

9th Circuit Mandate

TAB A

9th Circuit Order

TAB A

USDC Order

TAB B

Cunningham v. Washington County et al. 9th Circuit Pleadings

TAB C

ADDENDA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRADLY M. CUNNINGHAM,

Plaintiff - Appellant,

v.

COLUMBIA PICTURES
INDUSTRIES, INC.; et al.,

Defendants - Appellees.

No. 18-35442

D.C. No. 3:17-cv-01686-SI
U.S. District Court for Oregon,
Portland

MANDATE

The judgment of this Court, entered April 23, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica F. Flores Poblano
Deputy Clerk
Ninth Circuit Rule 27-7.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRADLY M. CUNNINGHAM,

Plaintiff-Appellant,

v.

COLUMBIA PICTURES INDUSTRIES,
INC.; et al.,

Defendants-Appellees.

No. 18-35442

D.C. No. 3:17-cv-01686-SI
District of Oregon,
Portland

ORDER

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Cunningham's petitions for rehearing en banc (Docket Entry Nos. 29 and 30) are denied.

All other pending motions and requests are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 23 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRADLY M. CUNNINGHAM,

No. 18-35442

Plaintiff-Appellant,

D.C. No. 3:17-cv-01686-SI

v.

MEMORANDUM*

COLUMBIA PICTURES INDUSTRIES,
INC.; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted April 17, 2019**

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Bradly M. Cunningham appeals pro se from the district court's judgment dismissing his action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of an anti-SLAPP motion to strike. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(9th Cir. 2003). We may affirm on any basis supported by the record, *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008), and we affirm.

The district court properly granted defendants' special motion to strike as to Cunningham's defamation claims because the claims arose out of expressive activity protected by Oregon's anti-SLAPP statute and Cunningham failed to establish a probability of prevailing on the merits. *See Schwern v. Plunkett*, 845 F.3d 1241, 1245 (9th Cir. 2017) (setting forth applicable two-step analysis); *see also* Or. Rev. Stat. § 12.120(2) (one-year limitations period for defamation); *Magenis v. Fisher Broad., Inc.*, 798 P.2d 1106, 1109 (Or. Ct. App. 1990) (when a false light claim alleges facts that also constitute a defamation claim, the false light claim must be filed within the period for bringing a defamation claim); *Workman v. Rajneesh Found. Int'l*, 733 P.2d 908, 910-11 (Or. Ct. App. 1987) (discovery rule does not apply to defamation actions arising out of public utterances).

Dismissal of Cunningham's federal claims was proper because Cunningham failed to allege facts sufficient to state a plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996) (plaintiff alleging infringement of constitutional rights by private parties must show that the infringement constitutes state action).

The district court did not abuse its discretion by denying Cunningham's motion to compel discovery because Cunningham failed to demonstrate actual and substantial prejudice resulting from the denial of discovery. *See Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004) (standard of review); *Sablan v. Dep't of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988) (district court's "decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by denying leave to amend because amendment would have been futile. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (setting forth standard of review and explaining that "[a] district court acts within its discretion to deny leave to amend when amendment would be futile").

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions and requests are denied.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

BRADLY M. CUNNINGHAM,

Plaintiff,

v.

**SONY PICTURES ENTERTAINMENT, A
CORPORATION; COLUMBIA TRISTAR;
NATIONAL BROADCASTING
CORPORATION AKA NBC UNIVERSAL;
AND JANE AND JOHN DOES 1-100,**

Defendants.

Case No. 3:17-cv-1686-SI

JUDGMENT

Michael H. Simon, District Judge.

Based on the Court's ORDER,

IT IS ADJUDGED that this case is DISMISSED with prejudice.

DATED this 26th day of April 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

BRADLY M. CUNNINGHAM,

Plaintiff,

v.

**SONY PICTURES ENTERTAINMENT, A
CORPORATION; COLUMBIA TRISTAR;
NATIONAL BROADCASTING
CORPORATION AKA NBC UNIVERSAL;
AND JANE AND JOHN DOES 1-100,**

Defendants.

Case No. 3:17-cv-1686-SI

ORDER

Michael H. Simon, District Judge.

Plaintiff *pro se* Bradley Cunningham is a prisoner currently incarcerated at the Oregon State Penitentiary. On October 24, 2017, Plaintiff filed a complaint against Defendants Sony Pictures, Columbia Tristar, and NBC Universal (collectively, “Defendants”) in which he asserts claims under 28 U.S.C. § 1983 and Oregon defamation. Plaintiff’s claims arise from statements made to the public in a docudrama entitled *Dead by Sunset*, which concerns the murder of plaintiff’s wife and the events leading up to that murder. Plaintiff alleges that the docudrama made various misrepresentations that have resulted in his prolonged incarceration. On December 19, 2017 Defendants filed a special motion to strike under Oregon Rev. Stat. (ORS)

§ 31.150. Plaintiff has subsequently filed a motion to strike, motion to show cause, and two motions for default judgment. Defendants have also filed an additional motion to dismiss NBC Universal from the action. For the reasons given below, Defendants' special motion to strike is granted and the remaining motions are denied.

A special motion to strike under Oregon's Anti-SLAPP statute, ORS § 31.150, allows a defendant "who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage." *Staten v. Steel*, 222 Or. App. 17, 27 (2008). In order to have the action dismissed, the defendant must first show that the case arises out of the protected activity identified in ORS § 31.150(2). "If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case." ORS § 31.150(3). If the plaintiff cannot meet this burden, the claim should be dismissed without prejudice. ORS § 31.150(1).

Plaintiff's claims arise from "conduct in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest." Plaintiff is currently serving a life sentence for the murder of his wife. The docudrama at issue in Plaintiff's complaint concerns that murder and the events surrounding it. The Oregon Court of Appeals has, in the past, held that news reporting about a neighborhood shooting concerns an issue of public interest and is therefore protected activity under ORS § 31.150(1). *Mullen v. Meredith Corporation*, 271 Or. App. 298, 706 (2015). So, too, is Defendants' retelling of a widely reported murder. Moreover, Plaintiff does not contest that that the docudrama concerned an issue of public interest.

Because Defendants have demonstrated that Plaintiff's claims arise from a protected exercise of speech, Plaintiff must show, though presentation of "substantial evidence," that he is likely to succeed on his claim. Plaintiff has failed to carry this burden. As a preliminary matter, Plaintiff's § 1983 claims must be dismissed because the Defendants are not state actors, and Plaintiff does not allege that they were acting under color of state law. Although Plaintiff argues in his response brief that "Defendants worked closely with and in the name of the State of Oregon in the production, filming and promotion of" the docudrama, he presents no evidence that this is the case, as is required by ORS 31.150(3).

Plaintiff has also not demonstrated a likelihood of success on his claim for defamation false light. Both claims are time-barred. "[W]hen a claim characterized as false light alleges facts that also constitute a claim for defamation, the claim must be filed within the period for bringing a defamation claim." *Logan v. West Coast Benson Hotel*, 981 F. Supp. 1301 (Sept. 9, 1997) (quoting *Magenis v. Fisher Broadcasting, Inc.*, 103 Or. App. 555, 560 (1990) (internal quotation marks omitted)). Plaintiff's allegations that could plausibly be characterized as constituting a false light claim are identical to those constituting his claim for defamation. Oregon's statute of limitations for defamation is one year. ORS 12.120(2). The statute begins to run on the day that the allegedly defamatory statements are made public. See *Workman v. Rajneesh Foundation Intern.*, 84 Or. App. 226, 230-31 (1987). The "discovery rule," which in some cases tolls a statute of limitations until a plaintiff discovers the basis for a claim, does not apply to claims for defamation "given the very public and inherently discoverable nature of the alleged defamatory statements." *LaHodny v. 48 Hours*, 2015 WL 1401676 at *3 (March 24, 2015); see also *deParrie v. Hanzo*, 2000 WL 900485 at *4 (D. Or. 2000). The docudrama that Plaintiff alleges contains defamatory statements was aired in November 1995, twenty-two years before Plaintiff filed this

claim. Plaintiff's claims for defamation and false light are thus time-barred under ORS § 12.120(2).

Although Defendants bring this motion to strike under Oregon's Anti-SLAPP statute, which directs the court to dismiss claims at this early stage without prejudice, dismissal with prejudice is appropriate in this case. The statute of limitations for Plaintiff's state law claims arising from the docudrama ran many years ago. In the twenty-two years since the docudrama was broadcast, Plaintiff has made several unsuccessful attempts to bring a defamation action against Defendants in both state and federal court. ECF 6 at 3, 4. Moreover, Plaintiff has not alleged, and nor does the Court believe Plaintiff plausibly can allege, that Defendants acted under color of state law in the production of the docudrama. Thus, Plaintiff will not be able to correct the deficiencies in either his state law or § 1983 claims through amended pleading.

Defendants' Special Motion to Strike (ECF 5) is GRANTED. Plaintiff's Complaint (ECF 1) is dismissed with prejudice. Plaintiff's Motion to Strike (ECF 12) and two Motions for Entry of Default (ECF 23, 29) are DENIED as moot. Plaintiff's Motion for Order to Show Cause (ECF 17) is without merit and also DENIED. Defendants' Motion to Dismiss (ECF 26) is DENIED as moot.

IT IS SO ORDERED.

DATED this 26th day of April 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**