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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

BIDBAY.COM, INC., et al., Plaintiffs and Respondents, v. BRUCE SPRY, JR., Defendant and Appellant.	B160126 (Los Angeles County Super. Ct. No. EC034110)

APPEAL from an order of the Superior Court of Los Angeles County, Charles W. Stoll, Judge. Affirmed.

Law Offices of Levy, McMahon & Levin, Asher Aaron Levin; Law Offices of Michael S. Duberchin and Michael S. Duberchin for Defendant and Appellant.

Law Offices of Moghaddami and Sadigh and Barzin Barry Sabahat for Plaintiffs and Respondents.

The issue raised here is whether a motion to strike certain causes of action in a complaint should have been granted under Code of Civil Procedure section 425.16, enacted to safeguard free speech rights by preventing "Strategic Lawsuits Against Public Participation." The claims in the lawsuit brought by respondents Bidbay.com, Inc. (Bidbay)[1] and George Tannous arose from defamatory statements allegedly posted in an Internet "chat room." Appellant Bruce Spry, Jr., defendant below, denied posting the statements, but nevertheless sought to have the claims stricken. The trial court reasoned that a party who denies making the statements at issue could not have been engaged in an act in furtherance of his right to free speech for purposes of the statute. Appellant contends that the statements are covered by section 425.16 without regard to who made them because they concern a public issue and were made in a public forum. We need not resolve this issue, however, because even if the provisions of section 425.16 apply, respondents submitted sufficient evidence to substantiate their claims and overcome the motion to strike. We, therefore, affirm the trial court's order albeit on a different ground.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Bidbay is an on-line or Internet auction site whose president and chief executive officer is respondent Tannous. In April 2002, respondents filed a lawsuit against appellant, an occasional user of the site, and a frequenter of Internet message boards and "chat rooms." The first amended complaint (FAC) contained causes of action for libel, intentional interference with prospective business advantage, unfair business practices, invasion of privacy, and disparagement. Appellant was named along with Auctioncow, a competitor of Bidbay's; Mootropolis, an affiliate of Auctioncow; and another individual.

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[1] After the initial complaint herein was filed, Bidbay changed its name to "AuctionDiner.com." For continuity's sake, we will refer to it as Bidbay throughout, although some of the documents refer to it by its new name.

According to the FAC, all the defendants made statements that appeared on message boards and in chat rooms to the effect that Bidbay sells child pornography and that Tannous failed to file or pay income taxes. This activity allegedly interfered with Bidbay's business, invaded Tannous's privacy, and disparaged Bidbay's good name. Separately, the FAC alleged that Auctioncow and Mootropolis were engaged in a conspiracy to put Bidbay out of business through a defamation campaign. "As a means of achieving this goal, Mootropolis, through its agents . . . encourage[d] untrue reports to authorities regarding the legality of the activities of Bidbay . . . merely to cause trouble for Bidbay and also cause bad publicity for the company."

Appellant filed a motion to strike the libel, intentional interference, and disparagement causes of action pursuant to Code of Civil Procedure section 425.16,[2] a statute enacted to prevent "Strategic Lawsuits Against Public Participation," often referred to as SLAPP suits. Appellant submitted a declaration in which he stated that he supplemented his income by selling items online, including on Bidbay. In 2001, he noted some glitches in Bidbay's program. For example, items he attempted to put out for bids would not show up on Bidbay's listing or the notice would be duplicated creating the misimpression there were multiple items for sale. Appellant posted some of his complaints in a chat room during an online discussion with Tannous, in response to a question from Tannous. After that, he was barred from the chat room, and Tannous threatened to sue him for slander. He denied having ever published anything about Tannous or his tax situation or about Bidbay and child pornography. He stated that he used the names "snowhunter," "snowhunter1," and "snowhunte," but never used "crycheck" or "the light."

Attached to appellant's declaration were printouts of some postings he had purportedly obtained from Internet chat rooms. One indicated Tannous's belief that appellant used the names "crycheck" and "the light" as well as "snowhunter." The posting indicated that others would soon be added to the lawsuit as Doe defendants.

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[2] All statutory references herein are to the Code of Civil Procedure unless otherwise indicated.

Another attachment was a lengthy letter written by respondents' attorney and apparently posted in a chat room discussing the limits of free speech, and threatening to add people who defamed Bidbay to the lawsuit.

In opposition, Tannous submitted a declaration stating that appellant was a "member" and "moderator" for Auction Saloon.com, a competitor of Bidbay's, and that appellant posted messages on Bidbay and Auction Saloon message boards saying Bidbay was involved in the sale of child pornography and that Tannous does not pay taxes. Tannous claimed to have confronted appellant with this information, and was told that the statements would stop only if payment was forthcoming. Tannous purportedly paid appellant $500 in an attempt to stop him from continuing to make the statements. Tannous further stated that he attempted to defend himself and Bidbay on Auction Saloon's chat board, but was "locked out."

Counsel for respondents stated in a separate declaration that when he made an attempt to dissuade members of Mootropolis from defaming respondents, he was accused by participants of being a Middle Eastern terrorist wanted by the FBI.

In reply, appellant submitted a supplemental declaration in which he admitted being a volunteer moderator for Auction Saloon, but denied using the position to attack or harm respondents. He admitted that Tannous paid him $500, but said it was to compensate him for "computer glitches" that had cost him that amount. He denied operating under the user names "unregistered 101" or "unregistered fraud,"[3] and again denied having made any statements as alleged in the complaint and opposition declaration.

The anti-SLAPP motion was denied. At the hearing, the court explained: "CCP section 425.16 permits the court to strike causes of action arising from an act in furtherance of the defendant's right of free speech in connection with a public issue

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[3] In their opposition memorandum, respondents claimed that in a chat room on another auction Web site, a participant using that moniker had begun attacking a person who was trying to support Bidbay and her Web site, Auction Mentor. She had also received anonymous threats.

unless the plaintiff establishes that there is a probability that the plaintiff will prevail in the claim. The defendant bears the initial burden of showing that the claims fall within the class of suits subject to a motion to strike under section 425.16. That is, the plaintiff's claim is based on an act of the defendant in furtherance of his right to free speech. . . . [Appellant] argues that he did not make the statements and that [respondents] cannot prove [their] claims. [Appellant] provides his own declaration to show that he never discussed [Tannous's] tax situation, that he does not know [Tannous's] tax situation, that he never published any information that [Bidbay] was selling child pornography. Thus, [appellant's] evidence shows that [appellant] was not engaged in any act in furtherance of his right to free speech. [Appellant's] evidence shows that he misunderstands the intent of section 425.16, the anti-SLAPP statute. Subdivision (a) of CCP section 425.16 states that the legislative intent of this section is to stop the use of judicial process to chill speech. If the defendant were making statements regarding child pornography or [Tannous's] tax situation, then [respondents'] lawsuit would chill his speech. However, since [appellant] states under oath of perjury that he did not make the statements, [respondents'] complaint cannot chill his speech because [appellant] was not engaged in free speech. Since [appellant's] evidence shows that [respondents'] complaint is not chilling acts of [appellant] in furtherance of his right to free speech, CCP section 425.16 is not the proper remedy. . . . [W]hat appears to the court is [appellant] should have filed a demurrer to this complaint or moved for summary judgment."

The court did not award any costs or monetary sanctions "since there does not appear to be any evidence that [appellant's] motion to strike is frivolous or intended to cause delay." Appeal was taken pursuant to section 425.16, subdivision (j), which provides: "An order granting or denying a special motion to strike shall be appealable under Section 904.1."

DISCUSSION

I

The Legislature enacted section 425.16 in response to its perception "that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817, disapproved in part on another ground in *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53.) Section 425.16 provides a procedure for the court "to dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) To this end, section 425.16 provides: "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 or 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).)

As used in the statute, "'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; (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." (§ 425.16, subd. (e).)

The courts are in agreement that "'[s]ection 425.16, subdivision (b)(1), requires the trial court to engage in a two-step process when determining whether a defendant's

section 425.16 motion to strike should be granted. First, the court decides whether the defendant[4] has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. [Citation.] If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that 'there is a probability that the plaintiff will prevail on the claim.'" (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved in part on another ground in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53; accord, *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 473-474; *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at p. 815.)

II

Preliminarily, the parties dispute whether comments made in an Internet "chat room" took place in a public forum for purposes of section 425.16, subdivision (e)(3), the only provision that could potentially lead to the statute's application here. Respondents contend that the forum was not public because Tannous was locked out when he attempted to defend himself and Bidbay from the derogatory statements allegedly being made.

In *Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at page 476, the plaintiff made a similar argument, urging that a newsletter published for the benefit of a homeowners association was not a public forum "because it was essentially a mouthpiece for a small group of homeowners who generally would not permit contrary viewpoints to be published in the newsletter." The court disagreed: "The Village Voice was a public forum in the sense that it was a vehicle for communicating a message about public matters to a large and interested community. All interested parties had full opportunity to read the articles in the newsletter. Although the Village Voice newsletter may not have offered a 'balanced' view, the Association's other newsletter -- the Board's official

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[4] The moving party is generally the defendant. The provision also applies to cross-claims and petitions. (§ 425.16, subd. (h).)

newsletter -- was the place where Association members with differing viewpoints could express their opposing views. It is in this marketplace of ideas that the Village Voice served a very public communicative purpose promoting open discussion -- a purpose analogous to a public forum." (*Id.* at pp. 476-477.)

The court recognized that other, earlier opinions had taken a narrower stance on this issue. In *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, overruled in part on another ground in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, and *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 863, footnote 5, the courts stated that a private newspaper could not be a public forum for purposes of section 425.16 because the publisher has ultimate control over the message. The *Damon* court did not feel constrained to follow those authorities because both predated the 1997 amendment to section 425.16, which stated "this section shall be construed broadly." (§ 425.16, subd. (a), amended by Stats. 1997, ch. 217, § 1, p. 95.) According to the court, "[i]n adopting that amendment, the Legislature expressly intended to overrule *Zhao's* narrow view of the statute." (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 478; see also *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1120 [in holding that a statement made in an official proceeding did not also have to concern an area of public significance to be protected, the court stated: "The Legislature's 1997 amendment of the statute to mandate that it be broadly construed apparently was prompted by judicial decisions, including that of the Court of Appeal in this case, that had narrowly construed it to include an overall 'public issue' limitation. . . . That the Legislature added its broad construction proviso within a year following issuance of *Zhao* [and other similar decisions] plainly indicates these decisions were mistaken in their narrow view of the relevant legislative intent"].)

We believe the court's analysis in *Damon* is correct. In order to qualify as a public forum, a computerized chat room need not provide information on all sides of an issue. It is enough that it be open to the public or a large segment of the interested community to examine, and that those who disagree have other forums available for expression of opposing viewpoints.

Respondents contend that *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993 supports their position that locking Tannous out of the chat room rendered it a nonpublic forum. In *ComputerXpress*, that court quoted *Damon* for the proposition that the term public forum "'is traditionally defined as a place that is open to the public where information is freely exchanged.'" (*Id*. at p. 1006, quoting *Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 475.) The court in *ComputerXpress* further noted, as we have discussed, that the court in *Damon* had no trouble applying that definition to a newsletter which was "'widely distributed to all interested parties'" but did not hold its pages open for expression of all possible viewpoints. (*ComputerXpress,* at p. 1006, quoting *Damon,* at p. 478.)

The fact that the chat room at issue in *ComputerXpress* was more open with respect to presentation of differing opinions than the one at issue here does not mean that the chat room here was not sufficiently public for purposes of section 425.16, subdivision (e). As the court stated in *Damon:* "Read in context of the entire statutory scheme, a 'public forum' includes a communication vehicle that is widely distributed to the public and contains topics of public interest, regardless whether the message is 'uninhibited' or 'controlled.'" (*Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 478.)

III

Respondents also dispute whether the matters referred to in the statements at issue in the complaint were related to matters of public interest for purposes of section 425.16, subdivision (e)(3). Generally speaking, "[t]he definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed 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." (*Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 479.) In *Damon*, the court concluded that statements criticizing the competency of the general manager of a planned development residential community were matters of public interest. Even though the issue was of direct concern only to the members of the homeowners

association, these members numbered in the thousands and concerned the manner in which they would be governed.

Legitimate information that an Internet auction site is dealing in child pornography would be of interest to the thousands of users and potential users of the site who could not possibly wish to have their merchandise listed alongside contraband. It would also be of interest to the millions of customers who have considered purchasing an item on an auction site, but would never support a business that engages in conduct that is both illegal and despicable. More importantly, public exposure and financial ruin for those who would support this horrific conduct would help stamp out a scourge to society, and so is of considerable benefit to the public at large.

Information to the effect that the head of Bidbay is or may be a tax cheat is of less obvious public significance. There is no evidence that Bidbay is a public company, so exposure of the foibles of its corporate officers in order to encourage the shareholders to choose different management or assist the public in its decision of whether or not to buy stock is not a consideration. (See *Global Telemedia Intern., Inc. v. Doe 1* (C.D.Cal. 2001) 132 F.Supp.2d 1261 [statements regarding publicly traded company with thousands of investors involved matters of public significance].) Nor was there any evidence that Bidbay was a large, powerful organization with impact on the lives of many individuals. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650, disapproved in part in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53.) Nevertheless, we will presume for present purposes that information concerning the general honesty and reputation for law abiding conduct of the operator of an auction site is of interest to potential site users, and therefore that the alleged statement had the necessary public interest component.

IV

Appellant contends that if the trial court had not erroneously found section 425.16 to be inapplicable, the motion to strike would have been granted because the complaint does not sufficiently plead libel and respondents did not make a sufficient prima facie

showing of admissible facts to sustain the complaint. With regard to the first contention, appellant states: "[Respondents] have not specifically plead [*sic*] the words written, identified the writer, identified the date or dates of publication, or identified the specific chat rooms and billboards where each such alleged publication occurred or the persons making said publications."

"It is sometimes said to be a [pleading] requirement . . . to plead the exact words [of the allegedly defamatory statement]." (5 Witkin, Cal. Procedure (4th ed. 1977) Pleading, § 695, p. 155.) "The chief reason appears to be that the court must determine as a question of law whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo." (*Ibid*.) Respondents identified the allegedly defamatory remarks well enough to enable the court to make that determination. The complaint further alleged that the named defendants made the identified remarks, that they were made more than once over a period of time, and that they were made in the chat rooms maintained by Bidbay and the defendant companies. We see no basis to require greater specificity.

With regard to the showing made by respondents to support their prima facie case, appellant maintains that the Tannous declaration should be disregarded because it "is bereft of supporting facts" in that "he does not state the date or time of the alleged publication" and "does not state what user name was used." Appellant focuses our attention on the documentary evidence which indicates that Tannous was mistaken about the identity of the person or persons who used the names "Crycheck" and "the light." Appellant's focus is misdirected. The declaration signed by Tannous stated that he saw messages on the Auction Saloon and Bidbay sites stating that Bidbay was involved in sales of child pornography and that Tannous did not pay income taxes. He suspected appellant and confronted him with this information. Appellant did not deny having made the statements, but tacitly admitted it, saying he would stop only if Tannous paid him money. In other words, Tannous claims to have received conformation about the source of the defamatory statements from appellant himself. Therefore, it is irrelevant that respondents failed to identify the user name, dates, etc. Appellant disputes that any such

conversation occurred, but that is an issue of fact which cannot be resolved in a section 425.16 motion. (See *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 ["In deciding the question of potential merit [for purposes of a section 425.16 motion to strike], the trial court . . . does not *weigh* the credibility or comparative probative strength of competing evidence . . . ."].)

Alternatively, appellant contends that Tannous's statements concerning the messages and postings violate the Best Evidence Rule, codified in Evidence Code section 1521, which provides in relevant part: "(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair." Section 1521 must be read in harmony with section 1523, which provides in pertinent part: "(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing. [¶] (b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence. [¶] (c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied: [¶] (1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means. [¶] (2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production."

Appellant did not raise any evidentiary objections to the declaration in his reply to the opposition. Moreover, even had the objection been raised, the tenuous and ethereal nature of writings posted in Internet chat rooms and message boards means that in all likelihood the exceptions outlined in section 1523, subdivision (b) or (c)(1) would have applied. More importantly, since respondents primarily relied on an admission by

appellant that he made defamatory statements and that the statements would continue until he was paid, the documentary evidence was not essential.

V

As an alternate basis for establishing the merits of his motion, appellant contends that the more innocuous statements he admitted making critical of Bidbay's services support his contention that the suit was brought to inhibit him from exercising his right to free speech. While it may be that respondents' subjective intent in bringing the lawsuit was to shut down a persistent gadfly, the Supreme Court has made clear in several cases that motivation and subjective intent are irrelevant. In *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53, the court held that a moving party need not prove the action was brought with the intent of chilling his or her exercise of free speech or petition rights. Then, in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, where a municipality brought a state court action for declaratory relief respecting the constitutionality of a mobilehome park rent stabilization ordinance in reaction to a federal court declaratory relief action brought by park owners, the court stated: "It is indisputably true, as the trial court observed, that City's action was filed shortly after Owners filed their claim in federal court. But the mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.] [¶] . . . California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.'" (*City of Cotati v. Cashman, supra,* 29 Cal.4th at pp. 76-77, quoting *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1002.)

The complaint herein is not based on the fact that appellant made complaints about Bidbay's service and pointed out alleged glitches in its program. It is based on

completely unrelated allegations that defamatory statements were made charging sale of child pornography and income tax fraud. For purposes of a section 425.16 motion to strike, we are bound to ignore the possibility of improper motivation or intent due to the Supreme Court's explicit holdings in *Equilon* and *Cotati*.

DISPOSTION

The order denying the motion to strike is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

CURRY, J.

We concur:

EPSTEIN, Acting P. J.

HASTINGS, J.