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ENDORSED
FILED
San Francisco County Superior Court

JUN 20 2006

GORDON PARK-LI, Clerk
BY: _____ Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, UNLIMITED JURISDICTION
COUNTY OF SAN FRANCISCO
DEPARTMENT 301

447679

DANIEL SHEEHAN, an individual; and
KATHLEEN SHEEHAN, an individual,

PLAINTIFFS,

VS.

THE SAN FRANCISCO 49ERS, LTD, a
limited partnership,

DEFENDANTS.

ORDER SUSTAINING DEFENDANT'S
DEMURRER WITHOUT LEAVE TO
AMEND

The general demurrer of Defendant The San Francisco Forty Niners, Ltd. (herein 49ers) to Plaintiffs Daniel and Kathleen Sheehans' Complaint came on regularly for hearing before the Honorable James L. Warren on March 20, 2006, in Department 301. Sonya D. Winner of Covington & Burling appeared on behalf of the 49ers and Benjamin Riley of Chapman, Popik & White LLP appeared for the Sheehans. During oral argument, counsel pointed out that the facts alleged in the Complaint rendered the Complaint moot, as the 2005 - 2006 49ers season had already passed and, consequently, injunctive relief could not be

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Chapman, Popik & White

1 granted. Per stipulation of counsel, Plaintiffs were then given leave to file a First Amended
2 Complaint to address the mootness problem. The First Amended Complaint, which has since
3 been filed, contains an allegation that Plaintiffs have purchased 49ers season tickets for the
4 2006 - 2007 season.

5 In reviewing the First Amended Complaint, the Court notes that in prior briefings on
6 this Demurrer, Plaintiffs alleged that they had no advance notice of the 49ers' pat-down
7 policy when they purchased their season tickets for the 2005 - 2006 season; hence their suit
8 for an injunction to stop the practice. The First Amended Complaint, however, alleges that
9 Plaintiffs recently purchased 49ers season tickets for the 2006 - 2007 season, at which time
10 they necessarily had knowledge of the 49ers pat-down policy prior to entry to a game.
11 Nevertheless, with this knowledge, Plaintiffs proceeded to purchase tickets for this year's
12 season. The Court thus requested supplemental briefing addressing this change in facts and
13 its implications.
14

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16 The Court, having considered the Defendants' Motion, the oral and written
17 arguments, the supplemental briefs, and positions of the parties for and against the Motion,
18 finds the following:

19 This Demurrer turns on whether the facts alleged in the First Amended Complaint are
20 sufficient to describe a prima facie violation of Article I § 1 of the California Constitution as
21 outlined in *Hill v Natl. Collegiate Athletic Association* (1994) 7 Cal.4th 23. Under *Hill*, there
22 are three elements to a cause of action for violation of California's constitutional right to
23 privacy action: First, there must be a specific, legally protected informational or autonomy
24 privacy interest. *Id.* at 35. Second, there must be a reasonable expectation of privacy, i.e.,
25 "an objective entitlement founded on broadly based and widely accepted community norms,"
26 on plaintiff's part. *Id.* at 36, 37. Third, "[a]ctionable invasions of privacy must be
27

1 sufficiently serious in their nature, scope, and actual or potential impact to constitute an
2 egregious breach of the social norms underlying the privacy right. Thus, the extent and
3 gravity of the invasion is an indispensable consideration in assessing an alleged invasion of
4 privacy." *Id.* at 37.

5 Bearing these standards in mind, Plaintiffs' case fails under the second and third
6 elements of *Hill*. Plaintiffs have not shown (and, indeed, based on the file in this case,
7 cannot show) that they have a reasonable expectation of privacy such that before entry to any
8 49ers games in the 2006 - 2007 season, they do not expect to be subject to a pat-down. Nor
9 that they shown that, in the light of their expectations, the pat-downs are sufficiently serious
10 in their nature, scope, and actual or potential impact to constitute an egregious breach of the
11 social norms underlying the privacy right.

12 As outlined in *Hill*, the extent of a privacy interest is dependent on the
13 circumstances.¹ *Hill* notes that the plaintiff in an invasion of privacy case must conduct
14 himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she
15 must not have manifested, either specifically or by conduct, a voluntary consent to the
16 invasive actions of defendant. *Hill* at p. 26. If voluntary consent is present, a defendant's
17 conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort
18 liability. *Id.*

19 In the circumstances of this case, and as stated in the First Amended Complaint,
20 Plaintiffs had full notice of the pat-down policy - - and the requirement of consent to a pat-
21 down prior to game entry - - prior to purchasing their tickets for the 2006 - 2007 season.
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¹ *Hill* outlines that even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to limit an intrusion upon personal dignity and security that would otherwise be regarded as serious. In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and

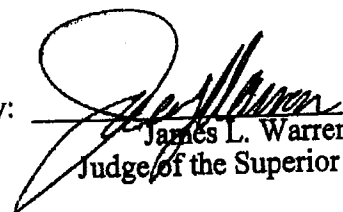
1 Nonetheless, with this foreknowledge, they voluntarily purchased those tickets. Therefore,
2 because Plaintiffs voluntarily consented to the pat-downs by the purchase of their 2006 -
3 2007 49ers season tickets, they cannot now claim that the pat-downs are "highly offensive to
4 a reasonable person" so as to justify tort liability. Nor can they claim a reasonable
5 expectation of privacy.²

6 Plaintiffs' voluntary consent to the pat-down policy by their purchase of the 49ers
7 2006-2007 season tickets shows that Plaintiffs do not have a reasonable expectation of
8 privacy in regards to the pat-downs before entry to the 49ers games. That purchase also
9 shows that the pat-downs are not sufficiently serious in their nature, scope, and actual or
10 potential impact to constitute an egregious breach of the social norms underlying the privacy
11 right. Because Plaintiffs cannot allege that they did not consent to the pat-down policy, and
12 because their consent is fatal to their complaint, leave to amend cannot be granted.

13 Defendants' demurrer is sustained without leave to amend.

14 IT IS ORDERED.

15 Dated: 6/16/06

16 By: 
17 James L. Warren
18 Judge of the Superior Court

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26 widely accepted community norms. Finally, the presence or absence of opportunities to consent voluntarily to
27 activities impacting privacy interests obviously affects the expectations of the participant.

28 ² Plaintiffs cite to *Kraslawski v Upper Deck* (1997) 56 Cal.App.4th 179 for the proposition that consent is
generally viewed as a factor in the balancing analysis and not a complete defense to a privacy claim. However,
as outlined in *Hill*, voluntary consent to an invasion of privacy can be determinative is showing that the
particular invasion is not highly offensive to a reasonable person so as to justify tort liability.

California Superior Court

County of San Francisco

Law & Motion Department • Room 301

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No. 447679

**Certificate of Service by Mail
(CCP § 1013a(4))**

I, Gordon Park-Li, Clerk of the Superior Court of the City and County of San Francisco, certify that:

1) I am not a party to the within action;

2) On JUN 20 2006, I served the attached:

**ORDER SUSTAINING DEFENDANT'S DEMURRER WITHOUT LEAVE TO
AMEND**

by placing a copy thereof in a sealed envelope, addressed to the following:

Sonya D. Winner
Covington & Burling
One Front Street
San Francisco, California 94111


Benjamin J. Riley
Chapman, Popik & White, LLP
650 California Street, 19th Floor
San Francisco, CA 94108

Ann Brick, Esq
ACLU
1663 Mission Street, Suite 460
San Francisco, California 94103

and,

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister St., San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practice.

Dated: JUN 20 2006

GORDON PARK-LI, Clerk
By:  deputy