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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ABTTC, INC., et al.,

Plaintiffs and Appellants,

v.

COMMUNITY SOLUTIONS, INC., et al.,

Defendants and Respondents.

G052134

(Super. Ct. No. MCC1301015)

O P I N I O N

Appeal from an order of the Superior Court of Riverside County, Gloria G. Trask, Judge. Affirmed. Request for judicial notice denied.

Law Office of Barry P. King and Barry P. King for Plaintiffs and Appellants.

Callahan Thompson Sherman & Caudill, O. Brandt Caudill, Jr., Joan E. Trimble; Lobb & Cliff, Mark Lobb and Uliana A. Kozeychuk for Defendants and Respondents.

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ABTTC, Inc., American Addiction Centers, Inc., Forterus, Inc., and Jerrod Menz (collectively ABTTC) appeal from an order granting a special motion to strike their complaint on the ground it constituted a “strategic action against public participation,” or “SLAPP” action. (Code Civ. Proc., § 425.16 (section 425.16.) ABTTC’s complaint alleged causes of action for defamation, interference with prospective economic advantage and unfair business practices against Community Solutions, Inc., and Charles J. “Rocky” Hill (collectively Hill). Both ABTTC and Hill operate drug and alcohol rehabilitation and detoxification facilities.

The causes of action alleged in the complaint are based on allegations Hill made false and defamatory statements that (1) ABTTC had no interest in the well-being of its clients and was “only in it for the money,” (2) ABTTC was “killing people,” and (3) ABTTC was run by “scumbags” who should be “put out of business.” The complaint also alleged that on at least one occasion, Hill falsely complained that ABTTC had purportedly “hijacked his web site” and he intended to sue it as a consequence.

On appeal, ABTTC concedes the anti-SLAPP law applies to its causes of action, and also that any statements arising out of either Hill’s participation as a consultant in a civil suit against it or his assistance with governmental investigations of ABTTC would be protected by privilege. However, it argues the trial court nonetheless erred in granting the motion to strike because some of the defamatory statements it claims Hill made to third parties fall outside of those privileged activities. We reject the argument.

The primary flaw in ABTTC’s argument is that the purportedly unprivileged defamatory statements highlighted in its opening brief – that it was conducting a “money-laundering operation”, that a federal indictment was “pending” against it, and that its facility was “not licensed” – are nowhere mentioned in its complaint. ABTTC implicitly acknowledges this problem by seeking leave to amend its complaint “in order to more clearly re-ground the complaint against Respondents based

on their non-protected activities.” But granting leave to file such an amended complaint in response to an anti-SLAPP motion is improper unless there was already sufficient evidence admitted to the trial court to demonstrate the plaintiff’s probability of prevailing on the amended cause of action. ABTTC has made no such showing in this case.

The order is affirmed. Hill’s request that we take judicial notice of an indictment – a document not presented to the trial court – is denied. The document is not relevant to our analysis.

## FACTS

ABTTC operates inpatient substance abuse rehabilitation facilities, including one in Murietta, California. Hill is the owner and director of Community Solutions, an outpatient rehabilitation clinic located in Temecula, California. Hill is certified by the California Association of Alcohol and Drug Counselors (CAADC) and has served as an expert witness in cases involving drugs and substance abuse issues. The code of ethics for the CAADC requires counselors who are aware of unethical conduct or unprofessional modes of practice to report such matters to appropriate authorities. In April 2010, Hill made a complaint to the California Department of Alcohol and Drug Programs concerning ABTTC. Hill’s complaint addressed a number of issues, including a report that sheriff’s deputies had spoken with the “housemanager” at ABTTC’s Temecula facility and were informed by the house manager that the facility served up to 15 patients and provided licensed detoxification services. However, the state licensing website reflected the facility was not licensed to provide such services. Instead, the facility was purportedly a “sober living home” which was allowed to house up to six patients.

In late 2010, a representative of the California Senate Office of Oversight and Outcomes contacted Hill as part of an investigation into rehabilitation facilities where deaths had occurred. Hill spoke with him on a number of occasions

Also in late 2010, Hill was consulted by plaintiff's counsel in *Benefield v. ABTTC, Inc.* (Super. Ct. Riverside County, Case Nos. RIC-1112376 and RIC-1203152), a case arising out of the death of a patient at ABTTC's Murietta facility. Hill was later retained as an expert witness for plaintiff in that case.

And in November 2011, Hill was contacted by a deputy attorney general about the complaint he had filed against ABTTC with the California Department of Alcohol and Drug Programs. Thereafter, Hill spoke with several people from the Attorney General's office regarding the standards for rehabilitation and detoxification facilities in California, and the ways in which ABTTC's practices have failed to meet those standards.

In July 2013, ABTTC filed its complaint, alleging causes of action for defamation, interference with prospective economic advantage and unfair business practices. The latter causes of action both incorporate the alleged defamation as a basis for liability.

On August 30, 2013, Hill filed a special motion to strike based on the anti-SLAPP law, and on September 3, he filed a demurrer.

Hill's anti-SLAPP motion asserted that all of his allegedly defamatory statements were made in connection with a matter under consideration by legislative, executive or judicial bodies, and thus all were protected by the anti-SLAPP law. Moreover, he contended that none of the statements was actionable on several bases, including on the basis they (1) were not factual, (2) were true, and (3) were privileged.

On October 31, 2013, ABTTC filed a motion to conduct limited discovery – specifically the deposition of a representative of United Behavioral Healthcare Systems – to establish Hill was responsible for the fact ABTTC was not listed as one of its

approved providers. That motion was granted, with the deposition questions limited to “the issues of alleged defamatory statements and interference with economic advantage.”

ABTTC opposed the anti-SLAPP motion, offering evidence of not only the statements set forth in the complaint, but also of additional disparaging statements made by Hill about it. It argued that these statements, made to persons who were not involved in either litigation or investigations relating to it, were not covered by privilege.

ABTTC also filed a response to Hill’s demurrer, consisting entirely of a request for leave to amend. It argued that many of the facts it would include in an amended complaint had not been known to it at the time it filed its complaint, and conceded “technical defects in the pleading that need to be corrected.” It also relied on this court’s opinion in *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 870-871, for the proposition that a complaint can be amended after an anti-SLAPP motion is filed, if the evidence submitted in opposition to the anti-SLAPP motion demonstrates the plaintiff’s probability of prevailing on the amended pleading.

The court granted the special motion to strike and ruled the demurrer to be moot.

## DISCUSSION

### *1. The Anti-SLAPP Law*

The anti-SLAPP law, section 425.16, provides a summary mechanism to test the merit of any claim arising out of the defendants’ protected communicative activities. The law authorizes courts to strike any cause of action which falls within the statute’s purview, if the plaintiff cannot demonstrate a probability of prevailing on it.

Section 425.16, subdivision (b)(1), requires the court to engage in a two-step process in determining whether a defendant’s motion to strike should be granted. “First, the court decides whether the defendant has made a threshold showing

that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

The statute defines "act[s] in furtherance of a person's right of petition or free speech" as including: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any 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; (4) or 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).) The statute is required to be broadly construed (§ 425.15, subd. (a)), and protects even private conversations about a public issue. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170.)

Then, only if the court finds the defendant has made the required showing, the burden shifts to the plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.) "To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Rosenaur v. Sherer* (2001) 88 Cal.App.4th 260, 274.)

We review an order made pursuant to the anti-SLAPP law on a de novo basis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ["Whether

section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal”].) “While we are required to construe the statute broadly, we must also adhere to its express words and remain mindful of its purpose.” (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864, fn. omitted.)

## 2. *The Merits of the Anti-SLAPP Motion*

In this case, ABTTC implicitly concedes Hill satisfied his burden under the first prong of the anti-SLAPP analysis, i.e., demonstrating that the causes of action alleged in its complaint arise out of protected activity. We consequently do not address that prong.

ABTTC focuses instead on the second prong of the anti-SLAPP analysis, arguing Hill’s alleged assertions that it was “running a money laundering scheme,” that it was “about to be the subject of a federal indictment,” and that it was “running an unlicensed facility” were made in situations unrelated to his involvement in any litigation or investigatory activities, and thus were unprotected by any privilege. Consequently, ABTTC claims it has established a “prima facie case for defamation, which is the minimal standard required by a second stage analysis . . . to defeat [Hill’s] anti-SLAPP motion.”

However, none of those alleged statements appears anywhere in ABTTC’s complaint. Instead, the complaint specifically alleges Hill defamed ABTTC by stating: (1) it had no interest in the well-being of its clients, and was “only in it for the money”; (2) it was “killing people”; and (3) it was run by “scumbags” who should be “put out of business.” The complaint also alleged that on at least one occasion, Hill falsely complained that ABTTC had purportedly “hijacked his web site” and he intended to sue it as a consequence.

And because these statements are not in the complaint, they do not constitute part of the alleged defamation cause of action. “The general rule is that the

words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.” (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, fn. 3.) Although an alleged slander may be pleaded with less specificity than libel, the complaint must nonetheless state the substance of the defamatory statement. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458 [“slander can be charged by alleging the substance of the defamatory statement”].) In either case, an allegation “of a ‘provably false factual assertion’ . . . is indispensable to any claim for defamation.” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 32.) Assertions of defamatory statements which are not alleged in the complaint need not be considered in assessing its legal sufficiency. (*Vogel v. Felice, supra*, 127 Cal.App.4th at p. 1017, fn. 3. [“In view of this rule we would be justified in disregarding any evidence or argument concerning statements not explicitly set forth in the complaint”].)

Again, ABTTC implicitly concedes this defect in its pleading and argues it should be allowed to amend the complaint “to more clearly re-ground the complaint against the Respondents based upon their non-protected activities.” However, as stated in *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 (*Simmons*), “the anti-SLAPP statute makes no provision for amending the complaint once the court finds the requisite connection to First Amendment speech.” As *Simmons* explains, “[a]llowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16’s quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. [¶] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his

opponent. [Citation.] Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. [Citation.] This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits." (*Id.* at pp. 1073-1074.)

In seeking the right to amend, however, ABTTC relies on this court's opinion in *Nguyen-Lam v. Cao, supra*, 171 Cal.App.4th 858 (*Nguyen-Lam*.) In *Nguyen-Lam*, the plaintiff filed suit for defamation after her appointment as superintendent of a local school board was derailed, allegedly as a result of false comments made by the defendant. The defendant filed a motion to strike under the anti-SLAPP law, arguing among other things that the plaintiff's complaint failed to state a cause of action because she qualified as a public figure and her complaint contained no allegation of actual malice. The trial court agreed that because the plaintiff's appointment as superintendent – however temporary – made her a public figure, an allegation of actual malice was required. However, it also reasoned that because the evidence already submitted in connection with the motion to strike was sufficient to demonstrate such malice, the plaintiff should be allowed to amend her cause of action to include that allegation, and denied the motion to strike.

In explaining why the trial court did not err in allowing the amendment, *Nguyen-Lam* distinguished *Simmons*, noting that although *Simmons* "rightly foresaw a 'procedural quagmire' in allowing an amendment [that] would necessitate 'a fresh motion to strike,'" that concern was not implicated when "the plaintiff's request for amendment to meet her burden on the second prong is founded upon timely submitted facts *already before the court*. In such cases, there is no need for a 'fresh motion to strike' [citation]; rather, the trial court need only rule on the motion and facts already under consideration." (*Nguyen-Lam, supra*, 171 Cal.App.4th at p. 872, italics added.) In other words, amendment was proper because the plaintiff in that case had already offered the trial

court sufficient evidence of malice in response to the anti-SLAPP motion to demonstrate a probability of prevailing on an amended cause of action which incorporated that allegation.

ABTTC's effort to bring this case within the parameters of *Nguyen-Lam* fails for two reasons. First, ABTTC is not proposing a very specific, minor correction to the alleged defamation claim already set forth in its complaint, as happened in *Nguyen-Lam*. Instead, it is proposing what appears to be a complete overhaul of its claim based on different allegedly defamatory statements than those already set forth, which were made to different people, at different times, and in different contexts. Of course, it's impossible to be certain about the scope of ABTTC's proposed amended pleading because none was ever submitted to the trial court. Thus, it is also impossible to conclude that if a future amended pleading were submitted, it would not necessitate any additional motions to strike. Consequently, the rationale for allowing amendment in *Nguyen-Lam* does not apply here.

And second, even if we pretended we knew exactly what ABTTC's new complaint would look like – if we just assumed the amended complaint would base a defamation claim on the three statements highlighted in its opening brief – it's reliance on *Nguyen-Lam* still fails. Under *Nguyen-Lam*, ABTTC is obligated to demonstrate that, like the plaintiff in that case, it has already offered the trial court sufficient evidence to demonstrate a probability of prevailing on all the elements of a defamation cause of action that is grounded on the statements it now relies upon. However, it has failed to do that.

A cause of action for defamation requires the plaintiff to prove not only that disparaging statements were made, but also that those statements *were false*. (*Gilbert v. Sykes, supra*, 147 Cal.App.4th at p. 27 [defamation “involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage”].) Thus, in order to meet its burden on the second prong

of the anti-SLAPP analysis, ABTTC was required to offer the trial court not only evidence that Hill made the additional unprivileged and injurious statements it now seeks to ground its claims on, but also that those statements were false.

Moreover, on appeal ABTTC has the burden of demonstrating it met that evidentiary burden. But ABTTC's brief cites no evidence in the record reflecting *the falsity* of the allegedly defamatory statements. To be clear, ABTTC repeatedly *asserts* such falsity in its brief, but it fails to support those assertions with any citation to *evidence* of falsity in the record. Under these circumstances, we could not conclude – as the panel was able to do in *Nguyen-Lam* – that ABTTC has already submitted sufficient evidence to demonstrate a probability of prevailing on this proposed amended claim. Consequently, we cannot conclude the trial court erred by failing to give it leave to amend.

#### DISPOSITION

The judgment is affirmed. Hill's request for judicial notice is denied. Hill is entitled to recover costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.