

ANTI-SLAPP MOTIONS
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FEBRUARY 2020

1. EXECUTIVE SUMMARY

Today, the hottest topic in California civil procedure is the special motion to strike against Strategic Lawsuits Against Public Participation (“SLAPP”). At least one, often several, appellate cases are published on a weekly basis in California. The purpose of this paper is to provide a brief overview of the anti-SLAPP motion and its actual and potential applicability to various types of surety litigation.

The Anti-SLAPP motion is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party’s constitutional right of petition or free speech. California Code of Civil Procedure §425.16(a).¹

In determining whether or not an action or claim is subject to the special motion to strike, the courts use a two-step process. First, the plaintiff’s claim must arise out of the defendant’s protected speech or petition and (2) lack even minimal merit. *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88-89, 124 Cal. Rptr. 2d 530, 535-536.

With respect to the first prong, it is the defendant’s burden to show that the lawsuit against him or her is predicated upon the exercise of a constitutional right of free speech or petition— i.e. that the claim arises out of the defendant’s protected activity. If that burden is not met, the motion will be denied.

If the defendant meets his or her burden showing that his or her conduct arose out of protected activity, then the burden shifts to the plaintiff to show the probability that he or she will succeed on the merits of the claim. In other words, even if the conduct for which the defendant is being sued implicates the defendant’s free speech or petition rights, the lawsuit may proceed if plaintiff makes a *prima facie* showing that his or her claim has merit.

2. EFFECT OF MOTION

Usually the special motion to strike is filed as the defendant’s first pleading in the case and within 60 days of the date of service of the complaint. Absent a motion to quash service, the filing of an anti-SLAPP motion waives any objection the defendant might otherwise have as to personal jurisdiction. The motion freezes the pleading. Once the motion is filed, the plaintiff

¹ All statutory references are to CCP unless stated otherwise.

cannot amend his or her complaint or dismiss the complaint without facing the prospect and paying mandatory attorney's fees.

Filing an anti-SLAPP motion automatically stays discovery subject to the court's limited discretion to permit discovery on issues relating to the motion.

The motion must be heard within 30 days of filing unless docket conditions do not permit. [In LA County it is unlikely that the motion will be heard within 30 days.]

3. ATTORNEY'S FEES

The prevailing party on an anti-SLAPP motion may recover attorney's fees. In many reported cases, the awards have been substantial.

The grant or denial of an anti-SLAPP motion is immediately appealable, and a notice of appeal automatically stays all further trial court proceedings on the cause(s) of action affected by the motion.

4. ACTIVITIES PROTECTED BY THE ANTI-SLAPP STATUTE

Statements and writings made before a legislative, executive or judicial proceeding or any other official proceeding authorized by law are protected. Section 425.16(e)(1). The statute protects all petition-related activity before a governmental body whether or not the statements involve a public issue. "All that matters is that the first amendment activity take place in an official proceeding will be made in connection with an issue being reviewed by an official proceeding." *Briggs v. Eden Counsel for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1116, 81 Cal. Rptr. 2d 471, 477.

Statements and writings made during judicial proceedings are protected by the anti-SLAPP statute. Filing a lawsuit is an exercise of a party's constitutional right to petition for grievances. A claim for relief filed in court is "indisputably a writing made before a judicial proceeding." *Navellier*, supra, 29 Cal. 4th 82, 90, 124, 124 Cal. Rptr. 2d 530, 537; *Briggs*, supra, 19 Cal.4th at 1115, 81 Cal. Rptr. 2d at 476.

Pleadings, statements and writings "in connection with" civil litigation are covered by the anti-SLAPP statute.

Pre-lawsuit notices and statements may also be subject to the anti-SLAPP motion. Statutory government claims would be protected. Insurance claims may also be protected. Where submission of an insurance claim is "a necessary prerequisite to expected litigation or is submitted as the equivalent of a pre-litigation demand letter, it may constitute protected petitioning activity." *People ex rel. Fire Ins. Exch. v. Anapol* (2012) 211 Cal.App. 4th 809, 827, 150 Cal. Rptr. 3d 224, 238.

Claims based on statements made in a client's investigation and report to its lawyers may be subject to an anti-SLAPP motion. *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600,

611, 61 Cal.Rptr.3d 701, 709. Thus, defamatory statements that might otherwise be defamatory made by a consultant or expert during the course of their investigation would be protected.

Similarly, settlement negotiations and agreements made in connection with litigation would likewise be protected. The anti-SLAPP statute may even protect settlement negotiations allegedly conducted in bad faith or for an unlawful purpose. *Seltzer v. Barnes* (2010) 182 Cal.App.4th at 964-967, 106 Cal.Rptr.3d at 298-301.

However, if the defendant's fraud or criminally unlawful conduct is performed under the guise of settlement negotiations is undisputed or established as a matter of law, its anti-SLAPP motion must be denied. *Flatley v. Mauro* (2006) 39 Cal.App.4th 299, 320, 46 Cal.Rptr.3d 606, 621-622.

Both §425.16 and Civil Code §47(b) (the litigation privilege) protect litigants' rights of access to the courts without fear of being harassed subsequently by derivative tort actions. *Healy v. Tuscany Hills Landscape and Recreation Corp.* (2006) 147 Cal.App.4th 1, 5, 39 Cal.Rptr. 3d 547, 550.

In contrast, contract negotiations are not afforded anti-SLAPP protection. *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 319, 83 Cal.Rptr. 3d 919-925.

Malicious prosecution actions may forever be dead. "By its terms, §425.16 potentially may apply to every malicious action, because every such action arises from an underlying lawsuit, or petition to the judicial branch." *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734, 735, 3 Cal.Rptr.3d 636, 641.

Similarly, claims for abuse of process in an earlier lawsuit (for example, wrongful levy of execution on plaintiff's property) are also subject to an anti-SLAPP motion. *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063.

However, a client's action against his or her former attorney, "whether pleaded as a malpractice claim, breach of fiduciary duty claim, or any other theory of recovery," is not subject to the anti-SLAPP statute "merely because some of the allegations refer to the attorney's actions in court." *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1275, 99 Cal.Rptr. 3d 805, 813.

However, claims by non-clients that an attorney acted incompetently or in violation of the Rules of Professional Conduct are subject to anti-SLAPP protection. *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 158, 143 Cal.Rptr. 3d 17, 30-31.

Recording a Notice of Lis Pendens is a "writing made in connection with an issue under consideration by a judicial body and thus squarely within the definition of the anti-SLAPP statute." *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1050, 93 Cal.Rptr.3d 457, 463.

A cross-complaint based on a cross-defendant's protected speech or petitioning activity may be a SLAPP suit, but not a cross-complaint unrelated to any protected activity. Thus, in *Kajima Eng. & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929, 116 Cal.Rptr. 2d 187, 193, a contractor sued the City for money due on a construction contract. City cross-complained for fraud in contractor's bidding and contracting practices. The cross-complaint was not subject to an anti-SLAPP motion because it arose from acts preceding the complaint (i.e., the contractor's fraudulent contracting and bidding practices), and not from acts in furtherance of the contractor's right of petition or free speech.

5. CCC&E v. LOS ANGELES UNIFIED SCHOOL DISTRICT

I had personal experience with a threatened anti-SLAPP motion against Ohio in *CCC&E v. Los Angeles Unified School District*. The District had defaulted CCC&E and demanded that Ohio complete the remaining work. Ohio and the District entered into a Takeover Agreement and Ohio and Suttles Plumbing entered into a Completion Agreement. Suttles completed the project but the District refused to release the \$92,000.00 contract balance to Ohio as provided in the Takeover Agreement.

CCC&E sued the District for wrongful termination. The District cross-complained for liquidated damages against CCC&E and Ohio. Ohio cross-complained for indemnity against CCC&E and breach of contract and declaratory relief against the District. The District's counsel then sent me a meet and confer letter demanding that I withdraw the causes of action against the District, relying on §425.16. I had alleged the existence of the Takeover Agreement making reference to it as an exhibit attached to the District's cross-complaint. I then recited the appropriate paragraphs of the Takeover Agreement for the proposition that no liquidated damages would be assessed against Ohio. Specifically, I alleged "however, LAUSD has breached both the terms of the performance bond and the Takeover Agreement by *asserting damages*, including, specifically, liquidated damages, against Ohio." The District's position was that the allegation "by asserting damages" was actionable because the District had the absolute right to assert that claim by way of its own cross-complaint as part of the judicial proceeding. After carefully researching the law, I believed the District's position was untenable. Nevertheless, I was able to reach an agreement with the District's counsel and filed an amended cross-complaint removing the "offensive" language. The case was resolved in mediation whereby the District paid Ohio the contract balance that was due under the Takeover Agreement **and paid Ohio almost the entirety of its indemnity claim against CCC&E!**² This was a complete victory for Ohio. Nevertheless, it points out just how pervasive anti-SLAPP motions have become and the pitfalls counsel face for even for unwitting intrusions into what might be considered protected speech.

² Essentially this was a novation. The District agreed to accept certain damages alleged by CCC&E as part of its wrongful termination claim, but since CCC&E otherwise owed Ohio indemnity, those monies were paid directly by the District (technically on CCC&E's behalf), to Ohio thereby making Ohio completely whole.

6. OTHER PROTECTED PROCEEDINGS.

- Hospital peer review hearing proceedings. *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal. 4th 192, 199, 46 Cal.Rptr. 3d 41, 45.
- Administrative proceedings. *Briggs, supra.* 19 Cal.4th 1106, 1115, 81 Cal.Rptr. 2d 471, 476.
- Proceedings before quasi-governmental entities are protected (e.g., The National Association of Security Dealers). *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App. 4th 719, 728, 28 Cal.Rptr.3d 833, 837-838.
- State Bar sponsored fee arbitration. *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App. 4th 347, 358, 64 Cal.Rptr.3d 504, 513. A law firm's fraud and negligent misrepresentation claims against the former client were subject to anti-SLAPP motion because they related to the client's seeking arbitration.

Note that non-judicial foreclosure proceedings are deemed a private, contractual alternative to judicial foreclosure and therefore a wrongful foreclosure action arising from a non-judicial foreclosure is not subject to the anti-SLAPP statute. *Garretson v. Post* (2007) 156 Cal.App. 4th 1508, 1520, 68 Cal.Rptr. 3rd 230, 239.

I recently had a case where an anti-SLAPP motion was granted, and substantial attorney's fees awarded in favor of the president of a homeowner's association who was sued for defamation by a homeowner. A statement made to an HOA is not made in connection with a matter of public interest where it is of import only to a "narrow sliver of society." The HOA proceedings must have a "strong connection" to governmental proceedings to qualify as "official." *Talega Maintenance Corp. v. Standard Pacific PAC Corp.* (2014) 225 Cal.App.4th 722, 732, 170 Cal.Rptr. 3d 453, 461. However, actions involving an HOA are often decided under §425.16(e)(3) (statements in public forum on issues of public interest) or §425(16)(e)(4) (other conduct in furtherance of free speech on issue to public interest). *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 545, 211 Cal.Rptr. 3d 705, 719.

The point is that one must be very careful and sensitive to any claims involving speech made in almost any forum imaginable. While not all of them will be provided anti-SLAPP protection, many are even though they may not seem intuitive.

7. DEFENDANT'S BURDEN OF PROOF.

The only thing the defendant needs to show to invoke the protection of the anti-SLAPP statute is that plaintiff's lawsuit "arises from" defendant's exercise of free speech or petition rights as defined in §425.16(e). *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61, 124 Cal. Rptr. 2d 507, 513.

The defendant need only make a *prime facie* showing that plaintiff's complaint "arises from" defendant's constitutionally-protected speech or petition activity. *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App 4d 449, 458-459, 125 Cal.Rptr. 2d 534, 541-542.

In determining whether the defendant has sustained his or her burden, the court considers the pleadings, declarations and matters that may be judicially noticed. *Brill Media Co., LLC v. TWC Group, Inc.* (2005) 132 Cal.App 4th 324, 329, 339, 33 Cal.Rptr. 3d 371, 374, 382 (disapproved on other grounds in *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25, 109 Cal.Rptr 3d 329, 339).

8. PLAINTIFF'S BURDEN OF PROOF.

Once the defendant makes a *prime facie* showing under the first prong, the burden shifts to the plaintiff to establish a "probability" that it will prevail on the claims based on protected activity that are asserted against the defendant. Section 425.16(b).

The plaintiff must produce evidence that would be admissible at trial to proffer a *prime facie* showing of facts supporting a judgment in its favor. To establish "probability" of prevailing on the merits, the plaintiff must demonstrate that the claim is based on protected activity that is both:

- (1) legally sufficient and
- (2) supported by a *prime facie* showing the facts sufficient to support a favorable judgment if the evidence submitted by the plaintiff is credited. *Navellier v. Sletten*, supra. (2002) 29 Cal.App. 4th 82, 89, 93, 124 Cal.Rptr 2d 530, 536, 540.

The "probability of prevailing" is tested by the same standard governing a motion for summary judgment, non-suit or directed verdict. In other words, in opposing an anti-SLAPP motion, it is the plaintiff's burden to make a *prime facie* showing of facts that would support a judgment in its favor. *Taus v. Loftus* (2007) 40 Cal. 4th 683, 714, 54 Cal.Rptr. 3d 775, 799; *Sweetwater Union High School District v. Gilbane Building Co.* (2019) 6 Cal. 5th 931.

9. CONCLUSION.

This paper only begins to explore the complexities, nuances and pitfalls for litigants involved in anti-SLAPP litigation. Becoming aware of how broad protected activity can reach is a first step in recognizing when facts may give rise to anti-SLAPP protection.

Note: Much of the foregoing is taken from Weil & Brown, *CA. Prac. Guide: Civil Procedure Before Trial* (TRG) (2019), Ch. 7 Part 2.