

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA

Cohen v. Chenoweth

Cohen · No. 22-CV-1451-GPC-WVG · Decided March 10, 2023

SUMMARY

The United States District Court for the Southern District of California denied King Cohen’s motion for leave to object to a declaration submitted by Rory Chenoweth, finding the objection untimely and lacking merit. The court also denied leave to file an untimely affidavit opposing the defendants’ motion to dismiss, concluding that the affidavit was both untimely and immaterial at the motion-to-dismiss stage.

CASE DETAILS

|                    |                                                                                                                                                                                                                |
|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT              | United States District Court for the Southern District of California                                                                                                                                           |
| JURISDICTION       | United States District Court for the Southern District of California                                                                                                                                           |
| DECIDED            | March 10, 2023                                                                                                                                                                                                 |
| DOCKET             | 22-CV-1451-GPC-WVG                                                                                                                                                                                             |
| DISPOSITION        | other                                                                                                                                                                                                          |
| PROCEDURAL POSTURE | Plaintiff King Cohen moved for leave to object to a statement in Defendant Rory Chenoweth's declaration and for leave to file an untimely affidavit opposing Defendants' motion to dismiss.                    |
| STANDARD OF REVIEW | On a motion to dismiss, the court accepts well-pleaded factual allegations as true, draws reasonable inferences in favor of the nonmoving party, and generally may not consider material beyond the complaint. |
| PRECEDENTIAL VALUE | Unknown                                                                                                                                                                                                        |

TOPICS

- motions to dismiss
- hearsay
- evidence
- pleadings
- civil procedure

PRACTICE AREAS

- civil procedure
- evidence

QUESTIONS PRESENTED

1. Whether Cohen should be granted leave to file a late hearsay objection to Chenowth's declaration.
2. Whether Cohen should be granted leave to file an untimely affidavit and accompanying screenshots in opposition to Defendants' motion to dismiss.
3. Whether Chenowth's statement about his own location was hearsay under Federal Rule of Evidence 801.

## HOLDINGS

1. Leave to file the objection was denied because the request was untimely and lacked merit.
2. Leave to file the untimely affidavit and accompanying screenshots was denied.

## KEY QUOTATIONS

*“At the motion to dismiss stage, the Court is not acting as a factfinder; instead the Court accepts as true the factual allegations contained in the complaint, and determines whether the complaint states a facially plausible claim for relief.”* (at 2)

## FACTUAL BACKGROUND

In opposition to Cohen's pending sanctions motion, Chenowth submitted a declaration stating where he was located when the events underlying the sanctions motion allegedly occurred. Cohen sought leave nearly two months after filing his reply to object to that statement as hearsay. Cohen also sought to submit an untimely affidavit and screenshots of text messages concerning the timeline of events and the alleged validity of his negligence per se claim in response to Defendants' motion to dismiss.

## PROCEDURAL HISTORY

Defendants filed a motion to dismiss on December 7, 2022. Cohen filed a timely but overlength response on January 12, 2023, and later sought leave to file an objection and an additional affidavit. The district court denied both requests.

## DISPOSITION

other

## CASES CITED

- *RG Abrams Ins. v. Law Offices of C.R. Abrams*, 342 F.R.D. 461, 485 (C.D. Cal. 2022)
- *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007)
- *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2011)
- *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007)

## OPINION

Cohen v. Chenoweth

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 KING COHEN, and HEATHER COHEN, Case No.: 22-CV-1451-GPC-WVG 12 Plaintiffs,  
ORDER

13 v. (1) DENYING MOTION TO FILE  
OBJECTION; AND

14 RORY CHENOWETH, and KELLYE  
(2) DENYING MOTION FOR LEAVE  
LAUGHERY,

15 TO FILE AFFIDAVIT

Defendants. [ECF No. 42] 16 17 Plaintiff King Cohen seeks leave to (1) object to a statement  
contained in Defendant 18 Rory Chenoweth's Declaration and (2) to file an untimely affidavit in  
opposition to 19 Defendants Rory Chenoweth's and Kellye Laughery's motion to dismiss. ECF No.  
42. For 20 the reasons that follow, both motions are denied. 21 Objection to Chenoweth's  
Declaration 22 In opposition to Cohen's pending motion for sanctions, Chenoweth submitted a 23  
declaration, the substance of which involves a statement attesting to his location during the 24  
time in which the events giving rise to the motion for sanctions purportedly occurred. See 25 ECF  
No. 25-1 at 2. This declaration was filed on December 23, 2022, *id.*, and Cohen filed 26 27 1 a  
reply on January 13, 2023, ECF No. 30. Now, nearly two months after the reply was 2 filed,  
Cohen seeks leave to object to the declaration as hearsay.<sup>1</sup> ECF No. 42 at 1.

3 Rule 801 of the Federal Rules of Evidence generally prohibits the admission of  
4 statements made outside of court that are being offered for the truth of the matter asserted. 5 But  
this statement is Chenoweth's own assertion of where he was located during the time in 6 question;  
he makes no reference to any type of matter prohibited by Rule 801. See RG 7 *Abrams Ins. v. L.*  
*Offs. Of C.R. Abrams*, 342 F.R.D. 461, 485 (C.D. Cal. 2022) (similar). 8 Accordingly, this motion  
to file an objection is denied for being untimely and lacking merit. 9 Leave to File Untimely  
Affidavit 10 Cohen next asks for the Court's leave to file an untimely affidavit in response to 11  
Chenoweth's and Laughery's motion to dismiss. ECF No. 42 at 2. He attributes the 12 untimeliness  
to his COVID-19 symptoms. *Id.* However, the motion to dismiss was filed 13 on December 7,  
2022, ECF No. 23; Cohen filed a timely—though overlength—response 14 on January 12, 2023,  
ECF Nos. 26 & 27; and the first time Cohen indicated he had 15 COVID-19 was March 6, 2023,  
ECF No. 39. Accordingly, unless Cohen meant to allege 16 that he has either been suffering from  
the symptoms of “long COVID” or has repeatedly 17 contracted COVID-19 over the last few  
months, the Court finds suspect the suggestion that 18 Cohen's current COVID-19 symptoms  
interfered with his ability to respond to Chenoweth's 19 and Laughery's motion to dismiss back in

January. 20 Cohen next argues that the untimely affidavit and accompanying screenshots of text 21 messages purportedly between his wife, Heather Cohen, and their neighbor, Chenoweth's 22 and Laughery's tenant, are necessary to "aid the fact finder in determining the timeline of 23 events, veracity of Defendants [sic] alibi . . . and finally the validity of [Cohen's] 24 25 26 1 Cohen's motion does not specifically identify this document, so the Court deduces through the process of elimination that this is the declaration and the statement at issue to which Cohen is referring. 27 1 || Negligence Per Se civil claim." ECF No. 42 at 2-3. However, at the motion to dismiss 2 ||stage, the Court is not acting as a factfinder; instead the Court accepts as true the factual 3 ||allegations contained in the complaint, and determines whether the complaint states a 4 || facially plausible claim for relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell 5 || Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007). "All reasonable inferences must be 6 drawn in favor of the non-moving party." *Bryan vy. MacPherson*, 630 F.3d 805, 823 (9th 7 || Cir. 2010). "Generally, a court may not consider material beyond the complaint in ruling 8 a" motion to dismiss. */ntri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 9 || (9th Cir. 2007). Setting aside the untimeliness of the affidavit, the Court finds immaterial 10 |at this stage the affidavit's support of factual allegations contained in the complaint. 11 || Accordingly, the Court DENIES Cohen's motion for leave to file an untimely affidavit in 12 || opposition to the Defendants' motion to dismiss. 13 IT IS SO ORDERED. 14 || Dated: March 10, 2023 <= 16 United States District Judge 17 18 19 20 21 22 23 24 25 26 27 28 22-CV-1451-GPC-WVG