

SHEEHAN v. SAN FRANCISCO 49ERS, LTD.

Supreme Court of California, 2009.

45 Cal.4th 992, 201 P.3d 472, 89 Cal.Rptr.3d 594.

CHIN, ASSOCIATE JUSTICE.

In 2005, the San Francisco 49ers, Ltd. (49ers) began implementing a policy of the National Football League (NFL) requiring all patrons at their football games to submit to a pat-down search before entering the stadium. Plaintiffs claim the policy violates their state constitutional right to privacy. The case has come to us after the superior court sustained a demurrer and dismissed the action. On appeal * * * , we assume as true all facts alleged in the complaint. * * * [W]e hold the record does not contain enough information to establish as a matter of law that the complaint fails to state a cause of action. Accordingly, this action is not susceptible to disposition on demurrer. We reverse the Court of Appeal’s judgment and remand the matter for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

In December 2005, plaintiffs Daniel and Kathleen Sheehan filed a complaint for injunctive and declaratory relief against the 49ers. It alleged the following:

Plaintiffs are longtime 49ers season ticket holders. * * * Plaintiffs and all other ticket holders “were subjected to a pat-down search by ‘Event Staff’ screeners before they were allowed to enter the stadium. On each such occasion, after being herded through barricades, [plaintiffs] were forced to stand rigid, with arms spread wide. The 49ers’ screeners then ran their hands around the [plaintiffs’] backs and down the sides of their bodies and their legs. Members of the San Francisco Police Department stood a few feet away from the screeners and observed the pat-down searches taking place.” The 49ers implemented the pat-down policy pursuant to a policy the NFL promulgated in August 2005, by which “stadium screeners are supposed to conduct physical searches by ‘touching, patting, or lightly rubbing’ all ticket holders entering every NFL stadium for each NFL game [that] year.” Plaintiffs “object to being forced to undergo these suspicionless searches as a condition of retaining their season tickets.”

The complaint * * * sought a declaration that the searches were unconstitutional and an injunction prohibiting any further such searches.

The 49ers demurred to the complaint, arguing that it did not state a cause of action. * * * Ultimately, the trial court sustained the demurrer without leave to amend and dismissed the action with prejudice. Plaintiffs appealed.

The Court of Appeal affirmed. It “conclude[d] that the Sheehans cannot demonstrate that they had a reasonable expectation of privacy under the circumstances....” It explained that “rather than submit to the pat-down the Sheehans had

the choice of walking away, no questions asked.” Justice Rivera dissented. She “disagree[d] that the purchase of future tickets with knowledge of the search policy—or acquiescence in a pat-down search to gain entry to the 49ers games—supports a conclusion *as a matter of law* that the Sheehans have relinquished their reasonable expectation to be free from unjustified, intrusive searches.” She would have reversed the judgment and remanded the matter for further factual development.

We granted plaintiffs’ petition for review, which raised the question whether the Court of Appeal properly found they validly consented to the search policy.

II. DISCUSSION

* * *

The case comes before us after the superior court dismissed the case on demurrer. This means that the 49ers have not yet even filed an answer, given any explanation or justification for the alleged search policy, or asserted any defenses. The only record we have, and all we have to go by in deciding this case, is the complaint. In this procedural posture, we must assume that all of the facts alleged in the complaint are true. Moreover, we may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible legal theory. The Court of Appeal held that plaintiffs validly consented to the search policy. It may ultimately be right, but the meager record before us does not establish valid consent as a matter of law. In particular, the 49ers have not demonstrated that the allegations of the complaint fail to state a cause of action under any possible legal theory. * * *

In *Hill* [v. National Collegiate Athletic Association], 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633, a case involving a challenge to the student-athlete drug testing policies of the National Collegiate Athletic Association (NCAA), we considered the showing a person must make to state a violation of California’s constitutional right to privacy. That decision made clear that “the right of privacy protects the individual’s *reasonable* expectation of privacy against a *serious* invasion.” (*Pioneer Electronics (USA), Inc. v. Superior Court* [casebook p. 339]. * * * “The party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.” “A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.”

Hill further explained that, “[c]onfronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to the defendant’s conduct that would minimize the intrusion on privacy interests.” * * *

Hill cannot properly be read, however, to have adopted a sweeping new rule under which a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may be rejected without any consideration of either the legitimacy or strength of the defendant’s justification for the conduct.”

* * *

The issue here involves the second element, the one the courts below found lacking. Plaintiffs must establish a *reasonable* expectation of privacy under the circumstances. “A ‘reasonable’ expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.” * * * “A plaintiff’s expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved.”

The factual record of this case—which consists solely of the complaint—does not establish what the competing social interests are. Presumably, the NFL, and ultimately the 49ers, adopted the policy to enhance spectator safety, but the record does not establish this or explain why the NFL believed the policy was appropriate. As evidenced by the circumstance that the pursuit of safety, like the pursuit of privacy, is a state constitutional right, the competing social interest of enhancing safety is substantial. Those who provide private entertainment venues * * * have a substantial interest in protecting the safety of their patrons. But when the security measures substantially threaten a privacy right, courts review the policy for reasonableness under the circumstances. Here, we cannot do so because the record does not establish the circumstances of, or the reasons for, the pat-down policy. The 49ers have not yet given any justification for its policy.

* * *

In this case, given the absence of an adequate factual record, we conclude that further inquiry is necessary to determine whether the challenged policy is reasonable in light of the factors we have discussed. Plaintiffs are entitled to proceed with their case.

III. CONCLUSION

We reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with this opinion.

WE CONCUR: KENNARD, BAXTER AND CORRIGAN, ASSOCIATE JUSTICES.

Concurring Opinion by WERDEGAR, ASSOCIATE JUSTICE [joined by GEORGE, CHIEF JUSTICE, and MORENO, ASSOCIATE JUSTICE].

I agree with my colleagues that the numerous unresolved factual issues remaining in this case preclude resolution on demurrer and require that we reverse judgment for the San Francisco 49ers (49ers) and remand for further proceedings. But both because of what it says and what it does not say in arriving at that conclusion, I cannot join the

majority opinion.

I

* * * Moreover, “[r]egardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion.” Thus, the question before us is whether or not the Sheehans can conceivably make out any privacy claim. Because privacy claims typically involve a fact-dependent weighing, resolution of such claims on demurrer is rare.

Having considered the rationales offered by the 49ers for deciding this case on demurrer, I agree with the majority opinion that the lower courts erred in finding that the Sheehans’ claim challenging their pat-down policy fails as a matter of law. At this stage, as the majority opinion acknowledges, the 49ers have not negated the existence of a reasonable expectation of privacy in the circumstances, an expectation that is heavily context dependent and can be fairly assessed only after the development of a factual record. Nor have they pled or proved any justification for the alleged invasion of privacy.

The barriers to resolving this case on demurrer, however, are even greater than is apparent from the majority opinion. The Sheehans have not yet been afforded the opportunity *Hill* guarantees them to rebut any asserted or assumed justification by raising alternatives. “Confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to the defendant’s conduct that would minimize the intrusion on privacy interests. ... [I]f defendant’s legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.” The existence of less intrusive alternatives thus may well bear critically on proving an invasion of privacy. On demurrer, we have no evidence whether feasible, less intrusive measures exist that might achieve the 49ers’ asserted goals—goals thus far not even pled—while reducing any invasion of privacy. Because the majority opinion devotes only passing reference to the fact that the existence of alternatives may be central to proof of a privacy claim, * * * its discussion of the role of alternatives is incomplete and misleading.

* * *

II

While the majority opinion speaks to matters we have no occasion to address, it is silent with respect to matters we are obligated to decide. Notably, the majority opinion simply assumes the Sheehans have sufficiently alleged a serious invasion of a privacy interest. But as the 49ers expressly contest this point, and as their contention, if valid, would lead to affirmance of the judgment, I do not think we are at liberty to simply assume the issue away, but instead should address it on the merits.

On those merits, I think it clear the Sheehans have alleged an invasion of privacy

of sufficient magnitude to survive demurrer and require the 49ers to answer. Significantly, the “serious invasion” prong (*Hill*) is intended only to allow courts to “ ‘weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.’ ”

* * * From these cases and from the general frequency with which pat-down policies are challenged and litigated to differing results, I think it apparent that the intrusion at issue, far from being trivial or insignificant, involves a substantial invasion of [the] citizens’ interests and expectations of physical autonomy.

With these reservations, I concur in the decision to return this case to the trial court for resolution on a fully developed record.