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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

DECISION DIAGNOSTICS CORP. et al., Cross-defendants and Appellants, v. MATTHEW D. GIRARDI et al., Cross-complainants and Respondents.	B275935 (Los Angeles County Super. Ct. No. BC 591973)

APPEAL from an order of the Superior Court of Los Angeles County, Michael M. Stern, Judge. Affirmed.

Baer & Troff, and Eric L. Troff for Cross-defendants and Appellants.

No appearance for Cross-complainants and Respondents.

INTRODUCTION

Appellants Decision Diagnostics Corporation, Keith Berman (its president), and Pharmatech Solutions, Inc. (a subsidiary) filed a complaint for malicious prosecution and abuse of process against respondents Matthew D. Girardi, his law firm (The Girardi Law Firm, LLP), Emily Corporation and Joseph DiFabio (Emily's president). Respondents filed a cross-complaint alleging, among other claims, that appellants had defamed Girardi by posting libelous statements on a public website. Appellants filed a special motion to strike the defamation claim under Code of Civil Procedure section 425.16 (the anti-SLAPP motion).[1] The trial court initially granted the anti-SLAPP motion, but after further consideration, denied the motion. Appellants contend the trial court erred in denying the anti-SLAPP motion. For the reasons set forth below, we conclude that the defamation claim did not arise out of activities protected under section 425.16. Accordingly, we affirm the trial court's order denying the anti-SLAPP motion.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. *Complaint*

On August 20, 2015, appellants filed a complaint against respondents, alleging causes of action for malicious prosecution and abuse of process. The complaint alleged that in January 2009, Emily obtained a judgment against Decision Diagnostics in a Florida court, and in November 2009, Emily registered the

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

Florida judgment in Los Angeles Superior Court pursuant to the Sister State Money Judgment Act, sections 1710.10 et seq.

On June 26, 2012, Girardi filed a complaint against appellants on behalf of Emily. The trial court sustained appellants' demurrer to the complaint with leave to amend, after concluding that the complaint failed to allege facts showing Emily had suffered any damages not already encompassed by the sister state judgment. Subsequently, following several amendments and demurrers, what remained of respondents' complaint were allegations that appellants had committed fraud and had engaged in a fraudulent conveyance.

Appellants' complaint for malicious prosecution and abuse of process alleged that respondents improperly continued the trial date based on unsupported allegations that Girardi had received death threats. Subsequently, a week before trial was scheduled to start, respondents voluntarily dismissed their lawsuit. The complaint further alleged that respondents engaged in abusive discovery tactics, viz., respondents did not produce their two forensic accounting experts for deposition, Girardi posted malicious messages against appellants and their employees on a public bulletin board, and Girardi improperly obtained Berman's medical records. With respect to the malicious prosecution claim, the complaint alleged that respondents filed their lawsuit against appellants even though each respondent knew there were no facts to support the allegations in the lawsuit. With respect to the abuse of process claim, the complaint alleged that Girardi improperly obtained Berman's medical records for the "ulterior purpose of harassing, vexing, and annoying Mr. Berman."

B. *Cross-Complaint*

On October 27, 2015, respondents filed a cross-complaint against appellants, alleging causes of action for defamation, cyberstalking, intentional infliction of emotional distress and injunctive relief. On December 9, 2015, respondents filed a first amended cross-complaint (FACC). In the cause of action for defamation, the FACC alleged that from April 2014 until the present, appellants made over 600 factually disparaging and insulting posts on Yahoo!'s message board dedicated to discussing Decision Diagnostics.

The FACC specifically referenced 13 posts made within one year of the filing of the cross-complaint that it claimed were false as applied to Girardi. (See *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1237 [one-year statute of limitations for defamation runs from date allegedly defamatory statement is published].) These included:

"Matthew cannot understand modern technology."

"Matthew you are delusional."

"Matthew == coward."

"Matthew, you are a sick, sick man."

"Matthew (bounty) know [*sic*] his end is near."

"Matthew are the Manhattan Beach police still investigating your lies about death threats."

"Matthew, does Joe[2] know you are doing this trial by internet message board?"

"Matthew, I am sure you are wishing KB, your tormentor, the best of luck today."

"Matthew is a loser, a poor lawyer blinded by rage and the lack of self importance. However, Matthew did contact many of the company's former management and several former employees. And for that, Matthew will pay the price."

"Matthew, did you just make yourself very small? Are you doing another one of your famous forfeits?"

"Matthew, you posted last week that you sued Sasha for libel. What untruth are you going to stick to?"

"Matthew, axe murders and even J & J lawyers have more integrity than you. Present your evidence, I for one cannot wait."

"Matthew's mommy and daddy divorced long ago. Matthew is a momma's boy, and that's a reason he doesn't work at daddy's big time personal injury law firm in Los Angeles. Another reason is that Matthew is just incompetent and daddy doesn't hire losers with out of control rage."

C. *Anti-SLAPP Motion*

On January 29, 2016, appellants filed a special motion to strike the cause of action for defamation. In the motion, appellants argued that the defamation claim was based on

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[2] "Joe" is likely a reference to Joseph DiFabio, Emily's president.

activities protected under section 425.16, as the challenged posts were written statements made in a public forum in connection with an issue of public interest. They further argued that respondents could not demonstrate the defamation claim had minimal merit, as (1) no evidence was presented that appellants were responsible for any of the challenged posts, and (2) the challenged posts were not defamatory.

In opposition, respondents contended that the defamation claim did not arise out of protected activities, as (1) Girardi is not a public figure, (2) the civil litigation between the parties was not a matter of public interest, and (3) the challenged posts were not exercises of free speech but rather acts of fraud and harassment. Respondents further contended they could prevail on the defamation claim.

D. *Trial Court's Rulings*

On March 29, 2016, the trial court granted the anti-SLAPP motion, concluding (1) that the defamation claim was subject to anti-SLAPP scrutiny "as involving the exercise of free speech in connection with matters of public interest," and (2) that appellants failed to make a prima facie showing of a likelihood of success on the merits of the defamation claim.

On April 13, 2016, respondents moved for reconsideration. On May 23, 2016, the trial court granted the motion for reconsideration. It then denied appellants' anti-SLAPP motion.

Appellants timely appealed.

DISCUSSION

"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 . . . 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.) "Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Only a cause of action that satisfies both parts 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 v. Sletten* (2002) 29 Cal.4th 82, 89.) "We review a trial court's decision on a special motion to strike de novo." (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 129

Section 425.16 protects any act "in furtherance of [a] person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) Under the statute, an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' 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, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) Below, appellants argued the challenged posts fell within the scope of section 425.16, subdivision (e)(3), as statements made in a public forum in connection with a matter of public interest. On appeal, they contend the challenged posts also fell within the scope of section 425.16, subdivision (e)(2), as statements made in connection with an issue under consideration or review by a judicial body.

A. *Section 425.16, Subdivision (e)(2)*

Under section 425.16, subdivision (e)(2), "statements, writings and pleadings in connection with civil litigation are covered by [section 425.16], and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) "[A] statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 (*Neville*).) Examples of such protected statements include: (1) a letter from the attorney of a homeowners association informing members of the association of pending litigation involving the association (see *Healy v. Tuscany Hills Landscape & Recreation Corp*. (2006) 137 Cal.App.4th 1, 5), and (2) an e-mail from the president of a staffing company to the

company's clients describing the status of pending litigation between the company and a competitor (see *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055). (*Neville*, *supra*, at pp. 1264-1266.) Other statements protected under section 425.16, subdivision (e)(2) include any communications absolutely privileged under the litigation privilege of Civil Code section 47, viz., statements reasonably relevant to pending or contemplated litigation. (*Neville,* at pp. 1266-1267.) However, not all activity that has some connection to an official proceeding is protected under section 425.16, subdivision (e)(2). Rather, section 425.16, subdivision (e)(2) requires that the activity must have some connection to an issue under consideration or review. (*Neville*, *supra*, at p. 1264, citing *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 867-868 (*Paul*).)

Here, although some of the allegedly defamatory posts referenced the lawsuit Girardi filed against appellants, the posts do not relate to a substantive issue under review in the action. Stated differently, whether Girardi was a "loser," "coward," or "momma's boy," etc., was not relevant to the issues in the underlying action against appellants. (See *Paul*, *supra*, 95 Cal.App.4th at pp. 867-868 [attorney's investigation into and disclosure of securities broker's private information not protected activity under section 425.16, as that conduct had no bearing on the securities fraud at issue in arbitration proceeding]; see also *Nguyen v. Proton Technology Corp*. (1999) 69 Cal.App.4th 140, 148 [statement in letter of attorney for former employer to plaintiff's new employer that plaintiff had beaten his wife not privileged under Civil Code section 47, as that statement was not reasonably relevant to threatened litigation over new employer's and plaintiff's acts of unfair competition].) In addition, the

challenged posts were not statements updating interested shareholders on the status of the litigation between the parties. They did not inform readers about the litigation or the issues under review in the litigation. In sum, the allegedly defamatory posts were not protected under section 425.16, subdivision (e)(2).

B. *Section 425.16, Subdivision (e)(3)*

Appellants contend the allegedly defamatory posts are "written . . . statement[s] . . . made in . . . a public forum in connection with an issue of public interest." (§ 425.16., subd. (e)(3).) We agree that the posts were written statements made in a public forum. However, we conclude appellants have failed to establish that the challenged posts were made "in connection with an issue of public interest."

According to the FACC, the allegedly defamatory posts were made on Yahoo!'s message board for Decision Diagnostics. Such message boards are public fora because they are websites "accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576 (*Ampex*) [concluding that Yahoo!'s message board for Ampex is a public forum for purposes of section 425.16].) Thus, the challenged posts were written statements made in a public forum.

However, not all statements made in a public forum are protected under section 425.16, subdivision (e)(3). To fall within the purview of section 425.16, subdivision (e)(3), the statements also must be in connection with an issue of public interest. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.) Although section 425.16 does not define "an issue of public interest," a "few guiding principles can be gleaned from decisional authorities."

(*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 481 (*Grenier*).) "For example, 'public interest' is not mere curiosity. Further, the matter should be something of concern to a substantial number of people." (*Ibid.*) "Additionally, there should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a broad and amorphous public interest that can be connected to the specific dispute is not sufficient. [Citation.]." (*Ibid.*) "Finally, a defendant charged with defamation cannot, through his or her own conduct, create a defense by making the claimant a public figure. Otherwise private information is not turned into a matter of public interest simply by its communication to a large number of people. [Citation.]" (*Ibid.*)

Generally, courts have found statements were made in connection with an issue of public interest where "the subject statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation]." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924 (*Rivero*).) With respect to corporations such as Decision Diagnostics, several courts have held that a corporation may be a matter of public interest depending on (1) whether the company is publicly traded, (2) the number of shareholders in the company, and (3) whether the company has promoted itself by means of press releases. (See *Ampex*, *supra*, 128 Cal.App.4th at p. 1577 [company a matter of public interest where (1) it is a publicly traded company with 59 million outstanding shares; (2) it promoted its corporate activity through numerous and recent press releases; and (3) it is the

subject of the over 112,000 posts on Yahoo!'s message board]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1008 (*CompuXpress*) [company a matter of public interest where (1) it is a publicly traded company with 12 to 24 million outstanding shares; (2) it made use of press releases to promote the company; and (3) it lost $10 million as a result of defendants' conduct]; *Global Telemedia Int'l., Inc. v. Doe 1* (C.D. Cal. 2001) 132 F.Supp.2d 1261, 1265 (*Global Telemedia*) [company a matter of public interest where (1) it is a publicly traded company with as many as 18,000 investors; (2) it inserted itself into the public arena by means of numerous press releases; (3) its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole; and (4) a chat-room dedicated to company has generated over 30,000 postings]; but see *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500, 1509 [fact that foundation was one of the largest charitable organizations in Southern California, was subject to public oversight by the Attorney General, and donated a substantial amount of money every year to persons and entities affecting millions of people did not transform private disagreement among foundation's directors into a public issue or an issue of public interest]; *Rivero*, *supra*, 105 Cal.App.4th at pp. 919, 926 [employment dispute between local union members and University of California, Berkeley, did not involve a public issue, although the University employed at least 17,000 public employees].)

Relying on *Ampex*, *CompuXpress*, and *Global Telemedia*, appellants contend that the challenged posts were made in connection with an issue of public interest because Decision Diagnostics is a publicly traded company that routinely promotes

itself with press releases and has over 4,000 shareholders whose investments may have been threatened or devalued by Girardi's actions. However, appellants failed to demonstrate that the challenged posts were made "in connection" with Decision Diagnostics. Stated differently, the posts concerned the alleged activity and characteristics of Girardi, not the corporate activity or characteristics of Decision Diagnostics or its management. (See *Grenier*, *supra*, 234 Cal.App.4th at p. 481 ["there should be a degree of closeness between the challenged statements and the asserted public interest"].) *Ampex*, *CompuXpress*, and *Global Telemedia* are distinguishable, as those cases involved allegedly defamatory statements about a publicly traded company and its officers and directors. (See *Ampex*, *supra*, 128 Cal.App.4th at p. 1575 [defamation claim against anonymous poster who posted critical messages about company]; *CompuXpress*, *supra*, 93 Cal.App.4th at p. 1006 [company filed trade libel action against defendants for making false and disparaging statements about company and its officers and directors]; *Global Telemedia*, *supra*, 132 F.Supp.2d at p. 1264 [company filed trade libel and libel claims against defendants for making negative and allegedly libelous statements about company].)

Appellants do not contend that Girardi is a person in "the public eye." (*Rivero, supra,* 105 Cal.App.4th at p. 924.) Nor do they contend that defaming Girardi "could directly affect a large number of people beyond the direct participants," or that there is "widespread, public interest" in appellants' negative views of Girardi. (*Ibid*.) Additionally, as stated in *Grenier*, *supra*, 234 Cal.App.4th at page 482, otherwise private information about Girardi is not turned into a matter of public interest "simply by its communication to a large number of people." In sum,

appellants have not demonstrated that the challenged posts were made in connection with an issue of public interest. Accordingly, the defamation claim does not arise from protected activity, and the trial court properly denied appellants' anti-SLAPP motion.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.