

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PATRICK D'ARCY et al.,

Plaintiffs and Respondents,

v.

BRETT SCHULTE,

Defendant and Appellant.

G057203

(Super. Ct. No. 30-2017-00916754)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Law Office of Benjamin G. Ramm and Benjamin G. Ramm for Defendant and Appellant.

Patrick J. D'Arcy, in pro. per., for Plaintiffs and Respondents.

*

*

*

Attorney Patrick D’Arcy and his law practice (collectively D’Arcy) sued Brett Schulte, among others, for allegedly defaming him in reviews on a web site called Ripoff Report. Schulte moved to strike D’Arcy’s complaint under Code of Civil Procedure section 425.16¹ (the anti-SLAPP statute). Schulte argued that the defamation claim against him arose from acts in furtherance of free speech in connection with a public issue, and D’Arcy would not be able to demonstrate he was likely to prevail on the claim. Following briefing, the trial court denied the motion, finding it a “close call.” Although Schulte had demonstrated the defamation claim arose from free speech in connection with a public issue, D’Arcy had met his burden of minimal merit sufficiently to permit his claim to proceed.

We find the trial court reached the right result. Because of the specific nature of the allegedly defamatory statements, however, we do not agree with the trial court that the public interest or issue requirement was satisfied. Accordingly, this matter does not fall within the ambit of the anti-SLAPP statute. The trial court, therefore, properly denied the motion, and we affirm its order.

I

FACTS

We limit our review of the facts to those directly involving Schulte, omitting mention of other defendants wherever possible.

A. Background

BASTA is “a nonprofit law firm devoted exclusively to low-income tenants” and represents them in unlawful detainer trials. BASTA generally demands jury

¹ Subsequent statutory references are to the Code of Civil Procedure.

trials in such cases. Suffice to say that among landlords trying to evict tenants, BASTA is not a popular organization.

D’Arcy often represents landlords, and on his web site, he has frequently written blog entries about BASTA, referring to them, among other things, as “the firm that deadbeat tenants turn to.” (Capitalization and boldfacing omitted.) D’Arcy stated BASTA is “feared by many landlord attorneys – and for good reason – they will stall you to death with their litigation tactics, and force landlords to pay them off or else endure huge legal fees to fight them. The legal work they produce is mostly crap, but they are experts at finding small mistakes that can stop an eviction cold.” BASTA, D’Arcy stated, gets “a slice of the action” whenever they recover money for their clients. There is much more that D’Arcy has written about BASTA, but for the purpose of providing some relevant background, it is fair to conclude that D’Arcy harbored a very poor opinion of this law firm.

B. The Ripoff Report Post

In April 2016, a post was made on the web site Ripoff Report about D’Arcy. Ripoff Report says it is “a worldwide consumer reporting Web site and publication, by consumers, for consumers, to file and document complaints about companies or individuals. While we encourage and even require authors to only file truthful reports, Ripoff Report does not guarantee that all reports are authentic or accurate. Be an educated consumer. Read what you can and make your decision based upon an examination of all available information.”

The initial post about D’Arcy was made by an individual purportedly named Zach Gellar, which stated D’Arcy was “incompetent” and had mishandled his unlawful detainer case.

Schulte commented on the post about D’Arcy under the name “John.” The post was as follows:

“I have never been represented by Mr. D’Arcy, however I found his web page when reasearching [sic] the excellent non-profit ‘BASTA’ that represented me in my case . . . and won for what it’s worth. Mr. D’Arcy seems to really dislike BASTA and rants about them on his . . . web page (in third person no less). Based on that, here’s my oppinion [sic] on Attorney Patrick J. D’Arcy.

“His website is oc-attorney.com with the title ‘Patrick J. D’[A]rcy - A Professional Law Corporation’ and states that his practice includes Real Estate Law, Backruptcy [sic] Law, Criminal Defense Law, and Business Litigation. What that tells me is this guy isn’t good enough at *anything* to spealize [sic], and that he’s so desperate for work he’ll take anything he can get. If you’re good at something, you spealize [sic]. His obsession with BASTA is hard to understand . . . I asked about Patrick J. D’Arcy at BASTA and they didn’t even remember him at first. He thinks he’s a big deal, no one else seems to. Then they laughed. He’s sort of a joke there.

“If you wonder WHY Patrick J. D’Arcy is considered a joke at BASTA, I encourage you to read his own website oc-attorney.com [sic] It reads more like the ravings of a crazy person than an attorney. As I mentioned previusly [sic], he writes about himself in third person, which is often a sign of mental illness, and brags that LA Weekly wanted to interview *him* for their article about BASTA but he ‘refused’. Oh sure Patrick D’Arcy, you turned down press . . . because you’re so modest? This guys [sic] is *desperate* for attention. And not only that, his writting [sic] is pretty bad. But I guess that’s what you’d expect from Cal State Northridge.

“As of this writting [sic] BASTA had over 48 positive Yelp reviews from happy clients . . . and Patrick J. D’Arcy has zero. He’s disproportionately represented here on RipOff Report though . . . [sic] Decide for yourself what that means.”

In April 2017, D’Arcy filed the instant lawsuit, and he amended his complaint on July 26. D’Arcy claims in his brief that Schulte “was quickly connected to

BASTA . . . [and] is a BASTA IT manager, and was even served the [complaint] at BASTA's office.”

Schulte was named in the complaint as “John D.” The first amended complaint (the complaint) alleged Schulte's statement on Ripoff Report was defamatory on five grounds:

“a. In the title of the fake ‘review’ it states, ‘Incompetent Attorney.’

“b. The basis for ‘Incompetent Attorney’ is not supported by any facts, and is therefore defamatory on its face. Mr. D’Arcy has defeated BASTA at bench trials, a jury trial and even on appeal.

“c. The fake review falsely states that Mr. D’Arcy suffers from ‘mental illness.’

“d. The fake review falsely impugns Mr. D’Arcy's truthfulness about being interviewed for the *LA Weekly* article regarding BASTA. In fact, Mr. D’Arcy requested that the magazine NOT quote him, as confirmed by an email with Hillel Aron, the author who published the article.

“e. The allegation that Mr. D’Arcy has ‘zero’ positive Yelp reviews as of March 17, 2017 is false. Mr. D’Arcy had 5 star reviews on February 4, 2016 from ‘Manuel C.’ (on an eviction case) and on June 10, 2016 from ‘Fred J.’ (an eviction).” (Record references omitted.)

We limit our evaluation of the alleged defamatory statements to the statements pleaded in the complaint set forth above. “In defamation cases California follows a . . . pleading rule[] under which ‘the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.’” (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 635.)

After much wrangling over discovery, Schulte filed the instant anti-SLAPP action. After a number of delays and continuances, the motion was heard in December 2018, and denied by the trial court. Schulte now appeals.

II DISCUSSION

A. D’Arcy’s Request for Judicial Notice

D’Arcy requests we take judicial notice of a number of documents in two categories. The first is one of the California State Bar’s Rules of Professional Conduct. The second category consists of 13 exhibits which, as D’Arcy describes them, “were not before the trial court and not yet a part of the record.” (Capitalization and boldfacing omitted.)

“Matter[s] to be judicially noticed must be relevant to a material issue.” (*People ex rel. v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) Because all of the documents are only relevant to the second prong of the anti-SLAPP analysis, which we do not reach here, they are not relevant.² Accordingly, the request is denied.

B. The Anti-SLAPP Statutory Framework

The anti-SLAPP statute states: “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 under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) The purpose of the anti-SLAPP statute is to dismiss meritless lawsuits designed to chill the defendant’s free speech rights at the earliest stage of the case. (See *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002)

² We would not take judicial notice of the documents offered for the first time on appeal, as nothing here qualifies as the unusual circumstances under which that would be appropriate. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 396-397; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

29 Cal.4th 53, 67-68, fn. 5.)

An “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (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, 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, subd. (e).)

To determine whether an anti-SLAPP motion should be granted or denied, the trial court engages in 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. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken “in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,” as defined in the statute. (§ 425.16, subd. (b)(1).)” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

If that threshold is met, courts then look to the second step, determining whether the plaintiff has demonstrated a probability of prevailing on the merits. To do so, the plaintiff must state and substantiate a legally sufficient claim (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122-1123), thereby demonstrating the case has at least ““minimal merit.”” (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1105.)

On appeal, “[w]e review an order granting an anti-SLAPP motion de novo,

applying the same two-step procedure as the trial court.” (*Cole v. Patricia A. Meyer & Associates, APC*, *supra*, 206 Cal.App.4th at p. 1105.) In conducting our review, “[w]e consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

C. Protected Activity

We must first decide whether the challenged claims arise from acts in furtherance of Schulte’s right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e). In doing so, “[w]e examine the *principal thrust* or *gravamen* of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies” (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520.)

As a defamation case, there is no doubt that Schulte’s right of free speech is implicated. But because that speech was not before an official body, the anti-SLAPP statute only comes into play if the speech was “‘in connection with a public issue’” or “an issue of public interest.” (§ 425.16, subs. (e)(3), (4).)

D. Public Issue or Issue of Public Interest

As noted above, section 425.16, subdivision (e)(3), states “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” is within the scope of the anti-SLAPP statute. The same is true of subdivision (e)(4), which states that the following is within the ambit of the anti-SLAPP statute: “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.” Either provision may be relevant here; it does not really matter. What matters is whether Schulte’s review on Ripoff Report, and

the allegedly defamatory statements it includes, fulfills the public issue or interest requirement.

One case provides the following definition of public issue or interest:

“(1) The subject of the statement or activity precipitating the claim was a person or entity in the public eye. [Citations.] [¶] (2) The statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants. [Citations.] [Or] [¶] (3) The statement or activity precipitating the claim involved a topic of widespread public interest.” (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33 (*Commonwealth Energy*)). In that case, the court found an offer of investment services to a small group of investors in a competing firm did not constitute a matter of public interest. (*Id.* at p. 34.)

Another case set forth that “‘public interest’ does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker’s conduct should be the public interest rather than a mere effort ‘to gather ammunition for another round of [private] controversy’” (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132-1133 (*Weinberg*)).

Further, in the context of the anti-SLAPP statute, “public issue” and “public interest” refer to issues of “public concern.” (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 929.)

The trial court found the public issue or interest requirement was satisfied because Schulte’s “post herein touches upon matters of public concern and likely interests a significant number of people. After all, both plaintiff and BA[S]TA are

regular players in the landlord-tenant litigation world.” The court analogized to two cases involving homeowner’s associations which concluded issues concerning architectural guidelines and management were of sufficient public interest to satisfy the requirement. But as one of those cases stated, “public interest” generally applies only to private conduct if that conduct “impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.” (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) The other case the trial court cited, *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468, quoted the same language.

We do not dispute that the actions of homeowners associations can impact their communities similar to the manner in which a government entity might. But a homeowners association as a party to the dispute is distinguishable from the instant case. BASTA is a law firm that represents poor clients. D’Arcy is a lawyer who strongly dislikes and litigates against BASTA. Neither has a government’s power or an effect on society similar to a government entity.

Schulte argues that the Ripoff Report comment was made in connection with an issue of public interest – the use of juries to resolve unlawful detainer actions. “This topic has been the subject of bills introduced in the California Assembly . . . , discussions by industry lobbies . . . , and reporting in the media . . . D’Arcy joined this debate both by commenting extensively on the organization that is most closely associated with this issue” – presumably BASTA.

While this might be true under other circumstances, the topic of the lawsuit is not political comments relating to the use of juries in unlawful detainer actions. The alleged libelous statements here all concern D’Arcy personally – his alleged competence, whether he displays characteristics of someone who is mentally ill, whether or not he was interviewed for a magazine article, and whether he has any positive Yelp reviews. These are not issues of interest to anyone but D’Arcy and his clients and potential clients (if we

assume the last two are of interest to anyone besides D’Arcy at all). Thus, the alleged defamatory statements are not those which “could affect large numbers of people beyond the direct participants” (*Commonwealth Energy, supra*, 110 Cal.App.4th at p. 33) or “a substantial number of people” (*Weinberg, supra*, 110 Cal.App.4th at pp. 1132-1133).

The topics directly addressed in the defamation claim are also not of “widespread public interest” (*Commonwealth Energy, supra*, 110 Cal.App.4th at p. 33); rather, they are “matter[s] of concern to the speaker and a relatively small, specific audience” (*Weinberg, supra*, 110 Cal.App.4th at pp. 1132-1133). Moreover, there is not a “degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient.” (*Ibid.*) The challenged statements are specifically about D’Arcy and his competency, mental state, and honesty.

In *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, we rejected the defendant’s contention that a broad, nonspecific interest in the general subject of the litigation was sufficient to satisfy the public interest requirement. “Trimedica argues that ‘herbal dietary supplements and other forms of complementary medicine are the subject of public interest.’ As support, Trimedica cites regulations of herbal supplements by the Federal Trade Commission and the Food and Drug Administration pursuant to acts of Congress. Yet Trimedica’s speech is not about herbal supplements in general. It is commercial speech about the specific properties and efficacy of a particular product If we were to accept Trimedica’s argument that we should examine the nature of the speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute.” (*Id.* at p. 601.)

This is an even weaker case because of the extremely tenuous connection between the alleged defamatory statements and any subject that might be a public issue or of public interest. Any public interest would be on the general topic of low-income

tenants and how their eviction cases are processed by the legal system, including the use of jury trials. The allegedly defamatory statements do not even touch this topic.

Schulte's motives for making the statements are simply irrelevant. What matters is their content, and the content entirely relates to D'Arcy and his personal characteristics.

Schulte simply cannot abstract the topic until it becomes general enough to fit the public interest requirement. (*Consumer Justice Center v. Trimedica International, Inc.*, *supra*, 107 Cal.App.4th at p. 601.)

Accordingly, we conclude the complaint does not satisfy the "arising from" prong of the anti-SLAPP analysis.

E. Minimal Merit

Because we conclude that the first prong of the anti-SLAPP analysis was not met, we need not consider whether D'Arcy's defamation claim had minimal merit.

F. D'Arcy's Request to Reverse a Trial Court Finding

In his respondent's brief, D'Arcy requests we "affirm the trial court's ruling, except where D'Arcy was determined to be a limited public person . . . , and as to that ruling, to hold that D'Arcy is a private individual."

We decline. First, D'Arcy failed to cross-appeal, and we do not grant affirmative relief based on a request in a respondent's brief. Second, we have no jurisdiction to do so in any event. The expedited, interlocutory appeals in anti-SLAPP motions permit this court to review a trial court's decision to grant or deny an anti-SLAPP motion (§ 425.16, subd. (i)), not to decide collateral matters unnecessary to our review of the motion. Accordingly, D'Arcy's request is improper.

III

DISPOSITION

The court's order is affirmed. D'Arcy is entitled to his costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.