

PROFESSIONAL LIABILITY UPDATE

February 1, 2007

Issue No. 246

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Jessica R. MacGregor

Joseph P. McMonigle

Douglas J. Melton

Glen R. Olson

Jordan Rojas

Steven Sharafian

Ann L. Strayer

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Seth E. Watkins

Kevin Whittaker

Irene K. Yesowitch

ANTI-SLAPP STATUTE

CALIFORNIA LAW

By Jennifer A. Becker

Witte v. Kaufman (2006) 141 Cal.App.4th 1201

The Third District holds that the Strategic Lawsuit Against Public Participation (anti-SLAPP) statute applies in a dispute between attorneys concerning the resolution of an underlying case. A self-represented prevailing attorney is not entitled to attorney's fees under the statute.

Marven Stroh hired Thomas Witte to represent him in a partnership dissolution with his brother and a fee dispute with his former counsel, KLA. His brother's attorney was James Kaufman.

KLA prevailed in fee arbitration and Stroh agreed to a lien on the sale proceeds of a partnership mobile home park until final resolution of the dispute. Stroh informed Witte that he wanted to accept the arbitration award and told him to facilitate settlement of the matter in order to close escrow on the sale of the mobile home park. Witte refused in the belief that he could negotiate a reduction of the arbitration award. After Witte refused to follow his client's instructions, Stroh fired him.

Stroh attempted to settle the dispute with KLA through his broker, but KLA refused to discuss the matter with the broker until Stroh sent a note stating the attorney client relationship with Witte

had ended. After Stroh confirmed he terminated his attorney-client relationship with Witte, he reached a settlement with KLA.

Against his client's wishes, Witte served a rejection of the arbitrator's award and a request for trial de novo to KLA. KLA contacted Witte and asked on Stroh's behalf that Witte sign the substitution of counsel form. Witte never returned the call but eventually signed the substitution of attorney form.

Witte filed an action against Stroh, Kaufman and KLA. He alleged interference with contract by Kaufman and KLA by communicating with Stroh while Witte still represented him and by advising Stroh that he did not have to pay Witte from the proceeds of the sale of partnership assets.

KLA and Kaufman filed special motions to strike the causes of action against them under California's Strategic

Lawsuit Against Public Participation (anti-SLAPP) statute, C.C.P § 425.16. The trial court granted the motions and awarded Kaufman and KLA attorney fees.

The Court of Appeal noted that C.C.P § 425.16 involves a two-step process to determine whether a cause of action should be stricken. If the court determines that a cause of action arises from protected activity the burden shifts to the plaintiff to establish a reasonable probability of prevailing on the merits.

The court found the complaint was subject to the statute because the core of the contract claims arose from litigation-related communications between Stroh, Kaufman, and KLA.

The court rejected Witte's contention that his claims were not subject to the anti-SLAPP statute because they did not preclude KLA from pursuing and resolving its claims against Stroh. The question under the anti-SLAPP statute is whether the subject lawsuit stems from protected activity, not whether the protected activity is complete.

Witte attempted to avoid application of the statute by contending the communications were illegal since they violated statutes and Rules of Professional Conduct. Because KLA and Kaufman did not concede illegality Witte had to make a prima facie showing of illegality.

In addition, Witte had to demonstrate that the complaint was both legally sufficient and supported by sufficient prima facie evidence to sustain a favorable judgment.

The court determined he could not meet his second-prong burden. Witte cited no evidence to support his belief that Kaufmann's statements induced Stroh's actions. Any communications between Kaufmann and Stroh occurred after Stroh terminated his contractual relationship with Witte. As for KLA, Witte submitted no admissible evidence that would establish his claim and cited nothing to refute KLA's evidence that it engaged in no discussions with Stroh prior to Stroh's termination of Witte.

The anti-SLAPP statute provides for an award of attorney fees to a prevailing defendant on an anti-SLAPP motion to strike. The trial court awarded Kaufman and KLA attorney fees and costs. The Court of Appeal agreed with Witte that neither attorney defendant was entitled to attorneys' fees for its pro per representation.

Both Kaufman and KLA's fee award was reversed because the firms were self-represented.

Comment: This case demonstrates that Courts will use the anti-SLAPP statute in litigation of disputes between opposing counsel.