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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

JOHN IBARRA, Plaintiff and Appellant, v. CHICKIP, LLC, Defendant and Respondent.	B236444 (Los Angeles County Super. Ct. No. BC415273)

APPEAL from an order of the Superior Court of the County of Los Angeles, Zaven V. Sinanian, Judge. Affirmed, and remanded to determine attorney fees and costs.

Krane & Smith, Samuel Krane; SJS Counsel, Samuel J. Smith and David. R. Shein for Plaintiff and Appellant.

Cooley LLP, Seth A. Rafkin; The Leventhal Law Firm, Joseph S. Leventhal for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant John Ibarra brought an action, inter alia, for defamation against defendant and respondent ChickiP, LLC (doing business as CagePotato). Plaintiff appeals from the trial court's order granting defendant's special motion to strike (anti-SLAPP motion), which motion was filed pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP statute).[1] Plaintiff contends that the trial court erred in granting defendant's anti-SLAPP motion, and denying his request to conduct discovery prior to the adjudication of defendant's motion. We affirm the order because plaintiff did not show a probability of prevailing on his claims in that he did not submit a prima facie case showing the required malice, and hold that the trial court did not abuse its discretion in denying plaintiff's request to conduct discovery. We remand the matter to the trial court for a determination of appellate attorney fees to be awarded defendant.

FACTUAL BACKGROUND

For more than 28 years, plaintiff had been a trainer and manager of mixed martial arts fighters, and from July 2005 to July 2008, he trained Quinton "Rampage" Jackson, a prominent Ultimate Fighting Championship (UFC) fighter. Shortly after Jackson elected to end his training relationship with plaintiff, Tito Ortiz, another prominent UFC fighter, stated in an interview published on Punch Drunk Gamer Inc.'s website, "Let me explain this to you because it really pisses me off that [plaintiff] has done what he has done, he is a thief. I have been running training camps for seven years up in Big Bear California and the most that my camp has cost a fighter to attend is $35,000. [Plaintiff] was charging Jackson $65,000 to go to Big Bear. I don't understand that!! He was being very disrespectful and taking advantage of [Jackson]. Including travel, training partners, food and lodging, the most ever [that I charged for a training camp] was $35,000, maybe if you flew in more trainers [I would charge] $40K. Where did that extra money go that [plaintiff] was charging? [Jackson] is really pissed and he feels betrayed and that he was

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[1] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

taken advantage of and I couldn't agree more with him. I don't care if [plaintiff] reads this or hears about it anywhere, he already knows that he is blackballed. I don't care who you are; fighters work very hard for the money they earn and I feel slighted for even knowing [plaintiff]." These comments were reported by various media outlets.

About September 7, 2008, defendant published an article on its website entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," stating under a photograph of plaintiff, "Ju know what a 'chazzer is, [plaintiff]? Thassa pig that don't fly straight." The article republished the statement made by Ortiz as reported on Punch Drunk Gamer, Inc.'s website. The article then stated, "So that's it, then. Sometime directly before or after his fight with Forest Griffin, Jackson learned that the cost of training at Tito's camp was much less than [plaintiff] told him it was. [Plaintiff]—his mentor and spiritual advisor—was skimming 30 large per training camp, and [Jackson's] world fell apart. . . . If this is true, [plaintiff] is a scumbag who should be bounced out of the business. And it's just another warning to young fighters who can't be bothered with the financial aspects of their careers: Hire a professional, and don't leave everything in the hands of the sketchy guy with the Kangol hat and focus mitts."

Defendant published an article on its website entitled, "[Plaintiff] Scumbag Watch: Wandy Refuses Training From [Jackson's] Former Mentor,"[2] stating, "It's good to see some people have honor when it comes to competition. Too bad not everyone does." The article then stated that Wanderlei Silva appeared on Brazil Combat TV and the article quoted Silva as stating, "I've received a letter from someone offering training with [plaintiff] to me, but I didn't care to accept it. [¶] The letter contained phone numbers that I could use to get in touch with [plaintiff], but I threw it away. [¶] I think it's unethical to accept the former coach of my opponent, and if [plaintiff] is doing this with [Jackson], he may do the same with me later." The article commented, "It's pretty

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[2] The record does not disclose when it, or the other articles identified *post* in this section, were published by defendant. Plaintiff contends that he "was unable to confirm the dates of certain articles because his request for reasonable discovery on the issue of actual malice was denied."

despicable to think of Quinton Jackson's former coach selling secrets to the enemy, so to speak."

Defendant published an article on its website entitled, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It," stating, "Jackson was hesitant to comment on the situation that led to his split with [plaintiff], but when asked about Tito Ortiz's claims that [plaintiff] had been overcharging him for training camps, Jackson responded as follows: 'that was the small part of it. That was just one little thing he did."

Defendant published an article on its website entitled, "The Ten Most Notorious Lawsuits in MMA History," stating "[plaintiff], who didn't like what Tito Ortiz and most of the blogosphere were saying about him . . . decided to sue them all. Amazingly, this tactic got [plaintiff] nowhere, and such Internet personalities as SuperArmbarMan12 and DontKnowCrapAboutFitting2007 were allowed to continue on their merry way unmolested."

Defendant published an article on its website entitled, "Meet James Toney's Secret Weapon," stating, "I was kind of taken aback since the last I had heard [Jackson] was working with the beloved former Plaintiff of a CP court case, [plaintiff]. [¶] It turns out that [plaintiff] and [Jackson] parted company back in May, and since we can't afford to defend another frivolous lawsuit after paying for new CP smart cars for Ben and I, we'll say it was [plaintiff's] choice to leave and just leave it at that. It's not hard to believe, since he's never been a difficult person to deal with in the past."

Defendant published an article on its website entitled, "Mo Money, Mo Problems," paraphrased allegations of a complaint filed by Reed Wallace, president of White Chocolate Management, against Jackson and plaintiff, as follows: "[plaintiff] . . . road-blocked some deals that [White Chocolate Management] brought to him with the plan of going after the same deals later and keeping the spoils for himself. . . ." The article republished a statement made by Wallace as reported on a www.fightline.com, another website, as follows: "'[Jackson] has lost literally millions of dollar in deals that [plaintiff] just sent away because he doesn't want someone else taking the credit for those

deals' . . . . [Plaintiff] tried to go back to those companies and do the deal on his own and it just didn't work out. I know of two of [these deals] that he's still working on right now and one of these deals is a deal whereby [plaintiff] will only agree to allow the deal to happen with [Jackson] if the company in question agrees to a deal with him personally as well.' . . . [¶] . . . [¶] 'It's available by court/public record as an exhibit to the lawsuit . . . he needs to stop lying.'" Defendant's article concluded by stating, "[plaintiff] has been tight-lipped about this of late, which is probably smart since he's guilty as sin."

Defendant published an article on its website entitled, "Cheick Kongo Is Latest to Ditch [Plaintiff] for Wolfslair," stating that fighters Cheick Kongo and Jackson "previously trained with [plaintiff], who may or may not have been skimming money from [Jackson]."

Defendant published an article on its website entitled, "Uh-Oh: James Toney Has Hired [Plaintiff] as His Trainer," stating, "Friends forever. Or until somebody steals from somebody else like a total scumbag. Sorry, alleged scumbag. . . . [¶] . . . You remember [plaintiff], right? Dude with the hat, used to train 'Rampage' Jackson, then allegedly screwed him out of a bunch of money. [¶] . . . [¶] We don't mind saying that Toney could have done better (and, you know, less sleazy) in his search for an MMA trainer, but as long as he keeps one hand on his wallet and demands to see an itemized list of training camp expenditures, he should make out okay."

PROCEDURAL BACKGROUND

On June 5, 2009, plaintiff filed a complaint against numerous parties associated with mixed martial arts, including defendant, alleging four causes of action: defamation, invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. As to defendant, plaintiff alleged that "numerous MMA [mixed martial arts] and UFC [ultimate fighting championship] related websites published . . . comments made by Ortiz and in some instances, added defamatory remarks to their publications. [¶] By way of example, [defendant] published the article entitled, 'Tito Ortiz Confirms Juanito Ibarra's Scumbaggery' which contained a large photograph

of [plaintiff] with a quote below it from a well known film 'Scareface.' The quote states 'Ju know what a "chazzer" is, [plaintiff]? Thassa pig that don't fly straight.'" Defendant was not served with the complaint.

In July 2009, the trial court stayed all proceedings and discovery in the case pending its ruling on an anti-SLAPP motion filed by other defendants—David Carpinello, Punch Drunk Gamer, Inc., Hearst Corporation, and Houston Chronicle. In September and October 2009, the trial granted the anti-SLAPP motions by those defendants. We affirmed the trial court orders granting the motions. (*Ibarra v. Carpinello* (March 18, 2011, mod. March 23, 2011, BC415273 [nonpub.opn.]).)

On February 5, 2010, plaintiff filed a First Amended Complaint (FAC) against some of the same, and additional, defendants named in the original complaint, including defendant herein, alleging the same four causes of action: defamation, invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. As with the original complaint, plaintiff alleged that "[b]y way of example," of defamatory remarks made in MMA and UFC websites, defendant published the article entitled, "Tito Ortiz Confirms Juanito Ibarra's Scumbaggery" which contained defamatory statements. On July 16, 2010, defendant was served with the FAC.

On about August 4, 2011, defendant filed an anti-SLAPP motion pursuant to section 425.16, contending that plaintiff cannot demonstrate a probability of prevailing on his claim for defamation because the statements at issue were not "provably" false, plaintiff could not show defendant's actual malice, and the Communications Decency Act of 1996 (47 U.S.C. § 230) barred plaintiff's claims. Defendant also contended in his anti-SLAPP motion that because plaintiff's other causes of action were "duplicative [of] and subsidiary [to]" his defamation claim, they "also fail[ed] and must be dismissed as well."

On August 26, 2011, plaintiff filed, and the trial court denied, an ex parte application seeking an order granting him the ability to conduct discovery prior to responding to defendant's anti-SLAPP motion. Plaintiff filed an opposition to defendant's anti-SLAPP motion, contending that eight articles published by defendant are defamatory (eight articles)—the articles entitled, "Exclusive: Rampage Jackson Says He

Didn't Ask For Fight With Wanderlei Silva, But He'll Take It," "Mo Money, Mo Problems," "The Ten Most Notorious Lawsuits in MMA History," "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," "Uh-Oh: James Toney Has Hired [Plaintiff] as His Trainer," "Cheick Kongo Is Latest to Ditch [Plaintiff] for Wolfslair," "Meet James Toney's Secret Weapon," and "[Plaintiff] Scumbag Watch: Wandy Refuses Training From [Jackson's] Former Mentor."

At the September 7, 2011, hearing on defendant's anti-SLAPP motion, plaintiff filed an ex parte application for an order setting a hearing on a motion to conduct discovery and continuing defendant's anti-SLAPP motion. The trial court denied plaintiff's ex parte application as untimely, and granted defendant's anti-SLAPP motion. Plaintiff timely filed a notice of appeal.

DISCUSSION

A. Defendant's Forfeiture of Right to File Anti-SLAPP Motion

Plaintiff contends that defendant forfeited his right to file an Anti-SLAPP motion because it was untimely. We disagree.

In support of plaintiff's contention that defendant's Anti-SLAPP motion was filed untimely, he claims that "A party may not file an anti-SLAPP motion more than 60 days after *the filing* of the complaint, unless the trial court affirmatively exercises its discretion to allow a late filing." (Italics added.) Section 425.16, subdivision (f), however, provides that, "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."

Even if defendant's anti-SLAPP motion was untimely, "a court has the discretion to consider, and grant or deny on the merits, a special motion to strike filed after the 60-day deadline even if the moving defendant fails to request leave of court to file an untimely motion." (*Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 684.) Plaintiff has not established that the trial court abused its discretion in considering defendant's anti-SLAPP motion.

B. Anti-SLAPP

1. Standard of Review

An order granting a special motion to strike under section 425.16 is directly appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) We review the trial court's order de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79.) We do not weigh the evidence; rather, we accept as true evidence favorable to plaintiff, and evaluate evidence favorable to defendant to determine whether it defeats plaintiff's claim as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.)

2. Legal Principles

"'A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 [39 Cal.Rptr.3d 516, 128 P.3d 713].)" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34.) "The goal [of section 425.16] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 806.)

Section 425.16, provides that "[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." (§ 425.16, subd. (b)(1).) In considering the application of the anti-SLAPP statute,

courts engage in a two-step process. "'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) "'"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" [Citations.]'" (*Rohde v. Wolf*, *supra*, 154 Cal.App.4th at pp. 34-35.) "'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.]" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

3. Probability of Prevailing on the Merits

Plaintiff does not challenge the trial court's ruling that defendant met its initial burden under the anti-SLAPP statute—that the challenged causes of action are ones arising from protected activity. The only issue is whether the trial court correctly determined that plaintiff did not establish a probability of prevailing on his claims.

"To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. [Citations.] The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.] The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. [Citations.]" (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346; see *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719-720, fn. 5; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585.) Plaintiff contends that he demonstrated a likelihood he would prevail on the merits of his claims. We first deal with the defamation cause of action. As

noted *post*, plaintiff concedes that the determination of the defamation cause of action has an effect on the "viability" of the other causes of action.

A written statement is defamatory if it "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." (Civ. Code, § 45.) The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. (Civ. Code, §§ 45, 46; *Taus v. Loftus, supra,* 40 Cal.4th at p. 720.)

a. Provably False Assertions

"The sine qua non of recovery for defamation . . . is the existence of falsehood." (*Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1974) 418 U.S. 264, 283.) "A publication '"must contain a false statement of fact" to give rise to liability for defamation.' [Citations.]" (*Campanelli v. Regents of the Univ. of Cal*. (1996) 44 Cal.App.4th 572, 578.) Defendant contends that the statements at issue are not "provably" false statements.

"To state a defamation claim that survives a First Amendment challenge, . . . [the] plaintiff must present evidence of a statement of fact that is 'provably false.' [Citations.] '"Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot '"reasonably [be] interpreted as stating actual facts" about an individual.' [Citations.] Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of . . . contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection. [Citations.]" [Citation.]'" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1048.)

"Though mere opinions are generally not actionable (*Taus v. Loftus, supra*, 40 Cal.4th at p. 720), a statement of opinion that implies a false assertion of fact is . . . ." *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289.) "An opinion . . . is actionable only '"if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false."'" (*Ruiz v. Harbor View Community Assn*. (2005) 134

Cal.App.4th 1456, 1471.) "The dispositive question . . . is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion. [Citation.]' [Citation.] [¶] To ascertain whether the statements in question are provably false factual assertions, courts consider the '"'totality of the circumstances.'"' [Citation.]" (*Nygard, Inc. v. Uusi-Kerttula, supra,* 159 Cal.App.4th at pp. 1048-1049.)

"The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]" (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647.)

b. Actual Malice

The First Amendment requires that in order for a public figure to prevail on a claim of defamation the plaintiff must establish that defendants acted with actual malice. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; *Khawar v. Globe Internat., Inc*. (1998) 19 Cal.4th 254, 262; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256.) There is no dispute that plaintiff is a public figure. "[A]ctual malice means that the defamatory statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' (*New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 280 [84 S.Ct. 710, 726].) Reckless disregard, in turn, means that the publisher 'in fact entertained serious doubts as to the truth of his publication.' (*St. Amant v. Thompson* [(1968)] 390 U.S. 727, 731 [88 S.Ct. 1323, 1325].) To prove actual malice, therefore, a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' (*Bose Corp. v. Consumers Union of U.S., Inc*. [(1984)] 466 U.S. 485, 511, fn. 30 [104 S.Ct. 1949, 1965]; see also *McCoy v. Hearst Corp*. (1986) 42 Cal.3d 835, 860 [231 Cal.Rptr. 518, 727 P.2d 711].) [¶] Actual malice is judged by a subjective standard; otherwise stated, 'there must be sufficient evidence to permit the conclusion that the defendant . . . had a "high degree of

awareness of . . . probable falsity."' (*Harte-Hanks Communications v. Connaughton* [(1989)] 491 U.S. 657, 688 [109 S.Ct. 2678, 2696].)" (*Khawar v. Globe Internat., Inc.*, *supra*, 19 Cal.4th at p. 275.) The common-law standard of malice, which involves hatred or ill will towards the plaintiff, is not an element of the *New York Times* standard. (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 872; see *Greenbelt Cooperative Pub. Ass'n v. Bresler* (1970) 398 U.S. 6, 10 [instructing the jury in a defamation case that malice includes "spite, hostility or deliberate intention to harm," and that it could be found from the "'language' of the publication itself," was an "error of constitutional magnitude"].)

4. Analysis

a. Alleged Defamatory Statements Are Not Limited to Defendant's Article Cited in the FAC

Defendant contends that the only allegedly defamatory article it published that is cited in the FAC is "Tito Ortiz Confirms Juanito Ibarra's Scumbaggery," and that the other articles plaintiff relies upon—about seven other articles—are not "at issue in this appeal."

Plaintiff alleged in the FAC that, "By way of example," defendant's article entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery" is defamatory. "'The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.'" (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, fn. 3, citing *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5; see also 5 Witkin, Cal. Procedure (5th ed. 2008), § 7395, pp. 159-160.) The court in *Navellier v. Sletten* (2002) 29 Cal.4th 82, stated at pages 88-89, "'[T]he 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."'" Thus, plaintiff would seemingly have to show a prima facie case about the one article in the FAC.

Yet, the allegation that plaintiff was defamed, "for example" in a specified publication, is uncertain and subject to a special demurrer. (§ 430.10, subd. (f).) Defendant did not make such a motion and thus arguably waived any objections as to uncertainty. (§430.80, subd. (a); *Stockton Newspapers v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.)

If the allegations of the complaint are inadequate, but the evidence submitted in connection with the anti-SLAPP motion demonstrates a probability that the plaintiff will prevail at trial, the trial court may properly consider the evidence. (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 868 ["we need not resolve whether plaintiff adequately alleged actual malice in her original complaint because facts probative of actual malice emerged through the evidence the parties submitted for the hearing on the strike motion"].) We need not decide if in connection with the anti-SLAPP motion, plaintiff can introduce the alleged defamatory publications not specifically referred to in the FAC because we address those publications.

b. Provably False

Plaintiff contends that the statements at issue are provably false, but he does not specify the statements contained in the articles that he contends are provably false—those that "'"'could reasonably be understood as declaring or implying actual facts capable of being proved true or false.'"'" (*Hawran v. Hixson*, *supra*, 209 Cal.App.4th at p. 289.) We do not have to address this issue because we conclude there is not a prima facie case of the requisite malice. But, it appears that the eight articles do not contain statements that are provably false, other than perhaps Ortiz's quoted statement contained in the article entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," that plaintiff charged Jackson $65,000 to attend training camp. And there is some question as to whether that statement is defamatory.

For example, in our prior unpublished opinion in this matter, *Ibarra v. Carpinello* (March 18, 2011, mod. March 23, 2011, BC415273 [nonpub.opn.]), we held that when read in context with the other statements made by Ortiz in the article subject to that

appeal—the same statements that are set forth in the article here entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery"— his statement that plaintiff was "a thief" cannot reasonably be understood to mean in the literal sense that plaintiff had committed the crime of theft or any other similar crime; it reasonably meant that plaintiff overcharged Jackson to attend training camp, which is not a verifiable fact, but instead is an opinion of value. We also held in that case that even if Ortiz's statements imply that plaintiff was taking advantage of Jackson, that too is a statement of opinion and not a verifiable fact. Here, the same is true, and the fact that the title of defendant's article provides that Ortiz "Confirms" plaintiff's "Scumbaggery," does not change the nature of Ortiz's statements to "verifiable facts."

Similarly, defendant's use of the term "honor" in the article entitled, "[Plaintiff] Scumbag Watch: Wandy Refuses Training From [Jackson's] Former Mentor," is a statement of opinion, as is defendant's statement in the article entitled, "Meet James Toney's Secret Weapon," that it believed plaintiff's lawsuit was frivolous and defendant could not afford to defend another lawsuit.

In addition, some of defendant's statements do not even appear to be defamatory—"expos[ing] [plaintiff] 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." (Civ. Code, § 45.) For example, in the article entitled, "Cheick Kongo Is Latest to Ditch [Plaintiff] for Wolfslair," defendant stated that plaintiff may or "may not" have been "skimming money" from Jackson. That was an equivocal statement. In the article entitled, "Mo Money, Mo Problems," defendant's statement that plaintiff was "guilty as sin" does not specify of what plaintiff was "guilty." Similarly, in the article entitled, "The Ten Most Notorious Lawsuits in MMA History," defendant stated that plaintiff did not like what Ortiz and others were saying about him and plaintiff therefore decided to sue them. This does not defame plaintiff. Moreover, in the article entitled, "Oh-Oh: James Toney Has Hired [Plaintiff] as His Trainer," defendant states that a UFC fighter should keep "one hand on his wallet and demand[] to see an itemized list of

training camp expenditures." This can be viewed as good advice to any UFC fighter, regardless of whether plaintiff is his manager.

Also, plaintiff contends that he seeks to hold defendant liable only for defendant's "own analysis and language (i.e., not a quote from another party)," but at least one article, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It," consists of quotations from someone other than defendant. That article primarily, if not solely, consists of Jackson's quoted statement that plaintiff overcharged him for training camps.

Even if the articles contain statements that are provably false, plaintiff, as discussed below, failed to show that defendant published those statements with actual malice.

c. Actual Malice

Plaintiff concedes that he is a public figure and contends that defendant published the statements with actual malice. Plaintiff did not show that defendant acted with actual malice.

In support of his contention that defendant published the statements with actual malice, plaintiff cites to an article published on a another website, SI.com, on September 16, 2008, and contends that defendant "was . . . aware of [plaintiff's] public denials of the specific accusations involving financial improprieties" prior to publishing the articles. Plaintiff was quoted in the SI.com article, in response to a question of whether he "overcharged Jackson, or took money from him," that "I've never done anything I wasn't asked to do, and that's it. I would never take anything from anybody without them giving it to me. Never." Plaintiff, however, offers no evidence to support his contention that defendant was aware of the SI.com article prior to publishing the articles.

Plaintiff contends that defendant "was aware of the falsity of the Articles because [defendant] itself reported that the underlying accusations against [plaintiff] were increasingly unlikely to be true." In support of this contention, plaintiff, however, cites to approximately 150 pages of the record, and offers no analysis of the contention. Because

plaintiff asserts a point but fails to support it with reasoned argument or an adequate citation to the record, we treat that point as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775.)

Even if we considered the contention, plaintiff failed to establish that there is sufficient evidence to support the contention that defendant had notice of the falsity of the statements in the articles in question, particularly since plaintiff failed to present evidence of when defendant's allegedly defamatory articles were published—except the September 7, 2008, article. Plaintiff refers in his briefs only to three articles published by defendant that preceded the September 7, 2008, allegedly defamatory publication.

On July 29, 2008, defendant published an article entitled, "Juanito Ibarra Cast Out of Rampage Jackson's Garden of Crazy" (also discussed below), in which defendant quoted what one of Jackson's friends stated in an interview published on another website, SI.com: "'bottom line, somehow, someway [the split between Jackson and plaintiff] all involves money.'" Defendant stated that Jackson was "out of psychiatric observation and is attending outpatient treatment on a daily basis but he didn't seem completely cured after his initial release." Defendant quoted Jackson's friend as stating in the SI.com publication that Jackson "'would still make comments that were slightly weird,'" and that "'[y]ou could tell that he wasn't all the way there, but each day you could tell he was better . . . .'" Defendant's article evidences that defendant had notice that Jackson's friend stated that the split between plaintiff and Jackson involved money. It does not indicate that the statements in the subsequent articles were false. In addition, as discussed in more detail, *post*, to the extent that this July 2008, article evidences that defendant had reason to believe that defendant knew Jackson was an unreliable source for its articles, Jackson is first stated as a source in the article entitled, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It." In that article, Jackson is quoted as stating that plaintiff's overcharging him for training camps "was just one little thing [plaintiff] did," and it was a "small part" of why he "split with" plaintiff. We are unable to determine whether defendant reasonably believed that Jackson was an unreliable source for that article because plaintiff failed to establish when

it was published. In addition, defendant's statement in its July 29, 2008, article that Jackson did not seem to be completely cured from his mental condition does not necessarily mean that defendant believed Jackson had a sufficiently severe mental condition so as to make him an unreliable source when Jackson made the statements contained in the undated article entitled, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It."

On August 4, 2008, defendant published an article entitled, "Juanito Ibarra Devastated by 'Rampage' Jackson's Troubles," stating that recent reports have attributed the split [between plaintiff and Jackson] to money, but as more information on Jackson's mental state become apparent it seem less and less likely if only for the reason that money is way too normal a thing for fighters and trainers to squabble over, and nothing about this situation seems normal." Plaintiff's contention that he was subsequently defamed by defendant did not concern statements of a "way too normal a thing" regarding a mere "squabble over" money, nor does plaintiff contend that his "split" with Jackson did not concern "money."

On August 27, 2008, defendant published an article entitled, "Rampage to Make New Home at Wolfslair," stating that "Oddly, [Anthony] McGann [a source purportedly familiar with Jackson's new management] mentioned that Jackson's split with [plaintiff] was amicable, and they parted on good terms—which runs contrary to every other report on the subject." Plaintiff does not contend that defendant defamed him because the true fact is that "the spit [between he and Jackson] was amicable, and they [had] parted on good terms," so it in irrelevant whether defendant was purportedly put on notice of this. In addition, defendant was not put on notice of this report of an amicable split because defendant stated that McGann's comment was "[o]dd[]" and that it was "contrary to every other report" on the subject.

Plaintiff contends that defendant continued to publish defamatory statements despite having received two letters from plaintiff's counsel expressly notifying defendant of the falsity of its Articles. On May 18, 2009, plaintiff sent defendant a letter demanding that defendant retract statements made in its September 7, 2008, article

entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," because, according to plaintiff, it contained allegedly false and defamatory statements (first demand letter). Plaintiff objected to the article as follows: "The . . . publication at issue is entitled 'Tito Ortiz Confirms [Plaintiff's] Scumbaggery.' The publication contains a large photograph of [plaintiff] with a quote below it form the film 'Scareface,' which states, 'Ju know what a "chazzer" is, [plaintiff]? Thassa pig that don't fly straight.' In addition, the publications [sic] quote from the Ortiz interview in which Mr. Ortiz claims that [plaintiff] is a 'thief' and implies that what [plaintiff] has 'done' is stolen from and taken 'advantage of [Jackson].[']" The first demand letter merely stated that these statements . . . were false."

On May 23, 2009, in response to the first demand letter, defendant's counsel stated in an e-mail to plaintiff's counsel, "We do not believe the article in question contains any defamatory statements. However, as a courtesy to [plaintiff] and not as an admission, we have removed the article from our website. [¶] Nothing contained herein or omitted here from should be construed as an admission or a waiver of any defenses, claims, rights or remedies in this matter. Accordingly, all such defenses, claims, rights and remedies are hereby expressly reserved." Plaintiff stated in response that "removing the offensive material is not a retraction, as requested in my letter." Defendant's counsel then wrote, "Your letter lacked specificity as to which statements in the article were falsehoods. Could you certify as to which factual items are the subject of the retraction, and provide us with specific retraction language?" Plaintiff's counsel did not provide the requested information to defendant's counsel other than to contend that the letter "set forth the specific false, malicious and disparaging comments made of and concerning" plaintiff.

Although the first demand letter provided a general denial of the truth of the statements—"these statements . . . were false"— it failed to provide any specifics as to the allegedly false statements—particularly specifying the precise false statements made by Ortiz that "impl[y] that what [plaintiff] has 'done' is stolen from and taken 'advantage of' Jackson"— and the basis for such falsity. In order for a retraction demand to be effective, at least in the context of a plaintiff's ability to seek damages for defamation where the alleged defamatory statement was published in a newspaper or by [a] radio

broadcast, it must "specify[] the statements claimed to be libelous . . . ." (Civ. Code, § 48a, subd. 1; see *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 640-642.) "'The crucial issue in evaluating the adequacy of the notice turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected. (*MacLeod v. Tribune Publishing Co*. (1959) 52 Cal.2d 536, 554 [343 P.2d 36].)'" (*Anschutz Entertainment Group, Inc. v. Snepp*, *supra*, 171 Cal.App.4th at p. 642, citing *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 31.) As a result of the lack of specificity of plaintiff's first demand letter, defendant's response and reaction do not establish, by clear and convincing evidence, actual malice. "Surely liability under the 'clear and convincing proof' standard of *New York Times v. Sullivan* cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." (*Edwards v. National Audubon Soc*. (2d Cir. 1977) 556 F.2d 113, 121; *Harte-Hanks Communications v. Connaughton*, *supra*, 491 U.S. at pp. 691-692.)

In addition, plaintiff's first demand letter was sent to defendant over eight months after the article entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," was published. Actual malice is measured by the defendant's subjective awareness of falsity at the time of publication. (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. at p. 286; *Khawar v. Globe International, Inc*., *supra*, 19 Cal.4th at p. 262.) Similarly, because there is no evidence in the record as to when the other seven articles at issue were published by defendant, plaintiff has failed to establish that his first demand letter provided notice, to the extent it does, of the falsity of the statements contained in those articles before or at the time they were published.

On May 31, 2011, plaintiff sent defendant a second letter demanding that defendant retract the statements made in all eight of defendant's articles because they were allegedly false and defamatory statements (second demand letter). Plaintiff provided specific facts that he contended established that the eight articles contained false statements, including, inter alia, that plaintiff denied that he stole from Jackson, engaged

in self-dealing to the determent of Jackson, or took advantage of Jackson in any way as his manager and trainer; one of Jackson's financial advisors declared under penalty of perjury that he is unaware of fees paid to plaintiff from Jackson's account for payment of a training camp, and that he saw no evidence that plaintiff "took advantage" of Jackson, "engaged in self-dealing" to the detriment of Jackson's interests, or that there were any irregularities as to plaintiff with respect to Jackson's finances; and plaintiff declared under penalty of perjury that he did not have a training camp, never charged Jackson $65,000 for training, did not engage in any improprieties in connection with Jackson's finance, and never stole from, overcharged or engaged in self dealing to the detriment of any of his fighters, including Jackson.

Although plaintiff contends that the second demand letter expressly notified defendant of the falsity "of its Articles," by the time plaintiff sent his second demand letter to defendant, those articles had already been published, and the article entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery" had been withdrawn by defendant. As noted above, actual malice is measured by the defendant's subjective awareness of falsity at the time of publication. (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. at p. 286; *Khawar v. Globe International, Inc*., *supra*, 19 Cal.4th at p. 262.)

Plaintiff contends that malice is "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure a person" and defendant's use of "name-calling and pejorative attacks" in the articles establish defendant's hatred toward plaintiff. As noted above, however, the common-law standard of malice, which involves hatred or ill will towards the plaintiff, is not an element of the constitutional standard for actual malice articulated by the United States Supreme Court in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254. (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 872.) "*The New York Times* test 'directs attention to the "defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff."' [Citation.] Actual malice under *New York Times* 'is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages. . . . [Common-law] malice—frequently expressed in terms

of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights—would focus on the defendant's attitude toward the plaintiff[] . . . not toward the truth or falsity of the material published.' [Citation.] '"[Ill] will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." [Citations.]' [Citation.]" (*Ibid*.)

Plaintiff contends that defendant "always considered Ortiz to be unreliable," citing defendant's article entitled, "Tito Ortiz: Yep, Still and Asshole," published "on or about February 8, 2010," stating that Ortiz is "not one to let the truth get in the way of an opportunity to act like a total jerk." The article entitled, "Tito Ortiz Confirms [Plaintiff's] Scumbaggery," is the only article stating that Ortiz is the source of its statements. That article was published 15 months before the article entitled, "Tito Ortiz: Yep, Still and Asshole," was published, and as noted above, defendant had removed the article from its website over eight months before defendant published, "Tito Ortiz: Yep, Still and Asshole." Assuming Ortiz was stated as the source of any of defendant's other seven articles at issue, or that it could reasonably be implied that Ortiz was the source, plaintiff failed to establish when those articles were published. Thus, there is no evidence that defendant considered Ortiz to be unreliable at the relevant time.

Plaintiff implies that defendant knew that Jackson was an unreliable source because on July 29, 2008, defendant published an article reporting that Jackson had been placed under "psychiatric observation," and according to defendant, Jackson did not seem completely cured after his initial release. As noted above, in that article, entitled, "Juanito Ibarra Cast Out of Rampage Jackson's Garden of Crazy," defendant stated that Jackson was "out of psychiatric observation and is attending outpatient treatment on a daily but he didn't seem completely cured after his initial release." Defendant quoted Jackson's friend as stating in an article published on another website, SI.com, that Jackson "would still make comments that were slightly weird," and that "[y]ou could tell he wasn't all the way there, but each day you could tell he was better . . . ." Plaintiff does not cite the defamatory statements of which he contends Jackson was the source. Nonetheless, plaintiff's contention that defendant knew Jackson was an unreliable source

appears to concern defendant's article entitled, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It," in which Jackson is quoted as stating that plaintiff's overcharging him for training camps "was just one little thing [plaintiff] did," and it was a "small part" of why he "split with" plaintiff. Plaintiff, however, failed to establish when that article was published—whether it was published before July 29, 2008, when defendant published its article reporting that Jackson did not seem to be completely cured after his initial release from psychiatric observation. In addition, defendant's statement on July 29, 2008, that Jackson did not seem to be completely cured from his mental condition does not necessarily mean that defendant believed Jackson was not cured of his mental condition or was otherwise mentally incompetent when Jackson made the statements contained in the article entitled, "Exclusive: Rampage Jackson Says He Didn't Ask For Fight With Wanderlei Silva, But He'll Take It." Indeed, defendant quoted Jackson's friend as stating, "but each day you could tell he was better . . . ." In any event, as stated above, plaintiff contends that he seeks to hold defendant liable only for defendant's "own analysis and language (i.e., not a quote from another party)," and the objectionable language was a quote from Jackson.

Plaintiff contends that Wallace, the source of defendant's article entitled, "Mo Money, Mo Problems," withdrew his "article" upon the filing of this lawsuit, and defendant "made no effort to defend the credibility of its sources." In the article entitled, "Mo Money, Mo Problems," Wallace was quoted as stating that an exhibit in his lawsuit against plaintiff and Jackson establishes that Jackson had lost literally millions of dollars "in deals" because plaintiff would only agree to allow "the deals" to happen with Jackson if the company in question agrees to a deal with plaintiff personally as well. Plaintiff does not identify the article that Wallace purportedly withdrew, and plaintiff offers no evidence to support his contention that Wallace withdrew an article or when it was withdrawn. In addition, plaintiff does not establish that defendant knew Wallace withdrew his article, or the reasons he withdrew it.

d. Plaintiff's Other Causes of Action

Plaintiff also asserted causes of action for invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. In its anti-SLAPP motion, defendant described these claims "Tagalong Claims," and contended that "Because [plaintiff's] defamation claim fails as a matter of law . . . , his duplicative and subsidiary claims also fail and must be dismissed as well." On appeal, plaintiff did not address specifically whether he established a probability of prevailing on the merits of these claims other than to state in a footnote in his opening brief that he "concedes that the legal issue relevant to the determination of the defamation claim has a substantive effect on the viability of the remaining tort claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy." As with plaintiff's defamation claim, plaintiff has not submitted evidence showing a prima facie case on his claims for invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress.

Our conclusions are based solely on the evidence submitted in connection with the anti-SLAPP motion. We do not opine on any legal or evidentiary issues beyond the issues raised by defendant's motion.[3]

5. Plaintiff's Request to Conduct Discovery

Plaintiff contends that the trial court abused its discretion in denying his request to conduct discovery prior to the adjudication of defendant's anti-SLAPP motion. We disagree.

a. Applicable Law

Section 425.16, subdivision (g), provides that, "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the

[3] We do not reach the other defenses raised by defendant, including the Communications Decency Act of 1996 (47 U.S.C. § 230).

motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." We review a trial court's denial of a discovery request made pursuant to section 425.16, subdivision (g), under an abuse of discretion standard. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 191 ["We may not disturb the trial court's ruling on such a discovery request absent an abuse of discretion"].)

b. Background Facts

On July 19, 2010, defendant was first served with an operative complaint in this action. Five days later, on July 23, 2010, the trial court stayed the action, including all discovery, "pending the conclusion of the appeal" filed by plaintiff. On May 25, 2011, the appeal of plaintiff's case against other defendants for some of the same statements involved here was "concluded" when a remittutur was filed with the trial court.

On July 5, 2011, through July 23, 2011, plaintiff's counsel and certain counsel for defendants in the action—not defendant in this case—engaged in an exchange of meet and confer communications regarding discovery plaintiff previously propounded on the clients of those defendants' counsel.

Over two months after plaintiff learned that defendant intended to file an anti-SLAPP motion, on July 29, 2011, all of the parties held a "meet and confer conference" during which plaintiff's counsel stated that "Plaintiff was amendable to accommodating [certain] Defendants [in scheduling the responses to the outstanding discovery] provided counsel for Defendants would cooperate with me with respect to Plaintiff's need to conduct discovery in response to Defendant's anticipated anti-SLAPP motion and with respect to continuing the trial date."

On August 1, 2011, plaintiff's counsel sent counsel for the defendants in the action, including counsel for defendant in this case, a letter requesting that by August 3, 2011, each defendant provide him with "alternative dates for the depositions of Mr. Ortiz, Mr. Jackson, the PMK [person most knowledgeable] of [defendant] and one or two third parties to take place in the next two weeks" to be used "in response to any slapp motion

brought by [defendant]; to conduct follow-up discovery; or to prepare for trial." On the same day, August 1, 2011, defendant's counsel responded, "This is the first I've heard of your intention to depose [defendant's] PMK. Please send me the topics so I can determine who would be the PMK." The record does not reflect that plaintiff provided defendant with the "topics" for which defendant was to designate a PMK. Defendant contends, and plaintiff does not dispute, that plaintiff never propounded discovery on defendant.

The trial was scheduled to commence on November 7, 2011. Approximately three months before trial, on about August 4, 2011, defendant filed its anti-SLAPP motion.

On August 23, 2011, plaintiff's counsel wrote to counsel for the various defendants attempting to obtain a stipulation "regarding a discovery schedule, and a continuation of the trial date and all pre-trial dates [including the hearing on defendant's anti-SLAPP motion]." Plaintiff's counsel advised that if such a stipulation could not be obtained, he "intend[ed] to proceed with his ex parte application for such relief."

On August 26, 2011, plaintiff filed an ex parte application (first ex parte application) seeking an order "granting [plaintiff] the ability to conduct limited discovery prior to responding" to defendant's anti-SLAPP motion, and continuing the hearing on defendant's anti-SLAPP motion. Plaintiff sought an order permitting him to conduct discovery regarding defendant's alleged actual malice in publishing the articles at issue. Plaintiff stated in the ex parte application, "[The s]pecific facts that Plaintiff anticipates discovering include, inter alia, the identities of the individuals responsible for publishing the Articles for [defendant], the relationship of [defendant's] authors to [defendant]; the knowledge of [defendant's] authors as to the falsity of the assertions contained in the Articles before publication and after the receipt of the Demands (i.e., who knew what and when?); whether [defendant's] authors purposely avoided learning facts that would disprove the defamatory allegations contained in its Articles; what, if any, investigation was conducted by any of [defendant's] Authors in connection with the publication of the Articles and in response to the Demands; what documents and facts exist, if any, to allegedly prove the truth of any of the factual assertions contained in their Articles and

the implications derived there from [*sic*]; . . . the financial source documents which would conclusively prove or disprove the factual assertions contained in the Articles; the subjective indent of [defendant's] Author's; whether [defendant's] Authors had any doubts as to the veracity of the assertions contained in their Articles; and relevant correspondence by and between employees of [defendant] before publishing the Articles and after their receipt of the Demands."

During the August 26, 2011, hearing on the first ex parte application, plaintiff's counsel stated that he was filing the ex parte application because although he intended to file a noticed motion for the requested relief, he was advised by the trial court's clerk that there were no hearing dates available to schedule a hearing on the motion prior to the hearing on defendant's anti-SLAPP motion. The first ex parte application does not contain any evidence that plaintiff's counsel was advised by the trial court's clerk that there were no hearing dates available to timely schedule plaintiff's motion, including when plaintiff's counsel was so advised.

During the hearing, defendant stated that by at least May 9, 2011, plaintiff knew that defendant intended to file an anti-SLAPP motion because defendant advised the trial court of that intention during the May 9, 2011, case management conference, and the trial court kept the trial date—then scheduled for November, 2011—intact. After further argument by counsel, the following exchange occurred at the hearing: "[Trial court:] The ex parte relief is denied. . . . [¶] . . . [¶] [Plaintiff's counsel:] Is that with prejudice, your Honor? [¶] [Trial court:] Well, the hearing's next week. If you say without prejudice, I don't know if it's of any benefit to you. Are you suggesting that you're going to bring another ex parte application? . . . [¶] . . . [¶] I mean, you can take your appeal. You can file a writ if you disagree with the Court's ruling. [¶] [Plaintiff's counsel:] Your Honor, that would just continue everything. I had called the clerk, and the clerk told me there were no hearing dates. [¶] [Trial court:] All right. Well, we just had the hearing, basically. I don't find good cause. Insofar as I'm concerned, this is a hearing on the merits. But if you want to bring another ex parte motion, I suppose, on new facts or new information, you can do so. [¶] Ex parte relief is denied. The hearing goes forward [on

September 7, 2011]." The trial court issued a minute order stating that the ex parte application is denied, and it found "no good cause to grant the ex parte application."

At the September 7, 2011, hearing on defendant's anti-SLAPP motion, over a week after plaintiff filed his opposition to that motion, plaintiff filed another ex parte application (second ex parte application). It sought an order setting a hearing on a motion to conduct discovery and continuing defendant's anti-SLAPP motion. Like plaintiff's August 26, 2011, ex parte application, plaintiff's proposed motion sought an order permitting him to conduct discovery regarding defendant's alleged actual malice in publishing the articles at issue. The trial court denied plaintiff's ex parte application as untimely.

c. Analysis

Defendant contends that the trial court did not abuse its discretion in denying plaintiff's request to conduct discovery because section 425.16, subdivision (g), provides that the trial court may order that specified discovery be conducted "on [a] noticed motion," and it is undisputed that plaintiff failed to file a noticed motion. The trial court, however, concluded that, as to plaintiff's first ex parte application, although plaintiff did not file a noticed motion, the hearing on that ex parte application was nonetheless a "hearing on the merits."

Defendant contends that the trial court did not abuse its discretion in denying plaintiff's requests for discovery because plaintiff had ample time to propound the requested discovery on defendant, and plaintiff's request for leave to conduct the requested discovery was untimely.

Defendant asserts, and plaintiff does not dispute, that by May 25, 2011—at least May 9, 2011—plaintiff knew that defendant intended to file an anti-SLAPP motion. Plaintiff's counsel, however, did not advise defendant's counsel that plaintiff intended to depose defendant's PMK until August 1, 2011. Although plaintiff's counsel engaged counsel for the other defendants in meet and confer communications from July 5, 2011, through July 23, 2011, those communications did not include defendant's counsel.

Time was running out for defendant to file its anti-SLAPP motion. The trial was scheduled to commence on November 7, 2011, and the trial court could refuse to consider defendant's anti-SLAPP motion the longer defendant waited to file it.

On August 4, 2011, defendant filed its anti-SLAPP motion. It was almost three weeks thereafter—indeed the day before plaintiff's opposition to defendant's anti-SLAPP motion was due—that plaintiff's counsel sent a letter to counsel for the various defendants, including the defendant in this case, attempting to obtain a stipulation "regarding a discovery schedule, and a continuation of the trial date and all pre-trial dates [including the hearing on defendant's anti-SLAPP motion]."

Plaintiff did not file his first ex parte application until over three weeks after defendant filed its anti-SLAPP motion, and after plaintiff's opposition to defendant's motion was overdue by two days. Plaintiff did not file its second ex parte application and accompanying motion until the day of the hearing on defendant's anti-SLAPP motion, over a week after plaintiff filed his opposition to that motion.

Failure to provide "a timely . . . motion for discovery, supported by a showing of good cause . . . dooms the discovery request." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1053.) We conclude that the trial court did not abuse its discretion in denying plaintiff's request to conduct discovery on the issue of defendant's actual malice.

6. Attorney Fees and Costs

Defendant contends it is entitled to its attorney fees and costs on appeal. Section 425.16, subdivision (c)(1) states that, "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."[4] "'A statute

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[4] Section 425.16, subdivision (c)(1) states in full, "[I]n any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]' (*Evans v. Unkow* [(1995)] 38 Cal.App.4th [1490,] 1499-1500.) Section 425.16, subdivision (c) provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery on appeal. [Citation.]" (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, overruled on other grounds as stated in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5; see also *Liu v. Moore* (1999) 69 Cal.App.4th 745, 754.) Defendant, therefore, may recover its attorney fees and costs on plaintiff's appeal as the party prevailing on the appeal. (Cal. Rules of Court, rule 8.278(a)(2) ["The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal"]; *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448 [defendant is entitled to attorney fees and costs incurred in plaintiff's appeal as prevailing defendant on the anti-SLAPP motion]. We remand the case to the trial court for the limited purpose of permitting the trial court to exercise its discretion on the amount to award defendant for its attorney fees in connection with this matter.

DISPOSITION

The trial court's order granting defendant's special motion to strike pursuant to section 425.16 is affirmed, and the matter is remanded to the trial court in connection with defendant's request for attorney fees. Defendant is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.