Case No. S235735

SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC et al.,

Plaintiffs, Appellants, and Respondents

v.

LEONARD BLOOM, et al.,

Defendants, Respondents, and Petitioners.

ANSWER BRIEF ON THE MERITS

On Review From the California Court of Appeal for the State of California,
Second Appellate District, Division One
APPELLATE CASE NO. B264493
LASC CASE NO. BC564093

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, Richard Rand—the sole owner of plaintiffs Rand Resources, LLC and Carson El Camino, LLC (collectively, "Rand" or "Plaintiffs")—entered into a written contract with the City of Carson to serve as its exclusive agent with respect to soliciting an NFL franchise to relocate to Carson. Whereas Rand honored that contract—meeting with NFL officials, team owners, and City officials—the City did not, covertly engaging defendant Leonard Bloom and his company, U.S. Capital LLC (collectively, the "Bloom Defendants") to act as the City's agent, in plain breach of the City's contract with Rand.

As in every case, Defendants communicated among themselves in the course of breaching and interfering with the contract at issue. Based on these communications, and the facts that a municipality was party to the contract and the contract concerned soliciting the NFL, Petitioners ask the Court to find that the claims arise from protected activity triggering the anti-SLAPP statute.

The Court of Appeals unanimously held otherwise, ruling that the claims involved conduct, not speech, and even if one assumed otherwise (*arguendo* only), the purported "speech" did not concern a matter of public interest or a matter under consideration by a legislative body. The Court of Appeals was correct on each count.

First, Plaintiffs' claims were based on Defendants' conduct, not any protected speech. Under an exclusive agency agreement between Plaintiffs and the City of Carson that was in place from 2012 to 2014, Plaintiffs were supposed to be the only party soliciting the NFL on behalf of the City. Unbeknownst to Plaintiffs, Defendants undermined that contract at every turn, displacing Plaintiffs with another agent and actively hiding that fact from Plaintiffs. Plaintiffs' claims turn on that *conduct* by Defendants; the references to speech in the operative complaint are provided for context or as evidentiary support for Plaintiffs' claims, not as the basis for liability as required to trigger the anti-SLAPP statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78) [anti-SLAPP statute applies only where "plaintiff's cause of action itself *was based on* an act in furtherance of the defendant's right of petition or free speech."]; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215 [anti-SLAPP statute is not triggered where the speech referenced in the complaint is evidence in support of liability rather than the alleged basis for liability]; *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188 ["[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant."].)

Second, even assuming Plaintiffs' claims did somehow involve protected speech (*arguendo* only), that speech was not on a matter of public interest. The

communications relate only to *who* was the City's agent for soliciting the NFL, not the merits of NFL relocation or the substance of a proposed stadium deal or any other issue of public importance. (*See Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [explaining that, to satisfy the "public interest" test, the particular communications forming the basis for liability must go "beyond the parochial particulars of the given parties" and be of broader social significance].) Defendants failed to submit *any evidence* to the trial court indicating that the identity of the City's agent was a matter of public importance.

Third, and finally, Plaintiffs' claims did not arise from speech in connection with a matter under consideration by a legislative body. The activities for which Plaintiffs seek to hold Defendants accountable occurred almost entirely while the agency agreement was in place and did not concern the later potential renewal of the agreement. (*E.g. People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280) [An official proceeding must be imminent or pending to trigger anti-SLAPP protection].) Evidencing this, Defendants point to no statement or act regarding an issue under consideration by a legislative body whatsoever, but rather rely entirely on the fact that the City Council approved the agency agreement in 2012 and, two years later, decided not to renew it. But any contract with a municipality must be approved by its City Council. (*Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136

Cal.App.4th 1207, 1212.) That requirement does not transmute an ordinary commercial dispute into an anti-SLAPP case.

In short, this case is not, as Petitioners contend, about public or private debate over the merits of having an NFL franchise in Carson or what the stadium complex should look like. Nor is it even a case about who *should* serve as the City of Carson's agent in soliciting the NFL, which was settled when the City signed the contract at issue and selected Plaintiffs as its exclusive agent. Rather, this case is about whether Defendants breached and/or interfered with a valid and enforceable contract. As such, the Court of Appeal's unanimous decision should be affirmed. To decide otherwise would vastly expand the scope of the anti-SLAPP statute and potentially suck into its orbit every case involving any contract between a municipality and a private party.

II. BACKGROUND AND OPINION BELOW

A. Rand And The City Of Carson Enter Into An Exclusive Agency Agreement.

Richard Rand is a real estate developer and the owner of plaintiffs Rand Resources, LLC and Carson El Camino, LLC (collectively, "Rand" or "Plaintiffs").

In 2012, the City of Carson (the "City") entered into an exclusive agency agreement (the "EAA") with Rand whereby it appointed Rand "the sole person" responsible for "coordinating and negotiating with the NFL for the designation and

development of an NFL football stadium . . . in the City."[1] (AA:1:2:29-30)[2] Although the EAA was for a two-year period, it had a renewal provision stating that, upon a showing that Rand had exercised reasonable efforts under the agreement, the City "shall grant" two one-year renewal requests. (AA:1:2:30)

B. The City Breaches the EAA By Using Bloom As Its *De Facto* Agent.

While the EAA was in place, Rand worked diligently on convincing an NFL franchise to re-locate to Carson: meeting with NFL executives at the league's New York City headquarters; meeting with various team owners; hiring architects to draft plans for a stadium; creating promotional materials; making pitches to investors around the globe; and meeting and communicating with City officials to discuss those efforts. (AA:II:13:565-66 at ¶¶ 11-13) All in all, Rand spent hundreds of thousands of dollars and a significant amount of time in efforts to bring the NFL to the City. (*Ibid.*)

Unbeknownst to Rand, however, the City undercut him and breached the parties' agreement by allowing defendants Leonard Bloom and U.S. Capital LLC (collectively, the "Bloom Defendants") to act as the City's *de facto* agent in the same negotiations that Rand was supposed to be conducting. Specifically, during

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[1] Rand Resources, LLC, entered into the EAA with the City and subsequently assigned its rights under the EAA to Carson El Camino, LLC. Richard Rand is the owner of both entities.

[2] All citations to evidence herein are to Appellants' Appendix ("AA") and take the format (AA:Volume Number:Tab Number:Page Number).

the time the EAA was in effect, the Bloom Defendants, City, and the then-serving Mayor of Carson, James Dear ("Mayor Dear," and, together with the City, the "City Defendants") engaged in at least four types of prohibited conduct. First, the Bloom Defendants, with the knowledge and support of the City Defendants, "were contacting NFL representatives and purporting to be agents of the City with respect to bringing an NFL franchise to Carson," in which meetings the Bloom Defendants used promotional materials that were derivative of materials developed by Rand. (AA:1:2:31) Second, the City Defendants and Bloom Defendants would send each other confidential and private correspondence to facilitate Bloom's efforts with respect to the NFL. (*Ibid.*) Third, the Bloom Defendants "ghostwrote letters for Mayor Dear that Mayor Dear put on his official letterhead and sent to third parties as part of their efforts to undermine the EAA." (*Ibid.*) Fourth, when questioned by Mr. Rand about the Bloom Defendant's efforts, Mayor Dear lied to Rand, saying that "he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL." (AA:1:2:32)

Not surprisingly given the City's secret conduct with Bloom, when the EAA was up for extension in late 2014, the City did not renew it, violating the City's obligation to do so upon a showing of reasonable progress by Rand (which showing Rand had made). (*Ibid.*)

C. Rand Files Suit, and the Trial Court Grants Defendants' SLAPP Motions.

In February 2015, Rand filed suit against the City, Mayor Dear, and the Bloom Defendants. Rand's First Amended Complaint ("FAC")—the operative pleading—states causes of action for: (1) breach of contract against the City; (2) tortious breach of contract against the City; (3) promissory fraud against the City; (4) fraud against all Defendants; (5) intentional interference with contract against the Bloom Defendants; and (6) intentional interference with prospective economic advantage against the Bloom Defendants. (AA:1:2:34-40)

Defendants brought anti-SLAPP motions to strike only causes of action two through six. (AA:1:4:54-77; AA:2:7:430-54) The City did not move to strike Rand's breach of contract claim, and thus that claim is not at issue here.

Shortly after Defendants filed their anti-SLAPP motions, Rand moved, *ex parte*, to conduct certain specified discovery aimed at responding to Defendants' arguments as to the merits of Rand's claims. (AA:2:9:513-24) The trial court, without explanation, denied Rand's ex parte application. (AA:2:11:533) A few weeks later, at the hearing on Defendants' Motion, the trial court sustained Defendants' objections to each piece of evidence offered by Rand and presented the parties with a written tentative granting Defendants' motions in their entirety.

With respect to Prong 1, the trial court ruled that both sets of Defendants had met their burden because "communications involving the proposed development of

such commercial property fall into the 'matter of public interest' portion of the statute and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive or judicial body." (AA:IV:21:1095-1097 at §§ II-A, III-A) The trial court did not identify which specific communications or proposed development it was referring to.

In addition, the trial court found that the Bloom Defendants had established that the statements constituting the fraud claim against them were made "'in connection with a legislative proceeding,' as used in the anti-SLAPP context because their actions impacted the City's decision to decline to extend the Exclusive Agency Agreement." (AA:IV:21:1096 at § II-A-2) Again, the trial court did not identify the statements at issue.

Although the trial court ultimately reconsidered its blanket evidentiary ruling and admitted some of Plaintiffs' proffered evidence (AA:IV:24:1141-1158), it adopted its written tentative without change, failing to address any of Rand's now-admitted evidence or whether such evidence changed the outcome with respect to Prong 2—Plaintiffs' probability of success on the merits. (AA:IV:24:1116-1126.)

D. The Court of Appeal Unanimously Overturns the Trial Court.

The Court of Appeal unanimously reversed, holding that each of the five causes of action at issue was based on conduct and *not* on protected speech, making the anti-SLAPP statute inapplicable. (Op. at 13 [Second Cause of Action "is not

premised upon protected free speech or the right to petition for redress of grievances, but upon the City's conduct in carrying out (or not) its contract with Rand Resources."]; *id.* at 16 ["[T]he gravamen of the [third] cause of action is the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity."]; *id.* at 16 ["The gravamen of the fourth cause of action with respect to the City is ... the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent ... not the City's exercise of free speech or petitioning activity."]; *id.* at 17 ["The alleged wrongful conduct at the heart of [the fifth and sixth causes of action] is again the Bloom defendants' efforts to usurp Rand Resources's rights and role under the EAA."].) In so doing, the Court of Appeal relied on a line of California cases holding that the court must "distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity." (*Id.* at 10 [quoting *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215].)

Next, the Court of Appeal held that, even if Rand's claims were based on petitioning speech (and they were not), that speech was not of public importance because it concerned the *identity* of the agent that would represent the City in its solicitation of the NFL. (*Id.* at 13) In so holding, the Opinion recognized that the

question is not whether an overall project or development is of public importance, but rather whether the specific matter giving rise to liability is of public importance. In drawing this distinction, the Court of Appeal was informed by *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, which explained that, "[j]ust because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." (*Id.* at 14 [quoting *Commonwealth*, *supra*, 110 Cal.App.4th at 34].) Following *Commonwealth*, the Opinion held as follows:

> While having an NFL team, stadium, and associated developments in Carson is no doubt a matter of substantial public interest, plaintiffs' complaint does not concern speech or conduct regarding a large scale real estate development or bringing an NFL team to Carson and building it a stadium. It instead concerns the identity of the person(s) reaching out to the NFL and its teams' owners to curry interest in relocating to Carson. The identity of the City's representative is not a matter of public interest. In this regard, it is noteworthy that the City was not paying Rand Resources for its services or even reimbursing Rand Resources for its expenses. Furthermore, the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants, are also not matters of public interest.

(*Id.* at 14.)

The Opinion considered and distinguished *Tuchscher*, the principal case relied upon by Petitioners and the trial court, on the grounds that (i) unlike this case,

Tuchscher involved communications about the specifics of an actual planned development; and (ii) the parties there actually conceded that the development in interest was an issue of public interest. (*Id.* at 14-15)

The Opinion also held that subdivision (e)(2) was inapplicable. It reasoned that, to the extent that Plaintiffs' claims alleged speech at all, "the communications and conduct alleged in the cause of action were made solely in connection with the breach of the EAA, and not in connection with the issue of its renewal or any other issue under consideration or review by the City." (Op. at p. 15) It continued that "the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants were not made in connection with whether the EAA would be renewed or replaced with some agreement with the Bloom defendants," which was the only subject of later legislative review. (*Ibid.*)

Because Petitioners had not satisfied the first prong of an anti-SLAPP analysis, the Court of Appeal did not address Prong Two, Plaintiff's probability of success on their claims. (*Id.* at 18)

III. PLAINTIFFS' CLAIMS FOR BREACH OF AND INTERFERENCE WITH AN EXCLUSIVE AGENCY AGREEMENT DO NOT ARISE FROM PETITIONING OR FREE SPEECH ACTIVITY IN CONNECTION WITH A PUBLIC ISSUE OR AN ISSUE OF PUBLIC INTEREST WITHIN THE MEANING OF THE ANTI-SLAPP STATUTE.[3]

California's anti-SLAPP statute states that "[a] cause of action against a person *arising from* any act of that person *in furtherance of the person's right of petition or free speech* under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (C.C.P. § 425.16, subd. (b)(1) [emphasis added].) Although the statute is to be broadly construed when required to effectuate its purpose, its application is still limited to cases where the defendant establishes that the "conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)" of Section 425.16. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66) Two such categories are relevant to this appeal, subdivision (e)(4), which is addressed in this Section, and subdivision (e)(2), which is addressed in the next Section.

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[3] Although the Court has asked the parties to address whether Plaintiffs' breach of contract claim arises from protected speech in connection with a public issue, the City—the sole defendant on that cause of action—did not move to strike the breach of contract claim. As such, that claim is not at issue here. As discussed below, Plaintiffs' *tortious* breach of contract claim neither arises from protected speech activity nor does any implicated speech concern a public issue.

To qualify for protection under subdivision (e)(4) of the anti-SLAPP statute, defendants were required to establish that the conduct for which Plaintiffs seek to hold them liable was conducted "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." (C.C.P. § 425.16(e)(4).) In other words, Defendants must establish two independent criteria, first showing that the activity forming the basis for their claimed liability was conducted in furtherance of protected speech activity,[4] and then showing that the speech activity occurred in connection with some issue of public significance.

Defendants fail on both counts. First, Plaintiffs seek to hold petitioners liable for conduct (not speech) that occurred in furtherance of their commercial interests, not their Constitutional rights of free speech and petition. Second, even if protected speech or conduct in furtherance of protected speech did form the basis for some of Plaintiffs' causes of action (*arguendo* only), the "issue" involved concerns only the identity of the City's agent for soliciting the NFL and the breach of a contract related thereto. Although the parties to this case may care a great deal about this issue, it is

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[4] As it did before the trial court and the Court of Appeals, the City's brief entirely ignores the "in furtherance of [protected speech]" requirement, going so far as to elide the statute and misleadingly claim that the SLAPP statute protects all "conduct . . . in connection with a public issue or an issue of public interest." (City Br. at 28.) The City fails to cite any authority for this proposition, which is flatly inconsistent with the express terms of California's anti-SLAPP statute.

not one of public significance, and Defendants failed to introduce any evidence indicating that it was.

A. Plaintiffs' Tortious Breach of Contract and Tortious Interference Causes of Action "Arise From" Commercial Conduct, Not Speech, and Therefore the Anti-SLAPP Statute is Not Implicated.

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*Ibid* [emphasis in original].) "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188.) Rather, California has long recognized a distinction between cases where protected speech activity is of relevant evidentiary value to the cause of action and cases where the conduct furthering protected speech activity forms the gravamen of the complaint; only the latter cases are subject to anti-SLAPP motions.

As this Court has recognized, "the arising from requirement is not always easily met." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53,

66.) For instance, in *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, the Court considered a dispute between the national Episcopal Church and its Los Angeles Diocese, on one side, and a specific parish in Los Angeles (St. James) on the other side. Following a dispute over the ordination of gay ministers, St. James elected to disaffiliate from the national Church, triggering a lawsuit over the ownership of the physical property on which St. James was located. (*Id.* at 475-76.) Plaintiffs, the national church and Los Angeles Diocese, sued, claiming that they owned the property. (*Id.* at 476.) St. James moved to strike, claiming that the "action arose from their protected activity in first expressing disagreement with the higher church authorities regarding church governance and then disaffiliating from the general church." (*Id.* at 477.)

This Court held otherwise. Notwithstanding that protected activity "may lurk in the background—and may explain why the rift between the parties arose in the first place," the complaint was not subject to an anti-SLAPP motion because it was based on a property dispute, not the underlying cause of the rift. As this Court stated, "[t]he property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is 'the gravamen or principal thrust' of the action." (*Id.* at 477-78.)

Likewise, the Court of Appeals has repeatedly held that where, as here, a complaint is based on defendants' conduct in carrying out or interfering with a

contract, the mere fact that the complaint references communications does not trigger the anti-SLAPP statute.

Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790, is instructive. The plaintiffs there alleged that Wal-Mart induced them to sell their property subject to certain limitations on its future use. Then, when Wal-Mart needed the plaintiffs to extend escrow, it induced them to comply without telling them that it had filed updated permit applications for the property that, if granted, would negatively impact the plaintiffs. (*Id.* at pp. 795-98.)

The plaintiffs sued for breach of contract and fraud, and Wal-Mart argued that its conduct was protected because it occurred in connection with the permit applications. In holding that the fraud and breach of contract actions were not subject to the anti-SLAPP statute, the Court of Appeal explained that the alleged wrongdoing did not arise from petitioning activities in pursuing permits for the development, but rather Defendants' conduct in "carrying out...contractual duties, seeking to extend escrow [based on false promises], requesting the execution of documents, and other practices within the scope of the parties' contractual relationship." (*Wang*, 153 Cal.App.4th at 808.)

Similarly, in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, the Court of Appeals held that the anti-SLAPP statute was not triggered by a complaint challenging the City of Pico Rivera's alleged *conduct* in