

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Cohen v. Chenowth

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

OPINION

Cohen v. Chenowth

PER CURIAM.

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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 CHENOWTH, 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 Chenowth's Declaration and (2) to file an untimely affidavit in
opposition to 19 Defendants Rory Chenowth's and Kellye Laughery's motion to dismiss. ECF No.
42. For 20 the reasons that follow, both motions are denied. 21 Objection to Chenowth's
Declaration 22 In opposition to Cohen's pending motion for sanctions, Chenowth 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.¹ 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 Chenowth'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

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