

*Superior Court of California
County of Los Angeles*

Rochelle Kirk, et al. <p style="text-align: right;">Plaintiff,</p> vs. Spike Cable Networks, Inc., et al. <p style="text-align: right;">Defendants.</p>	Case BC537335 No.: Tentative Ruling
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Hearing Date: May 15, 2014

Department 54, Judge Ernest M. Hiroshige

Special Motion to Strike the Complaint

Moving Party: Defendants Eyeworks USA, Inc., Eyeworks USA, LLC, Bongo, LLC, Ross Weintraub, J.D. Roth, D.J. Nurre, Skip Bedell, Anthony Jensen, Kevin Harris, Jennifer Pike, and Craig Patton ("Defendants")

Responding Party: Plaintiffs Rochelle Kirk and Scott Waters ("Plaintiffs")

T/R: THE MOTION IS GRANTED. SINCE THE FIFTH CAUSE OF ACTION HAS BEEN DISMISSED, THE COURT RULES ON THE MOTION AS TO THAT CAUSE OF ACTION SOLELY WITH REGARD TO THE ISSUE OF ATTORNEY'S FEES.

PLAINTIFFS TO NOTICE.

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

In ruling on a special motion to strike pursuant to CCP § 425.16, the court engages in a two-step process. First, the court decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity (i.e., that the act or acts of which plaintiff complains were taken in furtherance of defendant's right of petition of free speech.) If such a showing has been made, the court then determines whether plaintiff has demonstrated a "probability" of prevailing on the claim. (*Equilon Enterprises, L.L.C. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) A plaintiff opposing a special motion to strike meets his or her burden by making a prima facie showing of facts which would support a judgment in the plaintiff's favor. (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) To prevail on an anti-SLAPP motion, the cause of action must satisfy both prongs of the anti-SLAPP statute. (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 709-10.)

Protected Activity

Plaintiffs allege that Defendants approached Plaintiffs in April 2013 in connection with a television show called "To Catch a Contractor" (hereinafter "the Program.") Defendants told Plaintiffs that they were looking for families that had been abandoned by contractors and are currently living with construction nightmares. (Compl. ¶ 23.) To induce Plaintiffs to allow their house to be used to promote the show, Defendants falsely represented that they would use only experienced, licensed contractors and crew and would fix all the mistakes of the original contractor. (Compl. ¶ 65.) At the end of the construction related to the show, a sewer pipe was left disconnected allowing about 200 gallons of raw sewage to spill underneath the house. (Compl. ¶ 34.) Plaintiffs began experiencing health concerns as a result of the sewage and mold at the premises. (Compl. ¶¶ 34-37.)

It is the principal thrust or gravamen of the claim determines whether section 425.16 applies. (*Martinez v. Metabolife Int'l, Inc.* (2003) 113 Cal.App.4th 181, 187.) Where a single cause of action alleges both acts protected under the statute and nonprotected acts, the entire cause of action falls under the scope of § 425.16 unless the protected acts are merely incidental to the claim. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.)

Defendants contend that CCP § 425.16 must be interpreted broadly, and that it applies here because Defendants were engaged in creating a television program. The Anti-SLAPP statute applies to "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." (CCP § 425.13(e)(4).)

Defendants contend that their conduct in creating a television program was an exercise of free speech rights. In *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, cited by Defendants, the defendants used the plaintiffs' names in a CSI: Crime Scene Investigation (CSI) television show. The court held that "the creation of a television show is an exercise of free speech and ... defendants' acts helped to advance or assist in the creation, casting, and broadcasting of an episode of a popular television show." (Id. at 143.) In the instant case, the alleged fraudulent statements and construction defects arose as part of Defendants' production of the Program and were, according to the complaint, integral to that free speech process.

Plaintiffs contend that the gravamen of the complaint is injury for defective remodeling of Plaintiffs' home, not free speech conduct. (Oppo. 4-6.) Plaintiffs cite *Martinez v. Metabolife Intern., Inc.* (2007) 113 Cal.App.4th 181, in which a consumer complained of physical injury resulting from consuming the manufacturer's herbal product. Although the complaint alleged claims involving the defendant's statements or representations made in connection with the product, the gravamen of the suit was for injury resulting from manufacturing and distribution of a defective product – conduct not protected by the First Amendment.

Here, the gravamen of the complaint is the production of the Program. Although Plaintiffs allege that Defendants made fraudulent statements, failed to comply with the Home Improvement Laws, and were negligent in the alterations and remodeling of Plaintiffs' home, this conduct was in furtherance of and inextricably intertwined with the production of the Program. Therefore, in contrast to *Martinez, supra*, the "defective product" at issue was Defendants' production of a television show, which is an exercise in free speech. (*Tamkin v. CBS Broadcasting, Inc., supra.*) This conclusion is supported by Plaintiffs' inclusion of the fifth cause of action for injunctive relief, which seeks to prevent the broadcast of the Program and shows that this free speech conduct is not merely "incidental" or collateral to Plaintiffs' complaint.

Defendants contend that the Program involved an issue of public interest. Courts have broadly construed "'public interest' 'to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.]" (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) Here, as argued in the moving papers at pages 9-10, the television program involved a matter of public interest – namely, the perils and pitfalls of home renovation and the risks of hiring "shady" or incompetent contractors. The *Dyer* case relied upon by Plaintiffs is off point because in that case the plaintiff's name was used for a character in the film as an "inside joke," and otherwise bore no connection to the issues addressed by the film. (See *Oppo*. 7.) Here, Plaintiffs do not dispute that they claimed to have hired a contractor for a bathroom remodel who failed to finish the work. Thus, Plaintiffs had a direct connection to the issue of public interest portrayed in the Program.

Plaintiffs contend that Defendants' defective remodeling was "illegal as a matter of law" and thus not constitutionally protected. In *Flatley v. Mauro* (2006) 39 Cal.4th 299, 305, the court held that "a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law ... cannot use the anti-SLAPP statute to strike the plaintiff's complaint." In *Flatley*, it was undisputed that the defendant engaged in criminal extortion, and the case stands for the proposition that the illegal activity must be conclusively established to lose protected status. Here, as discussed further below with regard to the alleged violation of § 7159, Plaintiffs have not shown that Defendants' conduct – i.e. the alleged fraud and the performance of the agreements to produce the Program – was illegal as a matter of law. At best, this would be a factual question relevant to the second prong of the SLAPP statute.

Based on the foregoing, Defendants met their initial burden of showing that the complaint arises from protected speech and conduct.

Probability of Prevailing

Valid Releases

Defendants contend that Plaintiffs signed three separate releases granting permission to Defendants to film and broadcast the process of repairs made to their home. Defendants submit evidence of three releases: the Location Release signed by

Plaintiff Kirk; the Appearance Release & Waiver signed by Plaintiffs Kirk and Waters and their children; and the Settlement Agreement signed by Plaintiffs Kirk and Waters.

In the Location Release, Plaintiff Kirk agreed "**TO ACCEPT ALL ALTERATIONS MADE BY PRODUCER ON AN 'AS IS, WHERE IS' BASIS AS OF THE DATE THAT PRODUCER VACATES THE PROPERTY.**" (Jensen Decl. Exh. C.) On its face, the Location Release would appear to bar any claims by Plaintiff Kirk related to alterations made by Defendant during the production of the Program. Contrary to Plaintiffs' argument in opposition (Oppo. 8), the Location Release is worded to release claims against third parties. (Jensen Decl. Exh. E at p. 4; Reply 6.) Also, Defendants have adequately rebutted Plaintiffs' argument that Todd Weinstein, who signed the Location Release as "General Counsel," lacked authority to bind Defendant Bongo. (See Reply 6.) However, the Location Release was not signed by Plaintiff Waters, and Defendants have not set forth a persuasive reason to find that Waters' claims would be barred under the Location Release.

In the Appearance Release, signed by both Plaintiffs and their children, Plaintiffs agreed as follows:

Releaser hereby agrees not to sue and irrevocably and unconditionally remises, releases, waives and forever discharges Producer, its parent and related companies, subsidiaries (whether or not wholly-owned) affiliates, divisions, licensees, and their past, present and future officers, agents, representatives, employees, successors and assigns, jointly and individually. . . from any and all manner of liabilities, claims and demands of any kind or nature, whatsoever, in law or equity, whether known or unknown, which Releaser. . . ever had, now has, or in the future may have against the Releases arising out of or related to the uses described herein, including, but not limited to. . . claims of personal and/or property rights. (Jensen Decl. Ex. G.)

Plaintiffs have not addressed the Appearance Release in their opposition papers. This release, signed by both Plaintiffs, would bar Plaintiffs' claims herein.

Finally, Defendants submit evidence that, after production and after the alleged damages caused to Plaintiffs' property, both Plaintiffs signed a Settlement Agreement which released Bongo, its affiliates and related entities, and its officers and agents from "any and all claims . . . of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected, fixed or contingent" arising out of or related to the filming of the Program. (Johnson Decl. Exh. D.) Plaintiffs also waived the provisions of Civ. Code § 1542 in the Settlement Agreement. Plaintiffs have not addressed the Settlement Agreement in their opposition papers. This release, signed by both Plaintiffs, would bar Plaintiffs' claims herein.

In opposition, Plaintiffs contend that the Location Release is void for failure to comply with relevant California law regarding home improvement contracts. (Oppo. 9-10.) A "home improvement contract" is a contract between an owner or a tenant and either a general or specialty contractor that provides for the remodeling, alteration, repair,

or improvement of a personal residence, in excess of \$500. (B & P Code § 7159.) The Location Release states that Bongo was granted by Plaintiffs "the right to modify, remodel, redecorate, refurbish, repair, deconstruct, demolish and otherwise alter the Property ... as the Producer determines in its sole discretion." It further states that **"NOTHING IN THE AGREEMENT SHALL OBLIGATE PRODUCER TO MAKE ANY ALTERATIONS TO THE PROPERTY WHATSOEVER."** (emphasis in original.) As argued in reply at page 5, the primary purpose of the contract is to grant permission to Defendants to use Plaintiffs' home as a location for a television show. Plaintiffs have not cited authorities that this type of agreement falls under the scope of § 7159. Moreover, even if § 7159 did apply to the Location Release, Plaintiffs do not raise this argument as to the Appearance Release or Settlement Agreement.

Based on the foregoing, Plaintiffs have not shown a probability of prevailing on their claims.

Injunctive Relief

In the fifth cause of action, Plaintiffs seek an injunction prohibiting the broadcast of the television show in which they appeared. "Prior restraints on media publications, if permissible at all, are permissible only in the most extraordinary of circumstances." (*KCST-TV Channel 39 v. Municipal Court* (1988) 201 Cal.App.3d 143, 146.) Plaintiffs have failed to show that such extraordinary circumstances exist in this case. Thus, the Plaintiffs fail to show a probability of prevailing on the fifth cause of action for this additional reason.

In a sur-reply, Defendants indicate that on May 8, 2014 they were served with Plaintiffs' request for dismissal of the fifth cause of action. The Court has entered this dismissal. However, a plaintiff may not avoid the attorney's fees provision of CCP § 425.16(c) by voluntarily dismissing the complaint or a subject cause of action prior to adjudication. (*Moore v. Liu* (1999) 69 Cal.App.4th 745, 752.) "The anti-SLAPP statute, Code of Civil Procedure section 425.16, anticipates circumstances in which parties dismiss their cases while motions to strike are pending. In such circumstances, the trial court is given the limited jurisdiction to rule on the merits of the motion in order to decide if it should award attorney fees and costs to the defendants. .) Insofar as the fifth cause of action has been dismissed, the Court rules on the motion as to that cause of action solely with regard to the issue of attorney's fees.

The motion is GRANTED.

Attorney's Fees

As the prevailing parties, Defendants may bring a separate motion for attorney's fees pursuant to CCP § 425.16(c).

Date: May 15, 2014


Judge Ernest M. Hiroshige