

TENTATIVE RULING: PART 3

In their Reply, Defendant argues such statements, made in the course of a judicial proceeding, are completely privileged and cannot form the basis for a slander cause of action citing Civil Code § 47 and *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163. (Reply, p. 2 lines 12-16)

However, the court in *Flatley v. Mauro*, 39 Cal.4th 299 at 324 did not find the privilege to be so absolute stating “conversely, Civil Code section 47 states a statutory privilege, not a constitutional protection. As we recognized in *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma* (1986) 42 Cal.3d 1157, that statutory privilege is specific and limited in nature. In *Oren*, we concluded that while Civil Code section 47 prohibited an action based on a party’s statements made during settlement negotiations, it did not preclude the use of those statements as evidence of the party’s intent to establish an abuse of process claim. (*Oren*, supra, 42 Cal.3d at pp. 1167–1168) We stated: “The privileges of Civil Code section 47, unlike evidentiary privileges which function by the exclusion of evidence [citation], operate as limitations upon liability.” (Italics added.) Indeed on brief reflection, it is quite clear that section [47, subdivision (b)] has never been thought to bar the evidentiary use of every ‘statement or publication’ made in the course of a judicial proceeding....” (*Oren* at p. 1168.) By parity of reasoning, Civil Code section 47 does not operate as a limitation on the scope of the anti-SLAPP statute. The fact that Civil Code section 47 may limit the liability of a party that sends to an opposing party a letter proposing settlement of proposed litigation does not mean that the settlement letter is also a protected communication for purposes of section 425.16. Therefore, we reject Mauro’s contention that, because some forms of illegal litigation-related activity may be privileged under the litigation privilege, that activity is necessarily protected under the anti-SLAPP statute.”

O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC (2019) 42 Cal.App.5th 546, 574 states, “to satisfy the second prong—the probability of prevailing—the plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is accepted. The trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. Although “the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.”” citing *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 962–963.) The party defending against an anti-SLAPP motion need only show that the claim has “minimal merit” to survive an anti-SLAPP motion. (*Navellier*, supra, 29 Cal.4th at pp. 93–94.)

The “minimal merit” aspect has been described as “sufficient prima facie showing”... “[S]ection 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant’s free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as ‘requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim’ [citation].” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63 “ ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” ’ [Citations.]” (*Navellier*, supra, 29 Cal.4th at pp. 88–89) Plaintiff cites admissible evidence, supported by a prima facie showing of facts, for all five (5) elements of a slander cause of action, demonstrating a probability of prevailing.

Fifth Cause of Action – Malicious Prosecution

To establish a cause of action for malicious prosecution, plaintiff must prove (1) That defendant was actively involved in causing plaintiff to be arrested [and prosecuted] [or in causing the continuation of the prosecution]; (2) That the criminal proceeding ended in plaintiff’s favor; (3) That no reasonable person in defendant’s circumstances would have believed that there were grounds for causing plaintiff to be arrested [and prosecuted]; (4) That defendant acted primarily for a purpose other than to bring plaintiff to justice; (5) That plaintiff was harmed; and (6) That defendant’s conduct was a substantial factor in causing plaintiff’s harm. (See CACI 1500)

The third and the fourth elements of the cause of action of malicious prosecution contain evidence involving protected speech by Defendant.

Under the third element, “That no reasonable person in defendant’s circumstances would have believed that there were grounds causing Plaintiff to be arrested and prosecuted”, Plaintiff offers the trial transcript of testimony offered by BLAKE during the criminal trial. (Opp. p.12, ¶ 3) (Marrs Decl. Exh A, pg 98, lines 19-23)

Again, Defendant’s testimony given, under oath, during the criminal proceedings clearly meet the definition of protected speech under CCP § 425.16(e)(1), “statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law”. The burden shifts to the opposing party to demonstrate a probability of prevailing on the claim.

The moving party made one evidentiary objection to evidence offered in support of the allegation of malicious prosecution, evidentiary objection #4. As indicated previously in this ruling, the objection is overruled.

Defendant offers one additional preceding page of the trial transcript of BLAKE’s testimony not provided by the moving party by way of showing that the testimony “would have been clear” with the additional page. (Swett Decl. Exh 1, Reply, line 25) However, as noted above, the court does not weigh the probative value of competing evidence and admits the evidence offered by Plaintiff as having minimal merit.

Under the fourth element of malicious prosecution, “That defendant acted primarily for a purpose other than to bring plaintiff to justice” Plaintiff offers the Declaration by Cameron Crocker. (Crocker Decl. p. 2, lines 15-21)(Opp. p.12, ¶ 4)

The moving party made no objection to the Declaration by Cameron Crocker (p. 2, lines 15-21).

Plaintiff cites admissible evidence, supported by a prima facie showing of facts, for all six (6) elements of malicious prosecution, demonstrating a probability of prevailing.

Unless a hearing is requested, this ruling is effective immediately. Neither further notice of the ruling nor a formal order per CRC 3.1312 is required.

MOTION TO STRIKE**TENTATIVE RULING: PART 1**

Defendant's Special Motion to Strike pursuant to CCP § 425.16 is DENIED.

Request for Judicial Notice

Defendant requests the court take judicial notice of the Complaint filed in Amador Case No. 18 CV 10654 pursuant to Evidence Code §§ 452 and 453. Defendant's request for judicial notice is granted as the Complaint is relevant in showing the conflict between the parties is personal, and not of public interest.

Plaintiff requests the court take judicial notice of the complete record and file in Amador Superior Court Case No. 17 CR 26191-03 pursuant to Evidence Code §§ 452 and 453. Plaintiff's request for judicial notice is granted as the contents of the file are relevant in showing the conflict between the parties is personal, and not of public interest.

Evidentiary Objections – Moving Party Defendant

Objection No. 1 – Declaration of Cameron Crocker, p. 2 13-15: "That comment was made on Facebook by Mr. Blake was "So go ahead and smack a kid if they are wearing something that you don't agree with. It's ok now." – Lack of personal knowledge; lack of foundation; hearsay. (Evid. Code §§ 403, 702, 1200.) No testimony is presented as to how Mr. Crocker came to learn of the purported statement. (Court declines to rule on Objection)

Objection No. 2, Declaration of Cameron Crocker, p. 3 8-10: "My reputation has been harmed by the fact that people I know and don't even know have questioned me about whether or not I struck Mr. Blake's child or attacked him in any fashion." - Lack of foundation; hearsay. (Evid. Code §§ 403, 702, 1200.) The people making the purported statements, when the statements were made and the statements themselves are not testified to. (Court declines to rule on Objection)

Objection No. 3, Declaration of Cameron Crocker, p. 3:22-23 & all of Exhibit A: "Attached to this declaration as EXHIBIT A is a sampling of commentaries that were sent in response to Mr. Blakes' Facebook post" - Lack of authentication; lack of foundation; hearsay, (Evid. Code §§ 403, 702, 1200, 1400.) No testimony is presented as to how Mr. Crocker came to possess these documents or how he knows that they are authentic. As to the purported comments from third parties, these matters constitute out-of-court statements offered for the truth of the matters asserted. (Court declines to rule on Objection)

Objection No. 4, Declaration of Jonathan P. Marrs, Exh. A p. 98:19-23: "Q. You can't tell me what he did to you, can you? A. Exactly, no. Q. Well, you didn't even see him do anything to you, did you? A. No." – Lack of foundation; misstates or misinterprets the witness' testimony (Evid. Code § 403.) **OVERRULED**

Code Civ. Proc. §425.16 provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." This section is to be construed broadly. (Cal. Code Civ. Proc. § 425.16(a))

The court's determination of an anti-SLAPP motion is a two-step process. First, the court determines if the party moving to strike a cause of action has met its initial burden to show that the cause of action arises from an act in furtherance of the moving party's right of petition or free speech. Second, if the court determines that showing has been made, the court determines whether the opposing party has demonstrated a probability of prevailing on the claim. (Navelier v. Sletten (2002) 29 Cal.4th 82, 88)

Protected Speech

There are four categories of protected speech for an anti-SLAPP motion (Code Civ. Proc. § 425.16(e)):

- (1) Statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- (2) Statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (3) Statements made in a place open to the public or a public forum in connection with an issue of public interest; or
- (4) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Defendant argues that all five (5) causes of action arise out of protected activity and may therefore be properly subjected to an anti-SLAPP motion. The court disagrees.

First, Second and Fourth Causes of Action: Libel Per Se, Libel Per Quod and False Light

On or around May 1, 2019, following resolution in favor of the defense (CROCKER) in the criminal trial in which Defendant (BLAKE) was a key witness, Defendant made a Facebook post stating:

"So go ahead and smack a kid if they are wearing something that you don't agree with. It's ok now." (Crocker Decl. Exh A)

This Facebook post is the underlying speech related to the first cause of action for libel, the second cause of action for libel per quod and the fourth cause of action, false light.

The moving party argues the above post is protected speech under Code Civ. Proc. § § 425.16(e)(2) "Statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" and 425.16(e)(3) "Statements made in a place open to the public or a public forum in connection with an issue of public interest".

CCP § 425.16(e)(2) Statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law

"[P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1113 "A claim arises from protected activity when that activity underlies or forms the basis for the claim.") (Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1062- 63)

19-CVC-11303

CROCKER, CAMERON

VS.

BLAKE, MICHAEL

MOTION TO STRIKE

TENTATIVE RULING: PART 2

Here, Defendant's Facebook post: "So go ahead and smack a kid if they are wearing something that you don't agree with. It's ok now" does not appear to arise from the same causes of action in either the criminal case (Amador Case No. 17 CR 26191-03) or the subsequent civil action (Amador Case No. 18 CV 70654).

The statement was made after the conclusion of the criminal matter and therefore is not protected under CCP § 425.16(e)(2).

Further, there were no allegations in that case involving hitting a child and no testimony was heard regarding hitting a child.

(Crocker Decl. ¶¶ 5-6)

The statement was made while the related civil action was pending, but the statement is not related to, or made in connection with that case as there were no allegations regarding Crocker hitting a child. (Complaint filed in Amador Case No. 18 CV 10654)

"We look for 'the principal thrust or gravamen of the plaintiff's cause of action.' (Martinez v. Metabolife Internat., Inc.(2003) 113 Cal.App.4th 181, 188) We 'do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action.' (Stewart v. Rolling Stone LLC (2010) 181 Cal.App.4th 664, 679) The 'critical consideration' is what the cause of action is 'based on.' (Navellier, supra, 29 Cal.4th at p. 89) (Hecimovich, supra, 203 Cal.App.4th at pp. 464-465, 137)

CCP § 425.16(e)(3) Statements made in a place open to the public or a public forum in connection with an issue of public interest

Facebook has been held to constitute a public forum for purposes of an anti-SLAPP analysis. (Cross v. Facebook, Inc. (201) 14 Cal.App5th 190, 199)

However, the statement does not appear to rise to the level of a matter of public interest. "At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance; what a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." Rand Resources, LLC v. City of Carson (2019) 243 Cal.Rptr.3d 1, 433 P.3d 899.

The speech at hand refers to hitting a child if they are wearing something that is disagreeable. The moving party seeks that the court extrapolate from that statement a broader issue of public concern in regard to the treatment of individuals supporting President Trump, and kids wearing Trump hats in particular. (Defendant Pts. Auth p.5, lines 18-19) However, the post makes no reference to any of those issues. In fact, if viewed in a vacuum, it is a statement made in a public forum that advocates violence against children, and is not protected.

This is a personal dispute between the parties, and not one of public interest or concern.

The moving party has failed to meet its initial burden to show that the first cause of action for libel per se, the second cause of action for libel per quod and fourth cause of action for false light, arise from an act in furtherance of the moving party's right of petition or free speech under CCP § §425.16(e)(2) or 425.16(e)(3). The burden does not shift to the opposing party to demonstrate a probability of prevailing on the claim.

Because the moving party failed to meet its initial burden, the court declines to rule on Defendant's evidentiary objections No. 1, No. 2, and No. 3, which are objections to the underlying statements related to the first, second and fourth causes of action.

Third Cause of Action for Defamation - Slander

To prevail on a cause of action for slander, plaintiff must show: (1) statement other than to plaintiff; (2) people understood that the statement was concerning defendant; (3) people reasonably understood the statement was concerning a crime; (4) defendant failed to use reasonable care in determining truth or falsity. (See CACI 1703)

The underlying speech in the third cause of action for slander is testimony given by BLAKE in the criminal proceedings on April 25, 2019. During that testimony, BLAKE accused CROCKER of assault and CROCKER's defense attorney questioned BLAKE.

Q: "You can't tell me what he did to you, can you?"

A: "Exactly, no."

Q: "Well, you didn't even see him do anything to you, did you?"

C."No." (Marrs Decl. Exh A, pg 98, lines 19-23)

Defendant's testimony given, under oath, during the criminal proceedings clearly meet the definition of protected speech under CCP § 425.16(e)(1), "statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law".

Thus, the burden shifts to the opposing party to demonstrate a probability of prevailing on the claim.

The second and the fourth elements of the cause of action of slander contain evidence involving protected speech by Defendant. Under the second element "People understood that the statement was concerning Defendant", Plaintiff offers the statement that Defendant specifically accused Plaintiff Cameron Crocker of assault. (Marrs Decl. Exh A, pg 98, lines 14-15)

The moving party made no objection to the Declaration of Jonathan Marrs Decl. Exh A, pg 98, lines 14-15.

Under the fourth element "Defendant Failed to Use Reasonable Care in Determining Truth or Falsity", Plaintiff offers the following testimony given by BLAKE during the criminal proceedings. During that testimony, BLAKE accused CROCKER of assault and CROCKER's defense attorney questioned BLAKE:

Q: "You can't tell me what he did to you, can you?"

A: Exactly, no."

Q: "Well, you didn't even see him do anything to you, did you?"

D."No." (Marrs Decl. Exh A, pg 98, lines 19-23)

Defendant objected to Plaintiff's evidence cited in support of the third cause of action for slander. Evidentiary objection #4:

Declaration of Jonathan P. Marrs, exh. A p. 98:19-23. Grounds for Objection: Lacks foundation; misstates or misinterprets the witness' testimony. (Evid. Code § 403.) Objection is overruled.