

PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP STATUTE

By John B. Sullivan

***Bailey v. Brewer* (2011) 197 Cal.App.4th 781**

The Second District holds that a pre-litigation statement made in connection with a claim barred by res judicata is not protected under California's Anti-Strategic Lawsuit Against Public Participation Statute.

Stafford Bailey employed Michael Brewer as a cameraman to shoot a documentary film. Bailey hired another cameraman to reshoot much of the footage because Brewer's work was unsatisfactory. Brewer sued Bailey in small claims court claiming they were partners and that Bailey had misappropriated partnership assets. The matter was decided after trial in Bailey's favor.

Subsequently Bailey sued Brewer for intentional interference with Bailey's licensing contract with Showtime. Bailey alleged that Brewer made a demand on Showtime to cease broadcast and provide an accounting. A second cause of action for intentional interference with economic relationship alleged that Brewer sought to disrupt Bailey's economic and contractual relationships with the African Channel, the 2009 Pan African Film Festival, and others by falsely claiming that he had a legal interest in the film.

Brewer filed a special motion to strike these two causes of action under California's Anti-Strategic Lawsuit Against Public Participation Statute, C.C.P. § 425.16 asserting the communications were protected as statements made in connection with an issue under

consideration or before a judicial proceeding. Bailey countered that Brewer's loss in the small claims action rendered the statements unprotected. The trial court denied the motion holding that at the time of the communications the dispute between the parties had not ripened into a proposed proceeding.

The Court of Appeal affirmed on different grounds. The issue litigated and decided against Brewer in the small claims action was substantially identical to the issue in the proposed proceeding. Thus, Brewer was collaterally estopped from re-litigating those issues. Where a party has exercised a right to petition and lost on the merits, there is no further right to petition implicated. A pre-litigation statement made in connection with a claim barred by res judicata is not protected under the anti-SLAPP statute because it does not implicate the core policy of the litigation privilege to protect access to the courts.

Comment: This is a narrow exception to the protection of the anti-SLAPP statute. Generally the litigation privilege provides broad protection to pre-litigation statements. Pre-litigation statements implicate the right to petition and are therefore entitled to anti-SLAPP protection.

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