Filed 3/8/12 Jones v. P. ex rel. Dept of Transporation

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GREGORY S. JONES, as Trustee, etc., Plaintiff and Appellant, v. THE PEOPLE, ex rel., DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.	B226430 (Los Angeles County Super. Ct. No. BC435115)

APPEAL from orders of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Reversed.

Callanan, Rogers & Dzida and Joseph S. Dzida for Plaintiff and Appellant.

Ronald W. Beals, Chief Counsel, Linda Cohen Harrel, Deputy Chief Counsel, Eric J. Fleetwood and Mark A. Berkebile for Defendant and Respondent.

INTRODUCTION

Klopping v. City of Whittier (1972) 8 Cal.3d 39 (*Klopping*) held that a property owner may recover in inverse condemnation for losses caused by a condemning authority's unreasonable conduct prior to actual condemnation. In this case, Gregory S. Jones, as Trustee of the Gregory S. Jones Revocable Trust (Jones), sued the People of the State of California, ex rel. Department of Transportation (Caltrans) for inverse condemnation. Jones alleged that Caltrans' unreasonable conduct, including its announcement and statements that its proposed design for highway expansion included an acquisition of a portion of his commercial property, forced him to renegotiate his lease with his tenant to a substantially lower rent.

Caltrans moved to strike Jones complaint pursuant to section 425.16.[1] Caltrans' anti-SLAPP motion[2] urged that the gravamen of Jones' complaint arose out of Caltrans' constitutionally protected communications on an issue of public interest and that Jones could not demonstrate a probability of prevailing on his action. The trial court granted Caltrans' motion. It struck Jones' complaint and awarded Caltrans attorney fees. This appeal by Jones challenges those rulings.

We conclude that while Jones' inverse condemnation action was the proper subject of a section 425.16 motion to strike, Jones demonstrated a probability of prevailing upon his claim. The trial court therefore should have denied Caltrans' motion. Accordingly, we reverse.

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[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND[3]

1. *The Caltrans Project*

Caltrans' project involves widening the Interstate 5 highway between State Route 91 and Interstate 710, a distance of 16 miles. The project is based upon a Major Investment Study completed in 1998. In 2000, the project received funding. The project is divided into several segments. Caltrans has filed several eminent domain actions to acquire property for the first segment of the project. Construction on the first segment was scheduled to begin in the winter of 2010.

Jones owns a parcel of commercial property located in the second segment of the Caltrans project. The specific details for the project's second segment have not yet been finalized but, as we explain below, Caltrans has consistently indicated that it intends to acquire a portion of Jones' property. Jones' property is triangularly shaped and bounded by three streets: Rosecrans Avenue, Firestone Boulevard, and Bloomfield. For the last 30 years, Jones has leased the property to TuneUp Masters, Inc. – Automasters (TuneUp Masters).

In 2001, Caltrans held a public meeting to obtain input about the potential environmental impacts of the project. Thereafter, Caltrans periodically sent newsletters to the community about the review process and project alternatives.

In spring 2006, Caltrans held a series of Community Workshop Meetings that included presentations about the project, including its design. Preliminary design plans were available for public inspection. Following a December 2006 public hearing, a final Environmental Impact Report (EIR)/ Environmental Impact Statement (EIS) was prepared and approved in 2007. In August 2007, copies of the document were sent to those potentially impacted, including TuneUp Masters.

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[3] Our statement of facts is therefore drawn from Jones' complaint and the evidence offered in regard to the motion to strike.

"In late May or early June 2009," TuneUp Masters contacted Caltrans and asked to look at the proposed design plans for the project. Shortly thereafter, a meeting was conducted at Caltrans' office. A Caltrans representative showed the proposed design plans to TuneUp Masters and explained how the project could impact the property.

On June 16, 2009, Jones telephoned Caltrans. Caltrans explained the project and its anticipated impacts on Jones' property. The next day, Caltrans wrote to Jones about the project and included drawings of the proposed work. Caltrans explained:

> "*I understand your Tenant and you ha[ve] a renewal lease agreement coming soon and that this project might impact the negotiation and business decision for you.* As I shared with you and your tenant both, this segment of the project is targeted to be in construction in late 2011 as of today [June 17, 2009], things may change and schedule may get push[ed] to later than 2011.
>
> "As you can see in the drawing, the impact to your property is in the front, the project will require approximately 24' for the Rosecran[s] Ave. widening, however, there is opportunity for the property to gain the space lost from the street in back of the property. The street area (existing Firestone Blvd) adjacent to the property will not be use[d] for street after the construction of the project and can be use[d] to mitigate your property area lost (this will need to be appraised and value[d] by Caltrans Appraisal Agent).
>
> "You also would like to talk to someone about your property acquisition and option available. For that information, please contact [name and telephone number provided]." (Italics added.)

On July 15, 2009, Jones again telephoned Caltrans to see if it would then acquire his entire property. He stated TuneUp Masters would "not sign a new lease and he does not want the property to be without a tenant." Caltrans explained that it could not consider acquiring the property since other processes had yet to be

completed (e.g., testing for hazardous waste testing, completion of right-of-way requirement maps, and appraisal of the property).

Jones' written reply to Caltrans reiterated that TuneUp Masters had indicated it might not remain after its lease expired on October 31, 2009 because it was concerned about the project's impact on its business. Jones asked Caltrans to contact him to discuss, among other things, "compensating [him] for the potential problems [he] will suffer as a result of the corridor improvement project and the possibility of the acquisition of [his] property as soon as possible."

In September 2009, Jones and TuneUp Masters executed a lease addendum modifying their lease. The prior lease had been for a ten-year term but the addendum created a month-to-month tenancy. Further, the addendum reduced TuneUp Masters' base monthly rent from $4,800 to $2,500. A declaration from Jones averred that the reduced rent "is insufficient to cover the costs of carrying the property including the mortgage payments, taxes and insurance. This was not previously the case under the original lease and rent."

In December 2009, Caltrans contacted Jones about signing a permit to allow Caltrans to enter his property to gather data to assess potential environmental issues. The data is needed to complete the final project designs and to conduct a Phase I Environmental Site Assessment. Jones refused to sign the permit unless "Caltrans immediately addressed his loss of rent." Caltrans responded that Jones' "loss of rental income claim is premature," could not "be addressed at this time, but could be addressed when Caltrans is ready to negotiate to acquire" his property. Caltrans advised Jones that if he "want[ed] the acquisition process to proceed at [a] quicker pace, he should sign the permit to help Caltrans move forward with the appraisal and acquisition process." Jones again refused to sign the permit and indicated he had retained counsel to sue Caltrans.

In March 2010, Caltrans responded to an email from Jones that had propounded three questions. First, Jones had asked when Caltrans would decide if it "plann[ed] on a full taking of [his] property." Caltrans explained that based upon its preliminary design plan, it proposed only a partial acquisition of Jones' property "along the frontage" that would "not impact[]" the "building improvements" on the land. Second, Jones indicated that because he had "a loan due in September," he "need[ed] to know the timing for [Caltrans] to make an offer so [he would] know what to tell [his] lender."[4] Caltrans explained that appraisal of Jones' property would begin once the hazardous waste testing and reporting process was completed, something that could take several months to complete. Third, Jones informed Caltrans that TuneUp Masters had "demanded a rent reduction based upon the business interruption that is going to occur or [it] was going to move" and then asked: "How do I recapture the difference?" Caltrans explained: "Some time ago, you and your tenant called [us] to discuss the project and the plans you received. At that time, . . . both of you [were told] that the plans indicated that only a partial acquisition was being identified, and that there will be specifications to the highway contractor to always maintain access for adjacent businesses to avoid interference with their operations." In addition, Caltrans noted: "There have been significant impacts to businesses due to the poor state of the economy in California. As a result of this poor business climate, all types of property have experienced increased vacancy, and reduced lease rates."

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[4] Jones' opening brief states: "If the case is allowed to proceed to trial, [he] makes the following further offer of proof; that the loan came due and payable on the property, and the income was not sufficient to justify the amount of payoff on the loan. Therefore, due to the reduction in income caused by Caltrans' project, [Jones] had to borrow against other properties in order to payoff the loan."

Jones submitted a declaration to rebut Caltrans' assertion that general economic conditions, not its proposed acquisition of Jones' property, had required Jones to reduce the rent. Jones averred that in October 2009 he had renewed a lease on a similar property "to another TuneUp Masters like business at $5500/month triple net (with annual rent increases) for a five year term. . . . This other property was not near and accordingly was not impacted by Caltrans' Interstate 5 Widening Project. But for Caltrans' project, the rent on the subject property would be comparable to [this] rent."

2. *Pleading Litigation*

In April 2010, Jones filed suit against Caltrans. He alleged causes of action for inverse condemnation based upon unreasonable pre-condemnation conduct and violation of the state constitutional provision that private property cannot be taken or damaged for a public use without payment of just compensation (Cal. Const., art. I, § 19).

Utilizing information contained in Caltrans' website, Jones alleged that "the right of way process for this segment of the project was initiated in the summer of 2009 with construction to begin in the winter of 2011."

In regard to Caltrans' discussion with TuneUp Masters, Jones alleged that Caltrans told TuneUp Masters "that this segment of the project [involving his property] is 'targeted' to be in construction in late 2011 as of today, but things may change and the schedule may get pushed to later than 2011" and that "multiple portions of Firestone Boulevard and Rosecrans Avenue will, at some undetermined point in the future, be closed adjacent to the Jones Property." Jones further alleged that Caltrans had informed TuneUp Masters about the project "in order to cause [TuneUp Masters] either to abandon the lease or to negotiate new terms calling for

payment of lower rent that would, in Caltrans' view, decrease the value of the Jones Property by lowering the rent paid."

According to Jones' complaint, Caltrans' discussion with TuneUp Masters about the project permitted TuneUp Masters to negotiate a more favorable lease with Jones than it would have otherwise have obtained. Jones alleged that Caltrans had "conducted itself with the intent to injure [Jones and TuneUp Masters] and with the intent to benefit Caltrans." Caltrans' conduct was unreasonable because it had not yet finalized its schedule or even formally approved its acquisition of any part of Jones' property and thus "prematurely acted to put a 'cloud' of condemnation over [Jones'] property." According to the complaint, "Caltrans knew that its actions would put a 'cloud' of condemnation over the Jones Property in the eyes of [TuneUp Masters], possible other potential tenants and possible potential buyers, effectively freezing it for several years while Caltrans acted on its own schedule and at its own convenience without regard to [Jones'] rights or interests and without regard to the damage [he] would suffer." Jones further alleged that Caltrans' conduct was unreasonable because although he apprised Caltrans about TuneUp Masters' concerns, Caltrans did not offer either to relocate TuneUp Masters or to compensate Jones for his lost rental income.

In addition, Jones alleged that Caltrans had approached the tenants and owners of nearby properties, told them it intended to acquire much of the land, "has actually acquired many such parcels of land," and, "has initiated eminent domain proceedings to acquire more."

In May 2010, Caltrans filed a demurrer to Jones' complaint. Following receipt of opposition from Jones, the trial court overruled the demurrer, finding that the complaint alleged sufficient facts to constitute a valid cause of action.

3. *Caltrans' Motion to Strike*

In June 2010, Caltrans filed a motion, pursuant to section 425.16, to strike Jones' complaint. Caltrans noted that Jones' inverse condemnation action relied, in large part, upon oral and written statements made by Caltrans to TuneUp Masters explaining the improvement project. Caltrans urged that a planned public highway project and its impact on the neighborhood is an issue of public interest and that all of its employees' statements were made in furtherance of Caltrans' statutory authorization to carry out the project. From that, Caltrans urged that Jones' complaint arose out of conduct taken by Caltrans in furtherance of its right to free speech and was therefore subject to a motion to strike.

The trial court granted Caltrans' motion. It found that "[s]pecifically, [Jones'] Complaint falls within Section 425.16(e)(4). The Complaint arises from [Caltrans'] protected activity, i.e. its right to free speech. . . . [¶] As [Caltrans] has met its initial burden, the burden shifts to [Jones] to show a probability of success on [his] claims. [His] evidence is insufficient to establish a probability that [he] will prevail on the merits." The trial court awarded Caltrans $11,418.75 in attorney fees.

This appeal by Jones challenges the trial court's orders.

DISCUSSION

A. *The Law of Inverse Condemnation*

In order to properly address Jones' appeal, we begin with an examination of the law of inverse condemnation. "Article I, section 19, of the California Constitution provides that property may be taken or damaged for public use only if just compensation is paid to the owner. That provision authorizes not only an eminent domain proceeding instituted by a public entity to acquire private property, but also an inverse condemnation action initiated by a landowner to

obtain compensation for a claimed taking or damage of his or her property. [Citations.]" (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 563-564.)

In *Klopping,* the California Supreme Court recognized a property owner's right to sue in inverse condemnation for activities that did not amount to an actual taking of the property. There, the City of Whittier (City) initiated condemnation proceedings against the plaintiffs' properties but a year later dismissed the action while at the same time declaring its intent to take the properties at some time in the future. (*Klopping*, *supra,* 8 Cal.3d at p. 42.) The property owners sued in inverse condemnation, alleging that the City's actions put a cloud over their properties, resulting in lost rental income. (*Id*. at p. 53.)

The *Klopping* court held: "[W]hen the condemner *acts unreasonably* in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property." (*Id*. at pp. 51-52.) Consequently, the property owner can sue to prove that "(1) the public authority *acted improperly* either by unreasonably delaying eminent domain action following an announcement of intent to condemn or *by other unreasonable conduct prior to condemnation*; and (2) *as a result of such action* the property in question suffered a diminution in market value." (*Id*. at p. 52, italics added.) Lost rental income is a proper method to establish diminution in market value if the condemning authority acts unreasonably. (*Id*. at p. 53.)

In sum, the thrust of an inverse condemnation action is the claim that the government's unreasonable pre-condemnation actions—conduct that often includes public statements and communications—results in a diminution of the

market value of the plaintiff's property. (See, e.g., *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [*Klopping* "makes clear [that] a public entity is liable for a diminution of market value caused by its precondemnation conduct only where it has acted *improperly and unreasonably*." (Italics added and omitted.)].)

B. *An Anti-SLAPP Motion*

"A special motion to strike 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. [Citation.] The purpose of [section 425.16] is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be 'construed broadly' to that end." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1165.)

Section 425.16 "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 (*Flatley*).) The statute posits a two-step process for determining whether a cause of action is subject to a special motion to strike. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).)

C. *The First Step in the Anti-SLAPP Motion: Jones' Claim Arises From Protected Activity*

In determining whether a claim arises from protected activity, as defined in section 425.16, subdivision (b)(1), the "focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning" as defined in section 425.16, subdivision (e). (*Navellier*, *supra*, 29 Cal.4th at p. 92.) "[W]e disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether [section 425.16] applies' and whether the trial court correctly ruled on the . . . motion." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

A governmental entity can file an anti-SLAPP motion. The statutory remedy of a motion to strike "extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17, and cases cited therein.)

We review de novo the trial court's ruling on a special motion to strike. (*Flatley*, *supra*, 39 Cal.4th at p. 325.) To determine whether Caltrans discharged its burden of demonstrating that Jones' complaint arose from constitutionally protected activity, we review the operative pleading and the supporting and opposing affidavits offered on the motion to strike. (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329-330; see also § 425.16, subd. (b)(2).)

In this case, the trial court granted Caltrans' motion on the ground that subdivision (e)(4) of section 425.16 applied. That provision states that protected speech within the meaning of the statute includes "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." (§ 425.16, subd. (e)(4).)

Jones contends that this provision does not apply because the gravamen of his lawsuit is Caltrans' conduct, not its oral and written communications. That is, he argues that Caltrans' speech was "only incidentally or collaterally involved" with its conduct. We disagree. As we explain below, the gist of Jones' inverse condemnation claim is that Caltrans, in carrying out the highway improvement project, engaged in unreasonable conduct, *including public announcements and statements to him as well as his longtime tenant TuneUp Masters*, that resulted in a diminution of the market value of his property because he was forced to lower the rent with TuneUp Masters.

The project to widen Interstate 5 was approved in 1998 and funded in 2000. As required by law, Caltrans disseminated, on an on-going basis, information about the property to landlords and tenants in its reach. The project is divided into several segments. Caltrans has filed eminent domain actions to acquire property for the first segment. Although Jones' property is in a segment for which the final design plans have not yet been finalized, the proposed design plan for this segment anticipates a partial acquisition of the portion of his property that fronts Rosecrans Avenue.

In 2009, TuneUp Masters contacted Caltrans about the project. Caltrans explained the proposed design to TuneUp Masters. Based upon its concerns that the project would negatively impact its business, TuneUp Masters forced Jones to modify its lease to substantially decrease the rent and to create a month to month tenancy. According to Jones, that was the very reason Caltrans had communicated with TuneUp Masters. That is, Caltrans had conveyed the information with the intent to lower the value of Jones' property and thus to put it in a superior

bargaining position when the time came to appraise the property for purposes of acquisition through eminent domain. Jones alleges this conduct was unreasonable because Caltrans had not yet finalized its schedule or even formally approved its acquisition of any portion of Jones' property. It is therefore apparent that Caltrans' speech was not, as Jones claims, "incidental and collateral to the [alleged] constitutional violation."

All of the speech to which Jones refers—Caltrans' public announcements, its statements at public meetings and its explanations to both TuneUp Masters and Jones—were about a matter Caltrans was involved in by virtue of its exercise of governmental functions: freeway construction and the attendant taking of property through the power of eminent domain. This speech concerned matters of broad public interest and was intended to inform the public about Caltrans' actions so that the public could provide its input to Caltrans before final decisions were made. The speech was therefore accorded the protections of the First Amendment. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 376-377.) Because Caltrans' protected speech forms the heart of Jones' lawsuit, the trial court did not err in finding that the anti-SLAPP statute applied. (See *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1116-1117.)

Jones' reliance upon *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790 (*Wang*) to support a contrary conclusion is not persuasive. *Wang* is the only published opinion that even touches upon the relationship between a special motion to strike and inverse condemnation. It concluded, based upon the specific facts of that case, that no protected speech was involved. We find that *Wang* is distinguishable.

In that case, Wang sold real property to Wal-Mart. Thereafter, Wal-Mart obtained permits from the City allowing Wal-Mart to develop the purchased property in a manner that allegedly blocked street access to Wang's other

properties. Wang sued Wal-Mart for breach of contract and fraud and the City for inverse condemnation (although the precise theory of inverse condemnation is not set forth in the opinion). Wal-Mart and the City moved to strike the complaint urging that all of Wang's allegations arose from protected activity—Wal-Mart's applications to the City for development permits. The trial court granted the motion but the court of appeal reversed.

In the portion of the opinion discussing the anti-SLAPP motion and inverse condemnation action, the appellate court wrote:

> "Likewise, with respect to the allegations against the City for inverse condemnation and declaratory relief, even though the Wangs' claims referred to [Wal-Mart's] applications for development permits, the critical consideration remains whether the causes of action are mainly based on the City's activity that gave rise to the asserted liability. [Citation.] It is difficult to compare the City's alleged inverse condemnation activities, such as preparing and revising staff reports and approving the request to vacate the streets, to a private or corporate defendant's protected free speech or petitioning activity in seeking such approvals. [Citation.] Even if the main focus remains on Wal–Mart's activities in seeking to have the street vacated, allegedly without proper notification to the Wangs, those are still predominantly private business-oriented activities that gave rise to the asserted contractual or tort liability. The liability theory is the loss of property value, allegedly caused by breach of contract or fraud (or inverse condemnation), rather than damages caused by any protected activity involving speech or petitioning the government.
>
> "With respect to both Wal-Mart and the City, we conclude the Wangs' causes of action raised only collateral or incidental facts with respect to any conduct falling within the applicable definition in the anti-SLAPP statutory scheme ('any written or oral statement or writing 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'; § 425.16, subd. (e)(2)). The trial court erroneously granted the motion under the first prong of the analysis." (*Wang, supra*, 153 Cal.App.4th at pp. 809-810.)

Wang is distinguishable from this case. *Wang* was primarily a business dispute between the plaintiff-landowner (Wang) and a third party (Wal-Mart) with only incidental governmental involvement. Further, it does not appear to have involved governmental speech but, instead, involved only the government's processing of the third party's applications and permits to develop its property. Here, in contrast, the government's speech (written and oral statements by Caltrans) to the public (including TuneUp Masters) about matters of public interest forms the core of Jones' inverse condemnation claim.

D. *The Second Step in the Anti-SLAPP Motion: Jones Demonstrated a Probability of Prevailing Upon His Inverse Condemnation Claim*

Because Caltrans established that Jones' inverse condemnation claim arose from constitutionally protected speech, the burden shifted to Jones to "establish[] a probability of prevailing on [his] claim[]. To meet this standard, [Jones] '"'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 [him] is credited.'"' [Citation.]" (*Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 425.)

Because the motion to strike "(1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff [here, Jones] and assess the defendant's [here, Caltrans'] evidence only to determine if it defeats the plaintiff's submission as a matter of law. [Citation.] Only a cause of action that lacks 'even minimal merit' constitutes

a SLAPP. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

First, Jones' complaint was legally sufficient because it properly alleged a cause of action for inverse condemnation based upon Caltrans' unreasonable conduct. In particular, Jones alleged that Caltrans informed TuneUp Masters about its intent to acquire a portion of Jones' property to force Jones to renegotiate the lease to a lower price and thus decrease the value of the property. (Compare *Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, 512 [demurrer properly sustained to complaint for inverse condemnation because it failed to allege, among other things, that the public entity intentionally acted to depress fair market value of the land].)

Second, Jones offered evidence to support his theory of unreasonable conduct. By 2007, the plan indicating a potential partial acquisition of Jones' property was disseminated to the public. In May or June of 2009, Caltrans informed TuneUp Masters about the potential impact of the project on the property it was renting from Jones. Shortly thereafter, Caltrans had several discussions with Jones about the project, indicating its awareness of the upcoming lease negotiations. Jones asked Caltrans to acquire his property. Caltrans declined although it had, through the exercise of its power of eminent domain, already acquired parcels for the first segment of the project. (Jones' property is in the second segment of the project.) In September 2009, Jones was forced to modify his lease with TuneUp Masters, reducing the monthly rent by almost fifty percent and creating a month to month tenancy. Taken together, this evidence demonstrates that Jones' suit for inverse condemnation cannot be said to lack minimal merit.

Caltrans' contrary argument is not persuasive. Relying upon several cases, including *Barthelemy v. Orange County Flood Control Dist., supra*, 65

Cal.App.4th at pages 563-565, it argues that its mere designation of Jones' property for public acquisition cannot establish a claim for inverse condemnation even if such designation affects the land's value. Jones concedes that Caltrans must go beyond mere planning to be liable but urges that it has done so here because it has moved into the acquisition stage by exercising its power of eminent domain to acquire several parcels for the first segment of the project.[5]

"The courts have segregated the public agency's activities into the planning phase and the acquisition phase for purposes of determining when precondemnation conduct gives rise to a damage claim. The owner has no recourse while the activities remain in the planning phase because the final decision to proceed with the project is still in doubt and may be modified or abandoned by the agency. The owner may have a right to recover damages after the agency's activities proceed into the acquisition phase and it has acted unreasonably." (11 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 30:17, p. 30-83.)

Given that Jones' property is in the next (second) segment of the project, we find Jones' argument to be persuasive. Caltrans has initiated eminent domain proceedings against properties in the first segment of the project. All of Caltrans' communications with TuneUp Masters and Jones, including its request that it be granted access to the property to conduct an environmental testing (a pre-condition to acquiring the property) support the conclusion that it will acquire a portion of Jones' property. In fact, nothing in the record suggests that either continuation of the project or Caltrans' acquisition of Jones' property is in doubt. In other words, on the facts of this case and in so far as Jones is concerned, Caltrans' actions have

[5] At oral argument, Caltrans conceded that it had acquired these properties.

taken it beyond mere planning and created potential liability for inverse condemnation based upon its unreasonable conduct.[6]

E. *Attorney Fees*

Caltrans concedes that reversal of the trial court's grant of its motion to strike requires reversal of its fee award.

DISPOSITION

The trial court's orders granting Caltrans' motion to strike and awarding Caltrans attorney fees are reversed. Jones is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.

[6] We express no opinion about the ultimate resolution of Jones' lawsuit. Instead, we simply find that in this pretrial proceeding, Jones established, as required by a law, a probability of prevailing upon the merits.