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ANTI-SLAPP

California Law

By Jennifer Becker & John S. Hong

Philipson & Simon v. Gulsvig (2007) 154 Cal.App.4th 347

The Fourth District holds that a cross-complaint based substantially upon defendant's initiation of arbitration and a subsequent complaint constitutes petitioning activity for purposes of the anti-SLAPP statute.

Lori Gulsvig was a shareholder and officer of CSS California, which hired the law firm of Philipson & Simon ("P&S") to collect an account receivable from the Color Spot Company. P&S obtained an uncollectible judgment. CSS California sold all of its assets to Tultex, which hired Gulsvig as an employee and P&S to collect accounts. Two years later, Gulsvig left Tultex and retained P&S to renew efforts to collect the Color Spot judgment.

P&S obtained an \$85,000 settlement \$15,000 of which was designated as attorney fees. When P&S did not remit the \$15,000 fee to Gulsvig she filed a fee arbitration request under the Mandatory Fee Arbitration Act (MFAA). At this point P&S challenged Gulsvig's right to retain any of the settlement, asserting that it belonged to Tultex's successor-in-interest, Campbell Advisors. P&S filed a complaint against Gulsvig on behalf of Campbell Advisors for the settlement funds.

Gulsvig then filed a cross-complaint against P&S for breach of fiduciary duty and negligence for failing to ascertain the owner of the Color Spot judgment.

P&S in turn filed a cross-complaint against Gulsvig claiming breach of contract, breach of covenant, fraud and negligent misrepresentation. Its damages consisted of its participation in the action and its potential exposure, as well as attorney's fees and costs.

Gulsvig filed a motion to strike the cross-complaint, alleging it was based on her pursuit of arbitration and the filing of her cross-complaint against P&S, acts protected as petitioning under the anti-SLAPP laws.

The Court employed the two-step analysis to determine if the anti-SLAPP statute applied. First it decided if P&S's causes of action against Gulsvig arose from protected activity. Second, it considered whether P&S could demonstrate a probability of success on the merits.

The Court found that each of the causes of action in the cross-complaint fell within the anti-SLAPP statute because they were based on Gulsvig's initiation of a State Bar sponsored fee arbitration proceeding, protected petitioning activity under the statute. Although the cross-complaint combined protected and unprotected activity, the anti-SLAPP statute applied because the unprotected conduct was merely incidental to the protected conduct.

P&S attempted to disguise that its claims were based on Gulsvig's initiation of fee arbitration by omitting reference to it in the operative cross-complaint. The court nonetheless considered these omitted allegations because the anti-SLAPP statute is to be broadly interpreted.

The Court rejected P&S's convoluted assertion that its fraud and misrepresentation causes of action were proper because they were based on Gulsvig's representations that she was the rightful owner of the Color Spot judgment, thereby causing her to sue P&S. The core of P&S's claim was that Gulsvig initiated the fee arbitration.

P&S did not demonstrate probable success on the merits on the fraud and negligent misrepresentation claims. P&S could not have relied on a false representation by Gulsvig that she owned the Color Spot judgment, because for two years she had asserted that Tultex owned the judgment. P&S's damages claims of possible exposure, attorneys fees and costs associated with being involved in the litigation were speculative and probably not recoverable under the rule that each party to litigation must bear its own fees.

With respect to the breach of contract

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and breach of covenant causes of action, the Court denied the anti-SLAPP motion. Gulsvig's only argument was that the contract claims were not viable because P&S failed to sufficiently notify her of her right to arbitrate pursuant to the MFAA. However Gulsvig waived her right to arbitrate by filing her own cross-complaint against P&S. Dismissal is discretionary under the MFAA, and it was not an abuse of discretion for the trial court to allow the contract causes of action.

Comment: The anti-SLAPP statute is generally not available to resolve "garden variety" disputes between attorneys and clients. This case is a rare example of use of the statute to control litigation between attorney and client.

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