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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAUL AMATO, Plaintiff and Appellant, v. ANDREA BERMUDEZ et al., Defendants and Respondents.	B283147 (Los Angeles County Super. Ct. No. BC630056)

APPEAL from an order of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

Tredway, Lumsdaine & Doyle and Brandon L. Fieldsted for Plaintiff and Appellant.

Law Office of Alec Rose and Alec Rose for Defendants and Respondents.

Plaintiff and appellant Paul Amato appeal from the trial court's order granting a special motion to strike under Code of Civil Procedure section 425.16 filed by respondents Andrea Bermudez and Lisa Pueschner. We conclude that Amato has not made a showing of minimal merit to state a legally sufficient claim, and that the trial court did not abuse its discretion in denying his motion for reconsideration. Accordingly, we affirm.

BACKGROUND[1]

Plaintiff and appellant, Paul Amato is the owner of and a trainer at Crossfit Reality (CFR), a gymnasium in Signal Hill, California. Defendants and respondents Andrea Bermudez and Lisa Pueschner are former members of the CFR gym. In May 2016, Bermudez and Pueschner became involved in a dispute with CFR regarding the company's refusal to terminate their membership contracts, which did not provide for early termination.[2] Around this time, and over the

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[1] Our factual recitation is based upon the allegations of the operative verified first amended complaint (complaint) and evidence presented in support of and in opposition to the [anti-SLAPP] motion. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

[2] Bermudez and Pueschner joined CFR and signed one–year membership contracts in early August 2015. At that time, Amato agreed to permit them to terminate their contracts within two months, but did not memorialize that term in their written membership agreements. In early October 2015,

course of the next few months, Bermudez and Pueschner were aware that a number of their friends at CFR had sought or were seeking to terminate their memberships at CFR, and engaged in negotiations and discussions with CFR in an effort to obtain an early cancellation of their contracts with no or nominal penalties. Amato alleged that, around this same time period, Bermudez and Pueschner slandered his personal and professional reputation among members of the Crossfit community and with potential clients by falsely telling "disinterested third parties that [he and an employee] were engaged in underhanded business practices, and . . . had made false statements to municipal authorities in order to have a competitor gym cited, fined and or put out of business."

On June 3, 2016, Bermudez, purportedly acting in participation and with the approval of Pueschner, posted a critical review of CFR on Yelp stating,

> "Nice facility but beware of the contract. I was told by the owner I could leave if I wasn't happy with the services . . . [Amato's] words–'We offer a service here, if you're not happy here, you can leave, we don't want unhappy members.' After months of

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Bermudez and Pueschner requested, and Amato agreed, to terminate their membership contracts with CFR. A few weeks later in October 2015, Bermudez and Pueschner asked to return to CFR. Instead of having them sign new contracts, Amato permitted Bermudez and Pueschner "to continue their original contracts from August 2015. At the time of reinstating the two contracts, neither [Bermudez or Pueschner] made any request for further early termination exceptions to the contract, and [Amato] made no further early termination exception offer."

> programming that didn't seem to make sense and the owners [*sic*] inability to coach and instruct . . . I found another gym but was then threatened with a lawsuit and/or small claims court to recoup my membership fees. The letter was pretty disheartening. So I'm stuck. Paying $150 a month for nothing."

On the same day, Bermudez posted a similarly critical review on CFR's public commercial Facebook page, stating, in part,

> "Nice facility but beware of the contract. I was told by the owner I could leave if I wasn't happy with the services . . . [Amato's] words–'We offer a service here, if you're not happy here, you can leave, we don't want unhappy members.' After months of programming that didn't make sense, coaches that were fired or quit, and the owners [*sic*] inability to properly coach and instruct, I wanted to leave. Quietly. I found another gym that met my needs. After giving my 30 Day Notice, I was then threatened with a lawsuit and/or small claims court to recoup my membership fees. The letter was super lame and pretty disheartening. So I'm stuck. Paying $150 a month for nothing. Super bizarre management here."

In early August 2016, Bermudez posted two revisions to her previous Yelp reviews of CFR stating,

> "Nice facility but BEWARE OF THE CONTRACT AND THE OWNER [AMATO]. He promised one thing and delivered an entirely different experience. It's more complicated to leave this gym than any other place I've spent time in. Before signing up, [Amato] assured me that I could leave the gym at anytime . . . . "Initially, I came over [to CFR] with friends from another gym that had closed. When a number of us (about 30 people) realized that there was zero coaching and programming, a lot asked to leave. Some had to pay 3 months and sign a legal agreement not to post anything disparaging about them on Yelp/Facebook. Others opted to stay and wait out their contracts. Numerous

> friends were desperate enough to pay the fee and sign the document. That's how bad it was.
> "I was told by the owner, when I first arrived, that I could leave if I wasn't happy with the services . . . [Amato's] words–'We offer a service here, if you're not happy, you can leave, we don't want unhappy members.' After months of programming that didn't make sense and the owners [*sic*] inability to coach and properly instruct . . . I found another gym. When I asked that my membership be terminated, I was told I would have to pay out the remaining balance. The reason I found that surprising was that a few months earlier, the owner assured me that I could leave if I wasn't happy. So I was stuck. Stuck with an owner that [*sic*] coerced me into a contract and then denied his initial assurance.
> "Nice space, Definitely not worth the $150–$200 a month in my opinion. . . . [¶] . . . . If you look at some of the Reviews on this page, over 90% of them are from folks who have since left for other gyms, dropped in one time or are current members who have never experienced other gyms . . . . Just an observation. Also kinda odd that there are no original coaches or members who belong to [CFR]. I was warned before joining that the people leave because of [Amato] . . . I wish I would have listened before signing up."

Bermudez's August Yelp reviews include a photograph of Amato at the front desk of CFR with the caption "The usual coaching style of [Amato] during a WOD [Workout of the Day]."[3]

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[3] Amato claims the photo depicts him looking at his phone. Respondents claim it shows him asleep in a chair. It would be impossible to assess the veracity of either claim based on the poor quality of the copy in the record.

On August 3, 2016, Pueschner posted a review of CFR on Yelp stating, in part,

> "If you decide to try [CFR], be very cautious with the owner, [Amato], and what he tells you regarding memberships. . . .
> "[Amato's] strategy is to misrepresent himself and [CFR's] membership terms. [Amato] comes across as an honest, trustworthy Veteran that you can make a deal with on a handshake . . . . However, he is the complete opposite.
> "[Amato] explained that the . . . billing system . . . for the rate he was giving me, had to be set up as a 1 year contract . . . . Similar to another Yelp review on here, [Amato] verbally explained to me . . . . 'We (CFR) offer a service here, if you're not happy at anytime, you can leave your contract, we don't want unhappy members . . . .'
> "[Amato] has misrepresented himself to countless members and when they get fed up . . . and want to leave, he will not financially allow them to leave. [Amato] has his membership coach email them using legal jargon and scare tactics into staying in their contracts.
> "I found out about CrossFit in 2008 . . . and have been a member of about 10 CrossFit gyms. I have never experienced anything like this at any other CrossFit gym. [¶] . . . [¶]
> "I'm writing this review because I wish I would have had a warning. I'm tired of seeing my friends miserable at this gym, being bullied into finishing out a contract that they were tricked into in the first place."

Amato filed this action against Bermudez and Pueschner in August 2016, alleging causes of action for libel, slander and conspiracy to defame.

In response to the complaint, defendants filed a special motion to strike under Code of Civil Procedure section 425.16,[4] the anti-SLAPP[5] statute. That statute provides that a claim arising from constitutionally protected speech or petitioning activity is subject to a special motion to strike unless the plaintiff can establish a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) Defendants argued that Amato's lawsuit was a SLAPP because it (1) arose from their exercise of constitutionally protected free speech activities on publically accessible websites in connection with issues of public interest and (2) to the extent defendants had accused Amato or any CFR employee of making false statements to municipal authorities regarding an unnamed competitor for the purpose of having the competitor gym fined, cited or shut down, such statements related to matters of public interest and were made in connection with an issue under consideration or review by an executive body.

As to the cause of action for libel, defendants argued that Amato could not demonstrate a probability of prevailing because the allegedly defamatory statements about which he complained were either

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[4] Additional references to "section 425.16" are to Code of Civil Procedure section 425.16.

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

nonactionable statements of opinion, or factually true statements about threatened litigation.

Defendants also argued that Amato could not prevail on his second cause of action for slander, because he failed to plead the claim with sufficient particularity to provide them adequate notice of the actions they had to defend. Finally, defendants argued Amato could not prevail on a cause of action for conspiracy predicated on two legally insufficient underlying tort claims.

The motion was initially set for hearing on January 31, 2017. On January 25, 2017, the trial court published a tentative ruling granting the anti-SLAPP motion after Amato failed to file any opposition. Based on his belief that his former counsel (who had since withdrawn) was working with defendants' attorney to consolidate a purportedly "related action," and that the hearing would be continued per counsels' stipulation, Amato (acting in pro. per.) sought ex–parte relief to continue the hearing. The court granted the application and scheduled a new hearing date for February 21, 2017. The court ordered that both "[t]he opposition [to the anti-SLAPP motion] and reply shall be filed per the code. C.R.C. Rule 3.1320(c) [*sic*]."[6] The parties were admonished that "untimely documents [would] NOT be considered by the Court."

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[6] As discussed at footnote 9 below, the reference to California Rules of Court, rule 3.1320 appears to have been clerical error.

Amato's opposition to the anti-SLAPP motion was due February 6, 2017. (Code Civ. Proc., § 1005, subd. (b).)

Still self–represented, Amato filed an untimely opposition to the anti-SLAPP motion on February 7, 2017. At the hearing on February 21, 2017, the court declined to consider Amato's untimely opposition papers,[7] and adopted its tentative ruling granting the motion.

On March 6, 2017, Amato filed a motion pursuant to Code of Civil Procedure section 1008, subdivision (a) (section 1008), for reconsideration of the order granting the anti-SLAPP motion.

An "Order After Hearing" granting defendants' anti-SLAPP motion, and striking the complaint, was entered on March 13, 2017.

On April 14, 2017, Amato filed a substantively identical Amended Notice of Motion and Motion for Reconsideration, which was denied on May 11, 2017. This timely appeal is from the order granting the anti-SLAPP motion.[8]

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[7] In dicta, the court proceeded to analyze the merits.

[8] An order granting an anti-SLAPP motion is immediately appealable. (§ 425.16, subd. (i), Code Civ. Proc., § 904.1, subd. (a)(13); *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371.)

DISCUSSION

1. *Governing Legal Principles*

A SLAPP suit is a meritless lawsuit brought primarily to chill or punish a defendant's exercise of the constitutional right of petition or free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60 (*Equilon*).) A SLAPP plaintiff is not concerned with prevailing in the lawsuit, but rather seeks to "'deplete "the defendant's energy" and drain "his or her resources"'" by forcing a litigant to defend an unmeritorious lawsuit. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463 (*Hecimovich*).) Section 425.16 was enacted to provide a vehicle to prevent such abusive lawsuits early and at minimal cost to the SLAPP target. (*Ibid.*) Under section 425.16, the trial court evaluates the merits of a possible SLAPP "using a summary–judgment–like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

Section 425.16 provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An "'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' includes: (1) any written or oral statement or writing made before [an] . . . executive . . . proceeding,

or any other official proceeding authorized by law, (2) any written or oral statement . . . made in connection with an issue under consideration or review by [an] . . . executive . . . or any other official proceeding authorized by law, (3) any written or oral statement . . . made in a place open to the public or a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Trial courts employ a two–step process when deciding an anti-SLAPP motion. The court first decides if the moving party has made a threshold showing that the challenged causes of action arise from protected activity. (*Equilon, supra,* 29 Cal.4th at p. 67.) If this threshold showing is made, the burden shifts to the party opposing the motion to demonstrate a probability of prevailing on the merits of its claims. (*Ibid.*) "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Soukup, supra,* 39 Cal.4th at pp. 278–279.)

Our review is de novo, applying the same two–step procedure as the trial court. (*Soukup, supra,* 39 Cal.4th at p. 269, fn. 3.) "We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 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.' [Citation.]" (*Ibid.*)

2. *Defendants Made a Threshold Showing that Amato's Claims Arise From Constitutionally Protected Activity*

The party filing a anti-SLAPP motion has the initial burden of making a prima facie showing that one or more causes of action arose from protected activity. (*Equilon, supra*, 29 Cal.4th at p. 67; see § 425.16, subd. (e).) Amato contends the trial court erred when it found that the Yelp and Facebook reviews posted which form the factual bases for his claims were "of public interest" and arose out of "protected activity under section 425.16." He insists the statements involve a "private dispute between private parties, and not . . . any matter of public interest."

The court concluded that defendants met their initial burden. Specifically, it found the allegedly defamatory "statements are of public interest as the online review websites are designed for consumers with prior experience to share their experience with other potential consumers considering patronizing the business and a false report to municipal authorities implicates potential misuse of municipal powers and false reports are a matter of public interest."

Amato contends this ruling was erroneous. He insists the statements at issue are unconnected to a "public issue" because they do not concern a "person or entity in the public eye," do not involve

"conduct that could directly affect a large number of people beyond the direct participants," and do not relate to "a topic of widespread, public interest." (See *Rivero v. American Federation of State, County and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 924; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc*. (2003) 110 Cal.App.4th 26, 33.) He is mistaken.

Under the broadly construed anti-SLAPP statute, consumer reviews of businesses open to the public are routinely viewed as matters of public interest. "'[A]n issue of public interest' . . . need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.'" (*FilmOn.com v. DoubleVerify, Inc*. (2017) 13 Cal.App.5th 707, 716-717.) Moreover, section 425.16 "governs even private communications, so long as they concern a public issue." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 897; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 [same].)

Here, the trial court correctly concluded that defendants' criticisms of Amato's business and his business practices, posted on publicly accessible commercial sites, were matters of interest to members of a significant subset of the general public which could directly impact potential consumers considering patronizing CFR, and thus were protected by the anti-SLAPP statute. Similarly protected as matters of public interest were defendants' allegedly slanderous statements to third parties regarding false reports by Amato or his

employee (Mustafa) to public authorities about a business competitor in an effort to have the competitor gym publicly sanctioned or shut down.

3. *Amato Failed to Demonstrate a Probability of Success on the Merits*

Once defendants satisfied the first prong of the SLAPP test the burden shifted to Amato to demonstrate, with sufficient admissible evidence, that he had a probability of prevailing on the merits of his claims. (*Equilon, supra,* 29 Cal.4th at p. 67; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289 [plaintiff's "prima facie showing of merit must be made with evidence that is admissible at trial"]; *Hecimovich, supra*, 203 Cal.App.4th at p. 474 ["plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits"].) Amato failed to present either timely or sufficient evidence that he was likely to prevail.

a. *The Trial Court Did Not Abuse Its Discretion in Refusing to Consider the Untimely Opposition*

A hearing on defendants' anti-SLAPP motion was originally scheduled for January 31, 2017. Defendants' counsel claims–and Amato does not dispute–that Amato, then self–represented, was personally served with the motion on November 14, 2016. Amato's opposition to the anti-SLAPP motion was due by January 18, 2017. (Code Civ. Proc., § 1005, subd. (b) ["All papers opposing a motion . . .

shall be filed with the court and a copy served on each party at least nine court days . . . before the hearing"]; *Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398, 407 (*Hupp*).)

On January 31, 2017, Amato filed an ex parte application requesting that the hearing be continued to February 21, 2017, due to a purported miscommunication between his former counsel and defendants' attorney, regarding an alleged agreement to continue the hearing. Defendants opposed this request. They argued that Amato's opposition papers were overdue (they still had not received them as of 8:30 p.m. January 26, 2017), and the court had already issued a tentative ruling granting the anti-SLAPP motion.

The trial court granted Amato's ex parte application and continued the hearing to February 21, 2017. In its January 31 order, the court explicitly admonished the parties that "[t]he opposition and reply shall be filed per the code. C.R.C. Rule 3.1320(c) [*sic*].[9] Any untimely documents will NOT be considered by the Court." The court's

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[9] The reference to California Rules of Court, rule 3.1320(c), which relates to notice of a hearing for a demurrer, is likely a clerical error. We are confident the court intended to refer to California Rules of Court, rule 3.1300, which provides that: "If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." (Cal. Rules of Court, rule 3.1300(a), (d).) We are equally confident the "code" to which the order refers is Code of Civil Procedure section 1005, which governs filing deadlines in motion proceedings such as the one at issue here. (See *Hupp, supra,* 221 Cal.App.4th at p. 407.)

order was also attached to a Notice of Ruling prepared by Amato and filed on February 7, 2017.

Based on the order continuing the hearing, Amato's opposition to the anti-SLAPP motion was due by February 6, 2017. (Code Civ. Proc., § 1005, subd. (b); *Hupp, supra,* 221 Cal.App.4th at p. 407.) Amato concedes that his opposition was filed one day late, on February 7, 2017.

The anti-SLAPP motion was heard on February 21, 2017. Consistent with its January 31, 2017 order, the trial court observed that Amato had–for a second time–failed timely to oppose the anti-SLAPP motion. The court refused to consider his papers. Having failed timely to oppose the motion, or to object to any evidence defendants submitted in support of the motion, Amato failed to demonstrate any likelihood of success on the merits of his claims.

A trial court may exercise its discretion and summarily refuse to consider untimely papers in ruling on a motion, so long as its minute order or ruling so states. (Cal. Rules of Court, rule 3.1300(d).) Of course, "[c]ognizant of the strong policy favoring the disposition of cases on their merits," the decision to disregard late–filed papers should not be exercised arbitrarily. (*Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32.) In practical effect, the court should evaluate whether to exercise its discretion and reject late–filed papers by applying a flexible approach and considering whether "excusable neglect" has been shown under the factors relevant to granting relief under Code of Civil Procedure section 473. (*Ibid.*) Among factors to be evaluated are, an "attorney's neglect in untimely filing opposing papers

. . . in light of the reasonableness of the attorney's conduct [citation] [and] the effects of strict enforcement on the rights of the parties and the furtherance of justice. [Citation.]" (*Id.* at p. 33.) It is an abuse of discretion for the court to refuse to consider late–filed papers if excusable neglect is shown. (*Id.* at pp. 32-33.)

On appeal, as before the trial court, Amato maintains that his untimely filing constitutes excusable neglect because he is a self-represented litigant and, due to "a scheduling anomaly" when "calculating his deadline to file the opposition [for the continued hearing on the anti-SLAPP motion], he did not take into account Lincoln's Birthday because he did not know [it] was a court holiday."[10] He is mistaken.

First, it is of no moment that Amato has been self-represented at various times during this litigation. It is well established that "[p]ro. per. litigants are held to the same standards as attorneys. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ['A doctrine generally requiring or permitting exceptional treatment of parties who represent

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[10] Before the trial court, Amato also argued that he did not file an opposition because he expected the case to be consolidated with a pending related matter, and relied on representations made by defendants' counsel to consolidate the matters. The argument regarding consolidation of purportedly related cases–rejected by the trial court long before Amato's initial opposition to the anti-SLAPP motion was due–has not been revived on appeal.

themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation']; citation.)" (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) Amato's pro. per. status does not excuse him from adherence to governing law and rules of civil procedure. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) He is entitled to "'the same, but no greater consideration than other litigants and attorneys.'" (*Id.* at p. 1247; see *Lombardi v. Citizens Nat. Trust etc. Bank* (1955) 137 Cal.App.2d 206, 208–209 [pro.per. litigant is "'restricted to the same rules of evidence and procedure as is required of those qualified to practice law . . . ; otherwise, ignorance is unjustly rewarded.'"].)

Amato does not claim he was unaware that Lincoln Day is a state holiday, only that "he did not know if" it was also a judicial holiday. Absent exceptional circumstances, it would not constitute excusable neglect for a practicing attorney to fail to ascertain whether a state holiday was also a court holiday when calculating a "nine *court day*" deadline for filing a brief. (Code Civ. Proc., §§ 1005, subd. (b), italics added, 134, subd. (a) ["courts shall be closed for the transaction of judicial business on judicial holidays"]; Gov. Code, § 6700, subd. (a)(4) ["Lincoln Day" is a state holiday].) Amato cites no authority, and presents no facts to justify his failure to conduct this basic investigation. He simply invites this Court to ignore his neglect–the effect of which would permit him to file his opposition papers two weeks after they were initially due, and 13 weeks after he was served with the

anti-SLAPP motion. We decline and find no abuse of discretion in the trial court's refusal to consider the opposition.

b. *On the Merits, Amato Failed to Establish a Likelihood that He Would Succeed on the Defamation Claims*

Although the trial court appropriately granted the anti-SLAPP due to Amato's failure to file an opposition, it nevertheless proceeded to analyze the merits of the motion, and found Amato could not demonstrate a likelihood of success on the merits.

Once defendants establish that the action arises from protected speech activities, the second step asks whether Amato can show a probability of prevailing on his claims. To that end, Amato 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.) Amato did not and cannot demonstrate a probability of prevailing on the merits of his defamation claims.

Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander. (Civ. Code, § 44.) The tort involves an intentional, but unprivileged communication of a statement that is false, defamatory and, by its nature tends to injure or cause special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 (*Taus*).) For purposes of the tort, a statement is "published," every time a

defamatory statement is communicated to a third person who understands its defamatory meaning as applied to the plaintiff; no written dissemination is required. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242 (*Shively*).)

"'"'"The sine qua non of recovery for defamation . . . is the existence of falsehood.' [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]" . . . .' [Citation.]" (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624 (*ZL Technologies*); accord, *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259–260 (*Baker*).) "In all cases of alleged defamation . . . , the truth of the offensive statements or communication is a complete defense, regardless of bad faith or malicious purpose." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 646 (*Smith*).)

The pivotal question is whether the statement[s] at issue is or are statements of fact or opinion. (*Baker, supra,* 42 Cal.3d at p. 260.) Although "'mere opinions are generally not actionable [citation], a statement of opinion that implies a false assertion of fact is . . . .' [Citations.] Thus, the 'inquiry is not merely whether the statements are fact or opinion, but "'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.'"' [Citations.]" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1261 [finding defendant's statement that his relationship with

plaintiff ended, in part, not because of his abusive behavior toward her, but because of her abortion, was not opinion, but "an assertion of fact capable of being proved true or false"]; accord, *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1472 [accusations that attorney was "'reprehensible,'" "engaged in 'unconscionable' conduct, [and] 'egregiously violated' his statutory dut[ies]" were actionable as statements of fact given specific citations to statutes attorney purportedly violated].)

Conversely, an opinion that does not imply a provably false assertion of fact, is not actionable. (See *Charney v. Standard General, L.P.* (2017) 10 Cal.App.5th 149, 158 [finding statement that plaintiff was investigated by an "independent" third party was not defamatory because the independence of investigation did "'not imply a provably false factual assertion'"]; *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 856 [finding the statement: "'[l]egal records show that [plaintiff] is an unscrupulous lawyer who was sued for negligence, fraud and financial elder abuse'" non-actionable, because the question of whether lawyer was "'unscrupulous'" was not a "provably false assertion of fact"]; *GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 [statement that corporation was run solely "'for the benefit of its officers and directors'" constitutes a "subjective opinion with respect to corporate governance"].)

The determination whether a statement is one of fact or opinion is a question of law. (*Baker, supra,* 42 Cal.3d at p. 260; *J–M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247

Cal.App.4th 87, 104.) To determine whether a statement is actionable fact or nonactionable opinion, we apply a totality of the circumstances test pursuant to which we consider the language of the statement, and the context in which it was made. (*ZL Technologies, supra,* 13 Cal.App.5th at pp. 624–625; *John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312 [court must put itself in the place of the average hearer or reader].)

(1) *Libel*

In general, a written communication "which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," constitutes libel. (Civ. Code, § 45.)

Both defendants' alleged defamatory statements appeared on Yelp, an internet–based commercial review website, and Bermudez's statements appeared on CFR's public commercial message board on Facebook. Courts and commentators have recognized that readers of online message boards, blogs and reviews expect to see strongly worded opinions, not objective facts. (See e.g., *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1162 ["[t]he use of a pseudonymous screen name offers a safe outlet for the user to . . . criticize corporate or individual behavior without fear of intimidation or reprisal"]; *Global Telemedia Intern., Inc. v. Doe 1* (C.D.Cal.2001) 132 F.Supp.2d 1261, 1267 [finding that internet postings "are full of hyperbole, invective, short-hand

phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings"].)

The main components of Bermudez's and Pueschner's on–line posts related to (1) their dissatisfaction with Amato's intention to hold them to the terms of their admittedly binding membership contracts, despite oral assurances that they could leave if they became unhappy; (2) Bermudez's unhappiness at being "stuck" paying membership fees through the remainder of her contract after Amato threatened to sue to recoup the fees; (3) defendants' questioning of the quality of the programming and management at CFR, and Amato's integrity and coaching abilities; (4) allegations that numerous friends were unhappy at CFR, some of whom were also waiting out their contracts, and others who were given buyouts contingent on an agreement not to disparage CFR; and (5) Bermudez posting a photo of Amato sitting at CFR's desk with the caption, "The usual coaching style of [Amato] during a WOD."

Defendants' criticisms of Amato's management or programming methods, and his inability to coach or instruct (including the photo), are clearly statements of opinion. None of these statements contain demonstrably provable (or disprovable) facts. Without reference to specific undisclosed misconduct, such criticisms are too vague and uncertain to be actionable as conveying a defamatory accusation. (See, e.g., *Nygard, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1047 [employee's statements about """horrible working experiences""" with prominent business man, being pestered """round the clock""" and """[slaving] without a break""" are protected opinion about employer];

Moyer v. Amador Valley J. Union High School Dist. (1990) 225 Cal.App.3d 720, 722 [statement that plaintiff was the "'worst'" teacher was nonactionable opinion].)

Similarly, behavior that one person views as poor management or a bad business practice, may be acceptable to another person and conduct that makes one person feel cheated, may not affect another at all. For example, some might regard a gym owner's decision to bind a member to the terms of her contract as a "bad business practice." Someone else may view that practice as fair. Some may believe a business owner is free to reach a compromise agreement with a member who wishes to terminate his or her contract by which the member pays less than he or she owes in exchange for an agreement to remain quiet about the business, while others may view such a practice as improper.

Defendants also claimed that CFR threatened legal action for people wanting early termination of memberships. Despite Amato's invitation to do so, the law does not require that defendants justify the literal truth of every word of the allegedly defamatory content as it applies specifically to them, nor need we parse the allegations to determine their truthfulness. Defendants heard from friends and current or former members of CFR about threatened legal action. For purposes of the libel claim and the instant anti-SLAPP motion, it does not matter whether defendants were recipients of those threats. Factual truth is a complete defense to defamation. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 (*Gilbert*).) "It is sufficient if the defendant proves true the *substance* of the charge, irrespective of slight

inaccuracy in the details, 'so long as the imputation is substantially true so as to justify the "gist or sting" of the remark.' [Citations.]" (*Smith, supra*, 72 Cal.App.4th at pp. 646–647.) If an imputation is substantially true and justifies the "gist or sting" of the remark, the truth defense is established. (*Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 936; *Gilbert, supra*, 147 Cal.App.4th at p. 28.) Exhibits attached to the complaint, and declarations filed by Bermudez and Pueschner in support of the anti-SLAPP motion contain evidence that the gist of verifiable facts in their postings were true.

In sum, Amato failed to present admissible (or any) evidence demonstrating a likelihood of success on the merits of the libel claim.

(2) *Slander*

Slander is a false and unprivileged oral communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person. (Civ. Code, § 46; *Shively, supra,* 31 Cal.4th at p. 1242; *Taus, supra,* 40 Cal.4th at p. 720.)

The second cause of action for slander is predicated on allegations that defendants made verbal statements to unknown, disinterested third parties claiming that, at some unspecified time, Amato and his employee engaged in unfair business practices by making false reports about unspecified misdeeds by an unnamed competitor gym to unidentified municipal authorities in order to get the competitor cited,

fined or put out of business. These allegations fall far short of satisfying Amato's burden.

Amato has shown no probability of success on this claim. To show a probability of prevailing, the complaint must not be vulnerable to a successful demurrer. (*Gilbert, supra*, 147 Cal.App.4th at p. 31.) A demurrer would succeed where, as here, the pleading is uncertain, ambiguous, unintelligible and lacks sufficient facts to state a cause of action. (Code Civ. Proc., § 430.10, subds. (e), (f).)

The complaint fails to provide defendants a sufficient level of particularity so they can know what allegations they must defend in order to prepare their case. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458; Code Civ. Proc., § 430.10, subds. (e), (f).)

Further, Bermudez claims it is true that she discussed this rumor with Mustafa, CFR's employee in charge of management, and that he neither denied the rumor, nor indicated in any way that it was false. Amato has failed to demonstrate a probability of success on the merits as to the second cause of action for slander.[11]

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[11] We need not address the third cause of action for conspiracy. Because the underlying tort claims on which the conspiracy claim is predicated fail, there is no likelihood that Amato can prevailing on the conspiracy claim itself. "Conspiracy is not an independent cause of action, but rather a doctrine imposing liability for a tort upon those involved in its commission. [Citation.] And 'tort liability arising from conspiracy presupposes that the coconspirator . . . owes a duty to plaintiff . . . and is potentially subject to

3. *Motion for Reconsideration*

The court granted the anti-SLAPP motion on February 21, 2017. Pursuant to Code of Civil Procedure section 1008, subdivision (a) (section 1008), Amato filed a premature motion for reconsideration of that ruling on March 6, 2017.[12] For unexplained reasons, Amato then waited until April 14, 2017, to file an amended (identical) motion for reconsideration. The motion was denied. Amato contends that was error. He is mistaken.

First, Amato argues on appeal that his motion for reconsideration was premised on Code of Civil Procedure section 473. Not so. Although he made a single passing reference to that statute in the final paragraph of his declaration, Amato's motion for reconsideration was based entirely on section 1008, subdivision (a) as the basis for his contention that reconsideration of the order granting the anti-SLAPP motion was in order.

The trial court denied the motion for several reasons. First, Amato violated the rule which requires that a motion for reconsideration be "to the same judge . . . that made the order" as to

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liability for breach of that duty.' [Citation.]" (*1–800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 590.)

[12] The order granting the motion was not entered until March 13, 2017.

which reconsideration is sought. (§ 1008, subd. (a).) Second, the court noted that, despite the court's express admonition, Amato failed timely to oppose the anti-SLAPP motion, and the court had discretion to grant the unopposed motion. Third, reconsideration would be futile because, based on the court's analysis of the merits of the anti-SLAPP motion, the court expressly found that Amato failed to satisfy his burden. The judge hearing the motion for reconsideration observed that that analysis mirrored the findings she had made when ruling on a motion for reconsideration of her own grant of an anti-SLAPP motion filed by Bermudez and Pueschner in a similar case brought against them by Mustafa (a ruling the judge incorporated here).[13] We review a ruling on a motion for reconsideration for abuse of discretion. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.)

No abuse of discretion occurred. Apart from the fact that he did nothing to ascertain whether a known holiday was a judicial holiday, an argument we rejected, Amato's motion for reconsideration presented no "new or different facts, circumstances, or law" that would justify reconsideration of the court's order granting the anti-SLAPP motion. (§ 1008, subd. (a).)

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[13] The court also denied the motion for reconsideration as untimely. That was error. Although the court adopted its tentative as its final ruling on February 21, 2017, the order granting the anti-SLAPP motion was not entered until March 13, 2017. Accordingly, Amato's initial motion for reconsideration, filed on March 6, 2017, was actually too early, not too late.

DISPOSITION

The judgment is affirmed. Appellant is to bear respondents' costs and attorney fees on appeal in an amount to be determined by the trial court. (Code Civ. Proc., § 425.16, subd. (c)(1); *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 479.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.