

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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CLERK OF COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA
EJF

DIRECTV, INC.,

Plaintiff,

-vs-

Case No. 6:03-cv-239-Orl-28DAB

JEFF THACKER, HAROLD HOOVER,
PETER SMITH, SUSAN TRIPP,
BENNETT LEVE,

Defendants.

ORDER

Plaintiff, DIRECTV, Inc., has sued Defendant, Bennett Leve, and others for violation of provisions of 18 U.S.C. §§ 2512(1) and 2520. Pursuant to Fed. R. Civ. P. 12(b)(6), Mr. Leve moves this court to dismiss Count III of the Complaint asserting that 18 U.S.C. § 2512 does not provide DIRECTV a private right of action. The motion must be granted.

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cal. Int'l Chem. Co. v. Neptune Pool Serv., Inc., 770 F. Supp. 1530, 1532 (M.D. Fla. 1991); see also Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F. 2d 1171, 1174 (11th. Cir. 1993) ("Dismissal is appropriate where it is clear the plaintiff can prove no set of facts in support of the claims in the complaint."). A trial court, in ruling on a

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motion to dismiss, is required to review the complaint in the light most favorable to the plaintiff. Cal. Int'l, 770 F. Supp. at 1532. Consequently, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev., 711 F.2d 989, 995 (11th Cir. 1983).

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999) (citing Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1988)). However, "as a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996) (citing Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)) (citation omitted).

Section 2512(1) is obviously a criminal statute the violation of which may result in imprisonment and imposition of a fine. In relevant part, the statute provides:

- (1) Except as otherwise specifically provided in this chapter, any person who intentionally
 - (b) manufactures, assembles, possesses, or sells any electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; . . . shall be fined under this title or imprisoned not more than five years.

Section 2512 does not directly mention civil liability or indirectly suggest that Congress intended to provide private recourse for violation.

Section 2520(1), on the other hand, does create a civil right of action for certain specific violations. It provides:

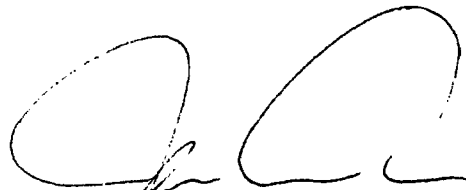
(1) Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is **intercepted, disclosed, or intentionally used** in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate. (emphasis added).

The question thus becomes whether the Complaint includes allegations falling within the exception providing for a civil cause of action.

The allegations specifically attributed to Mr. Leve do not include allegations that he intercepted, disclosed or intentionally used the electronic communications of DIRECTV. Indeed, those allegations contained in paragraphs 23 - 27 of the Complaint claim that Mr. Leve merely ordered and received Pirate Access Devices. Paragraph 18 of the Complaint alleges defendants "purchased and used illegally modified DIRECTV Access Cards and other devices ("Pirate Access Devices") that are designed to permit viewing of DIRECTV's television programming without authorization by or payment to DIRECTV." These paragraphs do not state, however, that Mr. Leve "intercepted, disclosed, or intentionally used" DIRECTV's electronic communications. Accordingly, these allegations alone would not support a civil cause of action under 18 U.S.C. § 2512. See generally Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985).

Accordingly, Mr. Leve's Motion to Dismiss (Doc. 13) is granted and Count III is dismissed without prejudice as to Bennett Leve. Plaintiff is granted 15 days to file an amended complaint.

DONE and **ORDERED** in Chambers, Orlando, Florida this 15 day of April, 2003.



JOHN ANTOON II
United States District Judge

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Copies furnished to:
Counsel of Record
Unrepresented Party