

AMADOR SUPERIOR COURT LAW AND MOTION TENTATIVE RULINGS

Monday, October 26, 2020

TO REQUEST A HEARING ON ANY MATTER ON THIS CALENDAR, YOU MUST CALL THE COURT AT (209) 257-2692 BY 4:00 P.M. ON THE DAY PRECEDING THE HEARING. NOTICE OF THE INTENTION TO APPEAR MUST ALSO BE GIVEN TO ALL OTHER PARTIES.

IF THE CLERK IS NOT NOTIFIED OF A PARTY'S INTENTION TO APPEAR, THERE WILL BE NO HEARING AND THE TENTATIVE RULING WILL BECOME THE ORDER OF THE COURT. NO FURTHER NOTICE OF THE COURT'S RULING WILL BE PROVIDED.

05-CVC-03846 KINNE, JOHN VS.

DEFENDANT'S MOTION TO VACATE OR SET ASIDE JUDGMENT

TENTATIVE RULING:

On the court's own motion, Defendant's Motion to Vacate Renewal of Judgment is continued to November 16, 2020 at 8:30 a.m. in Department 1.

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

10-CVC-06738 PORTFOLIO RECOVERY ASSOCIATES LLC VS. MCCUE, ELIZABETH

PLAINTIFF'S MOTION TO VACATE OR SET ASIDE JUDGMENT

TENTATIVE RULING:

Plaintiff's unopposed motion to Set Aside and Vacate Judgment against Elizabeth McCue is GRANTED.

Plaintiff has filed a Notice of Non-Appearance Pursuant to CRC 3.1304(c). The court shall sign the proposed order vacating the Judgment and dismiss the entire action without prejudice.

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

15-CVC-09430 PARTHMORE, IRA VS. DOES 1 TO 10

MOTION FOR SUMMARY JUDGMENT

15-CVC-09430 PARTHMORE, IRA VS. DOES 1 TO 10

MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING:

Plaintiff's Motion for Summary Judgment is DENIED.

Request for Judicial Notice

Plaintiff requests the court take judicial notice of the Modesto Police Department Traffic Collision Report dated January 7, 2013 pursuant to Evidence Code 452. The court may take judicial notice of the existence of the attached police report, but not the truthfulness of the contents therein.

A motion for summary judgment shall be granted when the moving party demonstrates "that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law CCP Section 437c(c). In making its decision the court may rely on affidavits, declarations, or matter of which judicial notice may be taken. CCP Section 437c(b).

On plaintiff's motion for summary judgment or summary adjudication of issues, burden is on plaintiff to prove every element necessary to establish its right to relief it seeks and to disprove every affirmative defense asserted against it; until that point, defendant has no burden to produce opposing evidence or to disprove anything at all. (United Community Church v. Garcin (1991) 231 Cal.App.3d 327)

Where defendant failed to file any affidavits in opposition to affidavits filed by plaintiff in support of plaintiff's motion for summary judgment, trial court was entitled to accept as true facts stated in support of plaintiff's motion which were within personal knowledge of affiant and to which affiant could competently testify. (Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal.App.3d 811)

Plaintiff's points and authorities and separate statement failed to include material facts to support each element of each cause of action. Further, Plaintiff relies on statements within the traffic collision report, which are beyond Plaintiff's personal knowledge.

Plaintiff is incarcerated at California Institute for Men in Chino. As per Amador Local Rules of Court, rule 4.03, subdivision F, the tentative ruling procedures do not apply in any case in which a self-represented party in the custody of the California Department of Corrections and Rehabilitation. Plaintiff may appear telephonically for hearing; orders will be made at time of hearing.

19-CVC-10958

EMMONS, BARBARA

VS.

RAYMOND, NADINE

MOTION TO STRIKE

TENTATIVE RULING:

Request for Judicial Notice

Plaintiff requests the court take judicial notice of the Third Amended Complaint filed in Amador Case No. 18 CV 10654 pursuant to Evidence Code §§ 452(d)(h). Plaintiff's request for judicial is unnecessary as the document is already part of the court file. However, there is no objection. Plaintiff's request is granted.

Plaintiff requests the court take judicial notice of the Diagnostic and Statistical Manual of Mental Disorders, (DSM-5), Exhibit 1.3-4, DSM-5 Diagnostic Criteria for PTSD pursuant to Evidence Code §§ 452(d)(h). Defendant objects to Plaintiff's request on the grounds of lack of authentication, lack of expert testimony and irrelevance. (Evid. Code §§§ 1400, 720, 122, 210) Objection sustained.

Factual Summary

On or about January 12, 2020, Defendant, Nadine Raymond, commented on a Facebook post of Barbara Fletcher, who shared a lengthy post by Maddy Brown, the gist of which describes frustration with horse trainers who lose patience with the riders whom they are training. (Wiggen Decl. Exh 1 & 2)

Nadine Raymond commented:

"Amen!!! For me it doesn't mean as a client I don't want the criticism...obviously I do because I want to improve. However, I will not be a whipping post for your pathetic childhood...or your desolved [sic] marriage...nor will I ever again sit and listen to you talk shit about all your clients then kiss the "rich ones" asses. Said trainer is pathetic...and wonders why nobody respects them. They are washed up." (Wiggen Decl. Exh 3)

The post was also commented on by Jim Norris, with his own comments about his experience with horse trainers, including that the "ex trainer ptsd is real". (Wiggen Decl. Exh 3)

Tisha Aronson read the Facebook post and immediately knew that comments of Jim Norris and Nadine Raymond were referring to Barbara Emmons. Aronson posted her own comment about her own positive experience with "said trainer". (Aronson Decl. ¶¶ 10-12) According to Plaintiff, she and Barbara Fletcher had a falling out which was widely publicized in the horse show community and led to a civil actions being filed. (Emmons Decl. ¶ 3) Plaintiff also had a dispute with Jim Norris, a former client, over an unpaid bill. (Emmons Decl. ¶ 6)

Plaintiff is never mentioned by name in the Facebook post, or in any of the comments. (TAC, Exh A)

LAW AND ANALYSIS

Code Civ. Proc. §425.16(b)(1) 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.

The moving party argues the fourth cause of action for libel in Plaintiff's Third Amended Complaint arises out of protected activity and may therefore be properly subjected to an anti-SLAPP motion. Defendant appears to be proceeding under CCP § 425.16(e)(3) and CCP § 425.16(e)(4).

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). Plaintiff concedes, for the purposes of this motion that the statement was made in a public forum. (Emmons P&A's lines 7-9) The Facebook page in which the comment was made is a public page, and largely devoted to equestrian pursuits (Wiggen Decl. ¶¶ 2-3)

Defendant argues that the statement alleged was made in connection with an issue of public interest, in that it was a part of a larger discussion of so-called "toxic trainers" in the horse show industry. (Raymond P&A's p. 4 lines 15-27)

The Facebook post appears to meet this standard, which is to be construed broadly. The original post is a lengthy one about a horse trainer's experience in watching other horse trainers berate or demean their clients and the negative affect that behavior

has on their client(s). (Wiggen Decl. Exh. 2) Defendant contributed to the discussion by describing her own experience as a client of a horse trainer. (FilmOn.com Inc. v. Double Verify Inc. (2019) 7 Cal.5th 133, 150)

Defendant's alleged comment on the post agrees with the premise of the post and then goes on to describe her own negative experience "as a client" of a horse trainer. The part that is perhaps attributable to Plaintiff herself begins at "said trainer" and the proceeds to call "said trainer" "pathetic" and "washed up". (Wiggen Decl. Exh 3)

"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)

The underlying cause of action is based on Raymond's alleged false statement about her experience as a client of Emmon's, or even more broadly as a client of any horse trainer, which can be broadly construed as a matter of public interest.

The court finds persuasive the moving party's characterization of the comment as a "consumer statement about the quality of a seller's service and the consumer's unhappiness with the same." (Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 888-889) The First Amendment protects a consumer's statements about the quality of a seller's service and the consumer's unhappiness with the same (Id. at p. 889 citing Paradise Hills Associates v. Procel (1991) 235 Cal.App.3d 1528)

The moving party has met their 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. Thus, the burden shifts to the opposing party to demonstrate a probability of prevailing on the claim. 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)

Libel Per Se or "Libel on its Face"

CA Civil Code § 45a states:

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

The Facebook post does not name or identify Plaintiff and therefore requires the necessity of explanatory matter or other extrinsic facts. Plaintiff provides these extrinsic facts through Declarations, under penalty of perjury, by Plaintiff and by Tisha Aronsen, who also read and commented on the Facebook post and knew it to be about Plaintiff. (Aronsen Decl. ¶ 10)

CA Civil Code § 48a(2) states:

"Special damages" means all damages that plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, and profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and not other.

Plaintiff alleges "significant emotional distress". (Emmons Decl. ¶ 10) Plaintiff offers no evidence in support of special damages or that she has "suffered in respect to his or her property, business, trade, and profession, or occupation..."

Plaintiff failed to meet their burden with competent and admissible evidence as to libel per se under CA Civil Code § 45a.

19-CVC-11425 SCHNEIDER, CHRISTOPHER VS. BANK OF AMERICA NA

MOTION TO STRIKE

TENTATIVE RULING:

On the court's own motion, Defendant's Demurrer to Plaintiff's Complaint and Motion to Strike are continued to November 16, 2020 at 8:30 a.m. in Department 1.

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.