**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

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| Leon Issac Kennedy,<br><br>Plaintiff,<br><br>v.<br><br>Johnson Publishing Company, LLC, a Delaware limited liability corporation; and John Does 1-5, individuals,<br><br>Defendants. | ) | No. 14 L 1038 |

**MEMORANDUM OPINION AND ORDER**

The state law of a plaintiff's domicile is generally applicable in a choice-of-law analysis. To survive a dispositive motion brought pursuant to the state of California's anti-SLAPP act, a plaintiff must demonstrate a probability of prevailing on the merits. Since the plaintiff here cannot establish that the defendant acted with actual malice in publishing an allegedly defamatory article, the defendant's dispositive motion must be granted with prejudice.

**Facts**

Leon Kennedy is a well-known minister and a Burbank, California resident. Prior to his current calling, Kennedy acted in Hollywood films and was a radio disc jockey. In 1971, he married television personality Jane Kennedy Overton, but the couple divorced approximately ten years later. At some point during their marriage, the couple voluntarily filmed themselves engaging in various sexual acts. That video later circulated privately, and today is available on the Internet.

Johnson Publishing Company, LLC is a Delaware limited liability corporation with its principal place of business in Chicago. Johnson Publishing publishes *Ebony* and *Jet* magazines. *Ebony*'s March 2013 edition included an article under the headline, "SCANDALOUS! REPEAT OFFENDERS! LIGHTS, CAMERA, ACTION," that stated in relevant part:

> Before celebs managed to forge careers out of leaked sex tapes, being caught on camera in compromising positions was oh-so taboo. The first example of this trend was the infamous 1980s **JAYNE KENNEDY** sex tape that was viciously leaked by her first husband during their divorce. Fortunately for Kennedy, the Internet wasn't

> widespread back in the day, so homemade copies were simply passed from perv to perv.

Johnson Publishing points out that Amy Keith, a California resident, wrote the piece, and she avers that she researched and wrote it in California.

On January 31, 2014, Kennedy filed a three-count complaint against Johnson Publishing charging defamation *per se*, defamation *per quod*, and false-light invasion of privacy. Kennedy seeks compensatory and punitive damages for the allegedly defamatory statements contained in the *Ebony* article and damages from John Does 1-5, the unknown individuals who wrote and edited the piece. Kennedy's claims are based on four specific statements. First, Kennedy denies that he "viciously leaked" the sex tape, and alleges, instead, that someone stole it and then leaked it in the 1990s. Second, Kennedy alleges that his divorce was amicable, as reported by Johnson Publishing in 1981 and 1982, and that he and his ex-wife remain friends. Third, Kennedy denies that he is a "repeat offender" since he has no criminal history, has never been linked to anti-social conduct, substance abuse, sexual harassment, gambling, domestic abuse, incidents of anger, and did not leak the sex tape once let alone multiple times. Fourth, Kennedy denies that he is not a pervert, alleging that he has been present at the birth of Overton's children, attended their school graduations, and invited to visit their home. Kennedy alleges that, as a consequence of the 2013 article, he had to cancel shows in Nigeria, California, Chicago, and Houston, experienced a decrease in conference invitations, and suffered from stress and anxiety.

In response to Kennedy's complaint, Johnson Publishing filed two motions. The first seeks to dismiss the complaint because the statements in the *Ebony* article are not defamatory and because a false-light-invasion-of-privacy claim is duplicative of a defamation claim. Johnson Publishing brings this motion pursuant to Illinois Code of Civil Procedure section 2-615. 735 ILCS 5/2-615. The second motion seeks to strike the complaint based on the substantive law found in the state of California's anti-SLAPP statute.[1] Cal. Civ. Proc. Code § 425.16. This motion does not identify the Illinois Code of Civil Procedure authorizing provision on which the motion is based. Keith is not a named defendant, but is a likely Jane Doe since she participated in the article's

[1] "Strategic lawsuits against public participation" seek to chill first-amendment rights to free speech and redress of grievances. *See* George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders," 12 Bridgeport L. Rev. 937 (1992). Anti-SLAPP statutes generally apply to dispositive motions as a means of expeditiously considering the merits of a SLAPP suit. *See, e.g.*, 735 ILCS 110/15.

publication. No other potential John or Jane Doe has been identified and none, including Keith, has been served.

## Analysis

### I. Procedural Posture

#### A. Section 2-615 Motion

The only question arising from a section 2-615 motion is whether the complaint presents allegations sufficient to support its causes of action. *See Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). If this court were to dismiss Kennedy's complaint – his first – it would likely be without prejudice so that he could try a second time to plead facts sufficient to state his purported causes of action. *See* 735 ILCS 5/2-615(d). That will not be the result here, but not because the complaint is sufficient, but because Johnson Publishing's motion is insufficient.

Johnson Publishing states, correctly, that in a defamation case, the relevant substantive state law is that in which the plaintiff resides. *See Velle Transcendental Research Ass'n, Inc. v. Esquire, Inc.*, 41 Ill. App. 3d 799, 802 (1st Dist. 1976). From this proposition, Johnson Publishing argues that California law should apply here. That is far too broad a conclusion. Johnson Publishing apparently failed to read the rest of *Velle* in which the court stated:

> In matters of pleading, including the sufficiency of pleadings or whether a cause of action is stated in a pleading, the law of the forum governs (16 Am. Jur. 2d *Conflict of Laws* § 76 (1964)) and in determining the sufficiency of the complaint we will thus apply the law of the forum State, Illinois.

*Id.* at 803. *See also Morris B. Chapman & Assoc. v. Kitzman*, 307 Ill. App. 3d 92, 99 (1st Dist. 1999). Yet Johnson Publishing cites only California law in support of its argument that the complaint is insufficient. Since Johnson Publishing has failed to cite any Illinois law on which this court may rely, the motion to dismiss is insufficient as a matter of law and must, therefore, be stricken. *See Villamil v. Elmhurst Mem. Hosp.*, 175 Ill. App. 3d 668, 671-72 (1st Dist. 1988) (foreign substantive law irrelevant in appeal of complaint's dismissal).

#### B. Motion to Strike

On its face, Johnson Publishing's motion to strike is defective because it fails to identify a Code of Civil Procedure section under which this court is

authorized to consider, let alone grant, such a motion. As the Illinois Supreme Court has expressly stated:

> Meticulous practice dictates that a lawyer specifically designate whether her motion to dismiss is pursuant to section 2-615 or section 2-619. . . . When confronted with such an omission, . . . reviewing courts typically review the nondesignated motion according to its grounds, its requests, or its treatment by the parties and the trial court.

*Illinois Graphics Co. v. Nickum*, 169 Ill. 2d 469, 484 (1994) (citations omitted). With such guidance, this court concludes that Johnson Publishing's motion to strike is properly designated as one brought pursuant to Code of Civil Procedure section 2-619(a)(9). 735 ILCS 5/2-619(a)(9). The reason is that Johnson Publishing asks this court to apply California's substantive law, which is plainly affirmative matter since it goes beyond the four corners of Kennedy's complaint. In addition, Johnson Publishing is not, in fact, asking this court to strike the complaint, which could permit its refiling, but to dismiss it with prejudice. Finally, while Kennedy disputes that California law defeats his complaint, he fails to argue that he would be prejudiced if the motion to strike were considered as a section 2-619 motion. In sum, this court will proceed to the substance of Johnson Publishing's motion to strike as if it were correctly denominated as a section 2-619(a)(9) motion to dismiss.

## II. Choice of Law

Before a court may embark on a conflict-of-law analysis, it must first determine whether a conflict exists. *See Townsend v. Sears, Roebuck & Co.*, Ill. 2d 147, 155 (2007). If there is a conflict, Illinois courts are to follow the most-significant-contacts test to determine which law is applicable. *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 801 (N.D. Ill. 2011) (applying Illinois law in defamation case). The test is comprised of the following factors: (1) the place where the injury occurred; (2) the place where the injury causing conduct occurred; (3) the parties' domicile, nationality, place of incorporation, and place of business; and (4) the place where the parties' relationship is centered. *Id.* These factors are weighed with the issues at stake and the policies embraced in the conflicting laws. *Id.*

In conflict-of-law cases, Illinois courts also follow the doctrine of depecage (originally, dépeçage), "which refers to the process of cutting up a case into the individual issues, each subject to a separate choice-of-law analysis." *Id.* This doctrine requires a court to analyze each issue raised separately. *Id.* Thus, in the context of defamation, the question of whether a statement is defamatory is separate from the question of whether a statement is privileged. *Id.* at 803.

As to whether the *Ebony* article is defamatory, both parties recognize that there exists a conflict of law. The parties argue that the action could be governed either by the law of California, Illinois, or Delaware. As to California, that state's anti-SLAPP statute is the broadest because it applies to "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Cal. Civ. Proc. § 425.16(e)(3). The Illinois anti-SLAPP act is narrower and applies only to matters "genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15. Delaware's anti-SLAPP act is the most limited because it applies only to governmental petitions and participations. Del. Code tit. 10 § 8137. Given the varying breadth of these laws, it is fair to conclude that a conflict exists and, therefore, a conflict-of-law analysis is appropriate.

Both parties also appear to agree that in a multi-state defamation case such as this, the issue of whether statements are defamatory is determined by the law of the state where the plaintiff lives. *Kamelgard v. Macura,* 585 F.3d 334, 341-42 (7th Cir. 2009). Courts usually arrive at this conclusion without conducting a formal most-significant-contacts test because defamation that occurs in multiple states can be hard to characterize. *Id.* at 341. The plaintiff's domicile is used as the default choice of law because that state is generally where most of the harm is felt. *Id.* at 342. Since neither party here offers an argument to depart from the norm, this court will apply California law to the issue of whether the statements in the *Ebony* article were defamatory.

As noted above, under the depecage doctrine, the question of whether the *Ebony* article's statements were privileged is a separate inquiry. There appears to be no binding precedent from Illinois courts on the issue, but federal courts applying Illinois law have routinely found that the most relevant factors for determining which anti-SLAPP statute to apply are: (1) the place where the speech occurred; and (2) the speaker's domicile. *Chi,* 787 F. Supp. 2d at 803. The emphasis placed on these factors makes sense considering that states have strong interests in determining for themselves how much protection they should afford to their citizen-speakers. *See id.*

In this case, it is not easy to characterize where the speech occurred. Johnson Publishing alleges that Keith researched and wrote the statements in California. Publication is an essential element of defamation, *see Kamelgard,* 585 F.3d at 342, and there can be no defamation until the speech has been published. *Id.* While publication has a business meaning, in the context of defamation law, publication is merely communication to a third party. *Id.*; *see also Black's Law Dictionary* 1227 (6th ed. 1994). It is unclear from the facts presented to the court where *Ebony* is sold and distributed to third parties, but it presumably includes California, Illinois, and Delaware, so the conduct could be

said to have occurred in each state and likely in others. This factor is, therefore, neutral.

The second factor is also not helpful. Johnson Publishing is a Delaware corporation with its principal place of business in Illinois. As noted above, however, Keith is a California resident who researched and wrote the article in California. Kennedy wishes to diminish the importance of Keith's domicile, while Johnson Publishing wishes to diminish the importance of its principle place of business and state of incorporation. Since both Johnson Publishing and Keith are responsible for the statements that allegedly defamed Kennedy, all three states matter, so this factor is neutral as well.

Since neither of these two factors is helpful in resolving which anti-SLAPP statute to apply, this court must look elsewhere for guidance. To this end, the court notes that the amount of expression an individual is allowed at the expense of another's reputation is a political balancing act best suited for resolution by legislatures so that individuals may be granted the leeway their legislatures deem appropriate. It is certainly fair, then, to determine how much freedom of speech the three legislatures have provided their residents. Illinois and Delaware each has a strong interest in determining how much of a privilege to grant Johnson Publishing, while California has a strong interest in determining how much of a privilege to grant Keith. This inquiry is also neutral.

Alternatively, it may seem wise to apply each state's anti-SLAPP statute to its particular defendant, but that is not how depecage is applied. *See Gregory v. Beazer East*, 384 Ill. App. 3d 178, 195-96 (1st Dist. 2008). The doctrine employs an issue-oriented approach, not a defendant-oriented one. *Id.* Thus, it would be error to employ this approach.

At this point, this court is in an unusual position. The primary factors typically used to determine which anti-SLAPP statute to apply do not resolve the issue and neither do the other factors that, at first, seemed useful. Further, there is no common-law precedent. In such a situation, it seems logical to go back to the bedrock principle that, when determining which law to apply, the "entire litigation must be considered in assessing which forum has the more significant contacts with the litigation." *Id.* at 196, *quoting Vickrey v. Caterpillar Tractor Co.*, 146 Ill. App. 3d 1023, 1027 (4th Dist. 1986). This court concludes, therefore, that it is proper to look to the other factors in the most-significant-contacts test to determine if they provide any guidance.

Johnson Publishing argues that the relationship between the parties is unquestionably centered in California, but that conclusion seems far too broad based on the three states that have an interest in this case. Since Kennedy's

interviews with Johnson Publishing in the early 1980s, it does not appear that the parties had any contact until 2013 when he mailed a complaint from his California home to Johnson Publishing's Chicago office. As stated above, the place where the conduct occurred is not particularly helpful here because conduct necessary to Kennedy's cause of action occurred in multiple states. Similarly, the domicile of the parties does not help much. Kennedy and Keith are from California, while Johnson Publishing is from Illinois or Delaware. So instead of tallying who has the higher number of residents in this action, it is more sensible to consider this factor neutral.

The final factor is the place of injury. Based on the complaint's allegations and the other pleadings and exhibits, it is fair to conclude that Kennedy may have been injured in multiple locations. He claims to have canceled shows in Nigeria, Houston, and Chicago, so there is potentially at least some injury to Kennedy that occurred in Illinois. As precedent suggests, however, the harm will almost always be felt the greatest in the plaintiff's domicile. Kennedy lives in California and his ministry is based there. It is fair to conclude, then, that the greatest injury arising from the allegedly defamatory remarks would have occurred in California.

In surveying the entire litigation, there is no doubt that California has the greatest interest in applying its laws to this dispute. Keith researched and wrote the piece in California, and it is one of the states where Johnson Publishing published the allegedly defamatory material. While Delaware, as Johnson Publishing's state of incorporation, and Illinois, as the company's principle place of business, each has an interest in this case, Keith will likely be named as a defendant if this case proceeds; consequently, California has a justifiable interest in protecting its citizen's freedom of expression. In sum, although many factors rated neutral in this analysis, the scale is tipped in California's favor because it is the location of Kennedy's greatest injury and because Keith has the most to lose when it comes to a party's (or potential party's) constitutional free-speech interest. This court concludes, therefore, that the California anti-SLAPP act applies.

## III. The California Anti-SLAPP Act

Johnson Publishing's section 2-619 motion to dismiss seeking to apply the California anti-SLAPP act requires a two-step analysis. *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 80 (2007). First, the movant must make a showing that the cause of action arises in furtherance of a protected activity. *Id.* If such a showing is made, then the movant has the burden of demonstrating a probability of prevailing on its claim. *Id.*

The parties do not dispute that the allegedly defamatory statements fall within the protection of the anti-SLAPP act. The act protects "any written or oral statement or writing made in a place open to the public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3). Johnson Publishing made its statements in a public forum, and a sex tape between two celebrities is arguably of public interest, that phrase being broadly construed. *Damon v. Ocean Hills Journalism Club,* 85 Cal. App. 4th 468, 477 (2000). In any case, Kennedy does not dispute that if California were the appropriate choice of law, that state's anti-SLAPP act would apply here.

Since Kennedy does not dispute that he is a public figure, for him to survive a motion to dismiss based on the anti-SLAPP act, he must demonstrate a probability of prevailing on the merits. That means he must establish by clear and convincing evidence that Johnson Publishing made its statements with actual malice. *Alnor*, 148 Cal. App. 4th at 81. Actual malice is defined as "publishing a knowingly false statement or where [the publisher] 'entertained serious doubts as to [its] truth.'" *Id.*, *quoting Reader's Digest Ass'n v. Superior Ct.*, 37 Cal. 3d 244, 256 (1984). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id.*, *quoting Reader's Digest*, 37 Cal. 3d at 256-57. It is a subjective measure, so even gross or extreme negligence is not enough to establish actual malice. *Id.* at 88. The mere failure to investigate is insufficient to demonstrate actual malice, but in the appropriate case, that fact may be used to create an inference that the defendant had subjective doubts about the veracity of the statements. *Id.* at 84-5, 90. "If evidence from which actual malice may be proven is not readily available, the nonmoving party may, on noticed motion and for good cause, request discovery." *Id.* at 93.

Kennedy's only evidence to support his claim that the allegedly defamatory statements were published with actual malice are interviews he gave in 1981 and 1982 stating that his divorce was amicable. Kennedy's case, therefore, revolves around whether Johnson Publishing's failure to investigate in 2013, given the circumstances, is enough that one could reasonably draw the inference that Keith or Johnson Publishing was aware that their statements about Kennedy were false or that they had serious doubts about their truthfulness. Considering all the circumstances and evidence, it does not seem that such a conclusion is warranted.

In this case, the defendants received no prior notice that their statements might be false. Johnson Publishing reported in 1981 and 1982 that the Kennedys' divorce was amicable, but there is no evidence that Keith or other persons responsible for the *Ebony* article knew about reports that had appeared

more than 30 years earlier. And even if Keith and others did know of those articles, it would not be unreasonable to believe that the divorce had soured later. Further, prior to the *Ebony* article, it was widely reported that Kennedy purposefully leaked the video. The defendants had no reason to doubt these accounts because, until this lawsuit, Kennedy made no effort to challenge them.

Finally, the cases Kennedy cites to support his malice claim are unconvincing. In *Fisher v. Larsen*, 138 Cal. App. 3d 627, 639 (1982), the court found evidence of actual malice when the defendants relied on the statements of one individual about another when the defendants knew that the two individuals were in a bitter feud. In *Antonovich v. Superior Ct.*, 234 Cal. App. 3d 1040, 1052 (1991), the court found a sufficient showing for actual malice based on a failure to investigate after Antonovich's staff told him that his statements were untrue. In *Grewal v. Jammu*, 119 Cal. App. 4th 977, 993-94 (2011), the court found that the plaintiff was not a public figure; nonetheless, the court in *dicta* stated that actual malice could be shown by relying on a known unreliable source. *Id.* at 994. All of these cases have a unifying theme – the defendants in those actions had been confronted with direct evidence that their statements may be suspect and then made no effort to verify them. No similar situation exists here.

The evidence presented by Kennedy is simply insufficient to demonstrate that he has a probability of demonstrating by clear and convincing evidence that Johnson Publishing, Keith, and others acted with actual malice. Kennedy contends that he needs more time for discovery, but under California's anti-SLAPP act he could have asked for limited discovery, but chose not to. In addition, the law is not in Kennedy's favor. As noted above, the anti-SLAPP act is intended to operate as a summary-judgment-like procedure at an early stage of litigation. *Id.* at 990. The application of California's anti-SLAPP act is, therefore, appropriate at this time, and Johnson Publishing's section 2-619 motion to dismiss should be granted with prejudice as to it and all John Doe employees or agents.

## Conclusion

The applicable choice of law for this lawsuit is that of the state of California, meaning that its anti-SLAPP act applies here. Further, Kennedy has failed to meet his burden of establishing that he has a possibility of establishing by clear and convincing evidence that Johnson Publishing or anyone else acted with actual malice, an essential element to his claim. With that conclusion,

IT IS ORDERED THAT:

1. Johnson Publishing's section 2-615 motion to dismiss is stricken;
2. Johnson Publishing's section 2-619(a)(9) motion to dismiss pursuant to Cal. Civ. Pro. Code § 425.16 is granted with prejudice;
3. This case is dismissed in its entirety; and
4. The case management conference on 10 July 2014 at 11:00 a.m. is stricken.

Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075