12/14/17
Dept. 73
Rafael Ongkeko, Judge presiding

LETITIA VASQUEZ v. BRIAN HEWS, et al. (BC658053)

Counsel for plaintiff/opposing party: Nana Gyamfi (L.O. Gyamfi)
Counsel for defendants/moving parties Brian Hews and Eastern County Newspaper Group, Inc.: Scott Talkov; Braden Holly (Reid & Hellyer)

DEFENDANTS' ANTI-SLAPP MOTION TO STRIKE (filed 6/15/17)

Tentative ruling

Requests for judicial notice: GRANTED.

Defendants' anti-SLAPP motion is GRANTED. Plaintiff has failed to demonstrate actual malice by clear and convincing evidence.

Discussion

Factual and procedural background

On April 14, 2017, Plaintiff Letitia Vasquez ("Plaintiff") initiated this libel action against Defendant Brian Hews ("Hews") and various news outlets owned and operated by Hews (collectively, "Defendants"). Plaintiff, who is an elected official serving on the Governing Board of Division 4 of the Central Basin Municipal Water District, alleges that since her election in 2012, Defendants have continually published fabricated, false, and misleading stories about Plaintiff. *Compl., 1:21-2:8.* Plaintiff alleges that she has not filed suit until now due to the high burden a public official must meet in order to succeed on a defamation claim. *Id.* However, Plaintiff alleges that on June 26, 2016 and February 12, 2017, Defendants published stories that finally broke the camel's back and forced Plaintiff to file suit. *Id.* Plaintiff alleges that on the above dates, Defendants published false stories claiming that (1) Plaintiff attempted to extort money from a company called Cook Hills Properties LLC ("Cook Hills"), (2) Plaintiff demanded money from Cook Hills for her vote on an upcoming Central Basin project, (3) Plaintiff demanded money in a pay-to-play scheme for her vote on an upcoming Central Basin project, and (4) Plaintiff demanded campaign donations from Cook Hills for her yes vote on a $552,000 Central Basin contract with Cook Hills. *Id.* at ¶ 11. Plaintiff alleges that each of these statements is demonstrably false and she offers various declarations of individuals purportedly involved in her meetings with Cook Hills to refute the veracity of Defendants' publications. *Id.* at ¶¶ 12-19. Plaintiff alleges that Defendants had no basis for making the above statements and that they knew the statements to be false or made them with reckless disregard for their truth. *Id.* at ¶ 20. Plaintiff alleges that Hews and Defendants made the above comments in an effort to damage Plaintiff's reelection campaign and in an effort to gain more readership. *Id.* at ¶ 21. Plaintiff alleges that she has demanded retractions, but that Defendants have not complied. *Id.* at ¶¶ 33-38.

On June 15, 2017, Defendants filed an anti-SLAPP motion arguing that Plaintiff's sole cause of action for defamation clearly arises from protected speech activity relating to a public figure on a matter of public concern and that Plaintiff will be unable to establish by clear and convincing evidence that

Defendants published the statements with actual malice. Defendants' anti-SLAPP motion is supported by two declarations from anonymous sources for the news story who claim to be elected directors who also serve on the Central Basin Municipal Water District board. These declarants assert that they were informed in a meeting with Central Basin Municipal Water District general manager, Kevin Hunt, that Cook Hills' representatives had made claims that Plaintiff had asked for money during her meeting with Cook Hills. These declarants then relayed what they had allegedly heard from Hunt to Hews.

Defendants request attorney's fees and costs in connection with their motion.

On July 20, 2017, the court granted Plaintiff's motion to conduct limited discovery by way of a three hour deposition of Hews regarding the circumstances surrounding the June 26, 2016 story and Hews' subsequent investigation of the facts. (Court's Minute Order of 7/20/17).

The deposition of Hews took place on September 20, 2017.

On November 29, 2017, Plaintiff filed her opposition. Plaintiff concedes that the first prong of the anti-SLAPP test is met, but she argues that she can prevail on the merits of her claim. Plaintiff contends that Defendants acted with actual malice when they did not conduct a proper investigation into the statement and because Defendants have ill will towards Plaintiff.

Plaintiff also requests attorney's fees and costs.

On December 7, 2017, Defendants filed their reply.

Merits[1]

CCP 425.16 motion to strike (anti-SLAPP)

A defendant may file a motion to strike a claim "arising from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" (§425.16(b)(1). *Bergstein v. Stroock, etc.* (2015) 236 Cal.App.4th 793, 803. "The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92. It is not the defendant's burden to prove that the actions were constitutionally protected (i.e., that the action was a valid exercise of constitutional rights). *Id.*, at 94-95. The defendant is only

[1] As a preliminary matter, the court addresses the procedural defect Plaintiff raises in her opposition. Plaintiff claims that the motion must be denied because it was scheduled for hearing more than 30 days after service. Plaintiff cites *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382 for the proposition that denial is mandatory in such circumstances. However, *Decker* was overturned by legislative action in 2005. Compliance with the 30-day period in subdivision (f) is expressly dependent on "the docket conditions of the court (which may) require a later hearing." There is no evidence that Defendants intentionally reserved a later hearing date on the court's reservation system when an earlier one for this type of motion was available. Further, as Defendants point out, Plaintiff did not object to the "late" hearing date and even asked for a continuance of this hearing in her motion to conduct limited discovery. This procedural objection is not a basis to deny the motion.

required to show that the cause of action falls within the purview of the anti-SLAPP statute, and is not required to prove its subjective intent. *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.

The statute itself requires courts to construe the statute broadly (§425.16(a) "to encourage continued participation in free speech and petition activities." (Citation omitted.) *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1211 The statute includes four categories of protected conduct as set forth in subdivision (e)(1) through (e)(4):

(1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any 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 (§ 425.16(e)(3)); or

(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 (§ 425.16(e)(4)).

CCP § 425.16 " 'requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted.' " (Citation omitted.) " 'First the court decides whether the *defendant* has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)" [citation].' [Citation.] ... [¶] If the defendant makes this showing, the court proceeds to the second step of the anti-SLAPP analysis. [Citation.] In the second step, the court decides whether the *plaintiff* has demonstrated a reasonable probability of prevailing at trial on the merits of its challenged causes of action. [Citations.] [¶] Conversely, if the defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step. [Citation.]" (Citation omitted.)" *Hunter v. CBS Broadcasting* (2013) 221 Cal.App.4th 1510, 1519 (italics added). "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Navellier, supra, at* 89 (italics omitted).

First prong- Protected activity: Have defendants shown that the conduct comprising Plaintiff's complaint arises from defendants' protected activity under any of the four categories in CCP § 425.16? In determining the applicability of CCP § 425.16 to the myriad of factual situations presented in anti-SLAPP cases, courts should look at the "principal thrust or gravamen" of a plaintiff's claims. *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.

For the purposes of the motion, Plaintiff does not contest that the subject article is a writing made in a public forum (a newspaper), in connection with an issue of public interest (here, discussing an elected official and a public project). Defendants have met their burden under the first prong of the anti-SLAPP test, whether under either (e)(3), (e)(4), or both.

Second Prong— Can Plaintiff Demonstrate Probability of Succeeding on the Merits of Her Libel Claim?

Once a defendant has established that the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of success on the merits. CCP § 425.16(b); *Equilon, supra,* at 67. "[T]he 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." *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 (internal quotations omitted). The evidentiary showing by the plaintiff must be made by competent and admissible evidence. *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1444. "We decide the second step of the anti-SLAPP analysis on consideration of 'the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (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.' [Citation.] [¶] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is 'not high.' [Citation.]" *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989.

"In making this assessment, it is 'the court's responsibility ... to accept as true the evidence favorable to the plaintiff ...' (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 2014, 212). The plaintiff need only establish that his or her claim has minimal merit (citations omitted) to avoid being stricken as a SLAPP." *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.

Defamation

The elements of a claim for defamation (whether libel or slander) are: (1) Intentional publication by defendant of statement of fact; (2) that is false; (3) defamatory; (4) unprivileged; and (5) has a natural tendency to injure or that causes special damages. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Civil Code section 45 provides, "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, 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."

Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which 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; Civil Code sections 45, 46.) Publication, which may be written (libel) or oral (slander), is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the public or a large group; communication to a single individual is sufficient. (*Ibid*; *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306.)

Falsity of the Alleged Statement

Plaintiff submits evidence that the alleged statement to Cook Hills regarding "pay-to-play" is false. Plaintiff states in her own declaration that during the June 2016 meeting, she never discussed campaign contributions or funding with Cook Hills. (Vasquez Decl. ¶ 4). Vanessa Delgado, also present for the meeting, likewise denies any discussion of contributions or funding from Cook Hills. (Delgado Decl. ¶

7). Byron de Arakal, the Director of Communications for Cook Hills at the time, also denies that Plaintiff attempted to extort money from Cook Hills. (de Arakal Decl. ¶ 3). General Manager Kevin Hunt, who allegedly reported the statements to Defendants' sources, denies ever receiving a phone call from Cook Hills during which Cook Hills stated that Plaintiff requested money for votes. (Hunt 2nd Decl. ¶ 7). Chief Engineer Lonnie Curtis likewise denies receiving a phone call from Cook Hills about the alleged money-for-votes exchange. (Curtis Decl. ¶¶ 8-15).

In their motion and reply, Defendants do not argue the truthfulness of the alleged statement. Accordingly, the court accepts Plaintiff's evidence as true for the purposes of this motion. *Soukup, supra* at 291. Plaintiff has met her burden to show the falsity of the statements involving money. *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 82.

Actual Malice

As a public figure, there is more to Plaintiff's burden. Because Plaintiff is without dispute a public figure under these circumstances, constitutional principles require Plaintiff to address Defendants' constitutional defense, i.e., show that Defendants acted with actual malice when publishing the allegedly libelous article. *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272, 280. Actual malice is defined as acting "with knowledge that [the publication] was false or with reckless disregard of whether it was false or not." *Id,* at 280. Actual malice must be shown by clear and convincing evidence, a standard which applies even in opposition to an anti-SLAPP motion. *Christian Research Institute, supra* at 84, 86. ("Independent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion."). *See also Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357-358 (Plaintiff city councilmember failed to meet his prima facie showing of actual malice under the clear and convincing standard. "**The burden of proof by clear and convincing evidence 'requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind**." *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 846, quoting *In re David C.* (1984) 152 Cal.App.2d 1189, 1208 (emphasis added).

The court in *Christian Research Institute*, cited *Reader's Digest v. Superior Court* (1984) 37 Cal.3d 244:

> The question is not "whether a reasonably prudent man would have published, or would have investigated before publishing. **There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.** Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Christian, etc., supra*, at 256-257 (emphasis added.)

In demonstrating actual malice, Plaintiff may offer proof by circumstantial evidence, including:

> "[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." (Citations.) A failure to investigate (citation), anger and hostility toward the plaintiff (citation), reliance upon sources known to be unreliable (citations), or known to be biased against the plaintiff (citations) - such factors may, in an appropriate case, indicate that the publisher himself

had serious doubts regarding the truth of his publication. *Reader's Digest Assn., supra, at* 257-258.

However, the *Reader's Digest* court cautioned that a factor standing alone would be insufficient to establish actual malice. *Id.* at 258. ("The failure to conduct a thorough and objective investigation, standing alone does not prove actual malice .., similarly, mere proof of ill will on the part of the publisher may likewise be insufficient.").

Here, Plaintiff argues that Defendants not only failed to investigate the story sufficiently, but also bear ill will towards Plaintiff.

Sufficiency of Investigation

Defendants contend that they relied upon the information of Art Chacon and Philip Hawkins, two other directors serving with Plaintiff. Chacon and Hawkins declare that they attended a meeting with General Manager Kevin Hunt at which Hunt informed them that Chief Engineer Lonnie Curtis received an angry phone call from Cook Hill stating that Plaintiff had requested donations in exchange for her vote. (Doe 1 Decl ¶ 7; Doe 2 Decl. ¶ 5; Chacon Decl. ¶ 7; Hawkins Decl. ¶¶ 6-7). Chacon and Hawkins subsequently reported this information to Defendants. Hews declares that both Chacon and Hawkins had provided reliable information in the past. (Hews Decl. ¶ 19). Relying on *Reader's Digest*, Defendants contend that given the reliable nature of their sources, they had no duty to investigate. *Reader's Digest, supra* at 259. ("A publisher does not have to investigate personally, but may rely on the investigation conclusion of reputable sources.").

However, Plaintiff disputes the reputability of Chacon and Hawkins given their previous associations with Defendants. The declaration of Randy Economy, a former reporter with Defendants, states that Economy, Hews, Chacon, and Hawkins routinely met to discuss "strategies to intimidate, hinder, embarrass and otherwise stop Ms. Vasquez from creating problems for Board Members Hawkins and Chacon." (Economy Decl. ¶ 21). Defendants counter that this declaration was submitted in support of a lawsuit that predates the instant case.

Defendants contend that they conducted an investigation, or at least attempted to verify the reports of Chacon and Hawkins. Hews declares that he called Cook Hill to verify the information and requested to speak with the owner of Cook Hill; no return call was made. (Hews Decl. ¶ 16). Hews declares that he took this lack of a return call as typical when the information is accurate. (Id. at ¶ 17).

Defendants also reached out to Delgado by email. (Depo. Hews 43:1-4) Delgado denies ever having received this email as it is an out-of-date address. Delgado states that Defendants had access to her current contact information. (Delgado ¶¶ 3-4). Defendants also attempted to reach Joseph Legaspi to get in touch with Plaintiff. (Depo Hews, 43:1-12). Legaspi, the Director of External Affairs for the Central Basin, denies having received any communication from Hews. (Legaspi Decl. ¶ 3).

Inasmuch as Plaintiff has submitted evidence contradicting Defendants' evidence, the court considers only whether the evidence favoring Plaintiff would entitle her to a decision in her favor. *Christian Research Institute, supra* at 84 ("A court may not weigh competing evidence on an anti-SLAPP motion. If the defendant's evidence does not demonstrate that plaintiff cannot prevail as a matter of law, we consider only whether evidence favoring the plaintiff, standing alone, would sustain a judgment in his or her favor.").

Defendants proffer uncontradicted evidence that Hews also called Hunt on June 22, 2016 to confirm the allegations and that during the call, Hunt did not deny the allegations, but merely said "You will have to wait until Monday morning." (Hews Supp. Decl. ¶¶ 15-21; Ex. 3). Hews confirmed that he brought up "bribery or extortion" during his conversation with Hunt. (Depo. Hews 62:4-5). Defendants have shown that in neither of his declarations does Hunt deny that this call from Hews took place.

As far as the state of the evidence shows, the uncontradicted evidence also shows that Lonnie Curtis has not denied a discussion with Chacon and Hawkins "downstairs" where Chacon quotes Curtis as saying "I can't believe she did that." This conversation was communicated to Hews.

In the court's view, Plaintiff has not established that Defendants conducted an insufficient investigation to the point of recklessness or actual malice. There were no obvious reasons to doubt the veracity of Curtis, Hunt, Chacon or Hawkins. Hews did not concoct the article out of thin air or base it on unverified anonymous sources. Even so, a "failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice..." *Reader's Digest, supra, at 258.* At most, as Defendants suggest, Plaintiff has alleged that Defendants were negligent in not investigating further before publication. Plaintiffs have not shown that Hews subjectively entertained serious doubt about the truth of the statements.

Ill Will towards Plaintiff[2]

Plaintiff contends that Defendants have demonstrated ill will towards her. As mentioned in the Economy declaration, Hews, Chacon, and Hawkins strategized ways to hinder Plaintiff's ability to cause problems for Chacon and Hawkins. (Economy Decl. ¶¶ 17, 21). Hews, however, declares that he bears no ill will or animosity towards Plaintiff. (Hews Decl. ¶ 40). Defendants do not address the Economy declaration in their reply.

Taking Plaintiff's information standing alone for purposes of this motion, Plaintiff makes a showing that Defendants harbored some ill will towards her.

Conclusion

In order to show actual malice by circumstantial evidence, a Plaintiff must establish more than mere inadequate investigation or ill will in isolation. Plaintiff must still make a prima facie showing of actual malice with clear and convincing evidence, albeit a "minimal" one for anti-SLAPP purposes. Here, Plaintiff has made some showing that Defendants harbored ill will towards her. However, Plaintiff has not shown that Defendants' investigation into the statement was inadequate so as to rise to the degree of actual malice. Acknowledging Plaintiff's burden as showing only a probable likelihood of prevailing, nevertheless, the court finds she cannot do so because Plaintiff has not established clear and convincing evidence of actual malice on Defendants' part.

Defendants' motion to strike Plaintiff's sole cause of action for libel pursuant to CCP § 425.16 is GRANTED. The action is ordered dismissed. Defendants shall give notice (unless waived) and serve and lodge a proposed Order of Dismissal. Attorneys' fees and costs, if any, shall be by noticed motion.

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[2] Many of the declarations in support of the opposition state that Hews has a track record of publishing false news articles and attempting to shake politicians down for advertising money on the threat of publishing such articles about them. However, this appears to be character evidence and none of the statements involve Hews and Vasquez expressly.