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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RACHEL NEUWIRTH, Plaintiff and Appellant, v. RICHARD SILVERSTEIN et al., Defendants and Respondents.	B205521 (Los Angeles County Super. Ct. No. SC094441)

APPEAL from a judgment of the Superior Court of Los Angeles County. John H. Reid, Judge. Reversed in part and affirmed in part.

Charles L. Fonarow for Plaintiff and Appellant.

Dewey & LeBoeuf and Suman Chakraborty (admitted pro hac vice); Lane Powell and Janis White (admitted pro hac vice) for Defendant and Respondent Richard Silverstein.

Freeburg, Nettels & Schaldenbrand and Steven J. Freeburg for Defendant and Respondent Joel Beinin.

SUMMARY

The plaintiff filed a complaint for defamation, and the defendants filed special motions to strike pursuant to Code of Civil Procedure section 425.16 which the trial court granted. The plaintiff appeals. Because we find the trial court erred in determining the plaintiff had failed to make a prima facie showing of facts sufficient to support a judgment in her favor if the evidence in her favor is credited regarding one cause of action against each defendant, we reverse in part and affirm in part.

FACTUAL AND PROCEDURAL SYNOPSIS

According to the allegations of her complaint, Rachel Neuwirth is a respected journalist working in the Los Angeles area. A "native of Israel, [she] has expressed strong pro-Israel views." "[P]ossibly in part because of her political views," she alleged, Richard Silverstein and Joel Beinin "harbor actual malice and animosity" toward her and want to damage her reputation and emotional well-being.

By way of background in this regard, Neuwirth alleged Rabbi Chaim Seidler-Feller, Director of Hillel at UCLA, physically attacked her without provocation in October 2003. Shortly after this attack, she said, "disciples of Seidler-Feller maintained in public print that [she] had provoked the attack by making inc[e]ndiary statements" to him. Neuwirth denied these allegations. As a result of her injuries, she said, she sought legal redress and reached an "amicable settlement" with Seidler-Feller and Hillel accompanied by a letter of apology from Seidler-Feller, "published in various tribunals," in which he "acknowledged that the attack upon [Neuwirth] was unprovoked, that he took full responsibility for said attack and apologized for his actions."[1] Notwithstanding

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[1] In a prior appeal in that case, we reversed the trial court's order overruling the defendants' demurrer to two of Neuwirth's causes of action. (See *Neuwirth v. Los Angeles Hillel Council* (Jul. 12, 2006, B185805) [nonpub.opn.].)

Seidler-Feller's admissions, "in an effort to vilify and damage [Neuwirth's] reputation further," Silverstein published on the Internet a statement which "in effect called [Neuwirth] a liar" and took the position that Neuwirth had, in fact, provoked the attack and that Seidler-Feller's "original version" was more credible than Neuwirth's. Silverstein "couch[ed] his allegations in the terms of his 'opinion'" to avoid subjecting himself to an action for libel.[2]

Thereafter, she alleged (in her first cause of action), Silverstein "decided to go further and commit a blatant libel of [Neuwirth]." On May 3, 2007, he published on the Internet an article in which he referred to her as "a 'Kahanist swine' thereby accusing [her] of being a member of a terrorist organization" and exposing her to hatred, contempt and ridicule and injuring her in her occupation in violation of Civil Code section 45. "The United States Department of State has issued . . . a list of terrorist organizations which include such organizations as Al-Qaida, the Palestine Liberation Front, and Kahane Chai, among others. To refer to a person as a Kahanist is to brand that person as a terrorist." Silverstein knew his publication was false, and it constituted libel per se, she said.

On May 13, Neuwirth alleged (in her second cause of action), Beinin published on the Internet a statement accusing her of having made a death threat against him although this allegation was false and Beinin knew at all times it was false; it was published for the express purpose of causing Neuwirth harm. At the same time, Silverstein issued another statement on the Internet reiterating the allegation Neuwirth had made a death threat against Beinin, although Silverstein knew the statement to be false. Accusing her of committing this crime, she alleged, also constituted libel per se under Civil Code section 45.

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[2] She said Beinin joined Silverstein in these allegations and falsely alleged Neuwirth had issued a death threat against him (as described in her second cause of action); the two "conspired and collu[d]ed to damage [her] reputation" and caused her harm.

In response, both Silverstein and Beinin filed special motions to strike. (Code Civ. Proc., § 425.16.) In his motion, Silverstein asserted Neuwirth's complaint arose from speech in a public forum regarding an issue of public interest as both he and Neuwirth write about the "Middle East conflict—a highly controversial matter of great public importance and political interest." He attached copies of the statements to his declaration.[3] Because he has chosen to advocate tolerance and peaceful reconciliation, he said, his "work has attracted vitriolic criticism from those who, unlike him, believe that Arabs and Jews should not live together."

Silverstein said his statement that Neuwirth was a "Kahanist swine" was neither defamatory (as he said it was non-actionable opinion) nor false. He said "Wikipedia . . . describes Kahanism as follows: 'Kahanism is a term used in Israeli political parlance to refer, first of all, to the ideology of Rabbi Meir Kahane, and, more generally, to other right-wing Religious Zionist movements or groups that share a belief in the fundamental tenets of that ideology, chief among them being the idea that the State of Israel should be governed theocratically, should accord full citizenship only to Jews, and that all gentiles should either be deported or allowed to remain as resident aliens with full economic and personal rights, but no political rights. [¶] The central claim of Kahanism is that all Arabs are, and will continue to be, enemies of the Jews, and that a Jewish fundamentalist state, absent . . . a voting Arab population and that includes Israel, the West Bank and Gaza Strip and also possibly areas of modern Jordan and Lebanon,

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[3] Silverstein also attached several other documents as exhibits, including documents he said evidenced the "derogatory and hateful comments" he received and a "fake blog" ("Little Dickie's Diaper Dropping") designed to look like it was authored by Silverstein. He said Neuwirth had sent him hateful e-mails and believed Neuwirth had been "involved in [the fake blog's] creation." As an example, he said, after the death of an Israeli professor who worked for peace in the Middle East (Tanya Reinhart), Neuwirth sent him an e-mail insulting Reinhart's memory. As support, he attached e-mail from a rachterry@sbcglobal.net address which he attributed to Neuwirth; he said he blocked her from sending him further e-mails and referred to Neuwirth as "Kahanist swine" in this context.

should be created. The Kahanist movement proper also argues that such a state should be ruled according to Jewish theocratic law known as Halakha, but the term "Kahanist" is sometimes used loosely to describe any Zionist group which seeks a greater Israel.'"

Regarding the second statement, he acknowledged posting the following on his Tikun Olam Web site at www.richardsilverstein.com: "Neuwirth Issues Death Threat Against Peace Activist[:] [¶] A prominent Mideast peace activist just e[-]mailed me that Rachel Neuwirth made a death threat against him. And he testified to this in a legal deposition. Good to know there's a legal record of it in case I need it myself to establish a pattern of her reckless, defaming and cyber-bullying behavior. . . ."[4] He argued, however, this statement was true, privileged under Civil Code section 47 and subject to immunity under the Communications Decency Act of 1996. (47 U.S.C. § 230(c)(1) ["No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"].)

In his declaration in support of his special motion to strike, Beinin said Neuwirth called him in 2003 and was violent and abusive so he hung up on her and did not respond to any subsequent calls. He said she called about 11 times between September 18 and 20, 2003, and left messages. In one, he said, she said he was "worse than the 'kapos'" because he had a choice in what he was doing and he was betraying his nation. He said "kapos" were "Jews who assisted the Nazis in carrying out the mass murder of other Jews during World War II." She said, "Hitler killed those who betrayed their nation first[.]" According to Beinin's declaration, "Neuwirth also said that Daniel Pearl is an example of what can happen if you betray your nation and that I should take all of this under consideration. I knew that Daniel Pearl was a Jewish American journalist who was kidnapped and murdered by Islamist radicals in Pakistan. At the time of the phone calls I

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[4] The post continues: "Rachel is harassing Yigal Arens once again. This time she's not telling his wife to leave him as she once did. Now, she's telling his wife that she never told her to leave Yigal. And that Yigal must retract those statements. Or what? Will she sue us all?"

was concerned about Neuwirth because I felt she might be mentally unstable and her messages were very violent in their tone."

After the chair of his department at Stanford University listened to the messages, Beinin said, she advised him to report the calls to police as both were concerned he might be in danger. The initial investigation was on September 22 and there was a follow-up on October 16, 2003. At the time, he said, he "still felt threatened and expressed [his] desire to pursue the case against Neuwirth." The responding officer called Neuwirth and she agreed to stop calling.

Beinin said he was deposed regarding the "above 'death threats' made to [him] by Rachel Neuwirth" in connection with Neuwirth's lawsuit against Rabbi Seidler-Feller. After that case settled, he said, Silverstein posted an Internet comment on May 13, 2007, in which he stated: "Alef Members: I wanted to make you aware of an ominous development in the history of my blog. You may know that Rachel Neuwirth and UCLA Rabbi Chaim Seidler Feller got into a physical altercation in 2003 following a campus talk by Sari Nusseibeh, over which she sued him. He recently agreed to a settlement in which he apologized and accepted her version of events. In my blog, I expressed an opinion that Chaim's original version of what happened (that she provoked him by first calling him a kapo) was more credible than her version.

"Her lawyer has sent me a letter threatening a lawsuit for defamation. I am confident based on consultations w[ith] attorneys that I have done nothing wrong [and] that she has no case. After all, her lawyer demands that I retract my 'statements contending Ms. Neuwirth is a liar' when I made no such statement. But that's beside the point. This is a naked attempt to cow the progressive Jewish blog world into submission; to tell us that we can only have opinions that the bullies say we can have. It's a flagrant example of attempting to stifle the independent voices in our community."

Beinin said he responded the following day with this comment: "Rabbi Chaim Feller's lawyer has my deposition on Rachel Neuwirth's death threat to me. He will probably share it with you. But why, I wonder, do you think that her lawyer's letter is 'a

naked attempt to cow the progressive Jewish blog world into submission?' [¶] There isn't much of such a world that anyone with their head screwed on right should worry about. Aside from the likelihood that Ms. Neuwirth doesn't have her head screwed on right, I rather see her behavior as an attack on the civilized world and an expression of how an ultra-Zionist understanding of the world can easily lead one to embrace a fantastical and racist understanding of the world."

In her declaration in opposition to Silverstein's motion, Neuwirth described Silverstein's allegations as "a pack of lies." She acknowledged she had been advocating her "views basically that the Jewish people should have their own homeland without being terrorized. I was born in Israel and am a f[e]rvent supporter of the Jewish cause." She said she had never spoken to Silverstein and had never written to him concerning his Web site and had never e-mailed him. More particularly, she said she had not written the "hate-filled fake blog" or other "offensive e-mail[s]" he had attributed to her. She said she had never objected to his right of free speech. "I only object to the fact that he falsely accused me of being a member of a terrorist organization by calling me a 'K[a]hanist swine' and that he in effect called me a liar by suggesting that it was not true, in connection with my lawsuit against Chaim Seidler-Feller, that the attack was totally without provocation and Seidler-Feller was 100% responsible for the attack as Seidler-Feller admitted in a letter of apology at the conclusion of the lawsuit."

Neuwirth asked the court to take judicial notice of the decision in *Kahane Chai v. Department of State* (D.C. Cir. 2006) 466 F.3d 125, discussing the Secretary of State's designation of Kahane Chai, and various "aliases" including Kahane.org, Kahane.net, Kach and several others, as "Foreign Terrorist Organizations (FTOs)."

In her declaration in opposition to Beinin's motion, Neuwirth said she had attempted to speak with Beinin in September 2003 because she had read an article he had written "contain[ing] numerous anti-Israel comments and distorted historical facts." She felt "compelled to speak with him concerning his comments since [she] felt his remarks should be clarified and corrected, especially since he, like me, is Jewish." She had three

telephone numbers for him and tried all three but did not leave messages. She reached him once, but he was "rude and hung up" on her. After that, she left him a message and "specifically recall[s] the gist . . . was that Jews must be at all times vigilant and not fall for the rhetoric of the terrorists that hate us and whose purpose is to annihilate Israel and the Jews. I made reference to Hitler and his killing of Jews and to the terrorists who killed Daniel Pearl. In no way whatsoever did I threaten . . . Beinin, nor were my comments intended to do anything other than to point out that terrorists, including the likes of Hitler, have no mercy when it comes to Jews and would kill the lot of us if able. For . . . Beinin to interpret these comments as a death threat toward him is simply beyond my comprehension. . . . I have never advocated violence against anyone except the terrorists who threaten the nation of Israel and all Jews."

After that, she said, she never tried to contact Beinin in any manner and was surprised a month later when she received a call from someone who identified himself as an officer with the Stanford Police Department. She told him she "never intended to threaten" Beinin, and he told her she should make no further calls. She agreed "since as far as [she] was concerned the matter had long since finished." Thereafter, she read Internet articles accusing her of "making a death threat." Since these statements "were blatantly false," she said, they "upset me tremendously and forced me to file this lawsuit since the statements clearly damaged my reputation."

Neuwirth's attorney submitted a declaration, indicating he had attached excerpts from Beinin's September 2004 deposition in which Beinin stated he had been "a little concerned that [Neuwirth's phone message] sounded a little bit like a death threat" so he called the police but told them he "didn't believe it, so [he] didn't want to exaggerate." He "really didn't think" she was going to "come up to Palo Alto and kill [him]," so he asked the officer to "just call her up and tell her not to do this anymore." In his presence, the officer called Neuwirth as Beinin requested. "She said [']okay.' That was the end of the story."

In a 28-page ruling, the trial court granted both special motions to strike and subsequently entered judgment in favor of both Silverstein and Beinin.[5] Neuwirth appeals.

DISCUSSION

A strategic lawsuit against public participation (SLAPP) "seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Code of Civil Procedure section 425.16, the "anti-SLAPP" statute, was enacted as "a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights."[6] (*Id.* at pp. 1055-1056.) In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action "arises from protected activity." (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.)

"[O]nce the defendant establishes the challenged cause of action . . . arise[s] out of the exercise of petition or free expression rights, the burden shifts to the plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. . . . The Supreme Court has defined the probability of prevailing burden as follows: '[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

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[5] In support of Beinin's motion, his counsel had submitted a declaration attaching copies of news articles regarding the litigation involving Rabbi Seidler-Feller as well as documents described as a September 2003 Stanford University Department of Public Safety Incident Report, citing Penal Code section 422, as well as an October 2003 follow-up investigation recommending the reclassification of the case as a "Threatening Telephone Call report" under Penal Code section 635m, subdivision (a). In its ruling, the trial court rejected the report as inadmissible hearsay.

[6] All further undesignated statutory references are to the Code of Civil Procedure.

judgment if the evidence submitted by the plaintiff is credited."'" (*Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 537, citations and further internal quotations omitted.) In reviewing an order granting a special motion to strike under Code of Civil Procedure section 425.16, "we use our independent judgment to determine whether the defendant was engaged in a protected activity and the plaintiff has sustained his or her burden of prevailing on the challenged cause of action." (*Ibid.*)

According to Neuwirth, Silverstein's and Beinin's statements as alleged in her complaint are outside the scope of section 425.16. We disagree. Under subdivision (e) of this section, "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: "(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; (4) or 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."

As our Supreme Court stated in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, "Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute." (*Id.* at p. 41, fn. 4, citing *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1247; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007; *MCSi, Inc. v. Woods* (N.D.Cal. 2003) 290 F.Supp.2d 1030, 1033; see also *New.net, Inc. v. Lavasoft* (C.D.Cal. 2004) 356 F.Supp.2d 1090, 1107 [statements made in software available free of charge].)

"In a sense, the Web, as a whole, can be analogized to a public bulletin board. A public bulletin board does not lose its character as a public forum simply because each statement posted there expresses only the views of the person writing that statement. It is public because it posts statements that can be read by anyone who is interested, and because others who choose to do so, can post a message through the same medium that interested persons can read." (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 897.) In *Wilbanks*, the court noted that while the defendant controlled her Web site, she did not

control the Web. "Others can create their own Web sites or publish letters or articles through the same medium, making their information and beliefs accessible to anyone interested in the topics discussed in [her] Web site. We conclude, therefore, that Wolk's statements were made in a public forum." (*Ibid.*)

Similarly, in this case, the sites where Silverstein's and Beinin's comments were posted are accessible to those who choose to visit these sites, and thus "hardly could be more public." (*Wilbanks v. Wolk, supra,* 121 Cal.App.4th at p. 895; see also *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at p. 1006; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., supra,* 129 Cal.App.4th at p. 1247.) Accordingly, each of the Web sites at issue constitutes a public forum.

With respect to the requirement that the statements be made in connection with an issue of public interest, we note that this term is also broadly construed; any issue in which the public takes an interest is of "public interest." (*Nygard v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039.) Even in cases where the issue is not of interest to the public at large, but rather to a limited, but definable segment of the public, constitutionally protected activity which occurs "in the context of an ongoing controversy, dispute or discussion . . . [thus embodying] the public policy of encouraging participation in matters of public significance" satisfies this "public interest" requirement. (*Du Charme v. International Broth. Of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 119.) Beinin and Silverstein hold views contrary to those of Neuwirth with respect to Israeli-Palestinian relations and posted their comments on Web sites where such views are exchanged and debated. We conclude that the threshold showing of protected activity is satisfied and that this action is within the ambit of section 425.16, subdivisions (e)(3) and (4).

We turn to the second step of the anti-SLAPP analysis. To establish a probability of prevailing, the 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." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, citations omitted.)

"For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' . . . In making this assessment it is 'the court's responsibility … to accept as true the evidence favorable to the plaintiff … .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit' . . . to avoid being stricken as a SLAPP." (*Ibid.*, citations and footnote omitted; see also *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738 ["the anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability' [citation]"], quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5.)

"Section 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as 'requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim' (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412 [58 Cal. Rptr. 2d 875, 926 P.2d 1061] (*Rosenthal*)). So construed, 'section 425.16 provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63.) "The purpose of section 425.16 is not to prevent lawsuits that arise from the exercise of constitutional rights, but it is to deter frivolous and improperly motivated lawsuits arising from those rights.[] Section 425.16 provides a 'fast and inexpensive unmasking and dismissal' of frivolous claims that are subject to the statute." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089, citation and footnote omitted.)

Civil Code section 45 defines libel as a "false and unprivileged publication by writing . . . 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." As the trial court concluded, plaintiff met her burden of establishing that Silverstein libeled her in calling her "Kahanist swine" in light of case law supporting Neuwirth's contention that the reference was tantamount to calling her a terrorist; similarly, she met her burden of establishing Beinin had libeled her because she said he had falsely accused her of making a death threat, a crime.[7]

We conclude that the trial court erred, however, in determining that the defendants' evidence of privilege sufficed to establish as a matter of law that Neuwirth could not prevail on her claims—with the exception of Neuwirth's second cause of action against Silverstein (for his repetition of Beinin's accusation Neuwirth had made a death threat against him). Neuwirth cannot prevail against Silverstein in this regard for the reasons explained in *Barrett v. Rosenthal, supra,* 40 Cal.4th 33.

With the exception of this statutory immunity available to Silverstein on the second cause of action, however, not only Neuwirth's evidence but also Silverstein's and Beinin's own evidence undermines both respondents' claims that Neuwirth cannot establish malice—either to the extent Neuwirth is a limited public figure such that malice must be proven or as required for the conditional privilege of Civil Code section 47, subdivision (c), to apply. The record contains considerable evidence to support a finding

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[7] "It would be a reproach to the law to hold that a defendant intent on destroying the reputation of a political opponent by falsely labeling him a Communist or communist sympathizer could achieve his purpose without liability by casting his defamatory language in the form of an insinuation that left room for an unintended innocent meaning. When as in this case, it can be reasonably inferred from the language used that defendant intended to charge plaintiff with communist sympathies and that many readers so interpreted its article, and defendant has admitted by demurring that such was its intent and the meaning placed on its article, it ill befits defendant to contend that it should escape liability on the ground that owing to a possible innocent meaning some of its readers did not draw the defamatory inference it intended that they should." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551.)

of malice with respect to Silverstein's statement that Neuwirth is "Kahanist swine." Indeed, even if he cannot be held liable for his repetition of Beinin's death threat accusation, it undermines his contention that the statement was merely nonactionable opinion rather than an assertion of fact. Similarly, Beinin does not dispute that in his 2004 deposition he specifically testified that he did not believe Neuwirth had threatened his life. Crediting Neuwirth's evidence for purposes of these special motions to strike, it was error to conclude that she could not prevail on her claims as a matter of law.[8]

DISPOSITION

The judgment in favor of Silverstein and Beinin and order granting their special motions to strike are reversed. The matter is remanded to the trial court with instructions to enter a new and different order granting Silverstein's motion as to the second cause of action only, denying Silverstein's motion as to the first cause of action and denying Beinin's motion as to the second cause of action. As to the second cause of action only, Silverstein is entitled to his costs and attorneys' fees pursuant to section 425.16, subdivision (c). As to the first cause of action against Silverstein and the second cause of action against Beinin, Neuwirth is entitled to her costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, Acting P.J.

We concur:

ZELON, J. **JACKSON, J.**

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[8] Neuwirth submitted an untimely reply brief without good cause and requested we take judicial notice of Internet postings that were not before the trial court. We deny these requests.