SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO
Civil Division

CASE MANAGEMENT CONFERENCE ORDER / Motion to Strike

CHARLES TENBORG VS. CALCOASTNEWS UNCOVEREDSLO.COM LLC	CV130237

Dept: Department 1

Judge: Hon. Martin J. Tangeman
Clerk: EBROWN
Reporter/Tape #: C. Griffith, CSR # 7251
12/11/13

COUNSEL Present	Not Present	
✓		Clune, Kevin B, Attorney for Plaintiff by J. Wagstaffe
✓		Sheahan, Jeanne M, Attorney for Defendant
✓		Johnson, Bruce E H, Attorney for Defendant by T. Burke
✓		Tompkins, Nancy, Attorney for Defendant

( ) All parties have (not) been served
( ) Cross-complaints are (not) ready for trial
( ) Jury demanded/waived by
( ) Court orders case entitled to preference
( ) ARBITRATION: parties stipulate/are ordered to non-binding private/judicial arbitration that shall be completed within ___ days/by
Parties shall comply with the terms of the arbitration order.
( ) MEDIATION: parties agree to mediation that shall be completed within ___ days/by_____.
( ) Mediator _____ ( ) Any local judge/private mediator
( ) Law and motion matters are pending
( ) Case assigned to track_____ ( ) Case ordered exempt
( ) Parties have (not) met and conferred.
( ) Case is reassigned for all purposes to
( ) Parties stipulate to Commissioner/Pro Tem to hear this matter.
(✓) Other The Court heaks argument and and orders the Tentative Ruling adopted as the Final Ruling as attached hereto. Counsel to discuss mediation at future CMC.

CALENDARING

(✓) CASE MANAGEMENT CONF. cont/~~set~~ for 02-03-14 at 9:00 am/~~pm~~ in Dept 1
( ) READINESS/SETTLEMENT CONFERENCE: _____ at _____am/pm in Dept_
( ) JURY/COURT TRIAL: _____ at _____am/pm in Dept___
Time estimate: _____ days
( ) OSC: _____ ordered to show cause on _____
at _____ am/pm in Dept._____ why case should not be dismissed/sanctions imposed for_____
( ) Matter ordered dismissed on _____ unless a motion to set aside this order is filed on or before that date. Clerk to give notice.
(✓) Notice is waived. ( )_____to give notice.

Rev 07/05

Judge of the Superior Court_____

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Tenborg v. CalCoast News, CV13-0237

Hearing: Defendants' Special Motion to Strike

Charles Tenborg (Plaintiff) brings this action against CalCoast News, Karen Velie and Daniel Blackburn (Defendants) for libel arising out of a November 14, 2012 article posted on CalCoastNews.com entitled "Hazardous Waste Chief Skirts Law." Plaintiff alleges that the article contains false and defamatory statements about him such as he was fired by the San Luis Obispo County Environmental Health Agency (CUPA), that his company, Eco Solutions, illegally transports hazardous waste, that he encouraged public agencies to ignore state law, and that he has exposed taxpayers to huge fines.

In response to the action, Defendants bring a CCP §425.16 special motion to strike on the grounds their actions arise from their free speech activities and Plaintiff cannot meet his burden to show a probability that he will prevail on his claims.

Pursuant to CCP §425.16, a cause of action arising from an act in furtherance of a person's constitutional right of free speech is subject to a special motion to strike, unless the plaintiff establishes a probability that he or she will prevail on the claim. *Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 111. In order to invoke the protection of CCP §425.16, the defendant need only make a prima facie showing that the plaintiff's claims arise from the defendant's constitutionally protected free speech or petition activity. CCP §425.16(e); *Equilon Enterprises, LLC v. Consumer Cause* (2002) 29 Cal.4th 53, 61. The plaintiff then has the burden to establish a "probability" of prevailing on the causes of action in the complaint. CCP §425.16(b).

There is little dispute that Plaintiff's claims arise from Defendants' constitutionally protected activities under CCP §425.16(e). Defendants' publication of the subject article and its topic of discussion are matters of public interest. See *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15. This was a news media article about alleged malfeasance related to the disposal of hazardous waste, which is a matter of public interest under CCP §425.16(e)(4). Thus, Defendants meet their initial burden to show their actions arise from a constitutionally protected activity.

Defendants contend that Plaintiff cannot meet his burden to establish a probability of prevailing on his libel claim because: (1) the publication of the article was privileged under Civil Code §47(d) as it was a "fair and true report" in a public journal of what was said during an official public proceeding; (2) the alleged libelous statements are literally and substantially true; (3) the subject statements were not "of and concerning" Plaintiff; and (4) the statements are not susceptible to a defamatory meaning.

Defendants represent that the statements in the article were based upon information that Douglas Dowden (Dowden), a former City of San Luis Obispo employee, learned at a

January 12, 2010 Stormwater Management Team Meeting (SMTM). Defendants provide declarations from Dowden and alleged minutes from the meeting. Defendants argue the statements in the article are privileged because they are a fair and true report of statements that were made at the meeting; regardless of the veracity of those statements or the motive for making the statements. *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 974.

The purpose of the fair reporting privilege is to protect free debate and expression related to the reporting of public proceedings. *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1558, quoting from *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 261. "The privilege [Civil Code §47(d)] applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceeding." *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1337. Section 47(d) therefore does not require a media defendant to justify every word that is published. Rather, "the media's responsibility lies in ensuring that the 'gist or sting' of the report—its very substance—is accurately conveyed." *McClatchy Newspapers,* supra, 189 Cal.App.3d at 975. Courts must therefore accord media defendants a "certain amount of literary license" and exercise a "degree of flexibility" in determining what is a "fair report." *Dorsey v. National Enquirer, Inc.* (9th Cir. 1992) 973 F.2d 1431, 1436.

Defendants start from the premise that the applicability of Civil Code §47(d) can be decided as a matter of law. According to Defendants, their reporting of statements made at a public meeting, as set forth in Dowden's declaration, capture the "gist or sting" of the proceeding. Defendants argue that the applicability of Civil Code §47(d) can be decided solely on the Court's review of the subject article as compared to the January 12, 2010 SMTM minutes and Dowden's recollection of that meeting.

Plaintiff raises two arguments contesting Defendants' privilege defense. First, Plaintiff contends the privilege does not apply because the subject article is not a reporting of what happened at the January 12, 2010, SMTM. The subject article never refers to, or reports on, what transpired at the meeting. Defendants, in their reply, assert the article accurately reports on the unlawful transportation of hazardous waste by Eco Solutions which was allegedly discussed at the meeting. But, a reader of the article would have no understanding that the article was a report on what took place at the meeting. The privilege applies if the substance of the publication or broadcast captures the "gist or sting of the statements" made in the official proceeding. Here, the article transmits the "sting" of the information learned at the meeting, but does not connect it with the meeting. "[I]n order to qualify as privileged such an article must state the source of its information. See Prosser, Torts, (3d ed. 1964) §110, p. 819." *Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal.App.2d 255, 259.

Second, there is a dispute here as to whether the information about Eco Solutions' license status was ever stated at the SMTM. The Court provided Plaintiff with relief from the

discovery stay to obtain evidence on this issue. Dowden declares that at the SMTM, Kerry Boyle stated that Eco Solutions was no longer licensed to haul hazardous waste; that the City should stop using Eco Solutions; and, that Eco Solutions was improperly classifying entities as exempt small quantity hazardous waste generators. But, Plaintiff provides a declaration from Kerry Boyle, the Hazardous Materials Coordinator for the City of San Luis Obispo Fire Department. Boyle states that he attended the January 12, 2010 SMTM, and declares that he did not make the statements that Dowden attributes to him. He also does not recall any other attendee making those statements. This is confirmed by Ron Munds, the Conservation Manager for the City of San Luis Obispo, who also attended the January 12, 2010 SMTM. He does not recall Boyle making the alleged statements. Both Boyle and Munds also question the existence of any official minutes of the meeting. According to Plaintiff, this evidence prevents Defendants from meeting their burden to establish that the subject article represents a fair reporting of what transpired at the January 12, 2010 SMTM.[1]

In reply, Defendants again contend the statements are privileged under Civil Code §47(d) as a matter of law. because the article captures the gist and sting of the official proceeding, whether or not the statements are true or false. *Hayward v. Watsonville Register-Pajaronian* (1968) 265 Cal.App.2d 255, 259. However, disputed facts prevent the Court, at this juncture, from concluding that Defendants' actions are as a matter of law privileged under Civil Code §47(d). See *McClatchy Newspapers, Inc. v. Superior Court, supra,* 189 Cal.App.3d 961, 976—"case law indicates this decision is one of law when, as here, there is no dispute as to what occurred in the judicial proceeding reported upon or as to what was contained in the report." The applicability of the privilege can only be decided as a matter of law when there is no meaningful factual dispute as to the content and distribution of the subject article. *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 278-79. Here, there is admissible evidence that creates a triable issue of fact as to what transpired at the January 12, 2010 SMTM. Finally, Defendants do not cite to any authority that suggests the privilege applies to fair reporting of statements that may not have been made at the public proceeding.

Additionally, as discussed above, the article is not a report of what transpired at the January 12, 2010 SMTM. Defendants contend that nowhere in Civil Code §47(d) does it require them to identify their sources. But, the statutory language of Civil Code §47(d) specifically applies to the reporting in a public journal of what was said during an official public proceeding. In this instance, the subject article makes no reference to or report of what transpired during the January 12, 2010 SMTM. In *Hawran v. Hixson, supra,* 209

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[1] Defendants bear the burden of proving the privilege's applicability. *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 348–349. But, for purposes of defeating a special motion to strike, "a plaintiff must also adduce competent, admissible evidence sufficient to overcome any privilege or defense to the claim asserted by defendant. *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323—Civil Code §47(b) litigation privilege presents substantive defense plaintiff must overcome to demonstrate probability of prevailing." *California Practice Guide, Civil Pro. Before Trial* (The Rutter Group) §7:1015.

Cal.App.4th 256, a press release was not privileged under Civil Code §47(d) because it did not relate to the SEC investigation. The *Hawran* court reasoned:

> Indeed, the September press release does not mention the subject SEC investigation, much less 'capture[ ] [its] substance, ... 'gist' or 'sting'....' *Kilgore v. Younger, supra,* 30 Cal.3d 770, 777. Having reviewed the entirety of the two-page press release, and particularly the assertedly defamatory assertions concerning Hawran's resignation and denial of wrongdoing, we cannot say the press release purports to report on, summarize or describe the SEC proceeding or investigation, the history of the SEC proceeding or investigation, or any communications made 'in the course of' that investigation. Rather, it is plain from the face of the document that the September press release is reporting the results and consequences of Sequenom's own internal investigation. Though the press release explains that a presentation to the SEC would be forthcoming, it does not purport to characterize or describe the contents of that presentation. Nothing in the September press release gives us the 'gist' of the SEC's charges, if any, or the proceedings before it. *Hawran, supra,* 209 Cal.App.4th at 280-281.

For the above reasons, the Court cannot conclude as a matter of law that the alleged defamatory statements are privileged under Civil Code §47(d).

In meeting his or her burden the "(P)laintiff must demonstrate that *the complaint is both legally sufficient* and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." *Premier Med. Mgmt. Systems v. California Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.

The burden is on a plaintiff to produce evidence that would be admissible at trial—i.e., to proffer a prima facie showing of facts supporting a judgment in plaintiff's favor. *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087; *California Practice Guide, Civil Pro. Before Trial* (The Rutter Group) §7:1005.

The essential elements for a defamation cause of action are an intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645. "In all cases of alleged defamation, whether libel or slander, the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose." *Id* at 646.

It is without dispute that Defendants intentionally published the November 14, 2012 article. Thus, the remaining elements that Plaintiff must establish are that the statements are false and are defamatory.

The article states that in the mid-1990s, Plaintiff was fired for undisclosed reasons from his job with the San Luis Obispo County Environmental Health Certified Unified Program Agency (Agency). Plaintiff, in his declaration, states that he resigned from his position in order to start his own business and left the Agency on good terms. Plaintiff also provides a declaration from Curtis Batson, the Director of Environmental Health Services, who affirms that Plaintiff voluntarily left the Agency and was not fired. Thus, Plaintiff provides sufficient evidence to establish the falsity of the statement.

The article also declares that Plaintiff illegally transported hazardous waste and has exposed taxpayers to huge fines by encouraging public agencies to ignore state law. According to Plaintiff, he was properly licensed and registered with the State to transport hazardous waste. Plaintiff provides evidence that he possesses a driver's license with a hazardous materials endorsement, that he has passed the Transportation Security Administration background check, and that he is registered with the Department of Toxic Substances Control to transport hazardous waste in California.

In reply, Defendants attempt to discredit Plaintiff's statements by providing a declaration from Aaron Wynn (Wynn), a former Eco Solutions employee. Wynn states that while he was employed with Eco Solutions, he observed on several occasions instances of company employees illegally transporting waste. According to Wynn, he was transporting hazardous waste on behalf of Eco Solutions without the required endorsement on his driver's license. Defendants then scrutinize Plaintiff's evidence and, in turn, cite to evidence that they believe negates the truth of Plaintiff's assertions. In reply, Plaintiff submits a supplemental declaration in which he attaches his registrations for the years 2009 through 2013. Plaintiff and William Worrell (Worrell), Manager of San Luis Obispo County's Integrated Waste Management Authority (IWMA), distinguish the types of "hazardous" waste and differing regulations applicable to each type. Plaintiff also discredits the statements made by Wynn. In fact, Worrell states: "The Article gets facts regarding these waste streams wholly wrong, and in the process of doing so makes inaccurate factual statements regarding Tenborg and his company's handling of them."

As to the statements related to Plaintiff exposing taxpayers to huge fines by encouraging public agencies to ignore state law, and specifically, encouraging agencies to fill out IWMA forms that allege the municipality is a small generator that self-transports, Plaintiff asserts that IWMA and other pick-up services require that the agencies sign a declaration in which they self-certify that they meet the CESQG requirements. Additionally, Plaintiff contends he was not transporting for CESQG in early 2010, thus it is false to claim he was encouraging the municipalities to ignore reporting protocols and transporting the loads himself in violation of state law.

The parties have provided the Court with numerous declarations and exhibits in support of their respective sides and counter evidence to each one of their claims. The evidence discussed above is a portion of the evidence that relates to certain defamatory statements. There are represented to be ten separate statements in the article that are allegedly

defamatory. The Court need not address the falsity of each and every statement. Rather, the evidence cited above clearly establishes that there is substantial admissible evidence on each side to create triable issues of fact as to the falsity of certain statements. In other words, contrary to Defendants' assertion, it is not undisputable truth that Eco Solutions unlawfully transported hazardous waste. There is substantial evidence to support Plaintiff's allegations which, if believed, would support a finding of liability. The Court cannot therefore determine, as a matter of law on this motion, that all the alleged defamatory statements are true.

While Defendants contend that some of the ten alleged defamatory statements are not reasonably susceptible to a defamatory meaning, a few of the statements are clearly defamatory. "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court." *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647. "[T]he slander statute expressly limits slander per se to four categories of defamatory statements, 'including statements (1) charging the commission of crime, or (2) tending directly to injure a plaintiff in respect to the plaintiff's [profession, trade, or] business by imputing something with reference to the plaintiff's [profession, trade, or] business that has a natural tendency to lessen its profits.'" *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 382. Here, the statements that Plaintiff illegally transported hazardous waste and encouraged public agencies to ignore state law would injure Plaintiff with respect to his profession as an environmental contractor. Determining the defamatory nature of each and every alleged statement is unnecessary because Plaintiff need only establish that he has a probability of prevailing on any part of his claim. *Id.* at 379.

Lastly, Defendants raise the issue that the defamatory statements are not "of or concerning" Plaintiff. Defendants assert the subject article is critical of the IWMA and Eco Solutions, but not Plaintiff. According to Defendants, 7 of the 11 statements do not expressly mention Plaintiff. However, the subject article names Plaintiff, includes his photograph, and identifies Eco Solutions as a company that Plaintiff owns. The article states Plaintiff was fired from CUPA and it is clear that Plaintiff is the "contractor" that allegedly illegally transported hazardous waste and exposed taxpayers to huge fines by encouraging public agencies to ignore state law. Also, it can be inferred from the article that the defamatory statements apply to Plaintiff despite the separate existence of Eco Solutions. *Di Giorgio Fruit Corp. v. American Federation of Labor and Congress of Indus. Organizations* (1963) 215 Cal.App.2d 560, 569. Again, the Court need not evaluate the applicability of each statement in relation to Plaintiff because there is sufficient evidence to show a false and defamatory statement related to Plaintiff relative to the alleged transportation of hazardous waste.

In their supplemental reply, Defendants refine their argument to separate out Plaintiff and Eco Solutions. Defendants now contend that 10 of the 11 statements are not actionable because they are not of or concerning Plaintiff and are not defamatory. Defendants then argue if in fact Plaintiff is synonymous with Eco Solutions then he should be considered

a public figure in which case he must show by clear and convincing evidence that the libelous statements were made with malice. This is a very different standard of proof, but the Court does not consider the argument because it was raised for the first time in Defendants' supplemental reply. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.

Plaintiff meets his burden by establishing that his libel claim is legally sufficient and supported by sufficient admissible evidence to support judgment in his favor. Defendants' special motion to strike is denied.

Plaintiff's objection nos. 4 and 5 are sustained; the remainder are overruled.

Defendants' objection nos. 5, 11, 13, 20, 25, 38, 40, 41, 45, 47, 51, 53, 79, 80, 84, 90, 94, 95 and 96 are sustained; the remainder are overruled.

The Request for Judicial Notice (in support of Supplemental Reply) is denied.