Filed 9/21/17 The Eye Machine, LLC v. Wasserman, Comden etc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE EYE MACHINE, LLC., Plaintiff and Respondent. v. WASSERMAN, COMDEN, CASSELMAN & ESENSTEN, LLP, et al., Defendants and Appellants,	B270815 (Los Angeles County Super. Ct. No. BC603834)

APPEAL from an order of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed.

Casselman Law Group, David B. Casselman, David Polinsky and Kirk S. Comer for Defendants and Appellants.

Hinds & Shankman, James Andrew Hinds, Jr., Paul R. Shankman and Rachel M. Sposato for Plaintiff and Respondent.

INTRODUCTION

Defendants, two law firms and private investigator, moved to strike the complaint by plaintiff, a manufacturing company, pursuant to Code of Civil Procedure, section 425.16,[1] the "anti-SLAPP" statute. The trial court denied their motion, ruling that defendants failed to make the requisite threshold showing that the challenged causes of action arose from protected activity.

Defendants appeal the order, contending plaintiff's claims arose out of statements that are protected activity under the anti-SLAPP statute, because (1) the statements were made during post-judgment asset discovery that was in the course of and in connection with litigation, within the meaning of section 425.16, subsections (e)(1) and (2); and (2) the statements concerned a person in the public eye whose life and controversies were a subject of public interest, within the meaning of section 425.16, subsection (e)(4).

Although we differ somewhat from the trial court's rationale, we conclude the trial court properly denied the motion because plaintiff's causes of action did not arise from protected activity under the anti-SLAPP statute. We therefore affirm the order denying defendants' motion.

FACTS AND PROCEDURAL BACKGROUND

1. Parties

Plaintiff/respondent The Eye Machine, L.L.C. (Eye Machine) is a Delaware limited liability company that is based in Minnesota. Eye Machine manufactures devices that treat macular degeneration.

---

[1] Statutory references are to the Code of Civil Procedure unless otherwise specified.

Defendants/appellants Wasserman, Comden, Casselman & Esensten, LLP and its successor Casselman Law Group (collectively Casselman) are law firms based in southern California. Defendant Paul Cohen (Cohen) is a licensed private investigator and the principal of his firm Investigative Resources Inc.

2. Eye Machine's Lawsuit

Eye Machine commenced this action by filing its complaint against Casselman[2] and Cohen. The complaint alleged in pertinent part as follows. Eye Machine retained Peter Pocklington (Pocklington) to solicit new investors for the company. Pocklington identified a potential Eye Machine investor, Harris Hatzissmou Phillip (Phillip). In 2013 Pocklington had procured Phillip's investment in another unrelated company, and in 2014 he encouraged Phillip to consider Eye Machine. By late 2014, Phillip was seriously interested in Eye Machine, and he was prepared to invest $100,000 to $150,000 in the company.

During the same period, Casselman was working for several clients to collect on their civil judgments against Pocklington. Casselman hired Cohen as a private investigator to assist in that effort, and in November 2014 Cohen located Phillip. Cohen spoke with Phillip by telephone on November 19, 2014. In an attempt to dissuade Phillip from engaging in any further negotiations or conversations with Pocklington with respect to Phillip's potential investment in Eye Machine, Cohen told Phillip

---

[2] To be precise, the complaint named Wasserman, Comden, Casselman & Esensten, LLP. When that law firm disbanded and a new firm of Casselman Law Group was formed, the complaint was amended to name the new firm as a "Doe" defendant. For simplicity, we refer to both firms as Casselman.

about: (1) Pocklington's wrongdoings with respect to his past bankruptcy proceedings; (2) the fact that Pocklington was denied a discharge in bankruptcy; (3) Pocklington's criminal conviction and criminal record; and (4) other misconduct by Pocklington.

As a follow up to his telephone call, Cohen sent Phillip an email on the same day. Cohen's email attached news articles about Pocklington, as well as the docket for Pocklington's criminal case. The email pointed out that Pocklington was "never vindicated" in his criminal case. It stated that Phillip could check out Cohen's background by calling an FBI special agent or the Casselman attorneys. And it encouraged Phillip to call Cohen if he was interested in speaking further.

Cohen's comments left Phillip "alarmed and concerned." Phillip called Pocklington to tell him what had happened, and Pocklington asked Phillip to send him Cohen's email. Phillip did so, and in his cover message Phillip noted that his conversation with Cohen was "[n]ot a pleasant call." Pocklington tried his best to "calm Phillip down," but he was not successful. In January 2015 Phillip notified Pocklington and Eye Machine that he had decided not to invest in the company.

Eye Machine's complaint alleged three causes of action against Casselman and Cohen: (1) intentional interference with prospective business advantage; (2) negligent interference with prospective business advantage; and (3) unfair competition and business practices. It prayed for recovery of compensatory damages, punitive damages, and injunctive relief.

3. Casselman's Anti-SLAPP Motion

Casselman responded with a special motion to strike all causes of action in Eye Machine's complaint, pursuant to the anti-SLAPP statute.[3] With respect to the first prong of the anti-SLAPP analysis – whether the challenged causes of action arose out of protected conduct – Casselman made two arguments.

First, citing section 425.16, subdivisions (e)(1) and (2), Casselman argued that Cohen's statements to Phillip were made in the course of a judicial proceeding and were made in connection with an issue under consideration by a judicial body. Casselman asserted that Cohen's statements were related to post-judgment asset discovery concerning the enforcement of two large judgments against Pocklington.

In support of this argument, Casselman submitted a declaration by the firm's principal attorney David Casselman. The declaration stated that Casselman had been retained to collect on two civil judgments against Pocklington: a 2007 judgment for $806,475.60 from a Florida federal court in favor of The Ageless Foundation, Inc. and Naomi Balcombe; and a 2000 judgment for in excess of C$10 million from a Canadian provincial court in favor of the Province of Alberta, Canada. Casselman registered both judgments in a California federal court and "domesticated" the judgments by obtaining a California judgment from the superior court in Riverside County. Casselman diligently attempted to collect from Pocklington on both judgments during the period from 2008 through the date of the declaration.

---

[3] Cohen joined in the motion in all respects but did not add any separate argument, so we refer to it as Casselman's motion for simplicity.

Casselman stated that during the course of these enforcement efforts, Pocklington filed a voluntary bankruptcy petition in the United States Bankruptcy Court in Riverside. Casselman appeared in the bankruptcy proceeding on behalf of its clients and alleged that Pocklington had engaged in fraudulent conduct. In 2009 a federal grand jury indicted Pocklington for bankruptcy fraud relating to his failure to disclose assets, and Pocklington pled guilty to the charge and was placed on probation in 2010. Pocklington ultimately violated probation and was sentenced to jail. In addition, Casselman moved on behalf of its clients to deny Pocklington a bankruptcy discharge because of his fraudulent conduct. The court granted the motion in 2012 and denied Pocklington a discharge of his debts.

Casselman explained that his firm hired Cohen as a private investigator to assist in locating Pocklington's assets. Casselman did not direct Cohen to contact Phillip and didn't intend for Cohen to interfere with Phillip's investment in Eye Machine or engage in any conduct that would embarrass Pocklington.

The motion also included a declaration by Cohen, who stated that he had been retained by Casselman to locate Pocklington's assets. A reliable source told Cohen that Phillip had recently invested money with Pocklington and might have information about Pocklington's bank accounts. Cohen telephoned Phillip in November 2014 and told him he was a private investigator working with attorneys to collect judgments against Pocklington, and the purpose of his call "was to obtain Mr. Pocklington's banking information in order to assist in judgment collection."

Phillip did not provide any financial information, but Cohen explained that "Mr. Phillip requested information and asked me questions about Mr. Pocklington. I truthfully answered

his questions. I did so because I believed that if I cooperated with him, he might cooperate with me and provide information about Mr. Pocklington's bank accounts." During their exchange, Phillip told Cohen he had heard that the court "vindicated" Pocklington in his criminal case. Cohen disagreed and responded by directing Phillip to the online criminal records in the federal Public Access to Court Electronic Records system (PACER), and by sending Phillip an email responding to his questions and attaching materials he had requested. Cohen said he was not aware of any relationship between Phillip and Eye Machine, and Phillip "was just a potential source of information, a lead I was pursuing in an effort to assist my [client's] efforts to collect on multiple million dollar judgments."

In its second argument, Casselman cited section 425.16, subdivision (e)(4) of the anti-SLAPP statute and claimed that Cohen's statements to Phillip concerned a public figure and were in connection with an issue of public interest. Casselman asserted that Pocklington was "in the public eye" as the former owner of a professional hockey team who had been involved in a number of public controversies.

In support of this argument, Casselman asked the court to take judicial notice of five matters: (1) Pocklington was the former owner of the Edmonton Oilers professional hockey team; (2) Pocklington was the team owner when the Oilers won the Stanley Cup in 1984; (3) during the period he owned the Oilers, Pocklington traded Wayne Gretzky to the Los Angeles Kings; (4) on October 4, 2014, the Edmonton Sun posted an article on the internet entitled "Controversial owner Peter Pocklington will join Edmonton Oilers' 1984 celebration"; and (5) the online article included readers' comments about Pocklington.

Casselman's declaration also addressed Pocklington's public figure status. Casselman stated that on January 13, 2016 he conducted an internet search for articles relating to Pocklington, and he found the referenced October 4, 2014, Edmonton Sun posting about Pocklington and the Oilers' Stanley Cup celebration. The declaration attached a copy of the Edmonton Sun posting, which included a short article, photographs, and comments by readers.

Casselman's anti-SLAPP motion also addressed the second prong of the statute – whether Eye Machine could establish a probability of prevailing on its claims. (See § 425.16, subd. (b)(1).) Casselman argued that the claims were barred by the absolute litigation privilege under Civil Code section 47, subdivision (b)(2), because they were based on statements that Cohen made in the course of post-judgment enforcement activity. Casselman also argued that Eye Machine could not produce evidence that would support the elements of its claims.

4. Eye Machine's Opposition and Casselman's Reply to the Motion

Eye Machine opposed the motion on all grounds asserted by Casselman. In opposing the first prong of the anti-SLAPP statute, Eye Machine argued that its claims did not arise from protected activity. It asserted that Cohen's statements to Phillip were made after the judicial proceedings had concluded through the entry of final judgments, and the statements involved disparagement of Pocklington and not judicial discovery. Eye Machine also asserted that Cohen's statements did not concern a matter of public interest because Pocklington was not a public figure and any interest in him involved a small number of people and not a broad segment of the public.

Eye Machine's opposition also addressed the second prong of the anti-SLAPP statute, arguing that the litigation privilege did not apply and it could prove the elements of its claims. Eye Machine submitted a declaration by its manager and legal counsel, Lantson Eldred, who stated that Pocklington was a consultant and not an owner of the company, and explained the company's negotiations with Phillip in late 2014 and early 2015.

Casselman filed a reply to the opposition, reiterating the same legal arguments made in its opening papers. The reply included a declaration by Kirk Comer, one of Casselman's attorneys, who described some of the firm's recent efforts to collect from Pocklington and attached some writs of execution that had recently been issued against him.

5. Trial Court's Ruling

The anti-SLAPP motion was argued and taken under submission by the court. Several days later the court issued a six-page order denying the motion.

The court ruled on procedural issues. It took judicial notice of all matters requested by Casselman except the readers' comments to the October 4, 2014, Edmonton Sun article about Pocklington, concluding that the truth of the comments was not a proper subject of judicial notice. The court ruled on objections to the Eldred declaration, excluding two statements based on hearsay. And the court excluded the entire declaration by Comer, ruling that it improperly presented new evidence in reply.

The court found that Casselman had not met its burden under the first prong of the statute, as it failed to prove that the challenged causes of action arose out of protected conduct. It rejected Casselman's argument that Cohen's statements were made in connection with a judicial proceeding within the meaning of section 425.16, subdivisions (e)(1) and (2). The court reasoned that "[t]he actions brought against Pocklington by the

Government of the Province of Alberta, Canada and the Ageless Foundation, Inc., et al. concluded in 2000 and 2007 [and] characterizing Cohen's investigation into Pocklington as statements made in connection with an ongoing legal proceeding would make all debt collection efforts protected activity under the anti-SLAPP statute, regardless of when the judgment was obtained." The court further explained that "the statements at issue here were not about Pocklington's financial assets. Rather, the gravamen of this action concerns Cohen's discussion of Pocklington's purportedly wrongful conduct in connection with his bankruptcy proceeding, the denial of bankruptcy discharge, Pocklington's criminal record, and other wrongdoing. [Citation.] Accordingly, these statements are even further removed from the litigation proceedings that gave rise to the 2000 and 2007 judgments than comments that directly concern Pocklington's financial assets."

The court also rejected Casselman's argument that Cohen's statements concerned an issue of public interest within the meaning of section 425.16, subdivision (e)(4). Citing defamation cases such as *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, and *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, the court ruled that Pocklington was not a "public figure" under the law.

Having found that Casselman did not meet its burden under the first prong of the anti-SLAPP statute, the court denied the motion. It did not address the parties' arguments regarding the second prong of the statute.

CONTENTIONS

Casselman contends the trial court erred by denying its anti-SLAPP motion. It argues Eye Machine's causes of action arose out of protected conduct because Cohen's statements to Phillip (1) were made during post-judgment asset discovery that was in the course of and in connection with litigation, within the

meaning of section 425.16, subdivisions (e)(1) and (2); and (2) concerned a person in the public eye whose life and controversies were the subject of public interest, within the meaning of section 425.16, subdivision (e)(4).

For the reasons that follow, we conclude Cohen's statements to Phillip, which formed the basis for Eye Machine's causes of action, did not arise out of protected conduct, and the trial court properly found the threshold requirement for anti-SLAPP protection was not met.[4]

DISCUSSION

1. Anti-SLAPP Procedure and Standard of Review

The anti-SLAPP statute provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235 (*Sipple*).) "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543 (*Hansen*); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

---

[4] Casselman has also argued on appeal that Eye Machine did not meet the second prong of the motion, by establishing a probability of prevailing on its claims. Because we affirm the court's ruling on the first prong, there is no reason to discuss this argument.

The first prong of the anti-SLAPP analysis requires the court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* 29 Cal.4th at p. 67.) The defendant makes this showing by demonstrating the acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1); *Equilon,* at p. 67.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier*).) "[T]he critical point is whether the plaintiff's cause of action itself was *based* on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

If the court determines the defendant has made the threshold showing, "it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier, supra,* 29 Cal.4th at p. 88; § 425.16, subd. (b)(1).)

We review both prongs of the anti-SLAPP analysis de novo. (*Hansen, supra,* 171 Cal.App.4th at p. 1544.) "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." (*Navellier, supra,* 29 Cal.4th at p. 89.)

2. Statements in Connection with a Judicial Proceeding

Casselman contends that Eye Machine's causes of action arose out of Cohen's statements to Phillip, made during post-judgment asset discovery that was protected conduct within the

meaning of section 425.16, subdivisions (e)(1) and (2). Those provisions state that protected conduct under the anti-SLAPP statute "includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§425.16, subd. (e).)

These statutory provisions focus on two forms of conduct: activity *made in* a judicial proceeding, and activity *in connection with* a judicial proceeding. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 (*Briggs*) [§ 425.16, subd. (e) "encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body."].)

The trial court found that Cohen's statements to Phillip were not "made in" a judicial proceeding, and Casselman does not dispute that determination on appeal. Instead, Casselman contends the statements were made "in connection with" a judicial proceeding involving the enforcement and collection of the two judgments entered against Pocklington. The trial court rejected Casselman's position because it concluded that the judicial proceedings against Pocklington ended with the entry of final judgments in 2000 and 2007, and it found that protected activity under the anti-SLAPP statute does not encompass post-judgment activity. This conclusion was wrong.

Courts have broadly applied section 425.16, subdivisions (e)(1) and (2) to all phases of the litigation process. It of course encompasses "the basic act of filing litigation" and similar conduct in court. (*Ludwig v. Superior Court* (1995)

37 Cal.App.4th 8, 19 (*Ludwig*); *Briggs, supra*, 19 Cal.4th at p. 1115.) It includes pre-litigation conduct, such as sending demand letters and threatening a lawsuit. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [applying the anti-SLAPP statute to pre-filing communications in anticipation of litigation]; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1059 [same].) It also includes post-judgment conduct involving the enforcement of judgments. (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 612 [applying the anti-SLAPP statute to documents filed in post-judgment marital dissolution proceedings].)

Appellate courts have often looked to the litigation privilege under Civil Code section 47, subdivision (b)(2) as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2). (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323; *Briggs, supra,* 19 Cal.4th at 1115; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263.) In *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (*Rusheen*), our Supreme Court applied the anti-SLAPP statute to an abuse of process claim based upon a default judgment and post-judgment enforcement activity. The court applied the litigation privilege to the post-judgment enforcement activity, noting that the privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Id.* at p. 1057.)

Other courts have similarly recognized that "judgment enforcement efforts, as an extension of a judicial proceeding and related to a litigation objective, are considered to be within the litigation privilege." (*Brown v. Kennard* (2001) 94 Cal.App.4th 40, 49-50 [levy on writ of execution]; accord, *Tom Jones Enterprises, Ltd. v. County of Los Angeles* (2013) 212 Cal.App.4th 1283, 1295 [release of funds taken through levy on writ of

execution]; *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [levying on bank account and recording abstract of judgment]; *Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 64-66 [motion for post-judgment writ of sale].)

The trial court accordingly erred in concluding that the anti-SLAPP statute does not encompass post-judgment enforcement activity. But this is not enough to support Casselman's position, because the activity in question must be "in connection with" a judicial proceeding. (§ 425.16, subd. (e)(2); *Briggs, supra,* 19 Cal.4th at p. 1113.) The trial court found that Cohen's statements to Phillip were too remote to be in connection with Casselman's enforcement of the judgments against Pocklington, and there is ample support for that conclusion.[5]

Eye Machine's claims against Casselman are based on Cohen's statements to Phillip that Pocklington engaged in misconduct during his bankruptcy proceeding, was denied a discharge in bankruptcy, had a criminal conviction and criminal record, and engaged in other acts of misconduct. These statements were made in a setting that was only remotely related to the litigation against Pocklington – an informal telephone interview in which Cohen was seeking information about Pocklington's assets. They were not made during a proceeding that was sanctioned by statute or court rule, they were not made by an attorney or an officer of the court, and they were not directed to a party or participant in the underlying litigation.

---

[5] Casselman has criticized the trial court for excluding the evidence submitted through the Comer declaration in its reply. We have no reason to address that issue, for we agree that Casselman's moving papers established ongoing post-judgment activity.

More important, the content of Cohen's statements had no relationship with the issues in the underlying litigation against Pocklington. *Paul v. Friedman* (2002) 95 Cal.App.4th 853 (*Paul*), is illustrative in this respect. In *Paul*, the plaintiff was a securities broker who brought tort claims against an attorney who had represented the broker's former clients in a securities arbitration. The broker alleged the attorney had conducted an intrusive investigation into the broker's personal life; specifically, the attorney and his investigator had told the clients and witnesses about sensitive personal details of the broker's life, including his financial affairs, spending habits, tax liabilities, and close personal relationship with another individual. The attorney made an anti-SLAPP motion to strike the tort claims, arguing that the statements had been made during the discovery process and were therefore "in connection with" the securities arbitration.

The Court of Appeal rejected the attorney's position and ruled that the injurious statements were too remote to constitute protected activity under the anti-SLAPP statute. The court held the statements concerned personal matters that were not relevant to the issues in the securities arbitration, and "[t]he statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding." (*Paul, supra*, 95 Cal.App.4th at p. 866.) The same is true here, because Cohen's statements about Pocklington's misconduct were not relevant to, or connected with, the issues in Casselman's judgment enforcement proceedings.

Further support is provided by cases construing the litigation privilege under Civil Code section 47, subdivision (b)(2). The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) As this court explained in *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134 (*Rothman*), "the 'connection or logical relation' which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the *communicative* act – be it a document filed with the court, a letter between counsel or an oral statement – must function as a necessary or useful step in the litigation process and must serve its purposes." (*Id.* at p. 1146; see *Silberg, supra*, 50 Cal.3d at p. 220 [communication must have "reasonable relevancy" to the litigation].) When the communication does not function as a necessary or useful step in the litigation process, it is not privileged. (See *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 151 [statement was not sufficiently connected to unfair competition litigation]; *Carney v. Rotkin* (1988) 206 Cal.App.3d 1513, 1522 [statement was not sufficiently connected to collection activity].)

Cohen's statements to Phillip did not meet these standards. While Cohen's questions about Pocklington's bank accounts were relevant to the judgment enforcement proceedings, his gratuitous comments about Pocklington's bankruptcy misconduct and criminal conviction were not. On an objective level, these personal gibes did not promote collection of the civil judgments or advance the purpose of the judgment enforcement proceedings. Just as in *Paul*, the statements were not "in connection with 'an issue under consideration or review' in the proceeding." (*Paul,*

supra, 95 Cal.App.4th at p. 866.) And just as in *Rothman*, they did not "function as a necessary or useful step in the litigation process and . . . serve its purposes." (*Rothman, supra,* 49 Cal.App.4th at p. 1146.)

Casselman has argued that Cohen's statements about Pocklington's bankruptcy misconduct and criminal conviction advanced the collection efforts because Cohen subjectively believed that his comments might encourage Phillip to reveal information about Pocklington's bank accounts. This is hard to believe, but in all events the test is objective rather than subjective. As this court recognized in *Rothman*, the "functional connection" between a communication and the litigation process "can be satisfied only by communications which function intrinsically, and apart from any consideration of the speaker's intent, to advance a litigant's case." (*Rothman*, *supra*, 49 Cal.App.4th at p. 1148; accord, *Silberg*, *supra*, 50 Cal.3d at p. 220 ["The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent."].)

The trial court was accordingly on firm ground when it ruled that Cohen's statements to Phillip were too far removed from the judgment enforcement proceedings to be protected activity under section 425.16, subdivision (e)(2).

3. Statements in Connection with an Issue of Public Interest

As an alternative to its first argument, Casselman contends Eye Machine's causes of action arose out of protected conduct because Cohen's statements to Phillip concerned a person in the public eye whose life and controversies were the subject of public

interest, within the meaning of section 425.16, subdivision (e)(4). The trial court rejected this argument, and so do we.[6]

Section 425.16, subdivision (e)(4) safeguards 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).) Section 425.16 does not define "public interest" or "public issue." "Those terms are inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371 (*Cross*); see *Rivero v. American Federation of State, County and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 929 (*Rivero*); see also *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 (*Weinberg*) ["it is doubtful an all-encompassing definition could be provided"].) Some courts, paraphrasing Justice Potter Stewart's famous quip about obscenity, have suggested that " ' "no standards are necessary because [courts and attorneys] will, or should, know a public concern when they see it." ' " (*Briggs, supra,* 19 Cal.4th at p. 1122, fn. 9; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1214; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 117 (*Du Charme*); see *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (conc. opn., Stewart, J.).)

---

[6] As noted, the trial court relied upon public figure defamation cases in rejecting Casselman's arguments. While that is not the appropriate test under section 425.16, subdivision (e)(4), we review the trial court's decision de novo and may affirm on any legal ground. (*Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 188.)

Nevertheless, courts have expounded on principles that can guide the assessment of whether a statement concerns a matter of public interest. In *Nygård, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027 (*Nygård*), the court observed that while section 425.16 does not define " 'public interest,' " it does mandate that its provisions " 'be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' " (*Id*. at p. 1039, quoting § 425.16, subd. (a).) With this in mind, the *Nygård* court explained that " 'an issue of public interest' . . . is *any issue in which the public is interested*. In other words, the issue 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." (*Nygård,* at p. 1042.)

In *Rivero*, the court identified three non-exclusive and sometimes overlapping categories of statements that have been found to encompass an issue of public interest under the anti-SLAPP statute. (*Rivero, supra,* 105 Cal.App.4th at pp. 919-924; *Cross, supra,* 197 Cal.App.4th at p. 373.) The first category comprises cases where the statement or activity precipitating the underlying cause of action was "a person or entity in the public eye." (*Rivero,* at p. 924; see, e.g., *Sipple, supra,* 71 Cal.App.4th at p. 239 [national figure]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651 [church subject to intense public scrutiny]; *Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 807-808 [a television show of "significant interest to the public and the media"].) The second category comprises cases where the statement or activity involved "conduct that could directly affect a large number of people beyond the direct participants." (*Rivero,* at p. 924; see, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 [home owners association's governance of 3,000

resident]; *Ludwig, supra,* 37 Cal.App.4th at p. 15 [environmental effects of mall development]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [potential safety hazards affecting residents of large condominium complex].) And the third category comprises cases where the statement or activity involved "a topic of widespread, public interest." (*Rivero,* at p. 924; see, e.g., *M. G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 [molestation of child athletes by coaches]; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162 [second-parent adoptions, particularly in the gay and lesbian community]; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1548-1549 [inappropriate relationships between adults and minors].)

In *Weinberg,* the court enumerated the following additional attributes of an issue that would make it one of public, rather than merely private, interest. "First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy . . . .' [Citation.] Finally, . . . [a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Weinberg, supra,* 110 Cal.App.4th at pp. 1132-1133; accord, *Cross, supra,* 197 Cal.App.4th at p. 374.)

Casselman has not submitted sufficient evidence to meet these standards. Casselman's declaration was based upon a single internet posting: an October 4, 2014, article by the Edmonton Sun concerning Pocklington and an upcoming celebration of the Edmonton Oilers' 1984 Stanley Cup victory. From this, the trial court took judicial notice that (1) Pocklington was the former owner of the Edmonton Oilers; (2) Pocklington was the team owner when the Oilers won the Stanley Cup in 1984; (3) during the period he owned the Oilers, Pocklington traded Wayne Gretzky to the Los Angeles Kings; and (4) the Edmonton Sun posted the article on the internet.

The trial court denied Casselman's request to take judicial notice that the online article included readers' comments about Pocklington, concluding that the truth of the comments was not a proper subject of judicial notice. Casselman has challenged that ruling and has asked this court to take judicial notice of the readers' comments pursuant to Evidence Code section 459. Casselman contends that the Edmonton Sun comments should be received for the limited purpose of establishing the fact that the public has made comments about Pocklington and not for the truth of the matters within the comments. We accept this limitation and grant the request, but the additional evidence does not change the result.

The sum total of the Edmonton Sun internet posting is insufficient to show that Cohen's statements about Pocklington were made in connection with a public issue or an issue of public interest. The posting includes 15 photographs, with no descriptions but which appear to depict activities related to the Oilers hockey team. The posting has a 47-line article, which begins "Peter Pocklington is coming!" and notes that Pocklington, the owner of the Oilers in the early 80's, plans to attend the 30th anniversary reunion of the Oilers' Stanley Cup victory. The

article mostly recounts events during Pocklington's ownership of the team in the 1980's, including his sale of Wayne Gretzky to the Los Angeles Kings. There is one line about Pocklington's recent activities, stating "On Sept. 20 last year, a California judge sentenced Pocklington to six months in prison followed by a further six months house arrest for breaching his probation on his perjury conviction." The posting also includes a readers' poll with the question "Do you think it's a good idea for Peter Pocklington to attend the Oilers 30th[?]" The results of the poll are not reported.

Although Casselman contends the readers' comments within the internet posting are significant, they are not. There is a total of 36 comments, but many are multiple posts by the same individuals; so there are no more than 25 identifiable readers who posted comments. Some comments are strongly negative (e.g., "I hope they arrest him when he gets off the plane. He owes this city a lot of money."; "Peter Pocklington is a first class sleaze bag. The amount of criminal activities he's been under investigation for would make a hardened criminal blush and he's still under investigation for several potential criminal ventures now."). Other comments are positive (e.g., "Peter Puck was a part of that great team as the owner, so why shouldn't he attend?"; "If it wasn't for Peter Puck, Edmonton wouldn't even be on the map. By all rights he should attend."). A number of comments aren't about Pocklington at all, but concern the current owner of the Oilers, the team owners who followed Pocklington, and the coach when the Oilers won the Stanley Cup.

In short, the Edmonton Sun internet posting is not evidence of a robust public debate about the misdeeds of someone in the public eye; it involves a small group of Oilers hockey fans reliving the old days and making a wide range of sports comments that include some negative and positive things about

Pocklington. This is insufficient under section 425.16, subdivision (e)(4). (See *Du Charme, supra,* 110 Cal.App.4th at p. 119 ["in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance."]; accord, *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 934; see also *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 81-84 [discussion within a small group of scientists was not protected activity]; *Weinberg, supra,* 110 Cal.App.4th at p. 1132 [discussion within a small audience of token collectors was not protected activity]; *Rivero, supra,* 105 Cal.App.4th at p. 919 [discussion within a limited group of public university employees was not protected activity].)

Casselman has argued that there is abundant evidence of Pocklington's celebrity status and the public discussion of his misdeeds, but that is not reflected in the record of this case. For the first prong of the anti-SLAPP statute, it is the defendant who has the burden to show that the plaintiff's action arises from protected activity. (*Equilon, supra,* 29 Cal.4th at p. 67.) The scant evidence presented by Casselman simply does not meet that burden. We therefore conclude the trial court properly rejected Casselman's arguments under section 425.16, subdivision (e)(4).

DISPOSITION

The order is affirmed. Respondent Eye Machine is entitled to its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

LAVIN, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.