Filed 9/4/12 Backlund v. Stone CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALYSSA BACKLUND, Plaintiff, Cross-defendant and Appellant, v. CHRISTOPHER STONE, Defendant, Cross-complainant and Respondent.	B235173 (Los Angeles County Super. Ct. No. BC449910)

APPEAL from a judgment of the Superior Court of Los Angeles County. Abraham Khan, Judge. Reversed and remanded.

Law Offices of F. Edie Mermelstein, F. Edie Mermelstein for Plaintiff, Cross-defendant and Appellant.

Miller Barondess, Erik Syverson, Vinay Kohli for Defendant, Cross-complainant and Respondent.

An aspiring lawyer in his 30's named Christopher Stone operated a website for teenagers on which he posted lewd photographs and other scandalous and salacious material. Stone presented himself in the mainstream media as an expert on the topic of "sextortion," a form of blackmail characterized by threats to humiliate a person by posting nude photographs on the Internet. In February 2010, Stone tweeted a threat to "spam" a seminude photograph of a teenage girl; she was subsequently interviewed by an investigative reporter for an article about Stone's threat to publicly humiliate her. Stone has now sued the girl for defamation. Following de novo review, we direct the trial court to strike Stone's pleading as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)[1]

FACTS

Backlund's Complaint

Alyssa Backlund filed suit against Christopher Stone and Stone's website "StickyDrama.com" in November 2010. In November 2009, Stone posted a lewd image of a minor female, with commentary that the image "appears to depict Alyssa Marie Robertson masturbating next to an infant. Such an act, in addition to being morally repugnant, probably violates several statutes pertaining to exposing children to obscenity." Stone published plaintiff's personal contact information with the image, which was viewed by thousands of people. Viewers posted comments of outrage and disgust, referred to plaintiff as a "whore," and contacted plaintiff directly via the link provided by Stone. Plaintiff is not the person depicted in the lewd image.

Stone's publication of an image falsely purporting to depict her in a lewd act exposed plaintiff to hatred, contempt, ridicule and disgrace. Backlund asserts causes of action for defamation and false light. Stone *admits* that he posted an image of a masturbating girl on StickyDrama, with plaintiff's contact information.

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[1] All undesignated statutory references in this opinion are to the Code of Civil Procedure.

In February 2010, Stone obtained a topless photograph of plaintiff and sent her a publicly viewable "tweet" stating, "Message him again, and your floppy titties are spammed all over the place. Last warning."[2] Stone's threat and the seminude photo of plaintiff were accessible to anyone on the Internet. Plaintiff did not consent to disclose the photo, and found the threat of public humiliation highly offensive. Plaintiff asserts a cause of action for public disclosure of private facts based on Stone's threat to spam the compromising photo of her. Stone *admits* that he threatened to publicly expose the indecent photo of Backlund unless she stopped contacting his houseguest Tammen.

Backlund's complaint asserts that Stone filed a small claims action for defamation against her, but never served it. Stone urged his website followers to contact a television company to ask that he appear on the *Judge Judy* show, so that Stone could participate in a segment involving his small claims case against Backlund. Backlund alleges that Stone filed the small claims action for the purpose of harassing her.

Stone moved to strike Backlund's complaint as a SLAPP. He argued that his publication of Backlund's name, residential address, and a map to her home (in connection with the publication of the lewd photograph) was not a public disclosure of private facts. At the same time, Stone conceded that a search of public records does not show plaintiff's residential address. Stone believed the lewd photograph depicted Backlund, so he included plaintiff's name and contact information in his posting. Stone subsequently realized that he was mistaken: the photograph actually depicts an underage girl in Ohio, not plaintiff. He removed plaintiff's personal contact link from the photograph, and offered to post on StickyDrama the heading, "Alyssa Marie Buckland [*sic*] is Not the Most Vile Camwhore Alive."

The trial court denied defendant's motion to strike Backlund's complaint. It found that Stone's Internet posting of child pornography is not protected free speech: section 425.16 "does not apply to indisputably illegal communications that are inherently

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[2] "Him" refers to a friend of Stone's named Parker Tammen.

criminal." Posting a link to plaintiff's personal webpage with comments attributing the wrongful child obscenity to plaintiff also does not implicate the anti-SLAPP statute. Stone did not appeal from the trial court's denial of his anti-SLAPP motion.

Stone's Cross-Complaint

After defendant's anti-SLAPP motion was denied, he filed a cross-complaint against Backlund for defamation and intentional infliction of emotional distress. Despite being a purveyor of child pornography (by posting on the Internet images of an underage girl masturbating next to an infant), Stone paints himself as a noble crusader who protects "naïve and unsuspecting [Internet] users [who] are easy prey to sex offenders." Stone trumpets that he "gained a reputation among mainstream media," leading to features about him in the New York Times, CNN, and Fox News about "sextortion"—the use of compromising nude photographs to blackmail the people in the photo.

Stone socializes with "Internet celebrities and online entertainers" who have "cult status" on StickyDrama and like-minded websites. Backlund was a fan of StickyDrama and wanted to join Stone's "milieu of 'stars.'" After Backlund sent repeated messages to one of Stone's houseguests, Parker Tammen, Stone admits sending Backlund a threatening "tweet" in February 2010, "telling her that an indecent picture she sent to Mr. Tammen would be exposed if she contacted Mr. Tammen again." Stone claims that his threat is not "sextortion" because he did not demand money, property, or additional nude photos from Backlund. At the time, Stone was 31 years old and Backlund was 19.

After Stone publicly threatened Backlund, she was interviewed by online journalist Adrian Chen for an article that appeared on Gawker.com in July 2010. The article initially stated that Stone committed "sextortion" by threatening to expose a seminude photo of Backlund taken when she was underage, but was corrected at Backlund's request to show that the photo was taken the week of her 18th birthday. Stone's threatening tweet to Backlund was shown in the Gawker article, which was entitled "StickyDrama's Christopher Stone Is a 'Sextortion' Expert in More Ways Than One." Chen quoted a Fox News report featuring Stone, which stated, "'A new type of blackmail is trapping teenagers, especially those who have sent provocative pictures to

friends. Hackers are stealing those photos and threatening their senders.'" Chen noted that Stone appeared on television ostensibly to warn teens about the dangers of sextortion, but neglected to mention that he is a expert on the subject because sextortion is something that Stone engages in himself. Gawker quotes Backlund (identified as "Sarah") expressing fear of Stone because of his threats to spam her topless image, saying, "He scares me shitless . . . he'll take anything he can to smash you."

Stone asserts a defamation per se claim against Backlund, alleging that her statements to Gawker journalist Chen are false, unprivileged, expose him to hatred, contempt and ridicule, and tend to injure his business. The statements are defamatory because they charge him with the immoral and criminal activity of exposing a topless photo of an underage girl on the Internet, and by regularly threatening to expose compromising pictures of young girls. Stone also seeks damages for emotional distress.

Backlund's Anti-SLAPP Motion

Backlund filed a motion to strike Stone's cross-complaint under the anti-SLAPP statute. Backlund argued that the article on Gawker.com concerns a public controversy. Stone holds himself out as an expert, appearing on camera as a commentator on sextortion for a nationally broadcast television program, thereby "inserting himself into the public eye." After Stone's television appearance, Backlund was contacted by investigative reporter Adrian Chen from Gawker.com, who wanted to question her about Stone's cyber-threat. Backlund agreed to answer Chen's questions if he protected her identity, because she feared further cyber-bullying by Stone. Backlund reasoned that Stone's cross-complaint arises from Backlund's exercise of her constitutional right of free speech in connection with an issue of public interest, and is protected by the anti-SLAPP statute. Backlund argued that Stone cannot prevail on the merits of his cross-complaint because the pseudonymous "Sarah" quoted in the Gawker.com article does not refer to Stone as a sextortionist, and the entire article is hearsay.

In opposition, Stone argued that Backlund's statements to Adrien Chen did not concern "an issue of public interest." Her comments only concerned the activities of Stone himself, which are not a matter of public interest. Even if Stone interjected himself

into the controversy of sextortion by appearing as an expert on a television news show, Backlund's comments are still not protected because they do not describe activity by Stone that qualifies as sextortion.

Stone claimed he is likely to prevail on his claims because Backlund made statements about him that are false, injure his reputation, and caused him extreme emotional distress. Stone submitted copies of various articles, including an Associated Press item on a federal investigation that coined the term "sextortion," and an FBI webpage advising people how to avoid becoming victims of sextortion.

Stone's declaration was executed in Buenos Aires, Argentina, and is not made under penalty of perjury under the laws of the state of California. He admits to threatening to expose a photograph of Backlund's breasts, feeling that "the only way to stop Backlund from harassing Mr. Tammen would be to send her a strongly worded message. To that end, in February 2010, I sent a 'tweet' to Backlund telling her that a topless picture she sent to Mr. Tammen would be exposed if she contacted Mr. Tammen again." Stone believes that Backlund's statements to Chen were false because (1) the topless photograph was taken when Backlund was 18 years old; (2) Stone's tweet did not include a link to an image of Backlund; and (3) "I did not continue to threaten Backlund with posting the picture nor did I threaten others similarly. Additionally, I did not engage in 'sextortion' because I never demanded that Backlund send me additional topless photos or any money or property in exchange for refraining from posting her photograph." Stone's declaration and appellate brief are replete with irrelevant, offensive, unsupported hearsay statements about Backlund that we do not deign to repeat.

THE TRIAL COURT'S RULING

The trial court denied Backlund's motion to strike. "[T]he Court concludes that the gravamen of the Cross-Complaint is not the interviewer's own commentary subsequently combined with Plaintiff's statements, on a public-interest topic of 'sextortion,' but instead Cross-Defendant's own comments, regarding an individual experience, concerning alleged threats by Cross-Complainant. . . . The instant fact pattern, of blindly answering questions about one's individual experience, without any

awareness of the author's intended topic of the publication, distinguishes it from others described in published opinions, where defendants themselves speak on issues of public interest. In other words, the focus of moving party's alleged statements was upon a private controversy, and the public-interest aspect, if any, was added surprisingly later, by the author, who is not being sued."

DISCUSSION

1. Appeal and Review

Appeal lies from the order denying Backlund's motion to strike under the anti-SLAPP statute. (§ 425.16, subd. (i).) The anti-SLAPP statute applies to cross-complaints, as well as to complaints. (§ 425.16, subd. (h); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735, fn. 2.) The trial court's ruling is subject to de novo review. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 670; § 425.16, subd. (a); *Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) There are two components to a motion to strike brought under section 425.16. First, the defendant must show that the claim arises from her exercise of the right to free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects constitutional rights, the court determines if there is a reasonable probability that the plaintiff will prevail on the merits of his claims. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) To protect First Amendment rights, the anti-SLAPP statute must "be construed broadly." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 735.)

3. Application of the Anti-SLAPP Statute

a. Threshold Showing That the Lawsuit Arises fm Protected Activity

Backlund relies on two of the four categories covered by the anti-SLAPP statute. She claims that her interview with The Gawker's journalist was a "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," or was "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(3)-(4).)

An issue of public interest is "*any issue in which the public is interested*. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute." (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.) We have no difficulty concluding that the topics of cyber-bullying and "sextortion" are matters of public interest. Stone himself provides the proof in his moving papers: he attaches documents showing that the danger to children posed by sextortion has been a topic of widespread media coverage and has resulted in federal investigations and prosecutions. The FBI addresses the topic on its webpage, to alert people how to avoid becoming victims of sextortion. Stone was interviewed on a television program regarding sextortion. If a newsletter sent to a handful of homeowners in a residential community qualifies as constitutionally protected commentary on a matter of public interest (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468), then a topic like sextortion that commands the attention of a nationwide audience on Fox News and CNN—as well as the attention of the FBI—certainly qualifies as a matter of public interest.

An interactive Internet site or news group is a "public forum" within the meaning of the anti-SLAPP statute, and postings on an Internet news site come within the ambit of the statute's protection. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4; *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 693; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1226 [websites accessible to the public are public forums]; *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576.) Stone states in his pleading that the articles about him in Gawker were "viewed by thousands of people." Gawker.com qualifies as a

readily accessible Internet news site and is therefore a public forum within the meaning of the anti-SLAPP statue.

The article on Gawker takes aim at Stone's credibility as a television news commentator on sextortion. The article includes the tweet from Stone to Backlund, threatening to spam "your floppy titties . . . all over the place." Stone admits making this threat. The article begins by saying that five months after Stone made the threat, "he appeared in a news report calmly warning teens about the dangers of 'sextortion.'" Gawker takes Fox News to task for featuring Stone, whose expertise in sextortion "comes from his own attempts at bullying a teenaged girl into silence by threatening to release topless photos of her."[3]

Backlund's comments printed on Gawker.com are afforded protection by the anti-SLAPP statue. When Stone chose to be featured in the print and television media as an expert on the topic of cyber-harassment, he "voluntarily subjected [himself] to inevitable scrutiny and potential ridicule by the public and the media." (*Seeling v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807-808.) Because Stone markets his expertise on sextortion, Backlund was within her rights to share Stone's threatening tweet, and to comment about her fear of Stone, who possesses nude photos of her "and if I talk to anyone about it or stick my nose into anything then he'll release them." The Gawker article contributes to the ongoing public discussion about sextortion, and about Stone's role as a media commentator in that debate. As such, Backlund's statements were not private at all: they were a public comment about a publicly disseminated threat against her made by public figure Stone. Publicity about Stone's threats and Backlund's resulting fear of Stone provide a cautionary lesson to the youthful readers of Gawker,

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[3] The author of the Gawker article sees sextortion as a type of cyber-bullying, which occurs when the Internet is used to hurt or embarrass others. "'Children have killed each other and committed suicide after having been involved in a cyberbullying incident,'" and it is a growing problem. (*D.C. v. R.R.*, *supra*, 182 Cal.App.4th at p. 1218.) The topic has provoked numerous scholarly discussions, including one from the National Crime Prevention Council. (*Ibid*.) Cyber-bullying is a matter of public interest.

who might read Chen's article and decide not to upload nude images of themselves, lest the images fall into the wrong hands and pose the risk of public humiliation in front of countless people. The published article about Backlund's chilling personal experience with Christopher Stone addresses a matter of grave public concern.[4]

b. Probability of Stone's Prevailing on the Merits

The trial court did not reach the second prong of the anti-SLAPP analysis, having erroneously concluded that this involved a "private" matter. We review the case de novo, so we discuss the second prong. Once the first prong of an anti-SLAPP motion is satisfied, the burden shifts to the party asserting the cause of action to establish a probability of prevailing. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 213.) If the claim stated in the pleading is supported by sufficient prima facie evidence, it is not subject to being stricken as a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93; *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 738; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498.)

Stone is a limited public figure. A limited public figure "is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues" regarding the controversy giving rise to the alleged defamation. (*Ampex Corp. v. Cargle*, *supra*, 128 Cal.App.4th at p. 1577; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.) It is sufficient that the person "attempts to thrust him or herself into the public eye." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 24.) Stone voluntarily thrust himself into a public controversy concerning the publication of lewd or compromising photographs of teenagers on the Internet. In November 2009, by his own admission, Stone published an image of an

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4 After the Gawker article appeared, Stone publicly posted Backlund's private address, a photo of her family home, and a new threat: "Lying to @ Adrian Chen will prove to be a costly and embarrassing mistake. And he will not help you." This underscores the insidious ease and pernicious aspect of cyber-threats, and explains why it is a topic of public concern. Stone's new post can be perceived as a threat to physically harm Backlund and her family by displaying the location of their home.

underage masturbating girl on StickyDrama, along with plaintiff's contact information, on a notorious website he operated. In February 2010, Stone admittedly tweeted a threat to spam a topless photograph of plaintiff. In July 2010, Stone appeared on Fox News to discuss "the scary new phenomenon" of publishing compromising photographs of teenagers. He has also been featured in the New York Times and on CNN.

Stone became a limited public figure by operating a publicly accessible website that published lewd photos of minors, and by seeking the public eye when he appeared on television and in print media to discuss the topic of sextortion. "Once he places himself in the spotlight on a topic of public interest, his private words and conduct relating to that topic become fair game." (*Gilbert v. Sykes*, *supra*, 147 Cal.App.4th at p. 25 [defendant thrust himself into the public debate on the merits of plastic surgery by appearing on a television show].) Public figures must prove by clear and convincing evidence that an alleged defamatory statement was made with actual malice. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.)

Stone fails to carry his burden of showing a probability that he will prevail on the merits of his claim. At the outset, we observe that Stone forfeited or conceded the second prong because he "offered no evidence in the trial court and makes no argument on appeal to establish that he is likely to succeed on the merits of his claim." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263, fn. 7.)

Stone's declaration in support of his anti-SLAPP motion is inadmissible and must be disregarded. A declaration subscribed in California must certify that it is "true under penalty of perjury," and, if signed outside of California, it must state that the declaration "is so certified or declared under the laws of the State of California." (§ 2015.5.) Out-of-state declarations that offend section 2015.5 "are not deemed sufficiently reliable for purposes of that statute, unless they follow its literal terms." (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611.) Any declaration that materially deviates from the statute "cannot be used as evidence." (*Id.* at p. 618.)

Stone's declaration does not mention the penalty of perjury or the State of California. (§ 2015.5.) Rather, it reads, "Executed this 30th day of June 2011 in Buenos

Aires, Argentina." The declaration is wholly inadmissible in this proceeding to show malice or anything else.

There is no proof that any of Backlund's statements during her interview were made with actual malice. Stone offers only the inadmissible allegations of his unverified cross-complaint, along with his equally inadmissible declaration. Neither of those documents provide any proof of malice, let alone clear and convincing proof. Stone's claims for emotional distress and injunctive relief fall along with his defamation claim, because Backlund was exercising her right to free speech. (See *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1120 [threats of divine retribution from church members was protected religious speech and could not form the basis of a claim for intentional infliction of emotional distress]; *Brunette v. Humane Society of Ventura County* (2002) 40 Fed.Appx. 594, 598 [while emotional distress may be considered an element of damage in a properly stated defamation action, it cannot form the basis of an independent claim on the same facts].)

We note that this was the third article about Stone that appeared on Gawker.com: the first two were "StickyDrama: The Teen Gossip Site Run by a 31-Year-old Pornographer" and "StickyDrama's Owner Recorded a Live-Streamed Rape and Blogged About It—But Didn't Report It." Despite repeated features damning his reputation, Stone did not sue Gawker.com or Adrien Chen for defamation. Instead, he focused on a teenager to whom he admittedly sent a threatening message, when she expressed her concerns and fears to the public about that threat. This follows Stone's admitted publication of a lewd photograph of an underage girl, whom he falsely identified as plaintiff. Given Stone's scurrilous and outrageous behavior toward young women, he cannot be heard to complain when confronted by one of his victims.[5]

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[5] Stone attends Southwestern Law School. An applicant to the California Bar has the burden of establishing "good moral character," which includes "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process." (State Bar Rules, rule 4.40.) Stone's Internet activities are abusive, unethical, demonstrate a

4. Attorney Fees

Backlund is entitled by statute to recover attorney fees and costs she incurred in the trial court and on appeal, as the prevailing party on her motion. The amount of the fees is to be determined by the trial court upon Backlund's motion. (§ 425.16, subd. (c)(1); *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1310.)

DISPOSITION

The judgment is reversed. Backlund is entitled to recover her attorney fees and costs on appeal. The case is remanded with directions to the trial court to enter an order (1) dismissing Stone's cross-complaint and (2) awarding attorney fees and costs to Backlund incurred in both the trial court proceedings and on appeal.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.

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manifest lack of maturity, discretion and good judgment, and mandate a thorough investigation into his fitness for State Bar membership. Stone must provide a copy of this opinion to the State Bar if he applies for admission to practice law in California.