GIFFIN v VASCONCELLOS, et al.

23CV46905

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On August 28, 2023, Robin Giffin ("Plaintiff") filed a Complaint against Steven Crane Vasconcellos ("Vasconcellos"), Sierra View Financial Corp. ("SVFC"), and County of Calaveras ("County"), seeking orders for partition, accounting, injunctive relief, and declaratory relief.[1]

On July 11, 2024, Plaintiff filed a motion seeking a preliminary injunction ordering Vasconcellos to "immediately terminate and thereafter refrain until further order of the court, from any grading, earthmoving, or construction, or contracting with anyone else, or otherwise consenting to or allowing anyone else, to do any grading, earthmoving, or construction on the Subject Property or any of the adjacent property owned by the Bureau of Land Management."

As set forth below, Plaintiff's unopposed motion for preliminary injunction is **GRANTED**.

I. Factual Background

Plaintiff is a co-owner, as a tenant in common, of the real property commonly known as 16789 Highway 26, Glencoe, CA 95232 ("Subject Property") which is at the heart of the underlying Partition Action. Defendant Vasconcellos is the only other co-owner; the other defendants have liens of record on the Subject Property.

The Subject Property consists of about fifteen acres accessible from Highway 26 by an unpaved road of about two miles in length. There are two houses on the Property, one occupied by Plaintiff's caretaker and the other occupied by Vasconcellos (Declaration of Robin Giffin ("Giffin Decl.") ¶ ¶ 1, 2.)[2]

There are two related cases pending in Calaveras County Superior Court. The first is an Unlawful Detainer action Vasconcellos filed against caretaker Cam Luc (23UD 14167) that was judicially dismissed (Giffin Decl. ¶ 3.). The second related matter is a criminal case in which Vasconcellos is charged with a felony assault of Cam Luc (24F8898).

On or about May 11, 2024, Plaintiff learned from neighbors that Vasconcellos had hired workmen using heavy construction and grading machinery to conduct a grading operation covering a large area of the Subject Property. Plaintiff had no knowledge of

[1] Plaintiff has substituted Flagstar Banc Corp for Doe 1 and Mortgage Electronic Registration Systems, Inc. for Doe 2.

[2] Plaintiff lives in Placer County.

and had not consent to such work. (Giffin Decl. ¶ 5.) Plaintiff has never been provided with plans for any type of project and has never been provided with either an application for a building permit or the permit itself. (Giffin Decl. ¶ 6.) Approximately half of the area being worked on is BLM land. (Giffin Decl. ¶ 6, Ex. 3.)

On May 22, 2024, Plaintiff received an email from the Calaveras County Department of Public Works containing multiple photographs and a letter addressed to Plaintiff in which Public Works Permit Technician Sarah Liptrap stated:

> On May 16, 2024, a Stop Work Notice was placed at 16789 Highway 26 for unpermitted grading activity and stormwater issues. The Public Works inspector noted that approximately 350 cubic yards of material was moved with +/- 9 feet of uncompacted fills. The earthwork and grubbing activity appeared to enter an adjacent property owned by the Bureau of Land Management (BLM).
>
> The inspector spoke with someone on site who identified himself as the property owner and explained the requirements of an engineered grading permit after learning of the intent to build a structure at the graded location.
>
> An engineered grading permit is required, and all necessary erosion and sediment control measures must be installed immediately.

The letter concluded, “No work shall take place, excepting immediate installation of erosion and sediment control measures" and demanded that written correspondence acknowledging the requirements of the engineered grading permit must be received by the Public Works no later than May 30, 2024 (Giffin Decl. ¶ 9.)

Despite the stop work notice, on or about June 1 or 2, 2024, Plaintiff learned that the grading and earthwork had resumed. (Giffin Decl. ¶ 9.)

During the pendency of this action, whether Vasconcellos is being represented by counsel has been unclear. Attorney David Axelrod has represented Vasconcellos in the pending criminal action involving Cam Luc. On May 23, 2024, Mr. Axelrod expressed to Plaintiff’s counsel that he also represented Vasconcellos in the instant matter, but only for purposes of settlement. (Declaration of M. Campbell (“Campbell Decl.”) ¶¶ 2-6.) On June 3, 2024, Plaintiff’s counsel contacted Mr. Axelrod to determine whether communications about stopping work and proposed plans for the Subject Property fell within the confines of his representation of Vasconcellos. (Campbell Decl. ¶ 4.) On June 6, 2024, Mr. Axelrod reiterated that he was only representing Vasconcellos for settlement discussions, but that he might soon be engaged to represent him fully and “would let [Plaintiff’s counsel] know”. (Campbell Decl. ¶ 5, Ex. 6.) (The parameters of Axelrod’s representation of Vasconcellos has been clarified by the filing of an unlimited Substitution of Attorney filed on August 6, 2024.)

On June 21, 2024, Plaintiff's counsel sent an email to Mr. Axelrod that contained proposed language for a preliminary injunction and asked him if his client would stipulate to such an order, and if not, what modifications they proposed. Mr. Axelrod responded that there was no need for a preliminary injunction because:

> Mr. Vasconcellos has suspended all work of this nature on the property in question. He will stipulate and agree to continue the suspension, at least until necessary permits have been obtained and any other objections have been resolved. (Campbell Decl. ¶ 9, Ex. 8.)

On June 24, 2024, Plaintiff's counsel sent Mr. Axelrod language for a proposed agreement under which Vasconcellos would formally agree to cease any work on the Subject Property during the pendency of the underlying action. (Campbell Decl. ¶ 10, Ex. 9.) Mr. Axelrod did not respond to that email.

II. Legal Standard and Analysis

Typically, when determining whether to issue a preliminary injunction, the court considers two interrelated questions: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *see also Robbins v. Sup. Ct*. (1985) 38 Cal.3d 199, 206; Code Civ. Proc., § 526.)

However, in partition actions, the Court may issue a preliminary injunction for the purpose of 1) preventing waste, 2) protecting the property or title thereto, and c) restraining unlawful interference with a partition of the property ordered by the court. (Cal. Code Civ. Proc. § 872.130(a)-(c).)

Here Plaintiff has shown that despite an official stop work order, Vasconcellos has continued to conduct a large scale earthwork project on the shared Subject Property. This work has continued without a permit and, presumably, without the requisite immediate installation of erosion control measures. Plaintiff has, via counsel, attempted to work with Vasconcellos to either understand the nature of the project, or to have Vasconcellos stop the project until the underlying partition is completed. Nonetheless, Vasconcellos appears to continue the project and has failed to respond to reasonable overtures by Plaintiff's counsel.

Accordingly, there is great risk that without a preliminary injunction, Vasconcellos' actions will contribute to waste, will diminish or negatively affect the property or title thereto, and will unlawfully interfere with any partition ordered by this Court. As such, the Court is empowered to grant the Plaintiff's application for restraining order. Further, the Court notes that Vasconcellos failed to file any opposition to the present motion, despite his counsel's knowledge of the Plaintiff's application. "A failure to oppose a

motion may be deemed a consent to the granting of the motion." (Cal. Rule of Court 8.54(c).)

Accordingly, Plaintiff’s application for a preliminary injunction is **GRANTED**.

The Clerk shall provide notice of the Ruling forthwith. Plaintiff to submit a formal Order pursuant to Rule of Court 3.1312 in conformity with this Ruling.

WELLS FARGO BANK, NA v LACY

22CF14003

PLAINTIFF'S MOTION TO AMEND JUDGMENT

On February 14, 2024, a default judgment was entered in favor of Plaintiff and against Defendant in the amount of $11,223.43 (comprised of $10,740.58 in damages, $474.85 in court costs and $8.00 in attorney fees). Plaintiff files the instant motion to correct a scrivener's error regarding attorney fees and requests the amount be amended to $800.00.

The motion does not comply with Local Rule 3.3.7. All matters noticed for the Law & Motion calendar shall Include the following language in the notice:

> 3 3 7 Tentative Rulings (Repealed Eff 7/1/06, As amended 1/1/18) All parties appearing on the Law and Motion calendar shall utilize the tentative ruling system. Tentative Rulings are available by 2:00 p.m. on the court day preceding the scheduled hearing and can be accessed either through the court's website or by telephoning 209-754-6285. The tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the Court no later than 4:00 p.m. on the court day preceding the hearing including advising that all other sides have been notified of the intention to appear by calling 209-754-6285. Where appearance has been requested or invited by the Court, all argument and evidence Is limited pursuant to Local Rule 3 3. All matters noticed for the Law & Motion calendar shall Include the following language in the notice:
>
> **Pursuant to Local Rule 3 3 7, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. the court day before the hearing. The complete text of the tentative ruling may be accessed on the Court's website or by calling 209-754-6285 and listening to the recorded tentative ruling. If you do not call all other parties and the Court by 4:00 p.m. the court day preceding the hearing, no hearing will be held and the tentative ruling shall become the ruling of the court** [emphasis in original.]
>
> Failure to include this language In the notice may be a basis for the Court to deny the motion.

In the instant matter the Court finds that the unopposed Motion to Amend Judgment though set on Law and Motion calendar is akin to an administrative, or clerical matter, and inclusion of notice in motion is excused.

Plaintiff argues that the $8.00 in attorney's fees was a clerical scrivener's error that is patently obvious when considering Local Rule 3.3.3. Under this rule, an attorney's fees awarded in a default shall be calculated as "25 percent of first $1,000 (with minimum fee of $150); 20 percent of next $4,000; 15 percent of next $5,000; 10 percent of next $10,000; 5 percent of next $30,000; and 2 percent of the amount over $50,000." Under this framework, a judgment of $10,000.00 would warrant attorney's fees of approximately $1,800.00.

The original request for $8.00 is an obvious error. The actual request for $800.00 is reasonable and well within the framework of the local rule for awarding attorney's fees. Accordingly, Plaintiff's motion is **GRANTED**.

The Clerk shall provide notice of these Rulings to the parties forthwith. The Court intends to sign the submitted Amended Judgment.

DISCOVER BANK v MASON

CF8837

DEFENDANT'S CLAIM OF EXEMPTION

On April 29, 2010, Discover Bank ("Discover") obtained a judgment against Laverne Mason ("Mason") in the amount of $10,609.80, with a current balance to satisfy of $18,204.00. After Discover filed a renewal of judgment, the Court issued a new Writ of Execution on April 26, 2024. After Lassen County withheld funds, Mason filed a claim of exemption which Discover opposes.

Code of Civil Procedure section 706.050(a) states:

> Except as otherwise provided in this chapter, the maximum amount of disposable earnings of an individual judgment debtor for any workweek that is subject to levy under an earnings withholding order shall not exceed the lesser of the following: (1) Twenty-five percent of the individual's disposable earnings for that week; (2) Fifty percent of the amount by which the individual's disposable earnings for that week exceed 40 times the state minimum hourly wage in effect at the time the earnings are payable.

Mason states that her monthly income is $4,881.19. From this monthly amount, $415.47 is deducted for federal and state withholding, $115.37 for state tax, $302.18 for health insurance, and $2.00 for "RPESJC Duc." Mason therefore states that her monthly take home pay is $4,046.21. After expenses, Mason states that her disposable income is $105.16 per month. Mason does not specifically identify the source of her monthly income nor does she state whether she is paid monthly, bi-weekly, or weekly.

Mason seeks to have her County Employee Retirement Benefits and her Social Security Benefits declared exempt pursuant to Code of Civil Procedure section 704.110 and 42 U.S.C. section 407.

Code of Civil Procedure section 704.110(d) provides:

> All amounts received by any person, a resident of the state, as a public retirement benefit or as a return of contributions and interest thereon from the United States or a public entity or from a public retirement system are exempt.

42 U.S.C section 407 provides that the social security payments are protected from execution and garnishment.

Discover does not address Mason's arguments about social security or retirement but only states that it will agree to accept the applicable rate of net earnings under CCP 706.050 per pay period by way of payment installment until paid in full.

Because Mason has not provided information about the source of her income nor how it is paid, it is impossible for the Court to determine the appropriate amount for withholding.

Defendant's claim for exemption of social security and public benefits is **conceptually GRANTED**. However, Defendant is ordered to file a financial statement explicitly setting forth the source of her monthly income and whether she is paid monthly, bi-weekly, or weekly so the Court may determine the amount of withholding to be ordered. This statement must be filed by 3:00 p.m. on August 30, 2024. This hearing is continued to September 20, 2024, at 9:00 a.m. in Dept. 2 for a ruling setting a payment amount and schedule.

The Clerk shall provide notice of these Rulings to the parties forthwith. No further formal Order is required.

DVORAK v HOPE PUBLICATIONS, LLC.

24CV47332

DEFENDANT'S SPECIAL MOTION TO STRIKE

On April 22, 2024, Michael Dvorak ("Plaintiff") filed a complaint against Hope Publications LLC, dba Calaveras Enterprise ("Defendant") alleging causes of action for: 1) defamation, 2) libel, 3) false light, 4) defamation "per se", 5) defamation "per quod", 6) intentional infliction of emotional distress, 7) negligent infliction of emotional distress, and 8) damages.

Now before the Court is Defendant's special motion to strike pursuant to Code Civ. Procedure section 425.16.

Defendant's Request for Judicial Notice is GRANTED in full.

I. Background

Plaintiff is a member of the Board of Directors of the Calaveras County Resource Conservation District ("Calaveras RCD"). (RJN ¶ 12, Ex. 3.) He was appointed to the seven-member board in January 2022 by the County Board of Supervisors. (*Id*., Ex. 4.)

Defendant is a publishing company that operates a locally owned newspaper called the Calaveras Enterprise ("Newspaper"). (Complaint ¶¶ 12-13.) The Newspaper is printed once a week but is also available daily online. (*Id*. ¶ 14.) Plaintiff alleges that in the October 11, 2023 edition, the Newspaper published an "erroneous felony booking log", as follows:

> Michael Dvorak, 46, at 11:42 a.m. on the 10200 block of Pool Station Road in San Andreas and booked on Vandalism deface property a felony charge. (Complaint ¶¶ 17, 18, Ex. A.)

Plaintiff alleges that after a friend notified him of this report in the newspaper, he became mortified and suffered emotional distress. Plaintiff further alleges that on or about November 3, 2023, Plaintiff emailed the Defendant to take down the erroneous booking log post from their online website (Complaint, Ex B.) but Defendant failed to respond.

Plaintiff alleges that the Defendant uses the local sheriff / county office "Media Bulletin" to publish local arrest / booking logs and that in this instance, Defendant filed to verify

the County's information. After some apparent back and forth, on or about January 31, 2024, Plaintiff received a response from Sheriff DiBasilio and Deputy County Counsel Kara Frank, stating:

> "The Sheriff's Office cannot send a booking sheet because, as you also stated, you were not booked so there is no booking sheet." (Complaint ¶ 29, Ex. C.)

On or about February 5, 2024, Defendant took down the published news about Plaintiff's felony booking log.

II. Legal Standard

"The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected conduct from the undue burden of frivolous litigation." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.) "The anti-SLAPP statute does not insulate defendants from any liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." (*Id.* at 384.)

Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims arise from protected activity in which the defendant has engaged. If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least minimal merit. (Code Civ. Proc., § 425.16; *Park v. Bd. of Trustees of California State Univ*. (2017) 2 Cal. 5th 1057, 1061.) "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 v. Sletten* (2002) 29 Cal.4th 82, 89.)

The party opposing the special motion to strike must proffer a prima facie showing of facts supporting a judgment in his favor. (*Navellier v. Sletten*, (2002) 29 Cal.4th 82, 89.) In making its determination, "the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.] In making this assessment it is the court's responsibility to accept as true the evidence favorable to the plaintiff. [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

The plaintiff must also overcome substantive defenses to demonstrate a probability of prevailing. (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 434; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 [no probability of prevailing where claims are barred by the litigation privilege under Civil Code section 47.])

III. Discussion

A. Defendant has met its initial burden.

Defendant first bears the burden of establishing that the challenged allegations or claims arise from protected activity in which the defendant has engaged. Here, it has met that burden because the publication of the booking log was a statement made "in a public forum in connection with an issue of public interest." (Code Civ. Proc. § 425.16(e)(3); *Sonoma Media Invs. v. Super. Ct.*, (2019), 34 Cal. App. 5th 24, 33-34 (newspapers and their websites are "public forums" under the statute). Moreover, the newspaper's reporting in the Booking Log about alleged criminal activity clearly relates to "an issue of public interest." (*See, e.g.*, *Kapellas v. Kofman*, (1969), 1 Cal. 3d 20, 38: "Newspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed.").

B. Prima Facie Case

Because Newspaper has met its initial burden, the burden now moves to the Plaintiff to demonstrate that the allegations of the Complaint are both legally sufficient and supported by a sufficient prima facie showing of facts supporting a judgment in their favor. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) The party opposing the special motion to strike must proffer a prima facie showing of facts supporting a judgment in his favor. (*Navellier v. Sletten*, (2002) 29 Cal.4th 82, 89.)

1. Defamation/Libel/False Light[3]/Defamation Per Se/Defamation Per Quod

To carry his burden on the various defamation and libel claims, Plaintiff must demonstrate that he has pleaded, and has admissible evidence demonstrating, that the Booking Log is materially false, defamatory, and unprivileged and that its publication entitles him to damages. (*See Med. Marijuana v. ProjectCBD.com*, (2020) 46 Cal. App. 5th 869, 884 (2020). Because Plaintiff is a public figure, he must also demonstrate that the Defendant acted with "actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Reader's Digest Assn. v. Superior Cour*t, (1984) 37 Cal.3d 244, 250, citing *New York Times v. Sullivan* (1964), 376 U.S. 254, 279-80.)

Defendant preemptively argues that Plaintiff cannot carry his burden because the allegations are based on information obtained from the police Booking Log and are therefore absolutely privileged. Civil Code section 47(d)(1) makes privileged a "fair and true report in, or a communication to, a public journal, of [a] public official proceeding,

[3] False light and defamation are "essentially equivalent" causes of action. (*Fellows v. National Enquirer, Inc.*, (1986), 42 Cal.3d 234, 248 fn. 12.)

or…anything said in the course thereof." The crime reports of a police department are qualifiedly privileged under the Civil Code. (*Hayward v. Watsonville Register-Pajaronian Sun* (1968) 265 Cal.App.2d 255, 260.)

The act of accurately reporting what was contained in a police investigation record or Booking Log is privileged. Here, Defendant accurately reported what was in the police records, specifically, information that Calaveras County Sheriff's Office ("CCSO") posted to Citizen RIMS.[4] (Declaration of Corissa Davidson ¶¶ 9-12, 15.) Davidson used no other source of information for the Booking Log. (*Id.* ¶ 12, 15.) She prepared it by consulting the CCSO-published entries on the Arrests page of Citizen Rims as of October 11, 2023, and reporting it in the Booking Log. (*Id.* ¶¶ 9-15.) The Booking Log constitutes a fair and true report of the CCSO's communications concerning a judicial and/or "public official proceeding." (Cal. Civ. Code § 47(d)(1).)[5] Notably, Plaintiff does not dispute that CCSO, on October 5, 2024, reported that it had arrested him on a felony vandalism charge.

California " 'permits *no cause of action* based upon the defamatory nature of a communication *which is itself privileged under the defamation laws*.' " (*Brody v. Montalbano* (1987) 87 Cal.App.3d 725, 738-39 [citation omitted].) Accordingly, as the information Defendant published in the Newspaper was privileged as an accurate report of CCSO's communications concerning a public official proceeding, Plaintiff may not maintain any causes of action based in defamation law.

2. Remaining Causes of Action

Plaintiff also maintains causes of action for negligent and intentional infliction of emotional distress. Plaintiff may not maintain these causes of action either. The U.S. Supreme Court has defined a "zone of constitutional protection within which one could public concerning a public figure without fear of liability." (*Reader's Digest Assn. v. Superior Court,* (1984), 37 Cal.3d 244, 265, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269.) Further, that "constitutional protection does not depend on the label given the stated cause of action." *(Ibid.*) Accordingly, Plaintiff's remaining causes of action also fail because "liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication." (*Id*. at 265-266.)

[4] Citizen RIMS provides visitors access to several categories of information, including information about arrests (under the site's "Arrests" tab) and a "media bulletin" in which the CCSO disclosed information about recent calls for service ("Bulletin" tab). (Davidson Decl. ¶ 9.)

[5] Plaintiff argues that the website the Defendant used was an unofficial source but provides no evidence in support of this assertion.

III. Conclusion

For the foregoing reasons, Defendant's motion to strike is **GRANTED**. Plaintiff's Complaint is therefore stricken in its entirety and Judgment entered on behalf of Defendant. As the prevailing party, any claim by Defendant for costs and/or attorney's fees would be determined by subsequent motion(s). The Clerk shall provide notice of these Rulings to the parties forthwith. Defendant to submit a formal Order and Judgment pursuant to Rule of Court 3.1312 in conformity with this Ruling.