Superior Court of California
County of Los Angeles

JAMES WOODS,

Plaintiff,

vs.

JOHN DOE, ET AL.,

Defendants.

Case No.: BC589746

DEPARTMENT 45

[TENTATIVE] ORDER

Complaint Filed: 7/29/15
Trial Date: None set

Hearing date: February 6, 2016
Moving Party: Defendant John Doe aka "Abe List"
Responding Party: Plaintiff James Woods

Special Motion to Strike (Civ. Proc. 425.16)

The Court considered the moving papers, opposition, and reply.

The motion is GRANTED.

Defendant John Doe aka "Abe List" requests that the court strike the complaint on the grounds that it constitutes a strategic lawsuit against public participation ("SLAPP") within CCP section 425.16. Defendant contends that his speech is protected by the statute and plaintiff cannot show a probability of prevailing on the merits.

Plaintiff filed a complaint against John Doe aka "Abe List" and Does 2 through 10 for (1) defamation and (2) invasion of privacy by false light. Plaintiff alleges that his claims arise out of and are for damages with respect to a false and defamatory statement which was initially published on or about 7/15/15 by an unidentified anonymous person who created and who operates a Twitter account under the name "Abe List." ("AL") [Twitter is a social media

platform on which users send "tweets"—statements of up to 140 characters—visible to other users who "follow" them.] The owner of this Twitter account has thousands of followers and, since at least December 2014, has undertaken to engage his followers with a campaign of childish name-calling targeted against Woods. In the past, AL has referred to Woods with such derogatory terms as "prick," "joke,""ridiculous,""scum" and "clown-boy." Complaint, 8. On 7/15/15, and for the sole and intentional purpose of harming Woods, AL concocted and posted on his Twitter account the outrageous, baseless, false and defamatory statement "cocaine addict James Woods still sniffing and spouting." In doing so, AL intended to, and did, convey to thousands of AL's followers and others with access to the internet the false claim that Woods is addicted to cocaine, a controlled substance. Id., 9.

Plaintiff further alleges that an unidentified person operates and utilizes the AL Twitter Account which is displayed at or with the uniform resource locator ("URL") <https://mobile.twitter.com/abelisted?p=s>, and which is continually maintained and is included in and appears prominently in current Google.com and other search engine results. Indeed, a search on Google.com for "Abe List James Woods" yields the outrageous statements from the AL Twitter Account as the top two results, including one that calls Woods "a ridiculous scum clown-boy." Id., 10. AL published, and/or caused to be published or authorized to be published, the false statement on the AL Twitter Account and in current (as of the date of this Complaint) Google.com search engine results, causing the false statement to be viewed thousands of times and possibly even hundreds of thousands of times. AL posted the false statement in response to a Twitter post by Woods. Thus, the false statement has been seen not only by defendants' thousands of followers, but possibly by Woods' 238,512 followers on his Twitter account. Id., 11.

To rule on a section 425.16 motion to strike, the court employs a "two-step process: First, the court decides whether the defendant has made a threshold showing that the challenged

cause of action is one arising from protected activity." Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 16; Taus v. Loftus (2007) 40 Cal. 4th 683, 703; Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1056; Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 67. "If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." Vargas, 46 Cal. 4th at 16; Taus, 40 Cal. 4th at 703; Rusheen, 37 Cal. 4th at 1056; Equilon, 29 Cal. 4th at 67. The plaintiff demonstrates a probability of prevailing by showing that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 537; Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal. App. 4th 790, 799; Roberts v. Los Angeles County Bar Ass'n (2003) 105 Cal. App. 4th 604, 613; Chavez v. Mendoza (2001) 94 Cal. App. 4th 1083, 1087. "The defendant has the burden on the first issue; the plaintiff has the burden on the second." Gallimore v. State Farm Fire & Casualty Ins. Co. (2002) 102 Cal. App. 4th 1388, 1396.

Step One: Defendant's Moving Burden

In order to invoke Section 425.16, a defendant need only demonstrate that a suit "arises from" the defendant's exercise of free speech or petition rights. See CCP section 425.16(b); City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 78. This is determined by the "gravamen or principal thrust" of the action. Episcopal Church Cases (2009) 45 Cal. 4th 467, 477. See also Martinez v. Metabolife International, Inc. (2003) 113 Cal. App. 4th 181, 188 (the gravamen of the plaintiff's cause of action determines whether Section 425.16 applies). In making this determination, the court analyzes "whether the defendant's act underlying the plaintiff's cause of action itself was an act in furtherance of the right of petition or free speech. Accordingly, we focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." Dyer v. Childress (2007) 147 Cal. App. 4th 1273, 1279. "In

making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Code Civ. Proc. §425.16(b)(2).

The preamble to section 425.16 states its provisions are to be construed broadly to safeguard the constitutional right of free speech. §425.16(a). Broad construction must therefore be given to the phrase "an issue of public interest." Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal. App. 4th 133, 143.

On 7/15/15, plaintiff tweeted from his Twitter account @RealJamesWoods, "USATODAY app features Bruce Jenner's latest dress selection, but makes zero mention of Planned Parenthood baby parts market." In response, Abe List tweeted, "cocaine addict James Woods still sniffing and spouting."

Defendant's 7/15/15 tweet falls under CCP section 425.16(e)(3) "any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest" and 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."

Twitter is a public forum. The tweets were made in connection with issues of public interest.

Defendant has met his burden.

Step Two: Plaintiff's Responding Burden

"We decide this step of the analysis on consideration of the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (§425.16(b).) Looking at those affidavits, '[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.'

(Grewal v. Jammu (2011) 191 Cal. App. 4th 977, 989.) This is because the anti-SLAPP statute does not require the plaintiff 'to prove the specified claim to the trial court'; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. (Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 105.) 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' (Oasis West Realty, LLC v. Goldman (2011) 51 Cal. 4th 811, 820.) If the plaintiff can show a probability of prevailing on any part of [his or her] claim, the cause of action is not meritless and will not be stricken; once a plaintiff shows a probability of prevailing on any part of [his or her] claim, the plaintiff has established that [his or her] cause of action has some merit and the entire cause of action stands. (Oasis, supra, 51 Cal. 4th at 820, quoting Mann, supra, 120 Cal. App. 4th at 106.)." Burrill v. Nair (2013) 217 Cal. App. 4th 357, 378-79 (citations omitted). Plaintiff must present admissible evidence to make this showing, however, and cannot rely solely on the allegations of the complaint. Roberts v. Los Angeles County Bar Association (2003) 105 Cal. App. 4th 604, 613-14; see Evans v. Unkow (1995) 38 Cal. App. 4th 1490, 1497-98 (proof cannot be made by declaration based on information and belief).

The tort of defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." Taus v. Loftus (2007) 40 Cal. 4th 683, 720. "If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence, that the libelous statement was made 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 Court (1984) 37 Cal.3d 244. "Libel is defined by Civil Code section 45 as 'a false and unprivileged publication by writing, . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be

shunned or avoided, or which has a tendency to injure him in his occupation.' . . . In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication." Forsher v. Bugliosi (1980) 26 Cal.3d 792, 802-803.

"Whether published material is reasonably susceptible of an interpretation which implies a provably false assertion of fact—the dispositive question in a defamation action—is a question of law for the court." Couch v. San Juan Unified School Dist. (1995) 33 Cal. App. 4th 1491, 1500. The question is to be resolved by determining how the "'average' reader" would interpret the material. Id.; San Francisco Bay Guardian, Inc. v. Superior Court (1993) 17 Cal. App. 4th 655, 658-59 and by considering the "totality of the circumstances." Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal. App. 4th 798, 809; Sanders v. Walsh (2013) 219 Cal. App. 4th 855, 862. "Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot 'reasonably [be] interpreted as stating actual facts' about an individual. Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of . . . contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 1401; Seelig, supra; Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 14.

In considering the context of a statement, courts examine the "knowledge and understanding of the audience to whom the publication was directed." Seelig, supra. In Seelig, the court considered the "irreverence" of a morning radio program "which may strike some as humorous and others as gratuitously disparaging" in determining that "no reasonable listener" could take the challenged statements as factual pronouncements." Id. at 811. "Where potentially defamatory statements are published in a . . . setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the

character of statements of opinion." Gregory v. McDonnell Douglas Corp. (1976) 17 Cal. 3d 596, 601. For example, "online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." Summit Bank v. Rogers (2012) 206 Cal. App. 4th 669, 696-97.

Plaintiff alleges that on 7/15/15, AL falsely accused plaintiff of being a "cocaine addict" on Twitter.

Defendant argues that his tweet is not a statement of provable fact; rather, it is clear rhetorical hyperbole based on an examination of the context, the understanding of the audience, and the totality of the circumstances. Defendant contends that Twitter is known for hyperbole. Twitter users will not be inclined to view heated tweets as stating provable facts. Defendant is known for insult and hyperbole. His audience knows that he uses rhetorical accusations of drug and alcohol abuse as a way to express disagreement with political positions. He also reacts with anger to homophobia. Further, plaintiff is known for insult and hyperbole. His followers know that he is routinely at the center of heated political rhetoric. Defendant argues that his audience will not expect heated exchanges with him to contain provable statements of fact. Further, defendant's tweet came as part of a pattern of insult towards plaintiff. The tweet was the latest in a series of insults. Moreover, the tweet echoed a Twitter in-joke. Twitter users routinely use the "cocaine" insult to respond to plaintiff's political rants. Further, the insult was not offered in the abstract; it came in response to plaintiff's statement suggesting that the media should be concerned with abortion and not Catlin Jenner's dress selection. Plaintiff referred to Caitlyn by her former name, Bruce Jenner, making the "expression more pungent to a gay rights activist like Mr. Doe." Defendant also argues that as he is anonymous and tweets under a pseudonym, California courts recognize that statements by anonymous internet sources are less likely to be seen as statements of fact. His tweet was not formal—it was a sentence fragment, not a carefully crafted and grammatical statement. The tweet did not include any indicia of reliability.

In opposition, plaintiff contends that the tweet is a statement of provable fact. Plaintiff contends that Twitter "boasts it is 'an easy way to discover the latest news related to subjects you care about.'" Weinsten decl., Exh. C. And, that 63% of Twitter users say that the platform serves as a source of news about events and issues for them." Weinsten decl., Exh. D. Plaintiff argues that Twitter has been adopted by the mainstream media and public at large as a reliable source of information, and that it has had an extremely influential impact not only on society, but society's perceptions and beliefs. While conversations on Twitter can and do include opinion, jokes, and hyperbole, it cannot be ignored that people believe what they read on Twitter. As to his own Twitter account, he contends that he is a prolific user of Twitter and regularly tweets his opinions on entertainment, social and political issues of general interest. His followers include newscasters, entertainment celebrities, professionals, employers, friends, enemies, fans, and others interested in his views. Defendant AL is also an avid user of Twitter. He tweets on various subjects including politics, economics, gay rights, and national and international news, events, and issues. Plaintiff contends that AL has openly shared on Twitter his disdain for plaintiff. As to whether the statement is "hyperbole," hyperbole is an exaggeration of fact. The tweet was not an exaggeration of anything, "just a plain and false statement that Mr. Woods is a cocaine addict." See also declaration of Prof. Edward Finegan, an expert linguist, who states in his declaration that "nothing in the Tweeted words 'cocaine addict James Woods still sniffing and spouting' suggests that it should be interpreted as hyperbolic."

Plaintiff further argues that the statement is not provable false because he is not now nor has he ever been a "cocaine addict." He has never used cocaine. He also contends that the tweet was not "anonymous" but was made under a false name.

In reply, defendant argues that plaintiff's purported expert testimony on a question of law is inadmissible. Further, the testimony focuses only on plaintiff's tweet and defendant's tweet in response. The testimony does not address the totality of the circumstances. Defendant reiterates

that his tweet is a figurative insult, not a statement of fact. Further, defendant argues that, plaintiff's own words and tone on Twitter are not irrelevant because they are part of the larger context. As an example, in 2013, someone tweeted "@RealJamesWoods Have never heard logical argument against Obama just slogans and labels from you, Jon Voight, Giuliani, all RW shit-heads," and in response, plaintiff tweeted, "Well, put down your crack pipe, and retread my timelines. You'll find plenty there." Twitter is a place where plaintiff also "constantly and vigorously insults and engaged in inflammatory language, to the point that he's been widely branded a 'troll.'" Reply, at 6.

Defendant's objections to the declaration of Edward Finegan, Ph.D and the declaration of Michael Weinsten are SUSTAINED as improper legal opinion and opinion evidence on a question of law. "There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." Summers v. A.L. Gilbert Co. (1999) 69 Cal. App. 4th 1155, 1178. See also Nevarrez v. San Marino Skilled Nursing & Wellness Ctr. (2013) 221 Cal. App. 4th 102, 122 ("an expert may not testify about issues of law or draw legal conclusions.").

Plaintiff's objections are OVERRULED.

The court finds that as a matter of law, in consideration of the totality of the circumstances, the tweet at issue is not a statement of fact but rather "rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense" that does not support a defamation action. Seelig, supra. The tweet cannot be reasonably interpreted as stating actual facts about James Woods. Both tweets were in the context of expressing inflammatory opinions. There were no indicia of reliability as to defendant's tweet.

Plaintiff has not met his burden of showing a probability of prevailing.

The motion is GRANTED. Defendant is entitled to his attorney's fees.

It is so ordered.

Dated: February 2, 2016

MEL RED RECANA
Judge of the Superior Court