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

ANDREW KEEGAN HEYING, Plaintiff and Appellant, v. NEWSMAX MEDIA, INC., et al., Defendants and Respondents.	B278384 (Los Angeles County Super. Ct. No. SC124897)

APPEAL from an order of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Affirmed.

Kyle Scudiere for Plaintiff and Appellant.

Law Office of James M. Donovan, James M. Donovan, Michael J. Glenn, Michael A. Cabin, and Mark A. Lerner for Defendants and Respondents.

Plaintiff and appellant Andrew Keegan Heying (plaintiff) appeals from the trial court's order granting a special motion to strike, pursuant to Code of Civil Procedure section 425.16,[1] all of the causes of action asserted against defendants and respondents Newsmax Media, Inc. (Newsmax) and Morgan Chilson (collectively, defendants), in this action for defamation and other claims. We affirm the trial court's order.

BACKGROUND

The parties

Plaintiff is a film and television actor and a co-founder of Full Circle Venice (Full Circle), a community temple and non-denominational spiritual center located in Venice, California.

Defendant Newsmax is an online multi-media publisher of newsmax.com, a website that serves more than 14 million monthly readers. Newsmax publishes stories of general interest as well as news on entertainment, health, and finance. In addition to publishing stories reported by its own staff, Newsmax aggregates news from other publications. Defendant Chilson is listed as the author of an article about plaintiff published by Newsmax on May 15, 2015.

The May 8, 2015 incident and defendants' article

Full Circle occasionally rents its premises to third parties for use as event space. On May 8, 2015, Full Circle rented its premises to Maria Teresa Chavez, a third party who was not an employee, representative, agent, independent contractor, member, or affiliate of Full Circle, for a fundraising event for the Sea Shepherd Foundation. Chavez purchased several barrels of

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[1] All further statutory references are to the Code of Civil Procedure, unless stated otherwise. A motion brought pursuant to section 425.16 is commonly referred to as an anti-SLAPP motion. SLAPP is an acronym for a strategic lawsuit against public participation.

kombucha, a fermented beverage made from tea and yeast, to be sold and served at the event, unaware that the kombucha contained a percentage of alcohol by volume that required a license authorizing the sale of alcoholic beverages to be issued by the Department of Alcohol and Beverage Control (DABC). No license was obtained, and someone notified the DABC, prompting the agency to investigate the complaint. DABC undercover agents observed kombucha being served at the event, seized the containers of kombucha, and issued a citation to Chavez for selling alcohol without a license.

Plaintiff had no knowledge that kombucha was to be served at the May 8, 2015 event, or that kombucha contained alcohol. He was not present at the event when the DABC seized the containers of kombucha and issued the citation to Chavez. In the days following the incident, plaintiff provided a statement to only one media outlet, the Argonaut, a local Venice-Marina del Rey newspaper. In the article, plaintiff is quoted as saying: "'Kombucha is something we'd never imagine to be an illegal substance, and it's frustrating the system has that perspective.'. . . 'We're certainly taking full responsibility for co-creating the event. We try to put our best foot forward. We wanted to raise money for Sea Shepherd as a community; that's how Full Circle operates.'"

After the Argonaut article was published, multiple online news sources published articles about the incident. On May 15, 2015, Newsmax published an article with the following headline: "Andrew Keegan, 90's Heartthrob, Busted for Peddling Illegal Kombucha." The first sentence of the article stated: "Andrew Keegan, the actor and 90's heartthrob, was arrested Friday as part of a spiritual group cited for selling kombucha without a license at a spiritual center in California."

The instant lawsuit and anti-SLAPP motion

Plaintiff filed the instant action on October 21, 2015, asserting causes of action for defamation, false light invasion of privacy, negligence, violation of Civil Code section 3344, and misappropriation of name and likeness.

Defendants filed an anti-SLAPP motion, arguing that all of plaintiff's claims arose solely from defendants' acts in furtherance of the right of free speech in connection with an issue of public interest. Defendants further argued that plaintiff could not establish a probability of prevailing on his claims because there was no evidence that defendants acted with malice.

In support of their anti-SLAPP motion, defendants submitted the declaration of Alexandra Ward, the digital news producer at Newsmax Media, Inc. In that capacity, Ward covers trending news, assigns stories to reporters, edits the stories, and posts them to Newsmax's website.

Ward states in her declaration that she often assigns and publishes stories on trending topics at internet sites such as MSN, Bing.com, Yahoo!, and Facebook. On May 15, 2015, she reviewed stories at those sites and found that "Andrew Keegan Arrest" was a trending topic. Ward searched the internet where she found and reviewed several articles about plaintiff. Among the articles Ward reviewed was an Examiner.com article entitled "Andrew Keegan Arrested for Selling Kombucha at a New Age Temple," an Inquisitr.com article entitled "Andrew Keegan Arrested: '90s Teen Heartthrob Arrested for Selling Kombucha," and a Foxnews.com article entitled "Andrew Keegan Busted for Selling Kombucha at His New Age Temple." All of the articles discussed the DABC raid at a fundraising event at Full Circle. The Examiner.com, Inquisitr.com, and Foxnews.com articles Ward reviewed are attached as exhibits to her declaration.

Ward states in her declaration that after reviewing the internet articles, she believed plaintiff had been arrested. She then issued an assignment for a Newsmax story on that subject. Ward further states that she specifically relied upon the articles she reviewed, and that she re-reviewed the articles while editing the Newsmax article before posting it on Newsmax's website. Ward states that she would not have posted the Newsmax article had she not seen and relied upon several reputable online media outlets reporting on plaintiff's arrest, and that she had no reason to believe that any of the online articles she had reviewed were inaccurate. Finally, Ward states that after receiving notice of plaintiff's lawsuit, Newsmax revised its online article to correct the inaccurate reference to plaintiff's arrest.

Plaintiff opposed the anti-SLAPP motion, arguing that defendants' defamatory statements were not protected under section 425.16 because they were not made in connection with a valid public issue. Plaintiff further argued that he could establish that defendants acted with malice.

Following a July 12, 2016 hearing at which the parties presented argument, the trial court granted defendants' anti-SLAPP motion. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

Section 425.16, subdivision (b)(1) 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 under the United States Constitution or the California Constitution 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." Subdivision (e) of section 425.16 defines an "'act in furtherance of a person's right of

petition or free speech under the United States Constitution or California Constitution in connection with a public issue'" to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" (§ 425.16, subd. (e)(3)), or "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).)

Determining whether the statute bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier)*.) First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action "aris[es] from any act . . . in furtherance of the [moving party's] right of petition or free speech." (§ 425.16, subd. (b)(1); *Navellier*, at p. 88.) If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a "probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *Navellier*, at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 ""must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 (*Jarrow*), fn. omitted.)

A trial court's order granting a special motion to strike under section 425.16 is reviewed de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

II. Protected activity

Plaintiff contends the trial court erred by granting the anti-SLAPP motion because defendants failed to establish that the alleged defamatory statements constitute protected speech in connection with a public issue or a matter of public interest. Section 425.16 does not define the terms "public issue" or "public interest," but its preamble states that its provisions "shall be construed broadly" to safeguard "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039.)

The legislative directive to construe section 425.16 "broadly" has led courts to recognize that "'there is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate widespread attention to their activities . . . .' [Citation.]" (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 422.) Courts have thus found that "public issues" for purposes of the anti-SLAPP statute may include the identity of a beneficiary named in the will of a well-known actor (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [television broadcast showing Marlon Brando's housekeeper as beneficiary under his will was speech in connection with public issue]), a magazine's publication of "indie rock" bands' names (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677), and use of a successful rock band's image in a video game (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 ["use of No Doubt's likeness in Band Hero is a matter of public interest because of the widespread fame No Doubt has achieved"].)

Not every statement about a person or entity in the public eye is sufficient to meet the public interest requirement of the

anti-SLAPP statute. Absent a statutory definition for what constitutes "a public issue or an issue of public interest," courts have applied certain criteria for making this determination. "'California cases establish that generally, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." [Citations.] . . .' [Citation.]" (*Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 932, quoting *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1226.)

Plaintiff admits that he is a public figure and that members of the public are interested in him and his involvement with Full Circle. The newspaper and online media articles attached to plaintiff's complaint are abundant evidence of this. Plaintiff argues, however, that because the statements published about him were false, they were not made in connection with an issue of public interest.

Whether or not the challenged statements were false does not determine whether they constitute protected activity for purposes of the anti-SLAPP statute. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549 (*Haight Ashbury*).) Subdivision (e)(3) of section 425.16 applies to "any written or oral statement or writing made in . . . a public forum in connection with an issue of public interest," and not only to statements that are true. (See *ibid.*)

Plaintiff does not dispute that the Newsmax website on which the article about him was published is a public forum. Websites accessible to the public, such as the Newsmax site which is disseminated to more than 14 million monthly readers, are public forums for purposes of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.) Defendants accordingly met their burden of establishing that the challenged

statements were made in a public forum in connection with an issue of public interest and came within the scope of the anti-SLAPP statute.

Plaintiff next contends that the anti-SLAPP statute does not protect the publication of false statements. He cites no authority for this position, but argues that such conduct is not protected by the federal or California Constitution. That argument is unavailing. To meet their threshold showing under the first prong of the anti-SLAPP analysis, defendants need not prove that the challenged activity is constitutionally protected. (*Haight Ashbury, supra,* 184 Cal.App.4th at p. 1548; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419-420 ["'The Legislature did not intend that . . . to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law'"].) Defendants need only show that the challenged activity comes within the scope of section 425.6, subdivision (e). As discussed, defendants made this showing.

III. Probability of prevailing

A. General principles

Because the trial court correctly determined that plaintiff's claims against defendants arose from conduct that is protected under section 425.16, we must now determine whether plaintiff met his burden of "demonstrat[ing] a probability of prevailing on the claim[s]." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) To satisfy this burden, "the plaintiff must 'state[] and substantiate[] a legally sufficient claim.' [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Jarrow, supra*, 31 Cal.4th at p. 741, fn. omitted.) In

doing so, the court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

Although "'the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff . . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citations.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 261 (*Soukup*).) The plaintiff, however, "cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. [Citation.]" (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.)

B. Actual malice

Plaintiff's causes of action are all premised on the injurious publication of false statements. To prevail on his claims, plaintiff, a public figure by his own admission, must prove that defendants acted with actual malice. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 (*Reader's Digest*) [public figures must prove actual malice in order to prevail in a defamation action].) This actual malice standard applies not only to plaintiff's defamation claims, but to "all claims whose gravamen is the alleged injurious falsehood of a statement." (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042; *Reader's Digest,* at p. 265 [applying actual malice standard to false light invasion of privacy, libel, and defamation claims]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679-

689 [actual malice standard applies to statutory and common law misappropriation of name or likeness claim].)

Plaintiff must demonstrate actual malice by clear and convincing evidence. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84 (*Christian Research*).) "This requirement presents "'a heavy burden, far in excess of the preponderance sufficient for most civil litigation.'" [Citation.] 'The burden of proof by clear and convincing evidence "requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficient strong to command the unhesitating assent of every reasonable mind."' [Citation.]" (*Ibid.*)

In determining whether actual malice exists, courts apply a subjective test under which "the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. [Citation.]" (*Reader's Digest, supra,* 37 Cal.3d at p. 257.) To show actual malice, plaintiff must demonstrate that defendants knew the published statements were false or were made with reckless disregard of their truth or falsity. (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1578.) The reckless disregard standard requires a high degree of awareness of the probable falsity of the statement. (*Id.* at p. 1579.) There must be clear and convincing evidence that the defendant subjectively entertained serious doubt that the statements were truthful. (*Readers Digest*, at p. 256; *Christian Research, supra*, 148 Cal.App.4th at p. 84.)

Plaintiff contends that the Foxnews.com article about him, one of several on which Ward relied before posting the Newsmax article, "contains an evident and glaring reason to doubt . . . that Plaintiff was in fact arrested." The Foxnews.com article states in relevant part: "Kombucha, the fermented sparkling beverage made from tea and yeast, often contains between .5 percent and 1

percent alcohol. ABC agents issued Keegan and event organizations a citation for selling alcohol without a license after witnessing the beverage being served." Plaintiff argues that issuance of a citation is inconsistent with an arrest and that defendants acted with reckless disregard by stating that he had been arrested.

Issuance of a citation with a notice to appear is not necessarily inconsistent with an arrest. (See, e.g., *Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 452 [driving in excess of speed limit subjected plaintiff to arrest and citation].) Even assuming, arguendo, that the two are inconsistent, the Foxnews.com article itself is not clear and convincing evidence that Ward entertained serious doubt that plaintiff had not been arrested. Ward in her declaration states that she reviewed and relied upon several articles, including articles published by Examiner.com and Inquisitr.com, reporting that plaintiff had been arrested. Ward further states that after reviewing the articles, she believed plaintiff had been arrested.

Plaintiff' argues that defendants' failure to independently investigate the incident, deviation from professional standards, and motivation to maximize reader traffic at the Newsmax website establish their reckless disregard of the truth. Failure to investigate does not prove actual malice. (*Reader's Digest, supra,* 37 Cal.3d at p. 258.) Similarly "an extreme departure from professional standards" or "a newspaper's motive in publishing a story -- whether to promote an opponent's candidacy or to increase its circulation -- cannot provide a sufficient basis for finding actual malice." (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 665.)

Plaintiff failed to present evidence that defendants acted with actual malice. He accordingly failed to establish that his

claims against defendants have "minimal merit." (*Soukup, supra,* 39 Cal.4th at p. 291.)

CONCLUSION

Defendants made the requisite threshold showing that each of plaintiff's causes of action arises from an act in furtherance of the constitutional right of free speech in connection with an issue of public interest. (§ 425.16, subds. (b), (e), (f).) The burden then shifted to plaintiff to demonstrate a probability of prevailing on his claims. He failed to do so. The trial court accordingly did not err in granting the anti-SLAPP motion.

DISPOSITION

The order granting defendants' anti-SLAPP motion is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT