

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

REZA GANJAVI,)	Case No. 06 C 4189
)	
Plaintiff,)	
)	PLAINTIFF'S RESPONSE AND
v.)	MEMORANDUM IN OPPOSITION TO
)	DEFENDANT CINDY SMITH'S
JEREMY C. SMITH, CINDY SMITH,)	MOTION FOR SUMMARY
TODD TIPTON, WILLIAM D.)	JUDGMENT
JENNINGS, DELOITTE CONSULTING)	
LLC, DELOITTE & TOUCHE USA LLP,)	
DOES 1-10,)	Judge Gettleman
)	
Defendants.)	Magistrate Judge Denlow
)	

**PLAINTIFF'S RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANT
CINDY SMITH'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Plaintiff, Reza Ganjavi, by and through his attorneys, Law Offices of Khoi Dang-Vu, P.C. and Khoi Dang-Vu, and respectfully submits this Response and Memorandum in

Opposition to Defendant Cindy Smith's Motion for Summary Judgment. In support of his Response, Plaintiff states as follows:

PROCEDURAL HISTORY

On August 3, 2006, Plaintiff filed the instant action against Defendants, Jeremy C. Smith, Cindy Smith, Deloitte & Touche USA LLP, Deloitte Consulting and John Does 1-10, alleging theories of forgery, violation of attribution under the Copyright Act, false presentation under the Lanham Act, false light invasion of privacy, per se libel and slander, libel and slander, appropriation of name and likeness, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional interference with prospective economic advantage, unfair competition, common law copyright infringement, intentional misrepresentation, negligent misrepresentation, vicarious liability, and negligent enablement. A related case had previously been filed in the United States District Court for the Central District of California alleging the same or similar causes of actions against some of the same defendants in the instant case. Through ongoing discovery, Plaintiff discovered the identities of additional defendants, Todd Tipton (hereinafter, "Tipton") and William D. Jennings (hereinafter, "Jennings") and bases for adding Tipton and Jennings as additional defendants. Accordingly, on September 11, 2006, Plaintiff filed his First Amended Complaint which contained, among a number of typographical changes, included the addition of Tipton and Jennings as additional defendants.

On November 21, 2006, Defendant Jeremy Smith filed a Motion for a More Definite Statement. At the same time, Defendant Cindy Smith filed a Motion for Summary Judgment. This Court granted Defendant Jeremy Smith's Motion for a More Definite Statement on December 11, 2006, giving Plaintiff leave to file his Second Amended Complaint by December 29, 2006. Plaintiff has filed his Second Amended Complaint concurrently with this Response and Memorandum in Opposition to Defendant Cindy Smith's Motion for Summary Judgment. This Response and Memorandum is based on the facts and allegations presented in Plaintiff's Second Amended Complaint, which contain identical theories as those enumerated in the first two complaints filed by Plaintiff in the instant action.. Except for the theories of unfair competition and vicarious liability, it is, and has been, Plaintiff's position that all of the causes of action set forth in the Second Amended Complaint are applicable to the moving Defendant Cindy Smith.

STATEMENT OF FACTS

Plaintiff, Reza Ganjavi (www.rezamusic.com) is a record producer, classical musician, as well as an information technology and management consultant, who has produced a number of successful Compact Disks (CD's) in the Classical Guitar genre (www.rezamusic.info contains hundreds of pages of bona fide listener comments about the CD's). Plaintiff's address in the United States is 2331 Westwood Boulevard #152, Los Angeles, California 90064 (Plaintiff's Second Amended Complaint, Paragraph 23).

On information and belief, Defendant Cindy Smith is an individual residing in this District at 605 West Madison Street, Apartment 4811, Chicago, Illinois 60661, and is married to Jeremy C. Smith (collectively, "the Smiths"), who is also a Defendant in this case. Defendant's Cindy Smith's Rule 56.1 Statement of Material Facts, Paragraph 2.

With respect to the individual defendants in this case, it has been Plaintiff's position that, at various times, the defendants were liable for one or more of the following violations against Plaintiff:

- a) fraudulent use of Plaintiff's identity;
- b) fraudulent publication of material using Plaintiff's email address and name, including issuing racial slurs against African-Americans and persons of African descent, sympathizing with terrorist; explicitly threatening to kill a person, uttering ethnic slurs against Plaintiff, and directing obscenity at others;
- c) setup of mock websites to damage Plaintiff's business and reputation;
- d) publication of fictitious, forged, and altered material which were falsely attributed to Plaintiff as the author;
- e) publication of material which placed Plaintiff in a highly offensive light;
- f) publicly accusing Plaintiff of being a pedophile (which is absolutely false);
- g) copying and publishing Plaintiff's work without his permission and without privilege;
- h) violating Plaintiff's rights to attribution and integrity;
- i) attempting to assassinate Plaintiff's character;
- j) Using Plaintiff's identity to publicize false, negative, scandalous, and damaging statements about Plaintiff's products, artistic credibility, and reputation.
- k) directly and indirectly collaborating with each other in committing the alleged acts;
- l) and other acts which are explained hereinafter.

(Plaintiff's Second Amended Complaint, Paragraphs 34-115).

With regard to Defendant Cindy Smith, Plaintiff, through his own independent investigation, has confirmed from various online service providers that the internet account for Defendant Cindy Smith's home address was the source of at least several of the above alleged offenses (Plaintiff's Second Amended Complaint, Paragraphs 53). Moreover, Defendant Cindy Smith used the computers, network, and internet subscription used in several of the offenses, and posted on the same newsgroup in which many of the offenses against Plaintiff occurred (Defendant Cindy Smith's Affidavit Paragraphs 2, 3, 4). Contrary to Defendant Cindy Smith's sworn affidavit, both computers in her household were used by her and Defendant Jeremy Smith (Exhibits A and B). On more than one occasion the Smiths shared the same email addresses and apparently signed for each other (Exhibit G and Exhibit D of affidavit of Jeremy Smith). There is evidence that the entire scheme of the attacks on Plaintiff was at times a coordinated and collaborated effort conducted by more than one defendant. The Smiths' affidavits state that the Smiths never collaborated in their internet/usenet activities. This assertion is false (Exhibit D is just one example of their collaboration in postings to the classical guitar newsgroup). Finally, there is evidence that the coordinated attacks on Plaintiff were at times orchestrated through newsgroup and email accounts originating from the Defendant's residence (Exhibit J).

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Conversely, summary judgment is improper if the dispute about a material fact is genuine; that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505, 2511 (1986). Thus, where the nonmoving party shows that there is at least one genuine factual issue "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," a motion for summary judgment should be denied. *Id.*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides

that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Fed.R.Civ.P. 56(c).

ARGUMENT

A. Summary of Argument

In the present case, Defendant, Cindy Smith, has filed a motion for summary judgment solely on her contention that Plaintiff “cannot provide sufficient evidence that [Cindy Smith] has committed any acts that would give rise to any causes of action in the Complaint.” This contention is curious given that, to date, the defendants have not engaged in any discovery and therefore have no way of knowing what evidence Plaintiff can and cannot provide. In addition, Cindy Smith argues that Plaintiff cannot show that Cindy Smith participated in any of the specific acts alleged in the complaint and that Plaintiff cannot show that Cindy Smith participated in the Complaint's allegations because she “has never interacted with” Plaintiff. This argument is disingenuous, as Defendant fails to establish that direct interaction with Plaintiff is a requisite element of any of the causes of action alleged against Defendant.

In regards to Cindy Smith's contention that Plaintiff cannot show Cindy Smith participated in any of the specific acts alleged in the Complaint, Cindy Smith states that the sole basis for Plaintiff's case against her are based on “guilt by association,” namely by the fact that Cindy and Jeremy Smith are married and live at the same residence and that Cindy Smith and Jeremy Smith have access to a computer in that residence. To the contrary, as delineated below, Plaintiff has more than adequate evidence to back up the allegations against Cindy Smith, or at the very least, to create a genuine issue of material fact as to Cindy Smith's involvement in the activities alleged against her in Plaintiff's Second Amended Complaint.

B. Additional Basis for Plaintiff's Allegations Against Cindy Smith

Contrary to Cindy Smith's assertion that Plaintiff's case against her is based on “guilt by association,” Plaintiff's allegations against Cindy Smith are in fact based on evidence obtained by Plaintiff during the course of a thorough investigation conducted by Plaintiff prior to filing suit against Cindy Smith. In particular:

- a) Confirmations from various online service providers specify the internet account for

Defendant Cindy Smith's address as the source of the offenses (Plaintiff's Second Amended Complaint, Paragraph 53).

- b) Defendant Cindy Smith used the computers, network, and internet subscription used in the offenses, and posted on the same newsgroup in which many of the offenses against Plaintiff occurred (Defendant Cindy Smith's Affidavit Paragraphs 2, 3, 4).
- c) Contrary to Defendant Cindy Smith's sworn affidavit, both computers in her household were used by both her and Defendant Jeremy Smith (Exhibits A and B).
- d) On more than one occasion the Smiths shared the same email addresses and apparently signed for each other (Exhibit G and Exhibit D of affidavit of Jeremy Smith).
- e) There is evidence that the entire scheme of the attacks on Plaintiff was at times a coordinated and collaborated effort conducted by more than one defendant. The Smiths' affidavits state that the Smiths never collaborated in their internet/usenet activities. This assertion is false (Exhibit D is just one example of their collaboration in postings to the classical guitar newsgroup).
- f) There is evidence that the coordinated attacks on Plaintiff were at times orchestrated through newsgroup and email accounts originating from Defendant Cindy Smith's residence (Exhibit J).

Taken together, the above, at the very least, create genuine issues of material fact as to the involvement of Defendant Cindy Smith with regard to the facts alleged in Plaintiff's Second Amended Complaint. Accordingly, Defendant Cindy Smith's Motion for Summary Judgment should be denied.

a) Evidence from ISPs Led to the Smiths' Residence Account

The offenses were linked by evidence to the internet subscription at the residence where the Smiths live, and without further discovery it is not possible to know the degree and scope of involvement of Defendant Cindy Smith and Defendant Jeremy Smith. Signed affidavits by the defendants seem to aim to put the burden of responsibility for all offenses against Plaintiff that occurred from that household on Defendant Jeremy Smith, however, the affidavits contain material defects or concealments which makes such shifting of the blame onto one of the two defendants plausible. The nature, degree, scope, and frequency of the offenses that occurred from that residence can not be blamed on one of the two defendants residing there without further discovery.

b) Defendant Used Computers, Network, Internet Account Used in the Offenses

The Smiths shared the same computers, same network, same internet subscription that were used to carry on the offenses, and they posted on the same newsgroup on which many of the offenses against Plaintiff occurred (Defendant Cindy Smith's Affidavit Paragraphs 2, 3, 4).

c) Contrary to Cindy Smith's Sworn Affidavit, She Used Both Computers in the Household

In Defendant's Memorandum in Support of her Motion for Summary Judgment, Cindy Smith states that she and Defendant, Jeremy Smith, "have two computers in their home, each running a different operating system." Cindy Smith claims that, at all pertinent times, she "exclusively use[d] the computer running the Windows XP operating system." (Cindy Smith's Affidavit Paragraph 5). This is a false statement. The Smiths shared both computers in their residence. There is evidence that Jeremy Smith, at least on one occasion used the computer running the Windows XP operating system, either directly, or through the network [Exhibit B], and that Cindy Smith has at least on one occasion used the system in the living room running Debian GNU/Linux. Exhibit A is a message which according to her affidavit she composed, and the headers indicate it was from the Debian GNU/Linux system (the living room system).

An examination of the headers of all messages posted directly (without use of a news service) and emails by Defendants Cindy and Jeremy Smith reveals that two "User Agents" were used, corresponding to the client browser application and the Operating System of the two computers in her residence as stated in her affidavit. Exhibit B is an example of a message originating from the Windows (bedroom) computer by Defendant Jeremy Smith. There are other posts in the Exhibits she attached to her affidavit which were originated from the bedroom computer. Contrary to the Smiths' affidavits, such activity shows a clear sign of sharing of the different computing and network resources by both husband and wife.

The user agents are either:

- X-HTTP-UserAgent: Mozilla/5.0 (X11; U; Linux i686; en-US; rv:1.7.12) Gecko/20060205 Debian/1.7.12-1.1,gzip(gfe),gzip(gfe)
- X-HTTP-UserAgent: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1; SV1; DRS_E;.NET CLR 1.1.4322; InfoPath.1),gzip(gfe),gzip(gfe)

The first corresponds to the Debian GNU/Linux computer in the living room which the

Defendant claims to be used by her husband. The second corresponds to the Windows computer in their bedroom which she claims to exclusively use for her internet activity. Exhibit A's headers prove that contrary to her affidavit, that she indeed shared the living room computer for internet activities with her husband and used that system, and that her husband used the computer in the bedroom directly or through the network [Exhibit B] as well as the computer in the living room [Exhibit C].

Furthermore, the computer Cindy swore under oath that she does not use, partly belongs to her and has or has had a shared directory (folder) called "Jeremy and Cindy". Exhibit E, Page 18 shows that the defendants accessed Plaintiff's website from a locally saved copy of his web page. The statistics counter reported the source address (folder called "Jeremy and Cindy") to the statistics server. This led to the revelation of Jeremy and Cindy's identity through investigative efforts even before subpoenas were served to their home ISP. The subpoena officially confirmed this finding.

Cindy Smith has claimed that she "has only posted on USENET sixteen (16) times, all since February 19th, 2006, and only from Internet Explorer on Windows XP." Again, this statement is questionable. Exhibit A proves that she did not only use the Windows computer but also the computer running Debian GNU/Linux Operating System. She did not reveal the use of any emulation software on their machines, so Plaintiff's analysis and allegations are based only on known facts. Again, further discovery is required to determine the extent and nature of Defendant Cindy Smith's activities on usenet and internet as related to the offenses committed against Plaintiff.

d) Defendants Cindy and Jeremy Smith Shared the Same Email Addresses

On more than one occasion the Smiths have shared each other's email addresses. Sharing the same email address for Usenet postings by Cindy and Jeremy Smith goes back in years. In 2002, the email address, "cwenz123@earthlink.net" was used several times for Usenet postings including postings on the Classical Guitar newsgroup. The screen name associated with this email address on several postings was specified as "Cindy and Jeremy Smith" (e.g. message posted Sat, 20 Jul 2002 16:29:15 PDT).

On June 19, 2006, a message from Cindy's account was signed by Jeremy (Exhibit G) (as TG, short for Tommy Grand, one of Jeremy's most often used screen names; Cindy has also referred to the couple as "The Grands" in one of the messages of which she claimed authorship).

Exhibit D of affidavit of Jeremy Smith is a message posted on July 16, 2006 signed by "Jeremy and Cindy Smith" containing several defamatory and illusory statements such as one falsely accusing

Plaintiff of a homosexual relationship with two other men (while in truth, Plaintiff is not homosexual and the “affair” the message refers to never existed). Angelo Gilardino who was also named in the message posted an answer (Exhibit H).

Mr. Smith claims in his affidavit that Mrs. Smith had no part in the composition of this message. He also claims in his affidavit that on six occasions he used his wife’s email “accidentally”.

It is Plaintiff’s position that further discovery will prove that such sharing of email addresses and signing for each other was not so accidental. Further discovery and deposition is needed to determine which of the two defendants composed which messages.

e) The Smiths’ Usenet Activities were Collaborated

The attacks on Mr. Ganjavi were done in a collaborative gang-like fashion involving multiple defendants who coordinated their offenses and even tried to get other people to participate in their actions. Such evidence will be presented at trial or when the Honorable Court deems necessary.

Mrs. Smith’s Memorandum in Support of Motion states that “Jeremy Smith also states in his affidavit that Cindy has never participated in any of his Internet activities.” In 2002 they shared the same address to make postings to the Usenet. The email address, “cwenz123@earthlink.net” at times had then screen name: “Cindy and Jeremy Smith” (e.g, a message posted Sat, July 20, 2002). On June 4, 2006, in one of the messages Cindy claims authorship of in her affidavit she wrote: “BTW, Tommy [Jeremy] is at the symphony and has left me in charge” (Exhibit D). This is just one indication that Mr. and Mrs. Smith had some collaborative effort on their postings on the usenet and to say that “Cindy has never participated in any of his Internet activities” is a false statement in the Memorandum.

f) Attacks on Plaintiff were Sometimes Orchestrated from Smiths’ Account

There are a number of bits of evidence that indicates that some of the offenses on Plaintiff were orchestrated from the Smiths’ internet account through messages that called on people and other members of the “gang” of defendants to participate in the attacks.

In some such instances people were encouraged to participate in an attack of Plaintiff’s product on a popular internet retailer’s website in order to strengthen the intensity of the attack that was orchestrated through newsgroup and email accounts originating from Defendant Cindy Smith’s residence (Exhibit J). On October 29, 2005, Jeremy Smith posted a message regarding the attacks on Plaintiff’s product in which he stated: “In fact I know the gal who left one of the reviews”. Further

discovery and depositions required to establish the extent and nature of Defendant Cindy Smith's activities on usenet and internet as related to the offenses committed against Plaintiff.

CONCLUSION

Defendant has failed to meet her initial burden for summary judgment, demonstrating “an absence of evidence to support the non-moving party's case.” *Celotex Corp. v Catrett*, 477 U.S. At 325 (1986). Because Plaintiff has set forth specific facts as basis for his causes of action, and because the Defendant misrepresented important material facts in her sworn affidavit, Plaintiff respectfully requests that this Honorable Court deny Defendant’s Motion for Summary Judgment.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant Cindy Smith's Motion for Summary Judgment any other other relief as this court deems fit and just.

Respectfully submitted,

/s/ Khoi Dang-Vu

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