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ANTI-STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

California Law

By Jessica R. MacGregor

Soukup v. Hafif (2006) 39 Cal.4th 260

The California Supreme Court holds that a complaint premised on illegal conduct is not protected free speech or petition activity and is not subject to the anti-Strategic Lawsuit Against Public Participation statute. However, dismissal of a complaint pursuant to an anti-SLAPP motion does not establish illegal conduct per se.

Herbert Hafif became embroiled in several lawsuits with former employee Peggy Soukup. Eventually Hafif sued Soukup alleging she induced former clients to sue him. Soukup prevailed in a special motion to strike Hafif’s complaint under California’s anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. When Soukup in turn sued Hafif for malicious prosecution and abuse of process, he filed an anti-SLAPP motion to strike, alleging that his complaint arose from his valid exercise of free speech and petition rights. Soukup alleged the anti-SLAPP statute did not apply because Hafif’s actions were not a valid exercise of his first amendment rights. The trial court denied Hafif’s special motion to strike, which was affirmed by the Court of Appeal. The Supreme Court granted review then transferred the matter back to the Court of Appeal for reconsideration. When the Court of Appeal reversed the denial of Hafif’s special motion to strike, the Supreme Court again granted review.

During the pendency of the review the Legislature enacted C.C.P. § 425.18, “the SLAPPback statute.” This statute applies to actions filed by the target of a SLAPP suit against the party who filed that suit. The statute permits the filing of a special motion to strike a SLAPPback complaint. However, many of the protections afforded defendants under the anti-SLAPP statute such as a hold on discovery, strict time limits, and mandatory attorneys’ fees awards are not available under C.C.P. § 425.18. Instead, the statute is designed to make it easier for plaintiffs to defend against a SLAPPback motion. Among the plaintiff protections built into the SLAPPback statute is a provision that precludes “a party whose filing or maintenance of the prior cause of action . . . was illegal as a matter of law” from filing a special motion to strike a SLAPPback complaint.

Soukup alleged Hafif’s filing of the complaint from which her SLAPPback arose was illegal as a matter of law and,

for this reason, his special motion to strike was properly denied.

The Court examined what “illegal as a matter of law” means in the anti-SLAPP and SLAPPback context. Hafif’s complaint was not illegal as a matter of law, even though it had been dismissed pursuant to a SLAPP motion. The Court cautioned that “illegal as a matter of law” is a very narrow concept in the SLAPP and SLAPPback context. It arises only when a defendant concedes illegality or when the illegality is established conclusively by evidence submitted in connection with the special motion to strike. Plaintiff bears the burden of establishing that defendant’s act was illegal as a matter of law by identifying statutory violations and demonstrating the specific manner in which the statutes were violated.

Applying these rules, the Court found Soukup did not establish the filing of Hafif’s underlying complaint was illegal as a matter of law. Soukup did not have standing to assert violation of the two Labor Code sections she alleged Hafif violated by filing the complaint. Moreover, the Court rejected Soukup’s argument that Hafif’s complaint was a sham suit, which by definition was not entitled to First Amendment protection. Because the Legislature considered case law addressing this principle, but declined to apply the principle to exempt from the SLAPPback statute complaints dismissed via a special motion to strike, the Court would not create a broader exception to § 425.18.

Although Soukup lost the battle, she ultimately won the war. Having determined that Hafif satisfied the first prong of the SLAPPback statute, it held Soukup had met the second by

establishing a probability of prevailing on her claim against Hafif. Therefore, the Court reversed the judgment of the Court of Appeal and remanded the case for further proceedings.

Comment. *Soukup* demonstrates the difficulty in establishing that conduct is “illegal as a matter of law.” Complaints dismissed pursuant an anti-SLAPP motion to strike are typically deemed to have been filed without probable cause and thus are arguably “illegal as a matter of law.” However, as demonstrated by *Soukup*’s companion case, *Flatley v. Mauro*, (PL Update No. 245) only uncontradicted and conclusive evidence of egregious illegal acts will satisfy the “illegal as a matter of law” standard.

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