

laws of this state, a court rule, or an order of the court.

Funke-Bilu moves to strike a long list of allegations from the FAC. These are detailed in a chart in his memorandum of points and authorities, but are not included in his notice of motion, as is required. However, the Court is able to identify the 25 paragraphs or sections of the FAC Funke-Bilu moves to strike from the chart.

Most of the paragraphs or sections that Funke-Bilu seeks to strike are factual allegations setting forth the background of the case. Funke-Bilu argues that they should be stricken as irrelevant, are argument, statements of law, conclusions or hypotheses. In his reply, he argues that the complaint is riddled with legal references and argument, and highlights in particular paragraph 18 of the complaint, which sets forth Plaintiff's allegations about alleged false testimony provided by Oliveira in the criminal matter. Plaintiff opposes the motion, arguing that the pleadings merely allege the relevant factual and procedural history of the related criminal case.

Funke-Bilu moves to strike nearly the entire factual background section of the FAC, but fails to set forth why each section proposed to be stricken is irrelevant, argument or conclusory. Reviewing the pleading in detail, the Court finds that the alleged sections containing "argument, statements of law, conclusions or hypotheses" are mostly standard allegations that set forth the facts, procedural posture and allegations of the case. Further, conclusory allegations will not be stricken where they are supported by other, factual allegations in the complaint. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 7:181.) The Court declines to strike the requested paragraphs and sections on the grounds that they are as irrelevant, are argument, statements of law, conclusions or hypotheses.

Funke-Bilu next moves to strike Plaintiff's fourth and fifth causes of action for civil conspiracy and aiding and abetting on the grounds that they are barred by Civil Code section 1714.10, which provides that a cause of action against an attorney for a civil conspiracy with his or her client arising from an attempt to contest or compromise a claim or dispute is barred without a prior court order. However, the fourth and fifth causes of action are alleged only against Oliveira, not against Funke-Bilu. Funke-Bilu argues that they are in fact pleaded against him, because he is included in the allegations and because no cause of action for conspiracy or aiding and abetting lies without two or more people. Plaintiff argues that those causes of action are only pleaded against Oliveira, as set forth in the headings for those causes of action.

The fourth and fifth causes of action clearly state that they are only alleged against Oliveira. The Court does not have a motion from Oliveira before it, and therefore cannot strike those causes of action. If Plaintiff seeks to amend to add Funke-Bilu to those causes of action, defendant would be entitled to again raise this argument.

Funke-Bilu next moves to strike Plaintiff's prayers for punitive damages, alleging that they are not drawn in conformity with the laws of this state, namely Civil Code section 3294. Civil Code section 3294 allows for an award of punitive damages only when

oppression, fraud or malice can be proven by clear and convincing evidence. For either oppression or malice, plaintiff must show intentional, willful, or conscious wrongdoing of a despicable or injurious nature. (*Coll. Hosp. Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 721, as modified (Nov. 23, 1994).)

While conclusory characterization of defendant's conduct as intentional, willful or fraudulent is insufficient, conclusory allegations will not be stricken where they are supported by other, factual allegations in the complaint. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 7:181.) For example, an allegation that defendant was guilty of "oppression, fraud and malice" could not be stricken where the complaint contained sufficient facts to support such allegation. (*Perkins v. Sup.Ct. (General Tel. Directory Co.)* (1981) 117 CA3d 1, 6 ["The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree".])

Here, Plaintiff's prayers for punitive damages are sufficiently pleaded.² Plaintiff alleges that Funke-Bilu, an experienced lawyer, intentionally and deceitfully receive a 45-page fax pursuant to a subpoena, with no notice to Plaintiff, that contained Plaintiff's confidential medical information, including intimate sexual health information, and that upon receipt Funke-Bilu knowingly read, kept, transmitted and used plaintiff's records to intimidate, embarrass and humiliate plaintiff. (See FAC at ¶¶ 26-29.) She further alleges that after being ordered to destroy the records, that Funke-Bilu unlawfully utilized that confidential information to concoct perjured testimony by Oliveira. (FAC at ¶ 32.) At this stage, the Court must read the allegations of a pleading subject to a motion to strike as a whole, and assume their truth. (*Clauson v. Superior Court* (1998) 67 Cal. App. 4th 1253, 1255.) Reading the allegations of the FAC as a whole, Plaintiff has sufficiently pleaded her claims for punitive damages.

Finally, Funke-Bilu's requests that Plaintiff's prayer for attorney fees be stricken in that there is no basis for them. He cites no authority. While it is customary to plead the basis for a fee request, because contractual and statutory attorney fees are recoverable as costs of suit by noticed motion, a demand for fees in the complaint is not required for recovery. (Cal. Code Civ. Proc. § 1033.5, *Chinn v. KMR Property Mgmt.* (2008) 166 CA4th 175, 194, 82 CR3d 586, 602-603 (disapproved on other grounds in *deSaulles v. Community Hosp. of Monterey Peninsula* (2016) 62 C4th 1140, 1158); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial Ch. (The Rutter Group 2017) ¶ 6:275.) Plaintiff's prayer for attorney's fees shall not be stricken since the basis for same need not be described in the prayer, although it is unclear as to the basis for attorneys fees here.

Funke-Bilu's motion is denied. Funke-Bilu shall file his answer within 20 days from the date of service of this order.

² Funke-Bilu argues in his reply that Plaintiff failed to make sufficient legal argument in her opposition, and therefore has conceded his motion. Funke-Bilu, however, is the moving party and failed to set forth sufficiently why the Court should exercise its discretion to strike significant portions of the FAC. Moreover, the Court finds that the allegations for punitive damages are sufficiently pleaded on their face.