

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

PAPA JOHN'S INTERNATIONAL, INC.
and JOHN H. SCHNATTER

PLAINTIFFS

v.

CIVIL ACTION NO. 3:99CV-270-S

PIZZA HUT, INC.

DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on the Motion for Judgment on the Pleadings or Summary Judgment filed by the Defendant, Pizza Hut, Inc. Pizza Hut seeks dismissal of the claims of Plaintiff Papa John's International, Inc. ("Papa John's") on the basis that a separate action filed in the Northern District of Texas by Pizza Hut against Papa John's precludes Papa John's claims in the instant case. Pizza Hut seeks dismissal of Plaintiff John Schnatter's claims on the basis that they fail to state a claim as a matter of law. For the reasons below, Pizza Hut's motion will be denied by separate order.

FACTS

Pizza Hut and Papa John's operate competing nationwide pizza restaurant chains. Pizza Hut has been in business for nearly forty years, while Papa John's is a relative newcomer, having been started in 1984. In recent years, Papa John's has based its advertising campaign upon the slogan "Better Ingredients, Better Pizza." In that advertising campaign, it has made comparisons between its product and Pizza Hut's product. In response, Pizza Hut filed suit in the United States District Court for the Northern District of Texas in August, 1998, alleging that Papa John's had violated the Lanham Act, 15 U.S.C. § 1125(a) by engaging in false and misleading comparative advertising (the "Texas Litigation"). The subject matter of Pizza Hut's lawsuit centers around Papa John's slogan,

“Better Ingredients, Better Pizza,” including allegations regarding each restaurant’s sauce, dough, and toppings.

Pizza Hut also responded with its own advertising campaign comparing Papa John’s and Pizza Hut products. Three commercials in this advertising campaign became the subject of a counterclaim filed by Papa John’s in the Texas Litigation, alleging that Pizza Hut had violated the Lanham Act by engaging in false and misleading advertising. A fourth commercial, which Pizza Hut began airing after it filed the Texas Litigation, used an excerpt from a Papa John’s commercial in which Plaintiff Schnatter appeared. In response to this commercial, Papa John’s and Schnatter filed the instant lawsuit in the Western District of Kentucky, alleging federal claims based upon violations of the Lanham Act as well as state law claims.

On November 19, 1999, subsequent to the filing of the instant case, a jury in the Texas Litigation found Papa John’s “Better Ingredients. Better Pizza” slogan, as well as its claims regarding the parties’ dough and sauce, to be false and misleading. The parties waived their right to have damages tried to the jury and instead submitted their respective damages claims to the court. On January 3, 2000, the Texas Court issued its injunction and damages opinion. In part of that opinion, the Texas court enjoined Pizza Hut from running its commercial containing the excerpt of Papa John’s commercial portraying Plaintiff Schnatter, on the grounds that it was false and misleading. That commercial is the basis of Papa John’s and Schnatter’s claims in this case.

DISCUSSION

In considering a motion for judgment on the pleadings, the Court must “construe the complaint in the light most favorable to the plaintiff, accept all of the complaint’s factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.” *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). Summary judgment is appropriate 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." FED. R. CIV. P. 56(c).

Pizza Hut sets forth three arguments for dismissal of Papa John's claims: mootness, unclean hands, and that Papa John's claims were compulsory counterclaims in the Texas Litigation. With regard to the first, Papa John's and Schnatter do not dispute that part of their claim for relief is now moot, as Pizza Hut is currently enjoined from using that commercial. Papa John's and Schnatter do, however, have remaining claims for relief, including monetary damages, based upon the commercial. Therefore, judgment is not appropriate on the basis of mootness.

Pizza Hut also asserts that Papa John's has "unclean hands" in this matter, and that therefore its causes of action are barred. For unclean hands to bar a claim, the plaintiff's misconduct must "relate directly to the transaction about which the plaintiff has made a complaint." *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995). Plaintiff's alleged misconduct is related indirectly, at best, to the transaction in question. Pizza Hut's commercial was in response to Papa John's commercial which was found to be false and misleading by the Texas Litigation. However, the two commercials do not form one transaction. Any misconduct by Papa John's in their airing of their commercials does not give Pizza Hut carte blanche to employ similar alleged misconduct in the airing of their own commercials.

Pizza Hut has also again raised the issue of whether Papa John's claims were in fact compulsory counterclaims in the Texas Litigation. As grounds for reopening this issue, Pizza Hut relies upon the Texas Opinion and Judgment in which the Texas court enjoined Pizza Hut from airing the commercial that is the basis for the instant lawsuit. Once again, we note that the use of Schnatter's likeness was not at issue in the Texas Litigation, and the alleged misleading effect of this use is intertwined in the instant litigation with the claims regarding the two parties' pizza dough. Therefore, we again find that Papa John's claims were not compulsory counterclaims in the Texas Litigation. We do not find that Papa John's has unclean hands barring its claims.

We now turn to Plaintiff Schnatter's state law claims, which Pizza Hut asserts fail to state a claim as a matter of law. Schnatter asserts two causes of action under the tort of invasion of privacy: commercial appropriation and false light. Scant case law exists in Kentucky concerning the tort of invasion of privacy, but the Kentucky Supreme Court has adopted the principles of Section 652(A) of the Restatement (Second) of Torts concerning the tort of invasion of privacy, which includes appropriation and false light. *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981).

Pizza Hut asserts that Schnatter has failed to plead that his likeness has any value, a requirement of the tort of appropriation. *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995). In fact, however, Schnatter alleges in Paragraph 42 of the Complaint that his image and likeness has "tremendous value," which satisfies the pleading requirement.

Pizza Hut also argues that it did not "cash-in" on Schnatter's likeness because the commercial presents Schnatter speaking of behalf of Papa John's, not Pizza Hut. Section 652C of the Restatement, which specifically concerns appropriation, states, "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Clearly, Pizza Hut attempted to use Schnatter's likeness for its own use or benefit, and a review of the comments to Section 625C demonstrates that appropriation is not limited to instances in which a person's likeness is used to endorse a product. Finally, Pizza Hut asserts that its use of Schnatter's likeness was merely "incidental." We disagree. The clip of Schnatter is used not once, but twice in the commercial, and is in fact, the focus of it. Therefore, we do not find Schnatter's claim for appropriation fails as a matter of law.

Pizza Hut also claims that Schnatter's claim that Pizza Hut allegedly portrayed him in a false light fails as a matter of law. The two basic requirements of a false light action are: (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard of the falsity of the publicized matter and

the false light in which the other was placed.” *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981). In the Complaint, Schnatter alleges that his portrayal in the commercial is highly offensive, thus satisfying the first requirement.

In claiming that Schnatter’s action fails as a matter of law, Pizza Hut relies upon the finding in the Texas Litigation that Papa John’s dough is not better than Pizza Hut’s dough. Pizza Hut argues that this finding demonstrates that Pizza Hut’s commercial was not false, and that Schnatter was dishonest in his claim that Papa John’s dough is better. Pizza Hut’s commercial, however, claims that its dough is better than Papa John’s and shows a clip of Schnatter in a context that makes it appear that he agrees with that claim. The Texas court found the commercial to be false and misleading because it found that Pizza Hut’s dough is not better than Papa John’s. Thus, the findings in the Texas Litigation support Schnatter’s claim that the commercial portrays him in a false light by making it appear that he believes Pizza Hut’s dough is fresher than Papa John’s, when in fact, according to the Texas court, it is not. Therefore, Schnatter’s claim for false light does not fail as a matter of law.

CONCLUSION

Pizza Hut’s motion will be denied by separate order. A motion for continuance pursuant to Rule 56(f) made by Papa John’s is rendered moot by this opinion. The stay of discovery ordered by the Court on March 10, 2000, will be lifted.

This ____ day of _____, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion of the Defendant for Judgment on the Pleadings or for Summary Judgment is **DENIED**. The Motion for Continuance made by Plaintiffs is **DENIED** as moot. The stay of discovery entered by this Court's Order of March 10, 2000, is lifted, and discovery shall now proceed.

IT IS SO ORDERED this ____ day of _____, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record