2011 WL 2418085 (Cal.Superior) (Trial Order)
Superior Court of California,
Central Division.
Fresno County

THE REVENUE RESOURCE GROUP, Plaintiff,
v.
DASH DOLLS, et al. Defendants.

No. 11CECG00058.
June 7, 2011.

Order on Defendants' Motion to Strike Strategic Lawsuit Against Public Participation

Jeffrey Hamilton, Judge.

Oral argument was held on this matter on May 11, 2011. After considering the papers and the arguments of counsel, the Court GRANTS the motion. Defendants are ordered to prepare a judgment of dismissal in accordance with this ruling and submit same by June 27, 2011. The rulings by the Court and its reasoning are as follows.

1. Oral Testimony Request

This request is denied, as unnecessary to the resolution of the matter, and as no good cause was shown by plaintiff for presentation of live witnesses rather than declarations. California Rules of Court, Rule 3.1306(a).

2. Timeliness Issue

The Court finds that the motion is timely, based on the statement on the notices of acknowledgement and receipt that such receipt is "to be completed by sending before mailing." Mail service adds five days. Code of Civil Procedure section 1013(a) applies that five day addition to service by mail of "the notice or other paper."

Further, Code of Civil Procedure section 426.15(f) does not always require that leave to file a late motion be sought. Instead, it also permits the Court to hear a motion later than 60 days after service of the complaint, "in its discretion." Considering the strong public policy in favor of determining if anti-SLAPP protection is appropriate, a delay of five days is de minimus, and warrants an exercise of this Court's discretion to consider the motion on the merits.

3. Plaintiff's Objections to Evidence

Plaintiff made Objections Nos. 1 through 7 and Nos. 11 through 16 to news articles and other media discussions of the Kardashian Kard, on hearsay and other grounds. However, the materials are not offered for the truth of the matters stated in the publications, but to show that there was a public interest in this issue. These objections are overruled.

Plaintiff's Objection No. 17 is to a statement made by plaintiff's counsel and reported in the media. The same basis for the objections is tendered, however this is offered to show that plaintiff also knew of the public interest in the subject.

Plaintiff's Objections Nos. 8 through 10 are to the Connecticut Attorney General's letter, on the same basis. These objections are also overruled.

Plaintiff's Objections Nos. 18 and 19 are to defense counsel's recollection of the settlement discussions and extension of time to file this motion. They are not hearsay; counsel has a personal recollection of what he himself was involved in. The statements are not susceptible to the objections for lack of four dation, speculation, inadmissible opinion, or that they are argumentative. These objection's are also overruled.

Lastly, plaintiff's objection No. 20 is to all exhibits to the declaration of defense counsel. Those items are the media reports, the Connecticut AG's letter, and the correspondence between counsel in this case. The objections are made for the same reasons as the above and are overruled for the same reasons.

4. Defendants' Objections to Evidence

Objection No. 1 is made to paragraph 4 of Ms. Castro-Ayala's declaration describing the letter she is attaching. The objection is that the document speaks for itself. That is true, but the declaration contents authenticate it. This objection is overruled.

Objection No. 2 is to paragraph 5 of her declaration, wherein she relates she granted no extension on the 60 day period for the anti-SLAPP motion. The objection is that her statement is an inadmissible legal opinion, speculation, irrelevant, and lacks foundation. These are overruled. She knows what she personally did and did not do.

Objection No. 3 is to Mr. Miller's declaration, paragraph 6, stating his belief as to why the anti-SLAPP motion was filed. The objections are that the statement is an impermissible legal opinion, argumentative, lacks foundation, is speculation, and irrelevant. As a statement of evidence, it is speculation, and that objection is sustained. Objection No. 4 is to paragraph 8 of Mr. Miller's declaration, which Mr. Miller states is based on information and belief. The objection is hearsay, which is sustained. “An examination of the affidavits discloses that the statements therein were upon information and belief or hearsay evidence. Hence they were devoid of any evidentiary value.” *Jeffers v. Screen Extras Guild, Inc.* (1955) 134 Cal.App.2d 622, 623, 286 P.2d 30, citing *Kellett v. Kellett* (1934) 2 Cal.2d 45, 48, 39 P.2d 203: “As evidence, an affidavit made upon information and belief is hearsay and no proof of the facts stated therein.” *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204, 151 Cal.Rptr. 721 relies on *Kellett* for this point.

Objection No. 5 is to paragraph 10 of Mr. Miller's declaration, concerning a letter sent to defense counsel. The objections are that the letter is argumentative and contains an impermissible legal opinion. These objections are overruled. A statement of position in a meet and confer letter is admissible to show that meet and confer occurred, and what was discussed.

Objection No. 6 is to paragraph 11 of Mr. Miller's declaration, wherein Mr. Miller states he never granted an extension for the anti-SLAPP motion. The objections are the same as for Ms. Castro-Ayala's declaration on this point, and are overruled for the same reason.

4. Discussion of Basic Tenets of anti-SLAPP Protection

“SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants.” *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App. 4th 855, 858. The relative burdens of the parties with regard to such a motion are set forth in *Shekhter v. Fin. Indem. Co.* (2001) 89 Cal.App.4th 141, 150-151, 106 Cal.Rptr.2d 843 (citations omitted):

"The burdens of proof on a special motion to strike pursuant to section 425 [are] as follows: Section 425.16, subdivision (b)(1), requires the trial court to engage in a two-step process when determining whether a defendant's section 425.16 motion to strike should be granted. First, the court decides whether the defendant has made a threshold prima facie showing that defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that 'there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1). The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue."

"In terms of the so-called threshold issue, the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. Once it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation. Under section 425.16, subdivision (b)(2), the trial court, in making ??ts determination, considers the pleadings and affidavits stating the facts upon which the liability or defense is based."

5. The Complaint Involves Exercise of Free Speech by Defendants

In this case, there was a contractual agreement that bound defendants to limit their speech on the subject of the Kardashian Kard to positive, promotional speech, in return for financial gain. Breaching a contract does not normally fall under the free speech umbrella, even if one notifies the media of the breach. See *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal. App. 4th 1108. 1117:

> "It is irrelevant that plaintiff did not file this suit until *after* defendant's president filed a declaration on behalf of a party in a different lawsuit. It is even irrelevant if the instant case was filed ?? *retaliation* for defendant's having submitted the declaration. The filing of that declaration is not what this case is based on. This is a breach of contract suit based solely on defendant's alleged failure to comply with specific provisions in the settlement agreement."

For example, attorneys may not avoid malpractice suits over litigation conduct merely because the attorney's words were spoken in connection with litigation. It is the attorney's negligence, his or her breach of the contract to provide competent services, that is the crux of the complaint, not the speech. *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal. App. 4th 624, *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App. 4, 10 P.2d 801th 1179.

But also see *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 73 Cal.Rptr.3d 383. In that case, an employer sent out a letter to competitors warning them to steer clear of a terminated employee that the employer was planning on suing for breach of contract, which included dissemination of trade secrets. The employee sued for defamation. The lawsuit was based on the letter's dissemination. The Court ruled that the anti-SLAPP statutes did apply there.

Here, the conduct complained does involve a breach of contract by the defendants, who admittedly refused to carry out its terms. They refused to promote the card by any means past the date of their attorney's letter to plaintiff. However, there are also allegations that directly tie the defendants' public statements to the damages claimed by plaintiff.

For example, plaintiff claims it lost future business because the defendants let their intent to breach be known publically. In paragraph 52, for example, plaintiff charges that the public termination submitted it to public ridicule and constituted negative publicity about plaintiff and its products. In paragraph 54, plaintiff directly attributes closure of its business to

the negative publicity about this product. In paragraph 55, it lists two other celebrities with whom it was in negotiations at the time of the Kardashians' breach, who subsequently failed to enter into an agreement for promotion of a similar product -- due to the bad publicity.

We do not have a mere breach of contract action here, seeking recovery from the Kardashians of the contract damages for their breach of same. Instead, we have an attempt to also charge the defendants with loss of all other business unrelated to them, specifically tied to defendants' exercise of free speech. These allegations require a finding that the complaint does, in part, proceed from the Kardashians' exercise of free speech rights on a matter of public interest, under Code of Civil Procedure section 425.16(e)(2) and (3). The evidence of media reports and investigation by a government agency are more than sufficient to show an existing public interest before the defendants issued the public statement complained by plaintiff. [1]

6. Probability of Success Is Not Shown

The burden now shifts to plaintiff to make a prima facie showing of probability of success. That there was a breach of contract is admitted by the offer of the termination letter by defendants. There is no need of further proof o?? breach.

While defendants have not filed an answer, certainly the parties' discussion of media coverage and the statements by the Connecticut Attorney General raise a defense on the basis that the contract called for promotion of an unlawful product, either unlawful in the means of promotion by lacking full and careful disclosure of the downside, or unlawful in the very fact of the various charges.

Such coverage also makes it questionable as to whether or not contract damages could be shown. Plaintiff alleges that is was the publicity that killed off its business and ran off other potential celebrity clients. But it was not merely the Kardashian termination letter that did that -- it was the onslaught of negative coverage before and after their statement about the fees and charges associated with the card. In other words, the product's features themselves caused the problem once they became clearer to the public. The Kardashians merely made admitted that the concerns already voiced by others raised a sufficient question that the product might be unlawful or unfair that they no longer wished to be involved.

One may not enforce an unlawful contract. Civil Code section 1667, which states: “That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals.”

Once the publicity started, it would naturally cause loss of sales, no matter the source. Plaintiff has not met its burden to show that ??t is likely to prevail, because it has not addressed the claim the contract involved an unlawful/fraudulent product or how damages could be proven even had the defendants remained silent, given the record before the Court of apparently universal condemnation of the product's profit making features.

7. Attorney's Fees

Fees can be denied entirely if the anti-SLAPP motion was mostly unsuccessful. *Moran v. Endres* (2006) 135 Cal.App. 4, 26 P.2d 528th 952. But normally they should be awarded. *Mann v. Qualify Old Time Service, inc.* (2006) 139 Cal. App. 4th 328. The hard and fast rule is that unless the work pertains to the anti-SLAPP motion itself, no fees may be awarded. *Wanland v. Law Offices of Mastagni, Hoisted?? & Chiurazzi* (2006) 141 Cal. App. 4th 15.

In determining fees, the Court is vested with discretion. “The ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed

unless the appellate court is convinced that it is clearly wrong' -- meaning that it abused its discretion." *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511.

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*Id.* at 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511.) The Court arrives at that figure by looking to "a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*Id.* at 1096, 95 Cal.Rptr.2d 198, 997 P.2d 511.) Further, "The reasonable hourly rate is that prevailing in the community for similar work." (*Id.* at 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511.) In this case, that would be in Fresno.

The rates charged are admittedly Los Angeles rates. Mr. Kump charges $595 an hour, and Mr. Reynolds charges $450. The Court finds that the motion was not of such difficulty that it required the expertise of a particular attorney found only outside the Fresno area. A reasonable fee in this area for one of Mr. Kump's experience is $350 an hour, and for Mr. Reynolds is $300 and hour. The Court also finds that the reasonable amount of time for the work on this motion is 7.5 hours for Mr. Kump and 14 hours for Mr. Reynolds. Reasonable attorney's fees are therefore $6,825.00.

DATED this 7th day of June, 2010

<<signature>>

Jeffrey Hamilton

Judge of the Superior Court

Footnotes

1 Section 425.17 does not apply because the complained of conduct involved defendants doing the *opposite* of promoting card