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The anti-SLAPP statute in 2020

ONLY THE STRONG OR THE VERY WELL PREPARED SURVIVE, NO MATTER WHAT THE CASES SAY

There is no shortage of jurisprudence, scholarly discussion and rabble-rousing debate surrounding California's anti-SLAPP statute, Code of Civil Procedure section 435.16. The statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech ... shall be subject to a special motion to strike, unless the court determines ... there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. b)(1).)

Section 425.16 "provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Under the statute, all discovery is stayed without leave of court, Code of Civil Procedure section 435.16, subdivision (g), and a prevailing defendant is automatically entitled to an award of attorney's fees. (Code Civ. Proc., § 435.16, subd. (c)(1).) Those aspects of the statute provide a considerable disincentive to plaintiffs in cases involving protected speech or activity.

There is a plethora of cases that refer to the "minimum merit" a plaintiff must establish in opposing a motion under section 435.16. (*Baral*, *supra*,1 Cal.5th at pp. 384-385.) That standard has also been phrased as a "minimum burden" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 711), or as the "limited nature of a plaintiff's second step showing." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 892.) A closer examination reveals, however, that the plaintiff's "minimum" or "limited" burden is substantial.

According to the Supreme Court, the trial "court does not weigh evidence or resolve conflicting factual claims." (*Baral*, *supra*, 1 Cal.5th at p. 384.) The courts are supposed to "accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Given the nature of protected speech, however, it may be inevitable that the courts engage in some weighing of evidence, even if the leading cases say that it is improper to do so.

A quick overview of the anti-SLAPP analysis

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16….If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at pp. 384-385.)

The expanding scope of section 425.16

While the language of the anti-SLAPP statute has not changed for a long time, judicial interpretation of that statute has seen a rather extraordinary number of twists and turns. It might even be said that the only constant in anti-SLAPP jurisprudence is change itself.

The leading cases under section 425.16 focus upon the first prong of the statutory analysis. Over time, they illustrate significant disagreement among the Courts of Appeal over the kinds of claims that trigger application of the statute. As the Supreme Court resolved those disagreements, it interpreted the statute in an expansive manner. After all, "[n]othing in the statute itself categorically exclude[d] any particular type of action from its operation." (*Wilson*, *supra*, 7 Cal.5th at pp. 889-890.)

The trend toward expanding the reach of the anti-SLAPP statute is illustrated by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58, in which the Supreme Court expressly disapproved six published decisions and held that prong one does not require a defendant to show that a challenged cause of action evidences an intent to chill the defendant's valid exercise of constitutional rights. In *Baral*, the Supreme Court overruled or disapproved four opinions and held that the statute may be used to attack parts of a cause of action, as opposed to the entire cause of action. And in *Wilson*, the Supreme Court disapproved two published opinions and held that the motive underlying a defendant's allegedly wrongful conduct is irrelevant to "the first step of the anti-SLAPP analysis." (7 Cal.5th at p. 892.)

With the scope of the statute expanding, it follows that more attention will be paid to prong two of the analysis. And, while the standards for determining whether a plaintiff can establish a probability of success have not been judicially altered, recent decisions suggest that the approach taken by the courts is, indeed changing.

Prong two: Don't be misled by the term "minimum merit"

The appellate courts have described a plaintiff's prong two burden as "not high." (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 947.) According to the Supreme Court, the "plaintiff need only establish that his or her claim has 'minimal merit.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) Indeed, published opinions make it sound easy for a plaintiff to establish "a probability of prevailing on the merits" by holding that Section 425.16(b) "requir[es] the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim." (*Equilon*, *supra*, 29 Cal.4th at p. 63.)

See West, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2020

On closer examination, it appears that the term "minimal merit" is deceptive. Moreover, because the plaintiff's burden includes showing a "probability of prevailing" taking defenses into account, it seems almost inevitable that some weighing of evidence will take place during the prong two analysis.

Is analysis of an anti-SLAPP motion substantially the same as that of the MSJ?

Prong two has been described as "a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) In *Hicks v. Richard* (2019) 39 Cal.App.5th 1167, 1177, the court held that a plaintiff's anti-SLAPP "burden was similar to that of a party opposing a motion for summary judgment. He had to demonstrate his claims were both legally sufficient and supported by evidence that, if credited, would be sufficient to sustain a favorable judgment." Conversely, some courts have held that "[a]n anti-SLAPP suit motion is not a substitute for a demurrer or summary judgment motion." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851.)

The courts have not been forthcoming in terms of clarifying any differences between the two statutes. In *Sweetwater Union High School District v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 945, the Supreme Court declared that "[t]here are important differences between the two schemes," and then designated only one difference, which is "that an anti-SLAPP motion is filed much earlier and before discovery." (*Ibid.*)

California courts have announced different-sounding standards for the two motion schemes. In the summary-judgment setting, the court looks to "ascertain whether issues of fact exist to be tried." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1025.) When faced with an anti-SLAPP motion, "[i]t is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward.'" (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062.)

The difference between summary judgment and anti-SLAPP may simply boil down to timing, and the denial of discovery without leave of court. "Anti–SLAPP motions differ from summary judgment motions in that they are brought at an early stage of the litigation, ordinarily within 60 days after the complaint is served. (§ 425.16(f).) Discovery is stayed, absent permission from the court. (§ 425.16, subd. (g).)…" (*Baral*, *supra*, 1 Cal.5th at p. 385.)

A trap for the unwary

The term *prima facie* is often used, but rarely defined, in the law. "'Prima facie evidence' is defined as '[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.' (Black's Law Dict., *supra*, pp. 638-639.)." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1186.) In some settings, the term "prima facie case" is defined narrowly. In the demurrer setting, for example, the Court of Appeal equated "a prima facie case of retaliation in violation of FMLA" to be a recitation of "the elements of a cause of action." (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261.) The term "prima facie case" also comes up frequently as a plaintiff's burden in the summary-judgment context. In that context, the term also appears to have a narrow scope that equates to substantiating the factual requirements of a cause of action. The Court in *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202, for example, noted that "[c]ommonly, an employer will seek summary judgment, arguing that the plaintiff has not satisfied one of the four elements of the prima facie case and thus is not entitled to proceed to trial."

It has been held that a "'plaintiff is not required "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.'" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675.) In the anti-SLAPP context, however, the plaintiff's "prima facie" burden appears much more substantial than in other contexts when affirmative defenses are asserted.

In *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93, the Supreme Court held, without defining the term "prima facie," that for purposes of the second prong of the anti-SLAPP analysis, a plaintiff establishes a "prima facie case" through admissible evidence that amounts to a "showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Sustaining a judgment involves more than just factually substantiating the elements of a cause of action. By linking a plaintiff's burden to substantiating a favorable judgment, the courts require a plaintiff to produce admissible evidence which negates defenses asserted against the challenged claim.

Consistent with the notion that the plaintiff must substantiate a favorable judgment, the Supreme Court held in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 that an affirmative defense is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." Similarly, the court in *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 953 stated that "[t]he law is that to defeat a SLAPP motion, Comstock must overcome substantive defenses." The court in *Peregrine Funding, Inc.*, *supra*, noted this additional hurdle and noted that "[s]everal published cases have considered the validity of defenses in determining whether the plaintiff has shown a probability of prevailing in the context of section 425.16." (133 Cal.App.4th at p. 676.)

Note the use of the term "overcoming" in *Flatley* and in *Comstock*. Whereas anti-SLAPP cases generally speak in terms of "substantiating" a claim, in the case of protected speech it appears

See West, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2020

that a plaintiff faces the far stiffer burden of "overcoming" a defense.

The court in *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 25 may have increased a plaintiff's burden even more. That court affirmed the grant of an anti-SLAPP motion with respect to discrimination and retaliation claims under the Fair Employment and Housing Act because the plaintiff's proffered evidence did "not establish that defendants' justification for the nonrenewal of her contract was pretextual."

While earlier cases declared that a plaintiff was not required to "prove" his or her case, the *DeCambre* court affirmed the striking of a claim because the plaintiff could not "establish" (i.e., prove) the element of pretext. "Establishing" an element is new to the anti-SLAPP equation, and seems to be a far cry from the accepted anti-SLAPP standard (stating and substantiating a legal claim), from the related summary judgment standard (raising a triable issue of fact) for allowing a case to proceed, or from "overcoming" a defense.

Based on its skimpy citation history, *DeCambre* may be seen as an outlier that was disapproved on other grounds in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1070. On the other hand, *DeCambre* was recently cited in passing with approval by the Supreme Court in *Wilson*, *supra*, 7 Cal.5th at p. 889, fn.7.

Putting aside the confusion over the standard applicable to surviving defenses, the cases throw an additional hurdle at plaintiffs. Case law makes it clear that the plaintiff's burden includes substantiating claims even against defenses that were not even mentioned in the anti-SLAPP motion. This is clear from the following passage in *Navellier*: "Plaintiffs have taken the position that there was 'no requirement for [them] to come forward with evidence of damages' because defendant 'moved to strike solely on issues of law and did not contest or allege that there was no evidence of damages.' But where, as here, the motion to strike meets the 'arising from' prong of the anti-SLAPP test, the plaintiff must satisfy the second prong of the test and 'establish evidentiary support for [its] claim.'" (106 Cal.App.4th at p. 775.)

Another trap for the unwary: The courts may not necessarily "weigh" evidence

Time and time again, opinions have restated the principle that "[t]he court does not weigh evidence or resolve conflicting factual claims" in prong two. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.) As it turns out, however, if the courts don't exactly weigh evidence, they seem to engage in a process very much like weighing evidence or resolving conflicts in the evidence all the time in the anti-SLAPP context.

That observation is not a criticism of our courts and is likely just a product of the broad mission that the Legislature assigned to the courts in the context of protected activity, particularly speech. Long before the anti-SLAPP statute was adopted, the courts adopted a policy in favor of dealing with challenges to protected speech in a summary fashion. In 1978, the California Supreme Court cited even older authorities and declared that "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. (citation omitted). Therefore, summary judgment is a favored remedy…" (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685.)

The anti-SLAPP statute was adopted with the identical goal, which is "to prevent SLAPPs by ending them early and without great cost to the SLAPP target" by establishing "a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation." (*Varian*, *supra*, 35 Cal.4th at p. 192.)

Legal analysis of speech and protected activity is, however, rife with issues of inference. In defamation cases, for example, the issue of malice is often proven or disproven by inference alone. The court in *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84 noted that a "defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice" and then, after reviewing the plaintiff's circumstantial evidence, went on to hold that "the USPS FOIA response gives rise to an inference Alnor fabricated his conversation with Debra at the Pasadena postal inspector's office. This inference, however, lacks sufficient strength to meet the clear and convincing standard." (148 Cal.App.4th at p. 87.) It is clear that the courts have the power to decide the strength of evidence in the anti-SLAPP context, whether that process is called "weighing" or whether it goes by some other verb.

Inferences are particularly prevalent in discrimination cases. It is now clear that discrimination causes of action are subject to Section 425.16 because the anti- SLAPP "statute contains no exception for discrimination or retaliation claims." (*Wilson*, *supra*, 7 Cal.5th at p. 881.) In cases where there is no direct evidence of discrimination, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination…based on a theory of disparate treatment." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354.) Under the burden- shifting analysis, which is referred to as the *McDonnell Douglas* test, a plaintiff bears the burden of establishing a prima facie case, the employer is then required to offer a legitimate, non-retaliatory reason for the adverse employment action, and if the employer provides such a reason, the burden shifts back to the plaintiff "to attack the employer's proffered reasons as pretexts for discrimination." (24 Cal.4th at p. 356.)

It is difficult to see how the courts can assess the third element of the *McDonnell Douglas* test without weighing evidence because the concept of "strong"

See West, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2020

or "weak" evidence is inherent in the standard. "In weighing the evidence, the court may exercise the prerogatives of a fact trier by refusing to believe witnesses and by drawing conclusions at odds with expert opinion; if it grants the motion, its findings are not reversible if supported by substantial evidence." (*County of Ventura v. Marcus* (1983) 139 Cal.App.3d 612, 615.)

When the third prong is reached, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [... asserted] non-discriminatory reasons." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388-389.) Discussing the third prong, the Supreme Court in *Guz*, *supra*, held that plaintiff's evidence of age discrimination "even if barely adequate to demonstrate a prima facie case, is insufficient for trial in the face of Bechtel's strong contrary showing that its reasons were unrelated to age-related bias." (24 Cal.4th at p. 367.)

Even if they are within an anti-SLAPP court's prerogative, the kinds of assessments made in prong three of the *McDonnell Douglas* analysis certainly sound like the weighing of evidence. Thus, prong three may allow the trial court or Court of Appeal to regulate the outcome of a case even if the plaintiff's case in chief, prong one of the *McDonnell Douglas* analysis, is strong.

Conclusion

Because the second prong of the anti-SLAPP analysis contains layers of traps for the unprepared, attorneys should always examine potential claims closely to ascertain whether they might be deemed to arise from protected speech or conduct. Potential discrimination claims should be examined particularly closely because (1) the apparent weighing of evidence inherent in the third prong of the *McDonnell Douglas* test may complicate the task of predicting the outcome of an anti-SLAPP motion and (2) section 425.16 imposes a mandatory award of attorney's fees to a prevailing defendant. Needless to say, those factors should be fully disclosed to the prospective client.

When an anti-SLAPP motion is filed, it would be a mistake for a plaintiff's attorney to take the cases at their word with regard to a plaintiff's "minimum burden," or to oppose the motion by focusing solely on substantiating the elements of the challenged cause of action. A plaintiff's attorney should make provisions to furnish evidence sufficient to raise triable issues on any defenses, including defenses that have not been disclosed. In discrimination cases, plaintiffs' attorneys pay particular attention to substantiating the employer's alleged pretext, since evidence seems likely to be "weighed" in one way or another when the court considers that issue. Counsel should therefore seriously consider requesting discovery as a means of meeting the plaintiff's "minimum" burden in all discrimination cases. If all else fails, a denial of discovery may be fertile grounds for appeal in the event that there is an adverse ruling on prong two.

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