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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

J. KIELY BALL et al.,

Plaintiffs and Respondents,

v.

SANDEE SAURMAN,

Defendant and Appellant.

2d Civil No. B244750
(Super. Ct. No. 56-2012-00418245-CU-DF-VTA)
(Ventura County)

Plaintiffs J. Kiely Ball and Auditone Hearing Aids, Inc. (Auditone) sued defendant Sandee Saurman for defamation after she published highly critical complaints about Ball and his hearing aid dispensaries on two Internet websites and in a letter to members of a national hearing loss association. Saurman appeals the order denying her motion to strike the complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1]

We conclude the trial court erred in finding that Saurman had failed to establish that plaintiffs' claims arose from protected activity, as required under the first prong of the anti-SLAPP statute. Because Saurman did meet that threshold burden, the court should have considered the second prong, i.e., whether plaintiffs had demonstrated

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

a probability of prevailing on the merits. (§ 425.16, subd. (b)(1).) It did not make this analysis. Accordingly, we reverse and remand the matter to the trial court to do so.

FACTS AND PROCEDURAL BACKGROUND[2]

Saurman is a doctor of audiology and a licensed hearing aid dispenser who does not dispense or sell hearing aids. Ball is a licensed hearing aid dispenser in eight states, including California, but is not an audiologist. He is the president of Auditone, which he incorporated in July 2010. Previously, Ball was the president of Advanced Hearing Centers, Inc., which he sold in 2009.

In March 2009, Len Rossman asked Saurman to help him with the hearing aids he had purchased from Ball's business. Rossman claimed that Ball had refused to refund his money. Saurman telephoned Ball and demanded a refund on Rossman's behalf. According to Saurman, Ball laughed at her. Saurman and Rossman then went to Ball's office, where one of Ball's employees refused their demand for a refund. When they refused to leave without a refund, the employee called the police, causing them to leave.

Approximately a week later, Saurman picketed in front of Ball's business. Ball subsequently gave Rossman a refund, but required Rossman to sign a document releasing Ball of all claims and promising that no one he knew would come within 300 yards of Ball's businesses.

After Saurman assisted Rossman with his refund, other people contacted Saurman for similar assistance. Saurman filed a consumer complaint against Ball with the California Attorney General's office. She also filed multiple complaints with the California Department of Consumer Affairs. In one of the complaints, Saurman discussed Rossman's experience with Ball, and stated that "Ball should lose his California state hearing aid dispensing license," and be required to apologize to Saurman for

[2] As noted below, the trial court sustained numerous objections to the evidence presented in Saurman's anti-SLAPP motion. Our recitation of the facts is based on evidence that was not excluded by the court.

"threatening [her] 1st Amendment rights." Saurman also created a Facebook webpage called "Fight J. Kiely Ball Hearing Aid Dispenser."

In June 2010, the California Attorney General brought an accusation against Ball before the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) of the Department of Consumer Affairs. The accusation alleged numerous violations of state consumer laws. Ball settled that matter in December 2011.

In October 2011, Saurman wrote a letter to the chapter leaders of the Hearing Loss Association of America (HLAA) and mailed copies of the letter to Ball's clients. The letter discussed Saurman's negative experiences with Ball and advised the "Deputy Attorney General is going to try and revoke his license in a civil trial." The letter further stated, inter alia, that "the LA City attorney was going to press charges"; that the State of California is "trying to get a criminal trial on elder abuse on [Ball];" that Ball obtained money through forgery and that Saurman is a "prime witness" in the trial of "[S]tate of [C]alifornia *vs* Kiely Ball." The letter concluded: "I am adamant that the public, hearing impaired and elderly are protected. Please pass this information on to your members."

On January 2, 2012, shortly after Ball had settled the accusation brought before the Board, Saurman (using the pseudonym Jacey James) posted a complaint on the "Ripoff Report" website. The Internet posting stated that Ball and Auditone have illegal contracts and do not honor state laws, that Ball's former employees agree with Saurman and that "the State of California . . . has NINE accusations against his license and there is supposed to be a trial against his license." Saurman's posting further stated that Ball instructs his employees to "never" give a refund.

Ball and Auditone filed a complaint against Saurman for libel per se, negligence, negligent and intentional interference with economic relationship, invasion of privacy, unfair business practices and fraud. The claims are based upon Saurman's publication of allegedly false statements in the letter to the HLAA and on the Facebook and Ripoff Report websites. Plaintiffs alleged "[t]he letter to HLAA was seen and read

by members of the HLAA and by patients of J. Kiely Ball in and around Ventura County, California, and the RIPOFF REPORT website was seen and read by persons who reside in and around Ventura County where plaintiff conducts his occupation." Plaintiffs further alleged that "[t]he disclosure by [Saurman] created publicity in the sense of a public disclosure to a large number of people by publishing the [letter] to the chapter members of HLAA, . . . causing the letter to be sent to plaintiff's customers, and publishing the false statements on the Ripoff Report website." Ball stated in his declaration that as a result of the statements, "[t]he reputation of Auditone . . . , and my reputation have been harmed, contracts have been cancelled, income is reduced, and the Ventura County Star newspaper . . . has cancelled its advertising contract with Auditone causing a decline in revenue as a direct consequence."

Saurman filed a special motion to strike the complaint pursuant to section 425.16. In addition to her own declaration, Saurman submitted declarations from Rossman, Deana Langer, Frank Yee, Chris Wilson, Hal Levin, Brenda Russell-BACA and Kendall Jones. She also requested that the trial court take judicial notice of (1) an "Accusation" filed by the Board against Ball on June 10, 2010; (2) a decision and order entered by the Board on that Accusation; (3) a verified complaint filed in Utah against Ball; and (4) a small claims judgment entered in Los Angeles County Superior Court. Plaintiffs opposed the anti-SLAPP motion, and objected to the request for judicial notice and numerous portions of Saurman's supporting declarations and evidence. In reply, Saurman opposed the objections to her request for judicial notice but did not respond to the other objections.

The trial court sustained most of the objections to Saurman's evidence, and also denied her request for judicial notice. At the hearing on the anti-SLAPP motion, the trial court explained that its intent was to deny the motion "because of the evidentiary objections which pretty well gut the argument and leave it really without the factual support that would be necessary for the Court to make a finding that it was an exercise of free speech." Noting the complaint was unverified, the court refused to consider the allegations in plaintiffs' complaint or the attached exhibits.

In its written ruling, the trial court reiterated its view that Saurman had failed to produce admissible evidence showing that her speech qualified as protected activity under section 425.16, subdivision (e). The court concluded that subdivision (e)(2) did not apply because Saurman did not "prove that any (far less, all of) the allegedly defamatory statements she made regarding Ball and his company were made in connection with a governmental or official proceeding authorized by law." The court decided that subdivisions (e)(3) and (e)(4) did not apply because Saurman failed to prove "that her challenged speech was made in a public forum in connection with an issue of public interest." Because Saurman did not meet her initial burden of showing that her conduct was protected under the anti-SLAPP statute, the court determined "the burden . . . never shifted to Plaintiffs . . . to produce evidence showing a probability that they will prevail on their claims." As we shall explain, the court erred in failing to reach this issue.

The court denied plaintiffs' request for attorney fees because they failed to show that the motion was frivolous or filed to cause unnecessary delay. The court elaborated: "I think but for the evidentiary problems here, this might have qualified as an anti-SLAPP motion, so I don't think attorneys' fees are warranted here." Saurman appeals.

DISCUSSION

Saurman contends that the trial court (1) erroneously concluded that she had failed to demonstrate that plaintiffs' causes of action arose from protected activity and (2) abused its discretion by sustaining most of plaintiffs' objections to her evidence. Since the propriety of court's evidentiary rulings affects Saurman's first contention, we address that issue first.

Evidentiary Rulings

Plaintiffs filed more than 37 pages of objections to Saurman's request for judicial notice, supporting declarations and other documentary evidence. Saurman opposed the objections to the request for judicial notice, but did not respond to the other objections. In the last two pages of her opening brief, Saurman contends the trial court improperly took a "short cut" to denial of her motion by striking virtually all of her

evidence without considering the merits of each objection. We review a trial court's ruling on an evidentiary objection in an anti-SLAPP motion for abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.)

Contrary to Saurman's assertions, the trial court did consider the merits of each objection. It expressly overruled certain objections to the declarations of Saurman, Rossman, Yee and Levin. Moreover, Saurman has not demonstrated that the challenged evidentiary rulings were incorrect. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) Although she broadly asserts that plaintiffs' objections were "meritless," she does not specifically discuss the admissibility of any of the evidence she claims was improperly excluded. (See *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 ["appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived"].) We are "not required to search the record on [our] own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

Nonetheless, we agree with Saurman's assertion that the trial court's exclusion of a significant portion of her evidence did not undercut the entire evidentiary basis for her anti-SLAPP motion. Section 425.16, subdivision (b)(2), required that the trial court "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417-1418.) All of the facts necessary for the trial court to decide whether the challenged causes of action arose from protected activity were contained in plaintiffs' complaint, plaintiffs' opposing declarations and Saurman's admitted evidence. Indeed, most of the facts on this point are undisputed.

At the hearing on the motion, the trial court emphasized Saurman's failure to produce admissible evidence showing her challenged speech was made in a public forum in connection with an issue of public interest. When Saurman's counsel responded that the three exhibits attached to the complaint (i.e., Saurman's letter to HLAA and her Internet postings) confirmed the nature of the speech and that "plaintiffs themselves have

acknowledged that [the statements] were public speech made in a public forum," the court remarked: "It's not a verified Complaint. It's not the kind of evidentiary showing you need to make." Although the complaint is not verified, Ball included those same three exhibits in his opposing declaration, authenticated the documents and reiterated the pertinent allegations in the complaint. To the extent the trial court refused to consider this evidence, it abused its discretion.[3]

The Anti-SLAPP Statute and Standard of Review

"Section 425.16 provides an expedited procedure for dismissing lawsuits that are filed primarily to inhibit the valid exercise of the constitutionally protected rights of speech or petition." (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1292.) "The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. (§ 425.16, subd. (a).) The Legislature has declared that the statute must be 'construed broadly' to that end. (*Ibid*.)" (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 883.)

A court engages in a two-prong analysis to assess whether dismissal is required. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) First, the court must determine if the lawsuit falls within the scope of the anti-SLAPP statute. (*Ibid.*) A cause of action is governed by this statute if it arose from activities that were in furtherance of the moving party's free speech or petition rights. (§ 425.16, subd. (b)(1).) The moving party bears the burden of demonstrating that a cause of action arose from such protected activity. (*Equilon Enterprises*, at p. 67.) If the moving party meets this burden, the court then engages in the second prong of the analysis. (§ 425.16, subd. (b)(1).) In this stage, the burden shifts to the opposing party to demonstrate "a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

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[3] We deny Saurman's request to take judicial notice of the documents that were attached to her request for judicial notice in the trial court. Among other things, the documents are not necessary to resolve this appeal.

Only a cause of action that satisfies both prongs may be stricken under the anti-SLAPP statute. (*Id.* at p. 89.)

In making these determinations, the trial court considers the pleadings and supporting and opposing declarations filed by the parties, but "does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the [party opposing the motion] . . . ." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) We review de novo the trial court's ruling on an anti-SLAPP motion. (*Silk v. Feldman* (2012) 208 Cal.App.4th 547, 553; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.)

First Prong: Protected Activity

All of plaintiffs' causes of action are based on speech culled from three sources: Saurman's letter to the HLAA chapter leaders and her postings on the Ripoff Report and Facebook websites. To establish that the causes of action arose from protected activity, Saurman must show that the alleged defamatory speech falls within one of four categories set forth in section 425.16, subdivision (e): (1) statements made before a judicial proceeding; (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) "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." (*Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 804.)

Saurman contends that the challenged speech falls within all but the first category. Although Saurman has shown that at least some of the speech involved issues under consideration in the proceeding brought before the Board, we need not decide whether subdivision (e)(2) applies. It is only necessary to show that the challenged speech falls within one category, and Saurman has demonstrated that plaintiffs' causes of action arose from speech that falls squarely within subdivisions (e)(3) or (e)(4).

Section 425.16, subdivision (e)(3) encompasses statements made in "a public forum in connection with an issue of public interest." Plaintiffs do not dispute that Saurman's statements on the Ripoff Report and Facebook websites occurred in a public forum. It is well established that statements made on websites readily accessible to the public are deemed statements made in a public forum. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 896–897 (*Wilbanks*); *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007.)

Plaintiffs also do not dispute that Saurman's letter to the HLAA chapter leaders occurred in a public forum.[4] Indeed, they acknowledge the letter constituted a "public disclosure to a large number of people." (See *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476 [one-sided newsletter sent to 3,000 residents of a particular homeowner's community constituted a public forum because "it was a vehicle for communicating a message about public matters to a large and interested community"].) Nonetheless, whether the forum was public or private is inconsequential because, as discussed below, the letter raised a matter of public interest. Section 425.16, subdivision (e)(4), includes purely private communications that concern an issue of public interest. (See, e.g., *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546.)

The term "issue of public interest" under section 425.16, subdivision (e), is interpreted broadly. (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 716.) Conduct is a matter of public interest as long as it "'. . . ". . . concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic." [Citation.]'" (*Ibid.*) Indeed, the term is so broad that there is no requirement that the issue be "significant." (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.) Rather, "it is enough that [the issue] is one in which the public takes an interest." (*Ibid.*)

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[4] HLAA claims to be the nation's leading membership and advocacy organization for people with hearing loss, representing 48 million people nationwide. (See http://www.hearingloss.org/content/join.)

Courts have recognized that health care is a topic of public interest. (See, e.g., *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47 ["matters of health . . . are undeniably of interest to the public"].) "Courts [also] have recognized the importance of the public's access to consumer information. 'The growth of "consumerism" in the United States is a matter of common knowledge. Members of the public have recognized their roles as consumers and through concerted activities, both private and public, have attempted to improve their . . . positions vis-à-vis the supplies [*sic*] and manufacturers of consumer goods. They clearly have an interest in matters which affect their roles as consumers, and peaceful activities . . . , which inform them about such matters are protected by the First Amendment.' [Citation.]" (*Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, 1544; see *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [citing *Paradise Hills* on this point in connection with an anti-SLAPP motion].)

Wilbanks, supra, 121 Cal.App.4th at pages 900-901 held that statements on a website advising that a particular broker was being investigated by the California Department of Insurance and warning consumers of the broker's unethical business practices constituted protected speech under section 425.16 as "consumer protection information." The court explained that "[t]he statements . . . were not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices. [The] statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements . . . were directly connected to an issue of public concern." (*Id.* at p. 900, fn. omitted.)

Chaker v. Mateo (2012) 209 Cal.App.4th 1138, involved a series of derogatory statements about the plaintiff and his forensics business which were posted by the mother of the plaintiff's former girlfriend on the Ripoff Report website. The defendant's statements included: "'You should be scared. This guy is a criminal and a deadbeat *dad*. . . .'" "'I would be very careful dealing with this guy. He uses people, is into illegal activities, etc. I wouldn't let him into my house if I wanted to keep my

possessions or my sanity.'" (*Id.* at p. 1142.) The defendant further accused the plaintiff of picking up streetwalkers and homeless drug addicts. (*Ibid.*) In finding that the trial court properly granted the defendant's anti-SLAPP motion, the Court of Appeal stated: "We also have little difficulty finding the statements were of public interest. The statements posted to the 'Ripoff Report' Web site about Chaker's character and business practices plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness." (*Id.* at p. 1146.)

Most recently, in *Bently Reserve L.P. v. Papaliolios* (2013) 218 Cal.App.4th 418 (*Bently*), a former tenant of the plaintiff's apartment building posted a review of the building on "Yelp," an Internet website that collects consumer reviews of businesses. The tenant claimed, inter alia, that the owner was a "sociopathic narcissist" who likely contributed to the deaths of three particular tenants. The plaintiff sued the tenant for libel. In addressing the tenant's anti-SLAPP motion, the court bypassed the first prong in the analysis, noting that the parties agreed that prong had been met and that "the libel claim undoubtedly arises from protected activity." (*Ibid.*)

Saurman similarly sought to educate and warn consumers about Ball's allegedly deceptive and unethical business practices. Her posting on the Ripoff Report website warned consumers to "stay FAR away from [Ball]. He acts nice at first and then gets abusive to you. . . . Go to Costco. They CAN'T rip you off, give you an illegal contract or take advantage of you there!!!" Saurman's purpose in creating the Facebook webpage was "to inform consumers that this California Hearing aid dispenser has 9 accusations against his license and are asking for his license to be revoked by the CALIFORNIA STATE ATTORNEY GENERAL." In the same vein, the HLAA letter advised: "The scary part is that even if [Ball] loses his license he can still operate under a corporation and hire a dispenser and STILL rip off the elderly in our community. People need to know about him. . . . I am adamant that the public, hearing impaired and elderly are protected. Please pass this information on to your members."

Ball and Auditone provide a type of health care assistance to individuals suffering from hearing loss, particularly the elderly. Saurman's comments regarding Ball's business practices and honesty are indisputably a form of consumer information and, as such, concern a matter of public interest. (See *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1367 [discussion on website of potential harm from use of silver amalgam subject of public concern even though critical of the defendant]; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23–24 [criticism on website of named plastic surgeon matter of public interest because contributed to public debate about risks and rewards of plastic surgery].) The trial court erred in concluding otherwise.

Second Prong: Probability of Prevailing on Merits

Because Saurman met the first prong, the trial court should have proceeded to the second prong and decided whether plaintiffs met their burden to show a probability of prevailing on the merits. (§ 425.16, subd. (b)(1); *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 477; *Bently, supra*, 218 Cal.App.4th 418.) As noted in *Bently*, "[w]hile many Internet critiques are nothing more than ranting opinions that cannot be taken seriously, Internet commentary does not ipso facto get a free pass under defamation law." (*Bently, supra.*) The court must consider whether the challenged speech "is susceptible to being read as containing factual assertions, not just mere opinion," and whether "plaintiffs submitted sufficient evidence to meet their minimal burden under the anti-SLAPP statute to show a probability of prevailing on at least some aspect of their libel claim." (*Ibid.*) The trial court erred by denying Saurman's motion without conducting this analysis.

Saurman urges us to exercise our authority to conduct a de novo review and decide this issue in the first instance. In *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 286, the Court of Appeal similarly reversed the trial court's ruling that the defendant had failed to satisfy the first prong of the anti-SLAPP statute, but decided that because the trial court had never reached the second prong, "it [is] more appropriate that the trial court address [that issue] in the first instance." We agree, and accordingly remand the matter to the trial court to determine whether plaintiffs can demonstrate a probability of

prevailing on the merits of their claims. (See *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 271; *Birkner*, at p. 286.)

DISPOSITION

The order denying Saurman's motion is reversed and the matter is remanded to the trial court to decide whether plaintiffs can satisfy their burden under the second prong of the anti-SLAPP statute. Saurman shall recover her costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Barbara A. Lane, Judge

Superior Court County of Ventura

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Kendall T. Jones for Appellant.

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