

IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

████████████████████,)	
)	Superior Court Case
Plaintiff and Respondent)	Number: ██████████
)	
vs.)	Court of Appeal Case
)	Number: ██████████
████████████████████)	
)	
Defendants and Appellant)	
_____)	

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE ██████████, JUDGE

APPELLANT’S OPENING BRIEF

████████████████████
████████████████████
████████████████████

Appellant In Pro Per

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

_____,
Plaintiff /Respondent)
vs.) Superior Court Case
_____,) Number: _____
Defendants/ Appellant) Court of Appeal Case
_____) Number: _____
_____)

APPELLANT’S OPENING BRIEF

STATEMENT OF THE CASE

Plaintiff/Respondent, _____ (“Respondent”) was an employee at _____, also known as _____. (Clerk’s Transcript, hereinafter “CT” 24). Defendant/Appellant, _____ (“Appellant Mr. _____”) provided construction services for _____ and _____ in _____ and _____. (CT 24). On request from Respondent’s employer, Appellant Mr. _____ provided information regarding Respondent’s demands for bribes and kickbacks from Appellant Mr. _____. (CT 36). Thereafter, Appellant Mr. _____ came to know that Respondent was terminated from his job. (CT 37).

On April 9, [REDACTED], Respondent filed a complaint alleging defamation, intentional and negligent interference with contract, and eavesdropping against Appellant Mr. [REDACTED]. (CT 4). On December 6, [REDACTED], Appellant Mr. [REDACTED] moved the trial court for an order striking Respondent's Complaint in this matter in its entirety, under California's Anti-SLAPP statute, Section 425.16 of the Code of Civil Procedure. (CT 22). Appellant Mr. [REDACTED] asserted that his complained of conduct and statements were made in the exercise of his right of free speech and thus the Complaint is subject to California's Anti-SLAPP statute, Section 425.16 of the Code of Civil Procedure. (CT 23).

Appellant Mr. [REDACTED] alleged that his conduct was in connection with an issue of public interest, namely the prevention of commercial bribery by Respondent. (CT 23). Under Code of Civil Procedure, Section 425.16(e)(4), Appellant Mr. [REDACTED] conduct in coming forward at the request of Respondent's then-employer, [REDACTED], to disclose the commercial bribery engaged in by Respondent, was protected conduct. (CT 23).

On April 25, 2014, Respondent filed his opposition to the Motion. (CT 52). Respondent alleged that Appellant Mr. [REDACTED] raised false allegations of bribery against him because Appellant Mr. [REDACTED] did not get all of the business he wanted. (CT 53). Respondent's employer dismissed Respondent based on these allegations that Respondent

demanded kickbacks. (CT 54). Respondent argued that a private conversation between Appellant and Respondent's employer is not protected speech and that private business is not a matter of public interest. (Augmented Record, hereafter A.R., referring to the tentative ruling of the trial court entitled 'Special Motion to Strike' - 4).

On May 8, 2014, the motion was heard and the trial court denied Appellant Mr. [REDACTED] motion to strike the complaint on the ground that Appellant Mr. [REDACTED] did not meet his burden to show that the alleged conduct was of public interest. The court further held that Appellant Mr. [REDACTED] conduct did not fall under the purview of the anti-SLAPP statute. Additionally, the trial court held that Respondent met his burden of showing a prima facie case and probability of prevailing in his claims.

On June 30, 2014, Appellant Mr. [REDACTED] filed a timely notice of Appeal.

STATEMENT OF APPEALABILITY

The trial court's order dated May 8, [REDACTED], which denied the Special Motion to Strike Complaint Pursuant to CCP 425.16 filed by Appellant Mr. [REDACTED], is appealable under Section 904.1. Code Civ. Proc. § 425.16 (i).

STATEMENT OF THE FACTS

Respondent, as an employee at [REDACTED], also known as [REDACTED], acted as a procurement agent to obtain and finalize work orders with outside construction vendors, to provide construction work at the studio facilities.(CT 24).

Appellant Mr. [REDACTED] provided construction services to [REDACTED] and invoiced such work under a partnership company name of [REDACTED], which had a contractor's license through his proposed partner, [REDACTED], or invoiced under the name [REDACTED]. (CT 24).

In November 2011, Respondent told Appellant Mr. [REDACTED] to inflate the estimate for construction work at a certain project named ATN [REDACTED] project, and to kick the cash back to him. (CT 24). Appellant Mr. [REDACTED] increased the bid amount beyond \$26,700.00 originally estimated and won the bid for the work. (CT 24). Appellant Mr. [REDACTED] paid cash totaling \$2,500.00 to Respondent, at his request, as part of this project. (CT 24). Further, in January, 2012, Respondent asked

Appellant Mr. [REDACTED] to create an invoice for work done at the [REDACTED] project to be submitted under the company name [REDACTED]. (CT 24). This company had been approved for the project but had not actually performed the invoiced work. (CT 24).

Thereafter, in March, 2012, Respondent told Appellant Mr. [REDACTED] to create an invoice in the amount of \$1,300.00 for work that was not done at the [REDACTED] project, in order to offset a credit that was being given to the subtenant customer. (CT 24-25). Respondent asked for and received \$500.00 cash from Appellant Mr. [REDACTED] for this work not done, which was paid to Respondent in his office on [REDACTED]. (CT 25).

In May 2012, Appellant Mr. [REDACTED] was asked by Respondent's then employer, [REDACTED] to provide information regarding Respondent. (CT 25). Appellant Mr. [REDACTED] met with [REDACTED], VP of Operations and Technology for [REDACTED], and [REDACTED] who Appellant Mr. [REDACTED] believed was an officer in [REDACTED]. (CT 25). At that meeting, [REDACTED] and [REDACTED] confirmed that Respondent had been suspended and reinstated, and that the company was further investigating Respondent's conduct as the Director of Operations for [REDACTED]. (CT 25).

Appellant Mr. [REDACTED] explained to [REDACTED] and [REDACTED] [REDACTED], at their request, Respondent's irregular activities with regard

to the work at the construction projects. (CT 25). [REDACTED] thereafter sent Appellant Mr. [REDACTED] several emails, requesting further information and details about Respondent's illegal activities as part of their investigation. (CT 25). Thereafter, Appellant Mr. [REDACTED] came to know that Respondent was terminated from his job. (CT 25).

STANDARD OF REVIEW

Generally, “[r]eview of an order granting or denying a motion to strike under section 425.16 is de novo.” Flatley v. Mauro (2006) 39 Cal.4th 299, 325, 46 Cal.Rptr.3d 606 (quoting Sylmar Air Conditioning v. Pueblo Contracting Services, Inc. (2004) 122 Cal.App.4th 1049, 1056, 18 Cal.Rptr.3d 882.)). The courts consider “the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.” Id. at 326 (quoting Code Civ. Proc § 425.16, subd. (b)(2).) “However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, . . . [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’” Id. (quoting HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal.App.4th 204, 212, 12 Cal.Rptr.3d 786.)).”

Further, the Court of Appeals on appeal “review[s] independently whether the complaint against the appellant arises from appellant's exercise of a valid right to free speech and petition and if so, whether the respondent established a probability of prevailing on the complaint.” Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 919 (130 Cal.Rptr.2d 81).

ARGUMENT

I. The Trial court erred in denying Appellant’s Special Motion to Strike Complaint Pursuant to CCP 425.16 because Appellant met his burden in showing that his actions were related to free speech on a matter of public interest

As used in Code Civ. Proc. § 425.16, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes:

“(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.”

Code Civ. Proc. § 425.16(e).

“Statements that fit the definition of a public issue or an issue of public interest under subdivision (e)(4) generally fall into one of three categories.” Fontani v. Wells Fargo Investments, LLC (2005) 129 Cal.App.4th 719, 732 (28 Cal.Rptr.3d 833, 840-41). “The first includes statements that ‘concern[] a person or entity in the public eye.’” *Id.* (quoting Rivero, 105 Cal.App.4th at 924. “The second accounts for statements concerning ‘conduct that could directly affect a large number of people beyond the direct participants.’” *Id.* (quoting Rivero, 105 Cal.App.4th at 924). “The third general category covers topics of

‘widespread, public interest.’” Id. (quoting Rivero, 105 Cal.App.4th at 924).

Further, with regard to 425.16, “[t]he legislative concern,’ ‘is that the cause of action ‘aris[e] from’ an act in furtherance of the constitutional right to petition or free speech.’” Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 59 (124 Cal.Rptr.2d 507) (quoting Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal.App.4th 294, 307, 106 Cal.Rptr.2d 906.)

Furthermore, “[t]he definition of ‘public interest’ within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.” Rivero, 105 Cal.App.4th at 920. Moreover, “[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities” Rivero ,105 Cal.App.4th at 922.

A person would be considered guilty of commercial bribery when “[a]ny employee . . . solicits, accepts, or agrees to accept money or anything of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer” Penal Code § 641.3(a).

Additionally, “fundamental public interest in a workplace free from crime is no less compelling.” Ferrick v. Santa Clara University (2014) 231 Cal.App.4th 1337, 1356, (181 Cal.Rptr.3d 68). “The public policy of this state against crime in the workplace is reflected in the Penal Code sections declaring unlawful the acts of embezzlement (Pen.Code, § 504) and commercial bribery (Pen.Code, § 641.3), and in the federal antitrust laws.” Id. (citing Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 173, 164 Cal.Rptr. 839). Thus, though in the context of whistleblower statute, it has been held that it would be considered public interest “when an employee seeks to further this well-established public policy by responsibly reporting suspicions of illegal conduct to the employer” Id. “Retaliation by an employer” in such a situation “seriously impairs the public interest.” Id.

In the present case, Respondent committed several illegal acts, amounting to commercial bribery in connection with construction of buildings open to the public. Respondent asked Appellant Mr. [REDACTED] to inflate the estimate for construction work at [REDACTED] project, kick the cash back to him, and he paid cash totaling \$2,500.00 to Respondent as part of this project. (CT 24). Further, Respondent asked Appellant Mr. [REDACTED] to create an invoice for work done at the [REDACTED] project to be submitted under the company name [REDACTED] when in fact this company had not actually performed the work. (CT 24). Respondent told Appellant Mr. [REDACTED] to create an invoice in the amount of \$1,300.00

for work that was not done at the [REDACTED] project in order to offset a credit that was being given to the subtenant customer. (CT 24-25).

Appellant Mr. [REDACTED], being a contractor of Respondent's employer, disclosed these illegal acts committed by the Respondent related to the construction projects open to the public to Respondent's employer. Illegal acts or regular commercial bribery pertaining to construction of buildings for use by public or large numbers of people should be given broad construction to be considered ones of public interest.

Thus, the statements Appellant Mr. [REDACTED] made had to do with a significant issue of public interest in that he was responsibly reporting illegal conduct of an employee to the employer. It was intended to notify Respondent's employer of the illegal acts and to ensure proper construction and bribery-free bidding process related to facilities open to the public. The trial court itself conceded that bribery in the context of bidding of public use facilities may be an issue of public interest. Therefore the trial court should have found that CCP 425.16 applies here and should have granted the motion to strike complaint.

However, the trial court saw Appellant Mr. [REDACTED] statements as having come from a disgruntled contractor. The trial court erred in holding that Appellant Mr. [REDACTED] made false statements about Respondent's conduct because he was disgruntled and the allegations are of a private dispute between private parties. (A.R. Special Motion to Strike – 5). In the

first place, the statements were not false. Appellant Mr. [REDACTED] had produced invoices involved in the alleged acts. Appellant Mr. [REDACTED] had also produced email communications between Respondent's employer and Appellant Mr. [REDACTED], to show that Appellant Mr. [REDACTED] answered questions posed to him by Respondent's employer, and that was in line of the investigation that Respondent's employer had internally. (Reporter's Transcript, hereinafter "RT" 6).

Moreover, Respondent provided no evidence to show that Appellant Mr. [REDACTED] was disgruntled or that there was any malice associated with his actions. (RT 4). Further, Appellant Mr. [REDACTED] had filed his declaration that he made the statements without any ill will. (CT 37).

Appellant Mr. [REDACTED] assisted the investigation because he believed that there was unfairness in the way that contractors were being assessed by Respondent in all these situations where Respondent committed irregularities. By making true statements Appellant Mr. [REDACTED] exposed irregular activities of public interest which affected the public that are supposedly using these facilities and the public interest element had been met. (RT 6). Further, there is nothing on record to show that Appellant Mr. [REDACTED] statements were false. Moreover, Respondent's employer conducted its own investigation, and for whatever reason presently undisclosed, terminated Respondent's employment.

Therefore, the trial court erred in holding that Appellant Mr. ██████ did not meet his burden that the statements were ones of public interest when the trial court conceded that bribery in the context of bidding of public use facilities may be an issue of public interest. Further, the trial court erred in finding that Appellant Mr. ██████ was a disgruntled contractor and made false statements when there was no evidence on record.

II. Plaintiff/Respondent has not met his burden of showing a prima facie case on the causes of action raised in the Complaint

A. Respondent has not provided any competent or admissible evidence to prove his Claims.

“Where section 425.16 applies, the cause of action ‘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.’” Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 274 (105 Cal.Rptr.2d 674, 684), as modified (Apr. 5, 2001) (quoting § 425.16, subd. (b)(1).) “To establish such a probability, a 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.” Id. “Whether he has done so is a question of law, which we determine de novo.” Id.

“ [T]hese statutes literally require the trial court, at a preliminary stage of the litigation, to determine by examining affidavits the ‘substantial

probability' of plaintiff's prevailing on a claim, whether evidence 'substantiates' a standard of proof the plaintiff must meet, or whether plaintiff has 'established ... a reasonable probability' of recovery." Equilon Enterprises, 29 Cal.4th at 64.

Further, "[i]n assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence." Roberts v. Los Angeles County Bar Association (2003) 105 Cal. App. 4th 604, 613-14. "Malice may be established by showing that [defendants] had recklessly disregarded the truth or knew their statements were false." Rosenauro, 88 Cal.App.4th at 274.

"The sine qua non of recovery for defamation . . . is the existence of falsehood." McGarry v. University of San Diego (2007) 154 Cal.App.4th 97, 112 (64 Cal.Rptr.3d 467) (quoting Letter Carriers v. Austin (1974) 418 U.S. 264). "[T]he question is not strictly whether the published statement is fact or opinion, but is instead whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." Id. at 113.

Here, significantly, Appellant Mr. [REDACTED] has not made any false statements. Appellant Mr. [REDACTED] produced invoices and email communications supporting his statements. Further, he had filed a

declaration reinstating all these facts and stating that he did not have any ill will in making these statements. Further, there is no corroborating evidence other than Respondent's own declaration that there was no bribery. In Respondent's declaration he said that there was no bribery or kickbacks ever received or offered. The trial court simply states that Plaintiff has met his burden of showing no underlying bribery. (A.R. Special Motion to Strike – 9).

However, it is noteworthy that after Respondent's employer had the investigation, Respondent was terminated. So, it can be assumed that Respondent was fired after proper investigation by the employer and it was not based solely on Appellant Mr. [REDACTED] accusations alone.

Respondent relies on a declaration of [REDACTED], who is not a party, to assert that what Appellant Mr. [REDACTED] stated was false as to the sequence of events as to who sought the information of Respondent's acts first. However, it is to be noted that [REDACTED] filed a supplemental declaration that stated that he does not know of his own personal knowledge what the factors in the decision were by [REDACTED] to terminate Respondent because he was not involved in the decision to terminate Respondent. (CT 71). [REDACTED] stated in his declaration that when he stated 'Mr. [REDACTED] was terminated' he 'did not imply that Mr. [REDACTED] termination had any connection to the information received from Mr. [REDACTED], since I was not involved in the decision by [REDACTED]

██████████ to terminate ██████████. (CT 71). Further, ██████████ stated that when he stated that Appellant Mr. ██████████ accusations played a substantial factor in causing Respondent's termination, he did not know that to be true of his own personal knowledge. (CT 71).

Additionally, even if Appellant Mr. ██████████ accusations played a role in Respondent's termination, it is not clear how the court found that Appellant Mr. ██████████ statements had malice and ill will behind it. It is irrelevant whether Respondent's employer sought the information first or whether Appellant Mr. ██████████ reported the illegal acts first since the statements were made "to a person interested therein." Civil Code, Section 47c(1). Irrespective of these facts, the truth is that Appellant Mr. ██████████ had not made any false statements.

Respondent's causes of action on defamation and interference with contractual relationship and economic advantage, and other claims are meritless considering the fact that Appellant Mr. ██████████ has not intentionally made any false statements and all other evidence on record. The cause of action for eavesdropping should fail because the statute regarding eavesdropping specifically exempts any recording that evidences certain crimes, including bribery. Penal Code. § 633.5. Respondent has not met his burden of proving the causes of action by competent and admissible evidence. Further, Respondent has not provided any evidence to prove malice -and ill will -on the part of Appellant Mr. ██████████. Moreover, apart

from Respondent's declaration, there was nothing on record to show that Respondent had not received kickbacks or engaged in the act of bribery.

Respondent's economic disadvantage and interference of contractual relations are the result of his own illegal activities of which his employer was interested and become informed as part of its own internal investigation. The trial court erred in not finding that Respondent's conduct, in demanding bribes, taking kickbacks and causing false invoices to be submitted was directly related to an issue of public interest, namely commercial bribery involved in the bidding process for public-use facilities.

B. Appellant Mr. [REDACTED] statements are protected by qualified privilege under Civil Code § 47

Under Civil Code § 47 (c), a privileged publication is one made:

(c) [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands at such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) was requested by a person interested to give the information.

Hecimovich v. Encinal School Parent Teacher Organization (2012) 203 Cal.App.4th 450, 472-73, 137 Cal.Rptr.3d 455.

A party challenging the privileged publication, alleging ill will must put forth evidence showing “a feeling of hatred or ill will going beyond that which the occasion for the communication apparently justified”

Id. at 472 (quoting Katz v. Rosen (1975) 48 Cal.App.3d 1032, 1037, 121 Cal.Rptr. 853.)

Appellant Mr. **Pavlovic's** communications were to Respondent's employer/officers of employer who were "interested persons," who either requested the information or were entitled to it. Appellant, being a contractor of Respondent's employer could be found as a party who is also interested, or as one who stands at such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent. Furthermore, Appellant Mr. **Pavlovic** asserted in his declaration that he did not have any malice or ill will.

Moreover, Appellant had not made any false statements. Respondent put forth no contrary evidence showing "a feeling of hatred or ill will going beyond that which the occasion for the communication apparently justified." Hecimovich, 203 Cal.App.4th at 472. Appellant cannot rely solely on his unverified complaint and declaration to show that he has not accepted any kickbacks and that Appellant Mr. **Pavlovic** made statements against him because of ill will or malice. Further, protections under Civil Code § 47c is applicable to the communications made even in a private meeting and conversations on subjects of mutual interest and notably it does not require that the interested party to whom the statements are made should first request or seek that information.

Therefore, the lower court erred in finding that Appellant Mr. [REDACTED] statements were not protected under Civil Code § 47c on the sole basis that Appellant Mr. [REDACTED] first approached Respondent's employer and made the statements with ill will. Further, it is not clear on the record how the lower court reached a conclusion that Appellant Mr. [REDACTED] made false statements intentionally. The court should not have reached such a conclusion solely on the basis of an unverified complaint and Respondent's self serving declaration.

CONCLUSION

Appellant Mr. [REDACTED] respectfully requests that the decision of the lower court be reversed.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 3,750 words, which is less than the total words permitted by the rules of court. Appellant relies on the word count of the computer program used to prepare this brief.

Appellant In Pro Per