

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

Case No. CV 06-6532 ABC (FFMx)

Date February 2, 2007

Title Harlan Ellison v. Fantagraphics, Inc., et al.

*Priority Sent*

Present: The Honorable

Audrey B. Collins

Daphne Alex

None Present

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Present

None Present

Proceedings: DEFENDANTS' SPECIAL MOTION TO STRIKE (In Chambers)

Pending before this Court is Defendants' Special Motion to Strike Plaintiff's Complaint Pursuant to California Code of Civil Procedure Section 425.16 ("the anti-SLAPP statute" or "Section 425.16"). The Court finds this motion appropriate for submission without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Having considered the materials submitted by the parties and the case file, and for the reasons indicated below, the Court DENIES Defendants' Special Motion to Strike.

I. FACTUAL BACKGROUND<sup>1</sup>

Plaintiff Harlan Ellison alleges that Defendants defamed him through the publication of excerpts from a yet-to-be-released book, entitled Comics As Art (We Told You So). The allegedly defamatory statements, which were published on the internet and distributed at various public venues, are statements by Defendant Gary Groth about Plaintiff. Groth describes his interactions with Plaintiff in an earlier civil lawsuit. In that prior lawsuit, Groth and Plaintiff were co-defendants. Groth states that Plaintiff was "always coming up with schemes to wheedle out of paying his bills" and that one particular plan was "brilliantly Machievelian [sic]" and "included both stiffing his lawyers and screwing me." Groth also tells a story about a time in the lawsuit when Plaintiff refused to reimburse the opposing party for expenses until "the judge was about to order U.S. Marshals to arrest Ellison."

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<sup>1</sup> The facts in this section are taken primarily from the Complaint and the documents referenced in the Complaint.

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Plaintiff also alleges that Defendants violated Plaintiff's right of publicity through the publication of a book entitled The Comics Journal Library, Volume 6: The Writers. The book contains various interviews of writers, including an interview of Plaintiff conducted more than 25 years ago. The cover of the book has Plaintiff's name on it, indicating that his interview is contained within the book. Plaintiff alleges that the use of his name on the cover and inside the book violates his right of publicity.

On September 7, 2006, Plaintiff filed this action in California state court, and Defendants removed the case to federal court on October 13, 2006. On November 14, 2006, Defendants filed this Special Motion to Strike. Plaintiffs filed an Opposition to Defendants' Motion on December 14, 2006. On December 26, 2006, Defendants filed their Reply.

## II. LEGAL STANDARD

A SLAPP suit is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815 n.2 (1994), disapproved of on other grounds in Equilon Enters., LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002). California's anti-SLAPP statute allows a defendant to bring a special motion to strike against causes of action "arising from" protected activities - any act in furtherance of the right of petition or free speech in connection with a public issue. Cal. Civ. Proc. Code § 425.16(b)(1). The anti-SLAPP statute applies to state law claims brought in federal court. United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 971-73 (9th Cir. 1999).

In ruling on anti-SLAPP motions, a court engages in a two-step process. Equilon, 29 Cal. 4th at 67. The defendant bringing the anti-SLAPP motion must first make a prima facie showing that the action arises from an act in furtherance of his or her constitutional rights of petition or free speech with respect to an issue of public concern. Id. ("The moving defendant's burden is to demonstrate that the act or 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 California Constitution in connection with a public issue,' as defined in the statute."). An act in furtherance of a person's right of petition or free speech 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

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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; (4) or 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.

Cal. Civ. Proc. Code § 425.16(e). In deciding whether the cause of action arises from protected activity by the defendant, a court considers the pleadings and the supporting and opposing declarations and documents. See Navellier v. Sletten, 29 Cal. 4th 82, 89-90 (2002).

Once the defendant makes a prima facie showing, the burden then shifts to the plaintiff to establish the probability that he or she will prevail on the stated claims. Equilon, 29 Cal. 4th at 67. Assuming that the defendant meets its initial burden and that the plaintiff fails to show a reasonable probability of success, the complaint or offending cause of action is stricken. Cal. Civ. Proc. Code § 425.16(b)(1). Additionally, the defendant is entitled to recover reasonable attorneys' fees as a prevailing party. Cal. Civ. Proc. Code § 425.16(c).

## III. DISCUSSION

As a preliminary matter, the Court GRANTS Defendants' Request for Judicial Notice, but only with respect to the records of the prior court proceeding. Although the Court takes judicial notice of these documents, the Court does not take judicial notice of the truth of the facts contained within these documents. See Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001). And even though the Court declines to judicially notice some of Defendants' evidence, the Court has considered all of Defendants' evidence in deciding this motion. Plaintiff did not object, and it is proper for the Court to consider admissible evidence in ruling on an anti-SLAPP motion. See Navellier, 29 Cal. 4th at 89-90.

Defendants contend that they meet their burden under the first step of the anti-SLAPP analysis with respect to the entire Complaint in two different ways. First, they argue that the publication of Plaintiff's interview and Defendants' allegedly defamatory statements

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were made in connection with issues under consideration by a judicial body under Section 425.16, subdivision(e) (2). Second, Defendants argue that Plaintiff's conduct in the previous litigation and the interview that caused that litigation raise issues of public interest under Section 425.16, subdivision (e) (4). Because Defendants assert only that subdivisions (e) (2) and (e) (4) of Section 425.16 apply, the Court will consider only whether Defendants have met their burden under those sections. The Court concludes Defendants have not.

Initially, the Court must examine Plaintiff's claims to determine whether his lawsuit "arose from" Defendants' protected activities. The concept of "arising from" as it is used in the anti-SLAPP statute means that the Court must focus on "the substance of" the lawsuit to determine whether it arose from Defendants' protected activities. City of Cotati v. Cashman, 29 Cal. 4th 69, 78 (2002). "[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies." Scott v. Metabolife Int'l, Inc., 115 Cal. App. 4th 404, 414 (2004). "[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." City of Cotati, 29 Cal. 4th at 78. "[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." Scott, 115 Cal. App. 4th at 414.

**A. The Defamation Claim**

The principal thrust or substance of Plaintiff's defamation claim arises from Defendants' published statements regarding Plaintiff's propensity to "wheedle" and "scheme" out of paying his legal bills in the prior litigation. These statements were not made in connection with an issue under consideration by a judicial body and are therefore not protected activity under Section 425.16, subdivision (e) (2). Defendants do not point to any current litigation regarding Plaintiff's payment of legal bills. Defendants attempt to connect these statements to the prior litigation, but even if this were appropriate, Plaintiff's financial interactions with his co-defendant and his lawyers were not even issues under consideration by the court in that case.

Defendants argue that reports on previous litigation are protected activities under the anti-SLAPP statute, relying on Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 237-38 (1999). But Sipple involved a defendant commenting on statements made during

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depositions and at hearings in the prior litigation. Id. Thus, it fell under subdivision (e)(1) of Section 425.16 and not subdivision (e)(2). Id. Additionally, the allegedly defamatory statements in Sipple involved allegations of domestic violence, an issue before the court in the previous custody dispute. Id. The reasoning of Sipple is not applicable here, where Defendants' statements were not a discussion of previous testimony and were not related to an issue that was before the court.

Defendants' allegedly defamatory statements were also not made in connection with an issue of public interest under Section 425.16, subdivision (e)(4). Defendants argue that Plaintiff's interaction with his counsel and co-defendant during the prior litigation should be considered a matter of public interest because it was a well-known lawsuit involving a well-known author. That is not enough.

The concept of "public interest" in the anti-SLAPP statute has been broadly construed. It includes governmental matters as well as "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 479 (2000). There is nothing about Plaintiff's payment of his legal bills that would impact a broad segment of society. Although the lawsuit may be of some interest to the comic book community, Plaintiff's actions do not affect the comics community in a manner similar to that of a governmental entity. Mere curiosity does not create an issue of public interest. Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132 (2003).

The reasoning of Weinberg is persuasive. In Weinberg, the defendant, a token collector, published advertisements in a token collecting newsletter and sent letters to other token collectors that accused the plaintiff of stealing from him. Id. at 1128-29. The defendant argued that such statements were in the public interest because they protected other collectors from the alleged thief. Id. at 1126. But the court found no issue of public interest, recognizing that the defendant was simply waging a private dispute to discredit the plaintiff. Id. at 1134. Similarly, the alleged defamatory statements in this case do not raise an issue of public interest and are most properly understood as part of an ongoing private dispute between Plaintiff and Defendants. Defendants readily admit that there has been an ongoing feud between the parties.

Defendants argue that the reasoning of Sipple is applicable to their public interest argument. Although Sipple involved defamatory statements regarding the private affairs of a well-known person, there

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was a critical connection between the plaintiff's private affairs and a public issue. Sipple, 71 Cal. App. 4th at 239-40. Sipple involved accusations of domestic violence against a political strategist who had designed regional and national political campaigns emphasizing issues of domestic violence. Id. at 239. Defendants cannot identify a similar connection in this case that would make Plaintiff's activities in the previous litigation a public issue. Plaintiff has not injected himself into the public debate on any issues related to his payment of legal bills.

Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798 (2002), is similarly unhelpful to Defendants. In Seelig, the court noted that the plaintiff had injected herself into the public debate regarding reality television by agreeing to participate in a controversial reality television program. Id. at 807-08. Defendants cannot identify a similar public debate to which Plaintiff's actions would be relevant. Seelig may be Defendants' best authority, stretching the concept of "public interest" to its limit and possibly beyond. The public issue identified in Seelig was the condition of American society reflected by popular television programming. Recognizing an issue of public interest on the facts here would be an even greater stretch of the concept of "public interest" and is unwarranted. Defendants have not made a prima facie showing that the defamation claim arises out of activity protected by the anti-SLAPP statute.

**B. The Right of Publicity Claim**

The principal thrust or substance of Plaintiff's right of publicity claim arises from Defendants' publication of Plaintiff's name in connection with the republication of Plaintiff's interview. The republication of the interview was not made in connection with an issue under consideration by a judicial body and is therefore not a protected activity under Section 425.16, subdivision (e)(2). Defendants attempt to tie the republication of this interview to the lawsuit that followed the original publication. But that lawsuit ended many years before Defendants republished the interview, and the interview does not contain statements that were made in the previous litigation. Therefore, the reasoning of Sipple is equally irrelevant to the analysis of this claim.

Defendants' republication of the interview was also not made in connection with an issue of public interest under Section 425.16, subdivision (e)(4). Defendants argue that republication of Plaintiff's interview raises issues of public interest because Plaintiff is a well-known author and the interview resulted in a

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lawsuit. As previously explained, mere curiosity does not create an issue of public interest. Weinberg, 110 Cal. App. 4th at 1132. Public interest in the context of the anti-SLAPP statute includes governmental matters as well as "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 479 (2000). The interview of a well-known author regarding the comics industry, even if the interview resulted in a lawsuit, does not raise issues that would impact a broad segment of society or that would affect a community in a manner similar to a governmental entity. Defendants have not satisfied their initial burden to show that the anti-SLAPP statute is applicable to Plaintiff's right of publicity claim.

IV. CONCLUSION

For the reasons stated above, Defendants have not established that Plaintiff's claims arise from acts in furtherance of the right of petition or free speech in connection with a public issue. Therefore, it is not necessary for the Court to analyze the merits of Plaintiff's claims in an attempt to ascertain Plaintiff's probability of prevailing. Defendants' Special Motion to Strike is DENIED.

IT IS SO ORDERED.

Initials of  
Preparer

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