

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Special Set Calendar

Judge: HONORABLE TIMOTHY SCHMAL

Department 49

400 County Center, Redwood City

Courtroom 4B

Tuesday, August 27, 2024

IF YOU INTEND TO APPEAR ON ANY CASE ON THIS CALENDAR, YOU MUST DO ONE OF THE FOLLOWING:

1. EMAIL Fbernal@sanmateocourt.org BEFORE 4:00 P.M. CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING.
2. YOU MUST CALL (650) 261-5020 BEFORE 4:00 P.M. AND LEAVE A MESSAGE INCLUDING THE NAME OF THE CASE, THE CASE NUMBER AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING.
3. You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308(a) (1) .

Failure to do both items 1 or 2 and 3 will result in no oral presentation.

At this time, appearances shall be made by Zoom Video. Sign in using your first and last name. Mute your line until your case is called. RECORDING OF A COURT PROCEEDING IS PROHIBITED.

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TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

10:00

24-CIV-01575 RODNEY SORENSEN VS. SAN MATEO COUNTY BAR ASSOCIATION, ET AL.

RODNEY SORENSEN
SAN MATEO COUNTY BAR ASSOCIATION

JOSEPH C. SCHULTZ
JAMES A. MURPHY

DEFENDANT SAN MATEO COUNTY BAR ASSOCIATION'S SPECIAL MOTION TO STRIKE
TENTATIVE RULING:

I. SUMMARY OF RULING

The motion is denied. The Court does not find the challenged claims arise from acts in furtherance of defendant's right of free speech or right of petition.

II. BACKGROUND AND COMPLAINT

Plaintiff Rodney Sorensen's complaint against the San Mateo County Bar Association ("Association") brings causes of action for declaratory relief only. Sorenson alleges that the current arrangement in San Mateo County ("County") for legal services for indigent criminal defense is unlawful for two reasons: (1) trade associations are legally precluded from performing the responsibilities of a public defender office; and (2) the legal services agreements at issue are in violation of the Association's articles of incorporation and are thus void and unenforceable.

The Association strongly disagrees with the allegations. Its position is that it does not actually provide legal services, but rather hires private contractor lawyers to provide legal services for the indigent. Further, even if it did provide legal services and practice law, it is not precluded from doing so. The Association argues that the case law relied on by plaintiff does not reflect the current state of the law regarding non-profit corporations practicing law. (Complaint, Ex. 8.)

A. Indigent criminal defense in the County

The complaint does not describe how long the allegedly unlawful arrangement has existed.¹ In short, the County has no public defender office nor any law firm(s) providing indigent defense. Instead, the County hired the Association to run a Private Defender Program ("PDP"), which is not an independent legal entity. The PDP is a committee of Association members. (Complaint ¶ 3.) The Association employs PDP management lawyers (chief defender, assistant chief defender, managing attorneys) and hires other attorneys as panelists who provide indigent criminal defense services. The panel lawyers are classified as independent contractors of the Association and provide services pursuant to the Association's PDP Policies and Procedures

¹ The Association describes that the Private Defender Program has existed for 56 years. (Maguire Declaration, ¶ 2.)

Manual. (Complaint ¶ 4.) The PDP employs no one since it is not a separate legal entity. (Complaint ¶ 5.)

The PDP is funded pursuant to two legal services agreements – one with the County and one with the San Mateo County Superior Court (“Court”). The first (“County agreement”) requires the Association to provide qualified attorneys for financially eligible persons entitled to court appointed counsel in court matters. (Complaint, Exhibit 1, effective 7/1/23 through 6/30/28.) The Association also provides necessary and ancillary services (investigators, experts, forensic services), as well as staff to fulfill its obligations under the agreement. All those providing services are regarded as independent contractors of the County, not employees.

The County pays the Association in fixed-quarterly payments and generally, the fiscal year amounts range from \$23,666,049.00 to \$26,636,347.00 over the life of the agreement. The agreement has provisions for policies and procedures for panelists and staff, financial reporting, auditing, performance benchmarks, and termination notices and services. A fee schedule for panelists is attached to the agreement.

The second agreement is with the Court (“Court agreement”). It is also effective as of 7/1/23 for a five-year term and requires the Association to provide panel lawyers as court-appointed juvenile dependency counsel. The 2023-2024 fiscal year requires the Court to pay the Association \$765,432.00 for such services. (Complaint, Ex. 2.)

The complaint attaches previous agreements between the parties for 2021-2023 (Exs. 3, 4), the Association’s tax returns for 2021 (Ex. 5) and the Association’s articles of incorporation (Ex. 6) and correspondence between plaintiff and defendant. (Exs. 7, 8). Under the Association’s articles of incorporation, the corporation’s specific purposes are:

1. To facilitate and promote the administration of justice and the practice of law in the County;
2. To encourage legal education of Bench and Bar and to promote a spirit of cordiality and courtesy among the members of the Bar;
3. To cooperate in the work and purpose of the State Bar;
4. To uphold and elevate the standard of honor, integrity and courtesy in the legal profession.

Its general purpose is to carry into effect those specific purposes and to exercise any or all of those powers or any other powers authorized by law, provided that it shall not “carry on propaganda, or otherwise attempt to influence legislation or to participate in or intervene in any political campaign....” (Complaint, Ex. 6, Art. II.)

B. Complaint for declaratory relief

Sorensen’s complaint alleges an actual controversy exists between the parties. Sorensen, an Association member since 2020, articulated via a 12/14/23 letter to the Association the

reasons he believes its agreements for legal services are void. On 3/8/24, the Association responded and denied that the agreements are void and unenforceable. Thereafter on 3/12/24, Sorensen filed this suit.

Sorensen's causes of actions and prayer seek:

1. A declaration that the contract for legal services between the Association and County is void for illegality;
2. A declaration that the contract for legal services between the Association and Court is void for illegality;
3. A declaration that the contract for legal services between the Association and County is void as ultra vires; and
4. A declaration that the contract for legal services between the Association and Court is void as ultra vires.

Sorensen's prayer also seeks an order to appoint a receiver to wind down the Association's public defender panel, injunctive relief, and an order that defendant pay his fees and costs pursuant to CCP § 1021.5 and any other applicable statutes.

III. MOTION

A. Moving papers

Defendant moves to strike the complaint for declaratory relief pursuant to CCP § 425.16(e)(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." Defendant appears to identify the protected activity as communicative conduct such as the filing, funding, and prosecution of an action, decisions regarding hiring and firing one's attorney, and decisions to fund litigation. It argues the anti-SLAPP statute may be invoked by one who did not personally engage in the protected communicative conduct, citing *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18: "A person can exercise his own rights by supporting the forceful activities of others; it would be absurd to hold that the confident opponent who takes the public podium is protected, while the shy opponent who prefers to lend moral support by standing silently in the audience is not."

It argues that the illegal conduct and public interest exceptions to the anti-SLAPP statute do not apply here. First, plaintiff's allegations that the Association is engaged in illegal conduct are not sufficient to exempt the complaint from the anti-SLAPP statute. It is plaintiff's burden to conclusively prove the alleged conduct is illegal. (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 385; *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 613.) It argues the California Supreme Court has narrowly construed the exception to Section 425.16 for illegal conduct to only two limited circumstances: where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley v.*

Mauro (2006) 39 Cal.4th 299, 320.) The rule from *Flatley* is limited to criminal conduct. (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169.)

Second, to invoke the public interest exemption, plaintiff must show: (1) he does not seek any relief greater than or different from the relief sought for the general public; (2) if successful, the action would enforce an important right affecting the public interest and would confer a significant benefit on the general public or a large class of persons; (3) private enforcement is necessary; and (4) the action places a disproportionate financial burden on the plaintiff in relation to his or her stake in the matter. (CCP § 425.17(b).) The Association argues plaintiff cannot meet this burden because (1) his action does not seek to enforce an important public right; (2) private enforcement is not necessary; and (3) he seeks relief apart from the purported benefit which would inure to the public. Further, this exemption cannot apply here since the Association receives more than half its annual revenues from government grants or reimbursements for services rendered. (Maguire Declaration, ¶ 2.) (CCP § 425.17(d)(3).)

B. Opposition

Plaintiff argues that the public interest exemption applies and prevents any anti-SLAPP motion from being granted. He contends his suit is intended to enforce an important right, that he does not seek any individual relief, that private enforcement is necessary, and that the Association's tax returns do not establish they earn more than 50% of their annual revenue from government grants, awards, programs or reimbursements. He argues that defendant cannot establish that the complaint arises from protected activity and that he will succeed on the merits.

He spends considerable time on the issue of illegality of the contract and that since its illegality is conclusive, the illegality exception to section 425.16 applies. He contends that trade associations like defendant are still precluded from practicing law, regardless of the changes in case law and legislation related to public interest and legal aid corporations. As for his argument that the Association's contracting here is an ultra vires act, he relies on the prohibition in its articles from entering into any contracts that result in the "pecuniary gain or profit for the members thereof" and the Association's members' receipt of PDP funds violates this provision.

C. Reply

Defendant argues that plaintiff has failed to meet his burden to show the public interest exemption applies and that defendant's function – administering legal representation – constitutes petitioning activity -- by merely reiterating the holdings of the previously cited legal authority. Defendant also contends plaintiff cannot show a reasonable probability of prevailing and has no standing to bring the action since he is not a party to the agreements and there is no actual controversy. However, the case cited by defendant, *Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562, does not require a finding here of no actual controversy. In the demurrer in *Otay*, the trial court properly exercised its discretion in finding the third party's interest in the insurance policy to be premature since it could not yet make claims as a judgment

creditor. (*Id.* at 566-567.) Here, plaintiff is an Association member who challenges its agreements with governmental agencies regarding allegedly unlawful expenditures. Ruling in this case would not require an advisory opinion; “[i]t must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” [Citations.]’ (*Id.* at p. 1722.)” (*Id.* at 562.)

III. LEGAL STANDARDS

A. Anti-SLAPP

The Legislature enacted Code of Civil Procedure section 425.16, known as the anti-SLAPP statute, to provide a procedural remedy to dispose of lawsuits and causes of action that are brought to chill the valid exercise of the constitutional rights to free speech and to petition the government for redress of grievances. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) The court must engage in a two-prong analysis on an anti-SLAPP motion, with shifting burdens of proof as to each prong. In prong one, the court determines whether the conduct underlying plaintiff’s cause of action arises from defendant’s constitutional rights of free speech or petition. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395.) This is a threshold issue; if moving party fails to show the conduct is constitutionally protected, the court need not address prong two. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) Under the second prong, the burden shifts to plaintiff to prove a legally sufficient claim and to prove with admissible evidence a reasonable probability of prevailing. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Plaintiff cannot rely on the allegations of the complaint but must produce evidence admissible at trial. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) To defeat the motion, plaintiff need only demonstrate a prima facie case as to either part of the claim. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570; Weil & Brown, *California Procedure Before Trial* (The Rutter Group) §§ 7:1005, 7:1020.)

If the anti-SLAPP is granted, the court may not grant leave to amend to allege or omit facts demonstrating the complaint is not subject to the anti-SLAPP statute. (*Simmons v. Allstate* (2001) 92 Cal.App.4th 1068, 1073 [“Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from [Code of Civil Procedure] section 425.16’s quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.”]; *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1005.)

A defendant party who prevails on an anti-SLAPP motion is entitled to recover his or her attorney's fees and costs incurred on the motion, but not for the entire litigation. (§ 425.16(c).) A defendant who prevails on only part of the motion may be entitled to an award of fees and costs (but only those associated with the successful part of the motion), unless the results of the motion were so insignificant that the defendant did not achieve any practical benefit from the motion. The court has broad discretion in making this determination. (Weil & Brown, §7:1135.)

B. Exceptions to the anti-SLAPP statute

While not statutory exemptions, there are cases not subject to anti-SLAPP. These include indisputably criminal conduct and true threats. (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478-1479 [exception for illegal activity applies only if no factual dispute as to illegality]; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1224-1225 [intentional threats are not constitutionally protected and therefore a complaint based on such threats is not subject to anti-SLAPP].)

To prevent the abuse of anti-SLAPP motions, the Legislature adopted exemptions to the anti-SLAPP statute – cases in which a special motion to strike cannot be filed. Those are generally actions brought solely in the public interest or on behalf of the general public (§ 425.17(b)) and claims brought against a person primarily engaged in the business of selling or leasing goods or services (§ 425.17(c).) Even if an action falls within one of these exemptions, nonprofits that receive more than 50% of their annual revenue from governmental sources can file an anti-SLAPP motion when sued in connection with protected activities. (§ 425.17(d)).

If an exemption is raised, courts usually determine if it applies before performing the two-prong analysis since an anti-SLAPP motion will not lie if the claim is exempt. (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 498.) The statutory exemptions are narrowly construed. (*Exline v. Gillmor* (2021) 67 Cal.App.5th 129, 138.) Plaintiff bears the burden of proof as to the applicability of exemptions from the anti-SLAPP statute. (*Ibid.*)

IV. DISCUSSION

A. No applicable exemptions prevent an anti-SLAPP motion here

First, the illegality exception does not apply since there is a dispute as to whether the agreements are illegal and there is no indication the agreements entail criminal activity. (*Zucchet v. Galardi, supra*, 229 Cal.App.4th at 1478-1479; *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654 [“illegal” means criminal conduct, rather than a violation of a statute or common law standard]; *Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1046-1047 [court may evaluate whether conduct is illegal based on the complaint].)

While the public interest exemption appears to be relevant, the Association receives over half of its annual revenue from “federal, state, or local government grants, awards, programs, or reimbursements for services rendered,” thereby negating the exemption. (Maguire Decl. ¶ 2.) Plaintiff’s argument that the Association’s tax returns identify the funds as “program service revenue,” which has a specific meaning under the federal tax code, is misplaced. Based on the plain meaning of “government grant, award, program, or reimbursement,” and defendant’s evidence, the Court finds that this exemption will not preclude the anti-SLAPP motion here.²

B. The gravamen of this case is about ending a contractual relationship, not petitioning activity

The first prong of the analysis is determining if petitioning activity is the thrust of the complaint. If so, the complaint must be stricken because it chills the valid exercise of the constitutional rights to free speech and to petition.

“In determining ‘whether the challenged claims arise from acts in furtherance of the defendants’ right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e). [Citation.] ... ‘[w]e examine the principal thrust or gravamen of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies.’ [Citation.] The ‘gravamen is defined by the acts on which liability is based, not some philosophical thrust or legal essence of the cause of action.’ [Citation.] In other words, ‘for anti-SLAPP purposes [the] gravamen [of plaintiff’s cause of action] is defined by the acts on which liability is based.’ [Citation.]” (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111.) “Acts of governance mandated by law, without more, are not exercises of free speech or petition. ‘[T]he defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]’ (*Cotati, supra*, 29 Cal.4th at p. 78, italics in original.)” *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343, 354.)

1. The gravamen of this case – a purported illegal expenditure of public funds

² Defendant argues that even if its annual revenue from governmental sources did not exempt it, plaintiff cannot show the public interest exemption applies because his action does not seek to enforce an important public right, private enforcement is not necessary, and he seeks relief apart from any purported benefit to the public. However, at this pleading stage, these arguments are not supported by the complaint. Plaintiff is challenging the expenditure of public funds devoted to a constitutionally mandated public purpose but accomplished via a private entity. (U.S. Constitution, 6th Amendment; Penal Code § 987.2.) “The citizen-resident taxpayer who prevents an illegal expenditure of public funds not only safeguards his private interest in the amount of taxes he pays but upholds the general public interest in the fiscal integrity of his local government.” (*Bledsoe v. Watson* (1973) 30 Cal.App.3d 105, 109; see also *Humane Society of the United States v. State Board of Equalization* (2007) 152 Cal.App.4th 349, 361.) Based on the complaint, this case relates to an important public right, and there is no indication that plaintiff seeks any individual relief, aside from attorneys’ fees and costs pursuant to CCP § 1021.5 in the event he prevails.

Whether the Association is allowed to practice law or if the agreement is outside the scope of its authority is irrelevant at the moment. This motion is limited to if the complaint arises from protected activity, specifically conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest. (CCP § 425.16(e)(4).)

Unlike actions for damages, declaratory relief cases seek to “serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.” (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 364-365.) The practical end desired by plaintiff is the finding that the agreements are illegal, necessitating their demise. So the Court must determine if the gravamen of the case – declaring the agreements illegal – is premised on the exercise of the right to petition or free speech.

The agreements and the relationships formed by them are relatively simple: essentially, the Association accepts millions in public funds each year to hire private attorneys for indigent and juvenile clients. Based on the evidence, the Association does not actually provide legal services, but instead, is the intermediary between the client and counsel, pairing clients with qualified attorneys. (Maguire Decl. ¶ 3.) The Association’s acts underlying plaintiff’s causes of action are acts of contracting – accepting funds in exchange for assigning counsel -- not petitioning or engaging in free speech.

2. Defendant’s legal authority does not support petitioning activity

Defendant relies on five cases to establish that protected activity exists here: *Bowen v. Lin* (2022) 80 Cal.App.5th 155, 162; *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 680-681; *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 491; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; and *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17-19. But none of these cases establish that seeking to end a purportedly illegal agreement arises from protected activity.

Bowen and *Taheri* do not help defendant since the relationship between attorney and client, and their communication, is not at issue here. In *Bowen*, family members fired their attorney Bowen when their property repair dispute dragged on. Bowen then sued them for his unpaid fees, and they cross-complained for breach of fiduciary duty and malpractice. Bowen then filed his own cross-complaint for breach of oral contract and other interference claims against particular family members on the grounds they stopped cooperating with him, encouraged each other to fire him, and acted in concert to defraud him.

The appellate court found Bowen’s cross-complaint arose from protected activity – the family’s statements before a judicial proceeding and made in connection with an issue under review by a judicial body. (*Bowen v. Lin, supra*, 80 Cal.App.5th at 161-162.) The case helped clarify anti-SLAPP motions arising from attorney-client disputes: “Unlike a threat of malpractice, an attorney threatening litigation against former clients for decisions they made

while the attorney represented them *would* chill the constitutional right of petition by preventing the clients from fully and openly discussing litigation matters among themselves, with that attorney, or with another attorney. (See *Taheri, supra*, 160 Cal.App.4th at 489.) Such acts are at the very heart of the anti-SLAPP statute's protections. (*Ibid.*)” (*Bowen, supra*, 80 Cal.App.5th at 163.)

Taheri involved a law firm’s suit against an attorney who allegedly stole their client. The firm sued the other lawyer alleging contractual interference claims but the court found the claims related to communications between the client and new counsel about pending litigation, not soliciting activity. (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489.)

The Association’s hiring counsel for indigent clients is the conduct plaintiff seeks to end. While that conduct is necessary and a significant benefit to the public, it is entirely contractual. Plaintiff’s complaint seeks to end the relationship between the Association and two public entities, but that does not implicate the attorney-client relationship or attorney-client communications established between appointed counsel and the indigent (which could conceivably implicate petitioning activity).

Ludwig and *Lennar* found petitioning activity by defendants in their interests in civil lawsuits: in *Lennar*, a wife’s right of petition was invoked by her husband’s lawsuit even though she was not a party (*Lennar Homes of California, Inc. v. Stephens, supra*, 232 Cal.App.4th at 681); in *Ludwig*, parties who instigated suits and encouraged others to speak against a city’s discount mall project were found to have engaged in petitioning activity (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18). None of these activities are apparent here – instead, the crux of this case is if the agreements constitute illegal expenditures of public funds. Merely because a public purpose is the subject of the agreements – counsel for the indigent – does not render the contracts to implicate any petitioning or free speech activity.

Since under the first prong the Court does not find the challenged claims arise from acts in furtherance of defendant’s right of free speech or right of petition, the Court need not move to the second prong of the anti-SLAPP analysis.

Plaintiff’s Request for Judicial Notice:

Exhibits A-D, web news articles from various Northern California media outlets: Denied.

Defendant’s Objections to Plaintiff’s Evidence:

- 1.-4. Schultz Declaration, Exs. A-D: Sustained.
5. Complaint, ¶¶ 13-19: Overruled.



POSTED: 3:00 P.M.