SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/19/10			**DEPT.** WEK
HONORABLE JOSEPH S. BIDERMAN	JUDGE	K. SANDOVAL	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
RULING ON SUBMITTED MATTER E. AVENA/ CT ASST	Deputy Sheriff	NONE	Reporter

10:00 am	SC094441	Plaintiff Counsel	NO APPEARANCES
	RACHEL NUEWIRTH VS RICHARD SILVERSTEIN, ET.AL.	Defendant Counsel	
	170.6 CCP JUDGE JOHN H. REID BY PLAINTIFF		

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER;

SUBJECT: MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

MOVING PARTY: Defendant Richard Silverstein
RESP. PARTY: Plaintiff Rachel Neuwirth

Subsequent to the June 10 hearing on this matter, the Court requested supplemental briefing from both counsel regarding the applicability of the law of the case doctrine to the pending issues. Both sides submitted supplemental briefing onthis issue. No oral argument was requested.

DISCUSSION

In granting Defendant's motion to strike, the trial court held that for the purposes of C.C.P. §425.16, Plaintiff had met her burden to show that Defendant had committed libel per se. This was based on Plaintiff's citation to a decision in the D.C. Circuit in which that Court noted the Secretary of State "could reasonably infer that a Kahanist extremist is likely a member of Kahane Chai." Kahane Chai v. Dep't of State, 466 F.3d 125, 130 (D.C. Cir. 2006).

However, the original trial court found that

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several defenses and privileges available to Defendant supported granting of the motion. Judge Reid held that: (1) Plaintiff is a limited purpose public figure and did not present evidence to show that Defendants made the statements with actual malice as required under New York Times v. Sullivan, 376 U.S. 254 (1964); (2) the term "Kahanist Swine" to be a non-actionable statement of opinion; (3) Defendant could rely on the defense of truth because Plaintiff had failed to deny that she was a Kahanist and did not provide any evidence to show the statement was false and (4) Plaintiff could not establish malice to defeat the common interest privilege found in Civil Code section 47(c).

Upon review, the Court of Appeal remanded the case to trial court including instructions to deny Defendant's motion as to the first cause of action. The Court of Appeal agreed with the trial court: "[a]s 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." However, the Court of Appeal concluded 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. . . [as the] record contains considerable evidence to support a finding of malice with respect to Silverstein's statement that

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NATURE OF PROCEEDINGS:

Neuwirth is 'Kahanist swine.'" The Court concluded by stating: "[c]rediting 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." The Court of Appeal's decision directly addressed the first and fourth bases of the trial court's decision by holding that Plaintiff could establish that Defendant acted with malice for the purposes of determining an Anti-SLAPP motion to strike. The decision, however, did not specifically address whether Defendant's statement of "Kahanist swine" was non-actionable opinion or if Defendant had the complete defense of truth.

The first question this Court must address is the degree to which, in a motion for summary judgment, this Court is bound by the Court of Appeal's decision in denying a portion of Defendant's anti-SLAPP motion.

Defendant claims that summary judgment should be granted for five reasons: (1) The statement was non-actionable opinion rather than a statement of fact; (2) he is entitled to the complete defense of truth; (3) Plaintiff cannot prove actual malice; (4) the statement was privileged; and (5) Plaintiff cannot demonstrate injury.

In his brief on the issue of law of the case, Defendant first asserts that C.C.P. §425.16 bars this Court from considering the Court of Appeal

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NATURE OF PROCEEDINGS:

finding. Defendant next argues that the standard in an anti-SLAPP motion is different from that of summary judgment insofar as the burden of proof on Plaintiff will be higher in a summary judgment stage than at the anti-SLAPP stage. Lastly, Defendant argues that an exception to the law of the case exists here because the evidence now under consideration is new or different from what was presented in the earlier motion to strike.

Succinctly stated, the law of the case doctrine is "'the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.'" Yu v. Signet Bank/Virginia (2002) 103 Cal. App. 4th 298, 309 quoting Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 301. However, the law of the case "does not apply to points of law that might have been determined, but were not decided in the prior appeal" but "does extend to questions that were implicitly determined because they were essential to the prior decision." Yu, 103 Cal. App. 4th at 309.

While the standard at the anti-SLAPP stage may not be identical to the standard for summary judgment, the "standard for determining the merits of a defendant's anti-SLAPP motion to strike a complaint is similar to that for determining the

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NATURE OF PROCEEDINGS:

merits of a defendant's motion for summary judgment. Both seek to determine whether a prima facie case has been presented by the plaintiff in opposing the motions." Bergman v. Drum (2005) 129 Cal. App. 4th 11, 18. In Bergman, the Court of Appeal ruled that the trial court had erred because it had already ruled that the plaintiff had established a prima facie case of malicious prosecution. Id. In order for Defendant to prevail here, he must provide "additional or different evidence that would, as a matter of law, conclusively negate plaintiff's prima facie case." Id. This means that the law of the case will not apply if the facts are "substantially different" from the first. Put another way, application of the doctrine requires a "substantial identity of facts." See Wicktor v. County of Los Angeles (1960) 177 Cal. App. 2d 390, 395. The new evidence needs to be "materially" or "essentially" different from before. Id. "Additional evidence merely cumulative to evidence of the same class given on the first appeal will not carry a question outside the operation of the rule as to the law of the case." Id.

Defendant argues that since the original motion to strike the parties have engaged in much discovery, including numerous depositions, interrogatories and productions of documents, thus placing the matter at a factually different point then when the anti-SLAPP was considered. The parties submitted much of this discovery in briefing

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COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

and arguing summary judgment. However, having reviewed the evidence submitted, none of it raises issues of fact substantially, materially, or essentially different from that of the anti-SLAPP motion. Nor can the Court conclude that the evidence conclusively negates Plaintiff's showing of libel per se as determined by the Court of Appeal. By way of example, the exhibits Defendant has produced include depositions of Plaintiff in which she reveals her own interpretation of what the word "terrorist" means and the injuries she has allegedly suffered from the Defendant's statement. But Defendant has not demonstrated how this new evidence rises to the level necessary to find that the law of the case should not apply. Defendant also produced several declarations from scholars suggesting that there are alternative understandings of the phrase "Kahanist swine." None of this evidence conclusively negates what the Court of Appeal held was libel per se.

C.C.P §425.16(b)(3) does not bar this Court from considering the findings of the Court of Appeal. Defendant cites to a portion of the Bergman opinion where the Court of Appeal stated that "the obvious intent of [§425.16(b)(3)] is that a decision by a court that a plaintiff has presented a prima facie case in response to a defendant's section 425.16 motion to strike should not be used as proof that a verdict in the plaintiff's favor should be rendered in a later dispositive or

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NATURE OF PROCEEDINGS:

potentially dispositive portion of the case." Bergman, 129 Cal. App. 4th at 20. But Bergman also held that §425.16 does not bar application of the law of the case because "in the section §425.16 motion, the only thing established was the procedural conclusion that plaintiff had presented a prima facie case which entitled her to go forward." Id. at 21. Thus without an additional factual or legal matter, the defendant "is not entitled to reargue the proposition that plaintiff has not presented sufficient evidence to go before a trier of fact." Id. Given that Defendant has failed to introduce evidence sufficient to raise a substantially different factual or legal matter, Defendant's argument is unpersuasive.

Although not expressly raised by Defendant, there is potentially a different basis for not applying the law of the case doctrine here. [The Court notes that both parties were given an opportunity subsequent to the hearing to submit briefs on the applicability of law of the case.] As mentioned in Yu, the doctrine does not apply to points of law that might have been determined in the decision, but were not. However, the doctrine still applies to questions that were implicitly determined because they were essential to the decision of the Court of Appeal. See Yu, 103 Cal. App. 4th at 309. Although the Court of Appeal opinion directly addressed the issue of malice, it largely did not mention whether or not the statement was

NATURE OF PROCEEDINGS:

nonactionable opinion or if the Defendant could rely on the defense of truth. In order to show that she had a probability of prevailing on the merits, Defendant could not have succeeded in showing that the statement was merely opinion rather than an assertion of fact. Plaintiff could also not succeed if Defendant could establish the complete defense of truth. Thus, even if there was malice or actual malice, Defendant should still have prevailed if he had succeeded on either of these two arguments. The fact that the Court of Appeal stated "it was error to conclude that she could not prevail on her claims as a matter of law" indicates that the decision necessarily implies the Court of Appeal also found these decisions of the trial court to have been in error.

II. Summary Judgment

The Court of Appeals addressed the first four prongs of Defendant's motion for summary judgment and this Court concludes that it is bound by the Court of Appeal's determinations. Defendant claims that Plaintiff cannot show that she suffered an injury. "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." See Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal. App. 3d 377, 382. If a statement is otherwise not libelous on its face, the plaintiff must prove

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RULING ON SUBMITTED MATTER

E. AVENA/ CT ASST Deputy Sheriff | NONE Reporter

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BY PLAINTIFF

Plaintiff Counsel

NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

special damages. Thus, if there is libel per se, damage to plaintiff's reputation is presumed and there is no need on the part of the plaintiff to introduce evidence supporting actual damages. Id. The law of the case doctrine requires this Court to find that Plaintiff has established the existence of libel per se. Consequently, Defendant's final argument in support of summary judgment is unavailing.

The motion for summary judgment is DENIED.

RULINGS ON DEFENSE EVIDENTIARY OBJECTIONS

1 Sustained
2-3 Overruled
4 Sustained through "police report."
5 Sustained for "I believe no... death threat"
6-9 Sustained
10 Overruled except for "Seidler-Feller...losing the case"
11 Sustained
12 No objection interposed
13-15 Sustained
16 Overruled except as to "These libelous ... comment"
17 Overruled - Declaration on file is signed
18 Sustained as to legal conclusions of defamation
19 Overruled
20 Sustained
21 Overruled

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NATURE OF PROCEEDINGS:

22-26 Sustained
27 Overuled
28-32 Sustained
33 Overruled
35 Sustained
36 Overruled
37 Sustained
38-41 Sustained
42 Overruled
43-61 Sustained

II. CCP §128.7(c)(1) 21-day safe harbor:

A notice of motion for sanctions under 128.7 "shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion..., the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." See CCP §128.7(c)(1). Thus, a motion for 128.7 sanctions must be served at least 21 days before the challenged motion is heard. The offending party must have a full 21 days from when the 128.7 motion was served to withdraw or correct the challenged paper, which includes motions for summary adjudication.

The motion for CCP 128.7 sanctions was served on 4/29/10, according to the POS attached to the motion. This was after the terminating sanctions motion was already heard. The purpose of CCP 128.7

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NATURE OF PROCEEDINGS:

sanctions and the safe-harbor it to give Defendant a chance to withdraw the motion. Defendant had no such opportunity given the motion was served after the terminating sanctions request was heard. Plaintiff's Motion for CCP 128.7 sanctions is DENIED.

Clerk to give notice. Counsel for plaintiff to promptly notice remaining parties, if applicable.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 7-19-10 upon each party or counsel named below by depositing in the United States mail at the courthouse in Santa Monica, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: July 19, 2010

John A. Clarke, Executive Officer/Clerk

By: _____
K. Sandoval

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