

**LAW & MOTION
DEPARTMENT 18
HONORABLE HELEN I. BENDIX**

Hearing Date: 12/1/08
Case Name: INTERNET SOLUTIONS CORP. v. GARGA-RICHARDSON
Case No.: BC394102
Motion: SPECIAL MOTION TO STRIKE COMPLAINT.
Moving Party: DEFENDANT.
Opposing Party: PLAINTIFF.
Action Filed: 7/10/08

Tentative Ruling as of 11/24/08

Plaintiff alleges the following causes of action arising out of defendant's statements on defendant's website-- www.scamfraudalert.com-- that plaintiff is composed of "thugs," "crooks, criminals, scumbags targeting the unemploy [sic], elderly, students, stay-at-home moms, retirees and the innocent. Luring them into cashing fraudulent checks" (Complaint, Paragraph 13):

- (1) LIBEL PER QUOD;
- * (2) LIBEL PER SE; ? SECTION 230. - UNDER FEDERAL STATUS
- (3) INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS;
- (4) INJURIOUS FALSEHOOD--TRADE LIBEL;
- (5) VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.; and
- (6) INJUNCTIVE RELIEF.

Plaintiff also alleges that defendant published false claims on his website that plaintiff used the Internet to gain personal information under false pretenses (phishing), engaged in identify theft, and perpetrated employment scams. Complaint, paragraph 12.

Defendant moves to strike the complaint under the anti-SLAPP statute.

Evidentiary Objections

The opposing declaration is often conclusory, lacking in foundation, and includes hearsay (e.g., of potential customers declining to do business with plaintiff). As to

anti-SLAPP motions, "declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 26. . "The prima facie showing of merit must be made with evidence that is admissible at trial." Salma v. Capon (2008) 161 Cal.App.4th 1275, 1289.

Defendant has made only generalized objections (Reply, pp. 5-7); these objections lack the specificity needed to rule on any particular statement. Defendant has thus waived these generalized objections to the extent that the court has not itself disregarded obviously incompetent evidence under the authorities noted above.

The court's rulings on plaintiff's evidentiary objections, filed on 11/6/08, at set forth in pencil on the objections themselves. The parties are ordered to review those rulings (which are in Madam Clerk's possession) before oral argument.

Plaintiff as a Suspended Nevada Corporation

The court has sustained plaintiff's evidentiary objections to the unauthenticated website printouts that defendant asserts demonstrates that plaintiff is a suspended corporation. The court, however, is concerned that if plaintiff, in fact, is suspended and its counsel, knowing of that fact, continues to file documents and appear on behalf of such a corporation. If plaintiff is a suspended corporation, the court asks whether it should continue this hearing so that plaintiff can get reinstated? *See Weil & Brown, Civ. Pro. Before Trial* (The Rutter Group 2008) ¶2:93.1.

Evidentiary Burdens

The parties do not differ on their respective burdens. Defendant has the burden, in the first instance to show that the complaint comes within purview of the anti-SLAPP statute. Martinez v. Metabolife Inter. Ins. (2003) 113 Cal.App.4th 181, 186 Defendant relies on Section 426.16 (e)(3) and (e)(4) to argue that his website postings are an exercise of his First Amendment rights protected by the anti-SLAPP statute. Plaintiff does not assert that any of the exceptions in Section 425.17 apply here.

In determining that first step, judges are not limited to considering pleadings, but also may consider the moving and opposing parties' filed evidence to ascertain the conduct or communications upon which liability is allegedly based. City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 79; Navellier v. Sletten (2002) 29 Cal.4th 82, 89 ("In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'"); *Weil & Brown, Cal. Practice Guide: Civ. Pro. Before Trial* (The Rutter Group 2008) Paragraphs 7:235.20, 7:244.2.

Furthermore, arguments made by opposing parties as to the merits cannot be considered in the threshold analysis as to whether causes of action arise from protected activity. Freeman v. Schack (2007) 154 Cal.App.4th 719, 733 ("merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity."). Where "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." Flatley v. Mauro (2006) 39 Cal.4th 299, 316.

If defendant satisfies his burden as to the first prong of the anti-SLAPP analysis, plaintiff must show a probability of prevailing on the merits of the complaint. Equilon Ent., LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 "The plaintiff need only establish that his or her claim has 'minimal merit'...to avoid being stricken as a SLAPP." Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291..For purposes of ruling on anti-SLAPP motions, courts must accept complainants' admissible evidence as being true, cannot consider credibility or weigh evidence, and evaluate defense evidence only to determine if it conclusively has defeated plaintiff's proof as a matter of law. Flatley v. Mauro (2006) 39 Cal.4th 299, 326; Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 105-106.

The First Prong of the Anti-SLAPP Analysis

The court agrees with defendant that a website is a public forum. "Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 41 n.4; Weil and Brown, supra, at Paragraph 7:752.

The court also agrees that the statements at issue here concern a matter of "public interest" as that term is used in the anti-SLAPP statute. "Consumer information ..., at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." Wilbanks v. Wolk (2004) 121 Cal. App. 4th 883, 898-99 ("The statements ... were not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices. Wolk's statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern.").

"[W]hile the boundaries for determining whether a matter is of 'public interest'

under section 425.16, subdivision (c)(4), are imprecise, three patterns are discernible from the case law. It held that statements falling within the statute generally have at least one of three characteristics, namely, they 'concerned [1] a person or entity in the public eye [citations], [2] conduct that could directly affect a large number of people beyond the direct participants [citations] or [3] a topic of widespread, public interest [citation].'" Amarillas v. Campolong (2008) _ Cal.App.4th _, __, 2008 Cal. App. LEXIS 1782, *26-27.

The statements at issue here were made by a self-proclaimed consumer watchdog about purported fraudulent practices, including identity theft, against persons seeking employment opportunities on the Web. See, e.g., Garcia-Richarson Declaration, Paragraphs 3, 6, 7, and 8. Plaintiff admits to being a marketing consulting business providing services in developing corporate brands and marketing plans, website development, lead generation, and recruiting services to large base of clients. . Difrawi Declaration, Paragraph 3.

The court finds that defendant has satisfied his burden under the first prong of the anti-SLAPP analysis.

The Second Prong of the Anti-SLAPP Analysis

Libel Claims

The elements of the libel causes of action:

- False;
- unprivileged;
- publication by writing, printing, or other fixed representation;
- exposes a person to hatred, contempt, ridicule, or obloquy, or which causes person to be shunned or avoided, or which has a tendency to injure person in his occupation.

Ruiz v. Harbor View Community Assn. (2005) 134 Cal. App. 4th 1456, 1470-1471.

"Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." Pulver v. Avco Fin. Servs. (1986) 182 Cal. App. 3d 622, 638. As to libel that is reasonably susceptible of a defamatory meaning on its face; plaintiffs need not plead special damages. Selleck v. Globe Int'l (1985) 166 Cal. App. 3d 1123, 1135. These damages are presumed.

Resolution of whether plaintiff has satisfied its burden to show a probability of prevailing turns, in large part, on how plaintiff is characterized for defamation purposes: Is it a private figure or a limited public figure? Defendant relies principally on Ampex

Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, to argue that plaintiff is a limited public figure. Plaintiff counters that it has not voluntarily interjected itself in the public debate.

Plaintiff does not address Ampex in its opposing papers as to how properly to characterize itself for defamation purposes. Similarly, plaintiff merely argues that it is not a limited public figure because it did nothing "to make itself a public figure" and that there "is absolutely no evidence that ISC is a limited public figure." Opposition, p. 10. Plaintiff asserts that defendant cannot make plaintiff a limited public figure merely by posting false information about it on the Web.

The court reminds plaintiff that it has the burden to demonstrate probability of prevailing on each element of a cause of action. Mere argument is not sufficient.

Defendant cites only paragraph 41 of his Declaration in support of its contention that plaintiff is a limited public figure because it "openly sought to counter these discussions [on defendant's website] through forum postings and the development of specific websites whose sole purposes are to quell the controversy." Motion, p. 17. Paragraph 41, however, does not contain any evidence in support of this contention.

Defendant does not disagree that plaintiff had to "have undertaken some voluntary through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempt to thrust him or herself into the public eye." Ampex, at p. 1577. In Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351, the Supreme Court also recognized that one could become a limited public figure by trying to influence the outcome of public opinion. See also Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 934. See also Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1164(inviting media attention for a commitment ceremony and posting information about that ceremony on a website was enough to make plaintiff a limited public figures).

The court asks defense counsel to identify evidence demonstrating any such behavior on the part of plaintiff. In Ampex, the appellate court easily found that plaintiff, a publically traded company with its own blog had thrust itself into the public eye as to postings on that blog and its issuing of press releases and letters. Ampex, at p. 1578.

Characterization of plaintiff is critical to the defamation causes of action because such characterization governs whether malice is part of plaintiff's burden in addressing the second prong of the anti-SLAPP analysis.

If, arguendo, malice were part of plaintiff's burden, then the court would find that plaintiff has not demonstrated a prima facie case of malice, as opposed to lesser behavior like gross negligence. Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 88, 90 (gross negligence is not actual malice, but instead defendants must have had knowledge

of falsity or doubt of the truth, and failures to investigate must be purposeful avoidance of truth or of knowledge of facts which could confirm probable falsity).

Plaintiff asserts that defendant never spoke with Mr. Difrawdi and never visited plaintiff's place of business. Difrawdi Declaration, Paragraphs 5-6. This evidence, however, is not dispositive where defendant has presented evidence that his investigation included review of Washington Post and Los Angeles Times articles, a television station's expose, a federal prosecutor report, a search of a Florida Department of Corporations website, and conversation with a fraud expert (Mr. Henderson) in making the remarks posted on defendant's website. See, e.g., Garcia Richardson Declaration, Paragraphs 12, 13, 16, 17, 18, 33, 35, 39-41.

Furthermore, the references to moving party's exhibits of e-mail exchanges of self-serving assertions regarding threatened litigation, and a declaration about defendant's having been a victim of another unspecified Internet-based fraud, are vague, argumentative and unsupportive of a showing a malice (see Opposition, 12:7-20).

If the court finds, arguendo, that plaintiff is a limited public figure, then the court's finding regarding plaintiff's failure to show probability of prevailing as to the malice element would militate in favor of granting the motion as to the libel claims.

The court concedes that the evidence before the court does not fall within any of the fact patterns of the cases that have generated the definition of a limited public figure. See, e.g., Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 1577 ("The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues."); Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 934 ("'limited' purpose public figures, are persons who have either voluntarily injected themselves into a particular public controversy, or who have been drawn into such controversies."); Khawar v. Globe Internat. (1998) 19 Cal. 4th 254, 263, 265 ("involuntary limited public figure must have purposefully engaged in activity inviting criticism, or have acquired substantial media access in relation to the controversy"); McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 113 ("an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure....'"); Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 1272 ("Gertz, suggested there may be a third type of public figure—the involuntary public figure—although it noted 'the instances of truly involuntary public figures must be exceedingly rare.'"); Gertz v. Robert Welch (U.S. 1974) 418 U.S. 323, 351 ("an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."). (Emphases added.)

Defendant's declaration evidences various publications on the topic of plaintiff's voluntary web site presence and related controversies regarding that presence, upon which

defendant allegedly commented. Whether these publications are true or hearsay is immaterial to the public-figure analysis. Mr. Difrawdi admits that plaintiff operates some of its website activity referenced on defendant's web site (e.g., at ¶10). Plaintiff is thus not like a purely private citizen, who surprisingly and involuntarily has been dragged into the media spotlight solely as a victim of published defamation. The court looks forward to oral argument on whether this is a sufficient evidentiary showing to characterize plaintiff as a limited public figure.

Even assuming, arguendo, that plaintiff is not a limited public figure, the the opposing party's evidence is conclusory, speculative, and lacking in foundation and authentication, and is thus incompetent to prove that defendant— as opposed to others posting comments on defendant's website-- made the publications (see Difrawi Declaration, ¶¶7-8). In that regard defendant only admits posting some unspecified comments (e.g., motion, Archie Garga-Richardson decl., ¶6). "[S]ection 230 exempts Internet intermediaries from defamation liability for republication." Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 63 (citing 47 USC §230).

The opposing evidence is also incompetent to demonstrate causation of damages with respect to the libel per quod cause of action (id. at ¶¶9-14). For example, Mr. Difrawi avers in conclusory terms that plaintiff lost unidentified business because of defendant's website. Id. at Paragraph 11. His allegations regarding lost unidentified recruits is similarly conclusory and filled with hearsay. Id. at Paragraph 12. The only funds that Mr. Difrawi identifies that plaintiff has expended as a result of defendant's website are legal fees. Id. at Paragraph 13.

The court concedes that accusing someone of a crime--identity theft--is defamatory per se and thus damages is presumed.

The court is inclined to grant the anti-SLAPP motion as to the libel causes of action.

Intentional Interference with Business Relations

The elements of this cause of action are:

- Economic relationship existing between the plaintiff and third party;
- probability of future economic benefit to the plaintiff;
- defendant's knowledge of the relationship;
- defendant's intentional acts designed to disrupt the relationship;
- defendant engaged in an independently wrongful act in disrupting the relationship beyond just inducing disruption of economic advantage;
- actual disruption of the relationship; and
- economic harm to the plaintiff caused by the acts.

Salma v. Capon (2008) 161 Cal.App.4th 1275, 1290.

The court respectfully submits that plaintiff has not proffered any evidence of defendant's knowledge of the unidentified business relationships of plaintiff that are the subject of the interference cause of action. See Difrawi Declaration, Paragraphs 1-14. This is fatal to demonstrating probability of prevailing on the 3rd cause of action. The motion is granted as to the latter cause of action.

Injurious Falschhood-Trade Libel

The elements of this cause of action are:

- Defendant's false statement;
- publication;
- of matter disparaging the quality of another's property or services;
- which the publisher intended to cause harm to the owner, or should have recognized as being likely to cause it; and
- causation of pecuniary harm or loss.

Computerspress, Inc. v. Jackson (2001) 93 Cal. App. 4th 993, 1010.

The court is willing to assume that statements regarding one's using the Internet to gain personal information under false pretenses (phishing), engaging in identify theft, and perpetrating employment scams, would constitute disparaging remarks regarding plaintiff's services. Plaintiff's problem with this cause of action is its failure competently to evidence probability of prevailing as to the element of malice and damages.

"[A] cause of action for damages for trade libel requires pleading and proof of special damages in the form of pecuniary loss." Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 572. Plaintiff cannot assert a generalized loss of customers but must identify specific customers or transactions lost because of defendant's conduct. Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 109. For the reasons set forth above as to the libel per quod cause of action, plaintiff's evidence on this issue is conclusory and otherwise incompetent.

Actual malice is also an element of a trade libel claim. See Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 1362. For the reasons noted above as to the libel causes of action, plaintiff has not shown a probability of prevailing on the issue of malice.

The motion is granted as to the trade libel cause of action. 

Injunctive Relief

The Second District has held that Injunctive relief is not a cause of action but merely a remedy. See, e.g., Marlin v. Aimco Venezia, LLC (2007) 154 Cal.App.4th 154, 162 ("An injunction is a remedy, not a cause of action."). A fortiori, the motion must be granted as to this non-existent cause of action.

Section 17200 Claim

The elements of a Section 17200 claims are:

- A business practice;
- that is unfair, unlawful or fraudulent; and
- authorized remedy.

Bus. & Prof. Code § 17200.

See also generally William L. Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2005) ¶7:116 et seq..

Given that the court has found that plaintiff has not satisfied its burden as to the other causes of action, plaintiff cannot evidence a predicate act to support its claim under Business and Professions Code Section 17200. *See* Cal. Prac. Guide: Bus. & Prof.C. § 17200 Practice (The Rutter Group 2008) ¶5:141 ("A number of cases have held that if the complaint fails to state a violation of an underlying law, the § 17200 claim on which it is premised fails too.").

Disposition

The motion is granted, as to the entire pleading, without leave to amend.