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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

JANICE DICKINSON, an individual,

Plaintiff,

vs.

WILLIAM H. COSBY, JR., an individual; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC 580909

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY OF DISCOVERY PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16(g)

Assigned to Hon. Debre Katz Weintraub
Dept. 47

Filing Date: May 20, 2015
Trial Date: None Set

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Preliminary Statement

Controlling California law requires that before a court may lift the anti-SLAPP statute's automatic discovery stay, a plaintiff must conclusively establish that a defendant has made provably false assertions. Plaintiff's motion does not even try to meet this standard, arguing instead that Plaintiff is entitled to discovery regarding malice now and can get to the task of establishing the other elements of her claim later. *See* Motion to Lift Stay of Discovery (the "Motion") at 8 ("While Plaintiff will conclusively establish that Defendant's statements are provably false factual allegations, Defendant's malice is still highly relevant and can only be uncovered and demonstrated through the oral deposition testimony of Defendant and Mr. Singer."). Accordingly, Plaintiff's motion must be denied because "where, as here, the plaintiff fails to demonstrate the allegedly defamatory statements are provably false factual assertions—which the plaintiff must do to establish the necessary probability of prevailing on its defamation claim—no good cause exists to conduct discovery concerning actual malice." *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1345-46 (2008).

The California Court of Appeal has repeatedly held that "permitting discovery on the issue of actual malice before first determining, after briefing and argument, whether the plaintiffs had a reasonable probability of establishing the other elements of their libel cause of action" is an "abuse of discretion." *Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156, 1159 (2004) (granting defendant's writ petition); *Paterno*, 163 Cal. App. 4th at 1345-46 (same).

Argument

I. A Stay May Only Be Lifted For Good Cause, Which Is Not Present Here

Plaintiff does not dispute that Defendant's anti-SLAPP motion makes the threshold showing that the statements at issue arise from constitutionally protected petitioning activity. Nor does Plaintiff dispute that her claim is subject to the constitutional malice standard, which requires her to plead and prove falsehood, and to further establish malice by clear and convincing evidence. Motion at 7-10. Plaintiff also acknowledges, as she must, that absent a showing of good cause, the

Court may not lift the statutorily mandated stay of discovery.[1] Motion at 6. Plaintiff's request to lift the stay must be denied because Plaintiff failed to show good cause.

A. California Law Requires The Court To Resolve Issues Of Falsity, Publication, and Privilege Before Considering Discovery Into Actual Malice

California courts have articulated clear guidelines for determining whether good cause exists to lift an anti-SLAPP discovery stay in actions subject to the constitutional malice standard. "[P]laintiffs who bring defamation actions subject to the constitutional malice standard cannot show good cause for discovery on the question of actual malice without making a prima facie showing that the defendant's published statements contain provably false factual assertions." *Paterno*, 163 Cal. App. 4th at 1350. "[W]here, as here, the plaintiff fails to demonstrate the allegedly defamatory statements are provably false factual assertions—which the plaintiff must do to establish the necessary probability of prevailing on its defamation claim—no good cause exists to conduct discovery concerning actual malice." *Id.* at 1345-46.

Thus, "[e]ven if it looks as if the defendant's actual malice may be an issue in the case, if it appears from the SLAPP motion there are significant issues as to falsity or publication—issues which the plaintiff should be able to establish without discovery—the court should consider resolving those issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings." *Garment Workers*, 117 Cal App. 4th at 1163; *see also Paterno*, 163 Cal. App. 4th at 1351 ("Ampersand has not introduced sufficient evidence to establish a prima facie case of falsity or unprivileged statements. Consequently, the trial court

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[1] The purpose of the automatic stay is to "[p]rotect defendants exercising their freedom of speech from having their personal and financial resources exhausted by SLAPP-ers' discovery demands." *Garment Workers*, 117 Cal. App. 4th at 1161; *Paterno*, 163 Cal. App. 4th at 1350 (2008); *see also Metabolife Int'l, Inc. v. Wornick*, 264 F. 3d 832, 839 (9th Cir. 2001) (the anti-SLAPP law "allow[s] early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation"); *Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1124 (2006) ("[T]he anti-SLAPP statute 'protect[s] defendants from having to expend resources defending against frivolous SLAPP suits unless and until a plaintiff establishes the viability of its claim by a prima facie showing.").

erred in permitting discovery concerning Paterno's actual malice.").[2] This is because when "the defendant contends the plaintiff cannot establish a probability of success on the merits because its complaint is legally deficient, no amount of discovery will cure that defect." *Garment Workers*, 117 Cal. App. 4th at 1162.

In *Garment Workers*, the plaintiff requested relief from a SLAPP discovery stay to take depositions of defendants' employees on the issue of actual malice. *Id.* at 1163. The trial court granted the discovery "before first determining, after briefing and argument, whether the plaintiffs had a reasonable probability of establishing the other elements of their libel cause of action." *Id.* at 1159. The Court of Appeal held that the trial court abused its discretion by granting the request because it failed to consider the "serious questions about the falsity of the statements" raised by defendants in their anti-SLAPP motion. *Id.* at 1163. The Court of Appeal therefore issued a writ of mandate directing the trial court to vacate its discovery order, allow briefing and argument on the anti-SLAPP motion, and first decide whether the defamation claim has "a reasonable probability of success of the merits." *Id.*

A similar result was reached in *Paterno*. There, the Court of Appeal again issued a writ of mandate overturning the trial court's grant of the plaintiff's request to depose defendant on the issue of actual malice, while an anti-SLAPP motion was pending. 163 Cal. App. 4th at 1346. Citing *Garment Workers*, the court recognized plaintiffs "cannot show good cause for discovery on the question of actual malice without making a prima facie showing that the defendant's published statements contain provably false factual assertions," and held the plaintiffs failed to make that showing, in light of the arguments raised in the anti-SLAPP motion. *Id.* at 1351.[3]

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[2] Even outside the anti-SLAPP context, the California Supreme Court has recognized that a plaintiff asserting a defamation claim must demonstrate falsity before obtaining invasive and expensive discovery concerning the defendant's mental state. *See Mitchell v. Superior Court*, 37 Cal. 3d. 268 (1984) (holding that "[t]he falsity of the . . . charges . . . should be drawn into question and established as a jury issue before discovery is compelled," because "to routinely grant motions seeking compulsory disclosure . . . without first inquiring into the substance of a libel allegation would utterly emasculate . . . fundamental principles").

[3] *See also Diamond Ranch Academy, Inc. v. Filer*, 2015 WL 5446824, at *3 (D. Ut. Sept. 15, 2015) (denying request for discovery on actual malice because the question of whether the (footnote continued)

B. Plaintiff's Discovery Request Must Be Denied Pending Resolution of the Disputed Legal Issues Raised in Defendant's Anti-SLAPP Motion

The reasoning of *Garment Workers*, *Paterno*, and similar decisions is directly applicable to this case. Defendant's anti-SLAPP motion raises many bases for dismissal that have nothing to do with malice, and which must be resolved as a matter of law without discovery, including that:

- The statements are protected by the First Amendment;
- The statements are protected by the litigation privilege;
- Mr. Cosby did not personally publish the statements;
- The statements are privileged as "predictable opinion";
- The statements express opinions based on disclosed facts; and
- The statements are substantially true.

Anti-SLAPP Mot. at 5-13. Plaintiff acknowledges the need to address the legal issues raised in the anti-SLAPP motion, but argues she should be permitted to take discovery into the issue of malice *before* doing so. *See* Mot. at 8 ("While Plaintiff *will* conclusively establish that Defendant's statements are provably false allegations, Defendant's malice is still highly relevant and can only be uncovered and demonstrated through the oral deposition testimony of Defendant and Mr. Singer.") (emphasis added)). This approach has be repeatedly, and uniformly, rejected. *Garment Workers*, 117 Cal. App. 4th at 1163; *Paterno*, 163 Cal. App. 4th at 1351; *Diamond Ranch*, 2015 WL 5446824, at *3; *Fuchs*, 2011 WL 507258, at *12.

Plaintiff's request to lift the stay to allow discovery regarding malice is premature as a matter of law, because Plaintiff has not attempted to show (and cannot show) the serious legal deficiencies Defendant raised regarding Plaintiff's complaint lack merit. Granting Plaintiff's request to take those depositions *now*, before Plaintiff has even attempted to demonstrate that the alleged statements were factual, actually false, and made by Defendant, would result in precisely

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statements were false had yet to be decided); *see generally Fuchs v. Levine*, 2011 WL 507258, at *12 (Cal. Ct. App. Feb. 15, 2011) (unpublished) (cited by plaintiffs) (in malicious prosecution action, denying request for limited discovery because "while issues of malice and favorable termination might have turned on the mindset of [defendants], the ultimately dispositive issue of probable cause largely did not").

the type of "unnecessary, expensive and burdensome discovery proceedings" that *Garment Workers* warned against. Plaintiff's Motion should be denied.

C. Plaintiff's Arguments Lack Merit Because Plaintiff's Applies A Standard Inconsistent With Controlling Law

Plaintiff's Motion grounds its good cause argument on cases that have nothing to do with the SLAPP statute, or discovery stays more broadly. First, plaintiff cites two cases discussing what constitutes good cause for leaving a job sufficient to preserve entitlement to unemployment benefits to suggest the "good cause" necessary to lift the discovery stay is a nebulous concept "not susceptible of precise definition." Motion at 6-7 (citing *Hector Zorrero v. Cal. Unemp. Ins. Appeals Bd.*, 47 Cal. App. 3d 434, 439 (1975); *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals. Bd.*, 178 Cal. App. 2d 263, 274 (1960)). Plaintiff then relies on another employment case having nothing to do with the SLAPP statute to suggest that discovery should be allowed now because "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case" here. Motion at 7 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (holding that a plaintiff need not allege facts in an employment discrimination complaint sufficient to establish a prima facie case)).

These cases are inapposite on their face. It is hard to fathom what the discussion in *Zorrerro* and *California Portland Cement* regarding "good cause" to quit a job while preserving a right to unemployment benefits has to do with "good cause" to lift a SLAPP discovery stay, and Plaintiff makes no attempt to explain the relevance. Plaintiff's reliance on *Swierkiewicz* is similarly perplexing, as (1) the pleading standard applicable to Federal labor laws has no bearing on this case, and (2) the holding Plaintiff cites was effectively overruled by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).[4] Regardless, these cases cannot override the body of law developed by California courts specifically in the SLAPP context requiring plaintiffs to demonstrate a reasonable probability of establishing the other elements of a libel claim *before*

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[4] *See McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, n.4 (11th Cir. 2014) ("We note that *Twombly* effectively overruled *Swierkiewicz* when it rejected the old standard for dismissal set out in *Conley v. Gibson*.").

permitting discovery regarding actual malice. *See, e.g., Garment Workers*, 117 Cal. App. 4th at 1161 (granting defendants' writ petition and directing the court to vacate its discovery order because good cause could not exist to seek discovery on malice where the plaintiff failed to demonstrate the alleged factual statements were provably false factual assertions by the defendant); *Paterno*, 163 Cal. App. 4th at 1351 (same).

The use of these inapposite cases to misrepresent Plaintiff's burden cannot be chalked up to ignorance. Plaintiff's Motion failed to apply the appropriate standard despite citing numerous cases that do so, the vast majority of which *granted* defendants' anti-SLAPP motions, and/or *denied* requests to lift the discovery stay—illustrating the consistent force with which California courts have applied the SLAPP statute. *See, e.g., Garment Workers*, 117 Cal. App. 4th at 1161; *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 593 (2003) (affirming grant of Anti-SLAPP motion and denial of discovery); *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71 (2007) ("We recognize the actual malice requirement places a substantial barrier to defamation claims brought by a public figure, particularly at this early stage of the proceeding. This barrier, however, was erected in recognition that 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'").[5] In fact, the only case cited by Plaintiff in which the Court suggested it would have granted a request to lift the discovery stay was *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855, 868 (1995), and subsequent courts have recognized that

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[5] *See also, e.g., Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 277 (2001) (affirming trial court's grant of anti-SLAPP motion and granting defendant's request for attorneys' fees because plaintiff failed to show actual malice); *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 527 (2006) (reversing denial of anti-SLAPP motion where opinions expressed in email were not actionable defamation, and refusing to "engage in a leap of faith that . . . IHHI will present substantial evidence supporting its defamation claim at trial"); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (reversing judgment that publication was made with actual malice); *McCoy v Hearst Corp*, 42 Cal. 3d 835, 846 (1986) (reversing judgment that journalist had actual malice). The one case Plaintiff cites where a defamation claim was actually upheld has little bearing on the issues in this motion, because it was decided at the summary judgment phase, and no request for relief from a discovery stay had been made. *Antonovich v. Superior Court*, 234 Cal. App. 3d 1041, 1052-53 (1991).

language as dicta that is no longer viable after the 1997 amendment to the SLAPP statute requiring a broad interpretation thereof. *See Paterno*, 163 Cal. App. 4th at 1351 ("The court in *Lafayette Morehouse* . . . hinted, in dicta, that trial courts should 'liberally' exercise their discretion o authorize reasonable discovery . . . The *Lafayette Morehouse* decision 'predates the 1997 amendment requiring a broad interpretation of section 425.16.' Accordingly, we join the courts that have limited the reach of *Lafayette Morehouse's* language").

II. Even If Plaintiff's Discovery Request Was Not Premature, It Should Still Be Denied

Even if Plaintiff's request for discovery was not premature, there are several additional reasons why the request should be denied.

First, the discovery Plaintiff seeks is inextricably tied to the content of communications between Defendant and Mr. Singer—which are protected by the attorney-client privilege. Plaintiff acknowledges that attorney-client communications will no doubt be involved, yet claims that what Defendant knew did not become privileged when he communicated it to Mr. Singer. Motion at 13. But Plaintiff is not only seeking Defendant's general beliefs as to Plaintiff's accusations against him. Rather, uncovering Mr. Singer's state of mind in purportedly making the statements on Defendant's behalf will necessarily involve the details of what Defendant did or did not say to Mr. Singer—the actual "maker" of the statements—regarding the making of those statements. The content of those communications is clearly privileged.

Plaintiff next argues that any privilege was waived where third parties were present, and where Mr. Singer was "merely acting as a publicist." Motion at 14. However, Plaintiff has not proven that any third parties were present during Defendant and Mr. Singer's communications, and Mr. Singer was never "merely acting as a publicist" because, among other reasons, the statements relate directly to what potential *legal* action to take in response to the publication of Plaintiff's accusations against Defendant.

Second, even if the communications between Defendant and Mr. Singer were not privileged, they could not support a finding of actual malice because the statements were at most a one-sided account of facts made by Mr. Singer in his capacity as counsel for Defendant. Just as a reporter is "not required to provide an objective picture . . . or an accurate one," *Reader's Digest*

Assn. v. Superior Court, 37 Cal. 3d 244, 260 (1984), an attorney speaking in the interest of his client should be permitted to "present but one side of the story"—especially where, as here, the statement made contains the facts on which it is based and those facts are accurate. A lawyer's duty is to advocate for his or her clients. *See generally Paterno*, 163 Cal. App. 4th at 253 (holding that "slanted reporting . . . does not by itself constitute malice," and that "the actual malice standard is not measured by what an objectively reasonable reporter would have written"); *see also Owen v. Carr*, 134 Ill. App. 3d 855, 861 (Ill. Ct. App. 1985) (dismissing defamation claim against attorney who issued statement in newspaper that action against his client was an attempt to "deliberately intimidate" his client, because statement "can reasonably construed as an attorney's biased presented of his client's view"); *MKC Energy Investments, Inc. v. Sheldon*, 182 S.W.3d 372, 378 (Tex. Ct. App. 2005) (statements by attorney in newspaper that conditions in client's apartment were "dangerous and unhealthy" were not defamatory because they "constitute opinions of the attorney regarding his client's position").

Third, Mr. Singer has already submitted a sworn declaration detailing his process when he made the statements. *See* Declaration of Martin D. Singer In Support of Defendant's Special Motion to Strike, Oct. 6, 2015. Mr. Singer explained what information he based the statements on (Plaintiff's prior public statements and activities, and Mr. Singer's own investigation), and why he made the statements (because he believed that Plaintiff's assertions were false). *Id.* The state of mind of the maker of the statements—Mr. Singer—is thus readily available, which is by itself reason to deny Plaintiff's discovery request. *See Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 190 (2002) (affirming denial of plaintiff's request for limited discovery where the material sought was readily available from other sources).

To the extent Plaintiff seeks to "test" Mr. Singer's declaration, courts have rejected that as a justification for discovery. *See 1-800 Contacts*, 107 Cal. App. 4th at 593-94 (holding that "discovery may not be obtained merely to 'test' the opponent's declarations" and affirming denial of request for relief from discovery stay to take defendant's deposition); *Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 247 (1999) (holding that plaintiff's argument that he should

be "permitted to test respondents' self-serving declarations" would "subvert the intent of the anti-SLAPP legislation").

Conclusion

For the foregoing reasons, Defendant respectfully submits that Plaintiff's Motion to Lift Stay of Discovery should be denied.

DATED: October 19, 2015

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____
Christopher Tayback
Attorneys for WILLIAM H. COSBY, JR.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is First Legal Support Services, 1511 West Beverly Blvd, Los Angeles CA 90026.

On October 19, 2015, I served true copies of the following document(s) described as **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY OF DISCOVERY PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16(g)** on the interested parties in this action as follows:

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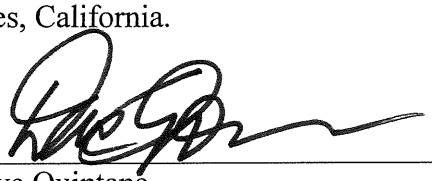
BY MESSENGER SERVICE: I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed on the Service List and providing them to a professional messenger service for service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 19, 2015, at Los Angeles, California.



Dave Quintana