

PROFESSIONAL LIABILITY UPDATE

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LIABILITY TO NON-CLIENTS

California Law

By Jennifer A. Becker

Flatley v. Mauro (2004) 121 Cal.App.4th 1523 (rev. granted 12/15/04)

The California Supreme Court has accepted for review a case from the Second District that holds that an attorney's extortionate threats are not constitutionally protected conduct and are not entitled to the benefit of California's anti-SLAPP (Strategic Lawsuit Against Public Participation) summary procedures.

Michael Flatley is a well-known performer and entertainment entrepreneur. After spending a night with Flatley in Las Vegas, Tyna Robertson accused Flatley of rape. Her counsel D. Dean Mauro sent a letter to Flatley's attorney alleging Flatley had sexually assaulted Robertson and demanded a substantial payment. The letter warned that if payment was not made the information concerning the alleged rape would be turned over to state, local, and federal authorities for criminal prosecution and that Robertson would issue a press release. Mauro repeated threats of publicity in subsequent telephone conversations with Flatley's counsel. After Flatley refused payment Robertson filed a civil complaint and then made false and defamatory statements that Flatley had raped her. Flatley then filed a civil complaint against Mauro in California.

Mauro filed a special motion to strike pursuant to C.C.P. § 425.16, California's anti-SLAPP (Strategic Lawsuit Against

Public Participation) statute. Mauro claimed that he sent a pre-litigation negotiation letter with a draft complaint for sexual assault and intentional infliction of emotional distress. The letter noted that there would be an investigation into Flatley's finances, which would then become a matter of public record and that information discovered that revealed any violation of criminal laws would be turned over to the appropriate authorities. Mauro stated that the filing of the lawsuit would be accompanied by a press release. Mauro eventually filed a complaint on behalf of Ms. Robertson in Illinois.

In opposition to the motion, Flatley filed a declaration from one of his attorneys, John Brandon. Brandon declared that he received Mauro's letter threatening criminal prosecution and then received a call from Mauro who gave a deadline to offer sufficient payment. Mauro made a second call with a similar demand, which was relayed to Bertram Fields, Flatley's personal counsel. Fields also

had a conversation with Mauro who said he knew how to play “hardball,” and threatened to go public absent an acceptable payment.

The Court of Appeal affirmed the trial court’s denial of Mauro’s special motion to strike. In ruling on a motion under C.C.P. § 425.16 the court must consider two components. The moving party has the initial burden of establishing that the plaintiff’s cause of action arises out of the defendant’s actions in the furtherance of the rights of petition or free speech. Then the burden shifts to plaintiff to establish a probability that he or she will prevail on the merits. To do so 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 plaintiff is credited.

In applying the test, the court disagreed with Mauro’s contention that the first prong can never entail an evaluation of legality of the defendant’s conduct. Typically issues concerning the legality of a defendant’s conduct are resolved as part of the second prong analysis. However if it can be established as a matter of law that the defendant’s speech or conduct is not protected because it is illegal, the burden does not shift to the plaintiff to make the minimal merits showing.

Mauro’s conduct was not protected because he went further than threatening to file a lawsuit and then publicize the information about the complaint. Mauro threatened criminal prosecution and publication of defamatory matter about the alleged rape as a means of obtaining leverage in the proposed civil action. The quid pro quo for the payment of

money was silence, which is extortion under California law. Extortion is not a constitutionally protected form of speech and is not a protected activity under federal or state law.

Comment: Vigorous advocacy should never cross the line into illegal conduct. When it does, courts will not protect attorneys from civil liability.

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