2012 WL 5503847
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Nina SHIN
v.
DIGI–KEY CORP.

No. CV 12–5415 PA (JCGx). | Sept. 17, 2012.

Attorneys and Law Firms

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Opinion

Proceedings: IN CHAMBERS

PERCY ANDERSON, District Judge.

***1** Paul Songco Deputy Clerk

Before the Court is a Motion to Dismiss filed by defendant Digi–Key Corp. ("Defendant") (Docket No. 14). Defendant challenges the sufficiency of the First Amended Complaint ("FAC") filed by plaintiff Nina Shin ("Plaintiff"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7–15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for September 17, 2012, is vacated, and the matter taken off calendar.

I. *Factual and Procedural Background*

Plaintiff filed her original Complaint on June 21, 2012. Plaintiff filed the FAC as a matter of right. Like the original Complaint, Plaintiff's FAC, asserts a putative class action on behalf of all people located within California during the past four years who had the telephone conversations with Defendant monitored or recorded without their knowledge or consent. According to the FAC, an investigator retained by Plaintiff's counsel contacted Defendant, a distributor of electronic components, at some point after Plaintiff placed a telephone call to Defendant's toll-free phone number. The FAC alleges that the investigator was informed by one of Defendant's customer service representatives that "incoming calls are recorded or monitored" and that Defendant does not disclose the recording and monitoring to callers. The FAC further alleges that Defendant's website states that calls may be "recorded or monitored for quality and training purposes."

The FAC alleges claims for violations of California Penal Code section 632 and seeks relief both pursuant to the Penal Code and California Business and Professions Code section 17200 for Defendant's alleged unlawful business practices. California Penal Code section 632(a) provides:

> Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential

> communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished ....

Cal.Penal Code § 632(a). The Penal Code defines "confidential communication" to include "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in ... any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal.Penal Code § 632(c). California Penal Code section 637.2 establishes that any person who has been injured by a violation of section 632 may bring an action against the person who committed the violation for the greater of either $5,000 or three times the amount of actual damages. Cal.Penal Code § 637.2(a).

***2** In its Motion to Dismiss the FAC, Defendant contends that Plaintiff has failed to state a claim because the FAC does not allege that Plaintiff's telephone call was actually recorded or monitored by Defendant. Defendant also asserts that the FAC fails to state a claim because it is not objectively reasonable to conclude that a phone call such as the one Plaintiff made to a customer service representative would be considered a "confidential communication."

II. ***Motion to Dismiss Standard***

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed.R.Civ.P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to " 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). *See, e.g., Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248–49 (9th Cir.1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in *Twombly*, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561, 127 S.Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." *Id.* at 556, 127 S.Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S.Ct. at 1965 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir.2002) (" 'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.' ") (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir.2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964–65 (internal quotations omitted). In construing the *Twombly* standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

III. ***Analysis***

***3** For purposes of California Penal Code section 632, a "confidential communication" is "confidential" "if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan v.*

Flanagan, 27 Cal.4th 766, 776–77, 117 Cal.Rptr.2d 574, 582, 41 P.3d 575 (2002); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 117 n. 7, 45 Cal.Rptr.3d 730, 748, 137 P.3d 914 (2006); *see also* Cal.Penal Code § 632(c) (defining "confidential communication" to include "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in ... any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded").

Here, Plaintiff called the toll-free ordering number for Defendant, a supplier of electronic components, and spoke to a customer service representative who identified himself as "Dave." Other than Plaintiff's conclusory assertions that she intended that her call be confidential, Plaintiff has alleged no facts that "reasonably indicate" that she desired that the conversation be confined to her and "Dave." In similar circumstances, other courts within the Ninth Circuit have concluded that individuals placing such calls have no reasonable expectation that their calls will not be recorded or overheard. *See Faulkner v. ADT Sec. Servs. ., Inc.*, No. C 11–968 JSW, 2011 WL 1812744, at *4 (N.D.Cal. May 12, 2011) ("Here, Plaintiff called ADT 'to dispute a charge assessed by ADT.' Plaintiff has not alleged what circumstances would support an expectation of privacy in such a call. This telephone call did not concern 'personal financial affairs' as in *Kearney*, private family matters as in *Flanagan*, or other circumstances that would create a reasonable expectation that the conversation would not be recorded. Based on the nature of ADT's business, i.e., home security, and the character of the telephone call, i.e., a billing dispute, an ADT customer calling ADT to dispute a charge would not have an objectively reasonable expectation that the call would not be recorded or overheard."); *see also Sajfr v. BBG Commc'ns, Inc.*, No. 10CV2341 AJB (NLS), 2012 WL 398991, at *6 (S.D.Cal. Jan.10, 2012) (holding that "consumer calls to a customer care center to discuss a billing issue do not support an expectation of privacy sufficient to qualify such calls as a 'confidential communication' under section 632").

The conclusion that Plaintiff's call to a toll-free ordering number is not a "confidential communication" pursuant to section 632 is further supported by the legislative history of California's anti-wiretapping statutory scheme. That legislative history, which is provided in Defendant's Request for Judicial Notice, and to which Plaintiff did not object, makes clear that the Legislature did not intend to limit the ability of businesses to record or monitor calls between their employees and customers for quality assurance purposes. *See* Request for Judicial Notice, Ex. F at 197, 200–01, 323–25; *see also Sajfr*, 2012 WL 398991, at *6 ("[T]he legislative history of section 632 reflects that it was not intended to prohibit 'service-observing' because the legislature deemed that practice to be in the public's best interest.").

***4** The Court therefore concludes that Plaintiff's claim for violation of California Penal Code section 632 fails to state a claim upon which relief can be granted. Because Plaintiff's claim brought pursuant to California Business and Professions Code section 17200 relies exclusively on the alleged violation of California Penal Code section 632, the section 17200 claim fails as well.

CONCLUSION

For all of the foregoing reasons, the Court grants Defendant's Motion to Dismiss. Because the Court concludes that Plaintiff can plead no set of facts that could plausibly establish that her phone call to Defendant's toll-free ordering number could be considered a "confidential communication," the Court dismisses Plaintiff's First Amended Complaint with prejudice. Plaintiff's Motion for Class Certification (Docket No. 11) is denied as moot. The Court will enter a Judgment consistent with this Order.

IT IS SO ORDERED.

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