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THE EHRLICH LAW FIRM

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Appellate Reports

PLAINTIFFS' LAW FIRM SUES CLIENT FOR DEFAMATION IN WEBSITE REVIEWS, TRIAL COURT GRANTS ANTI-SLAPP MOTION AGAINST FIRM, UPHELD ON APPEAL

Anti-SLAPP; protected activities; reviews posted on websites: *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882 (Second Dist., Div. 2.)

After a client fired her attorney and his firm, the firm placed a lien on the client's further recovery and then sued the client's daughter for defaming them in several online reviews. The daughter moved to dismiss the defamation claim under the anti-SLAPP law and the trial court granted the motion. Affirmed.

Nahid Lahiji (Nahid) retained the law firm and attorney Cohen to represent her in a dispute with her homeowner's insurer. The firm obtained some preliminary recovery, from which Nahid authorized the firm to retain $120,000. She later became dissatisfied with the firm's representation and terminated it. The firm then placed a lien on any further recovery from the insurer on a quantum meruit basis. Nine days later, a person using a Yelp account with the name "AI L." and with a photograph of Nahid's daughter, Arta Lahiji (Arta) posted a review of the firm and Cohen (the Yelp review). The review recounted the case and included the following statements: That the firm was "underhanded and shady," was "unprofessional and unethical," used "scare tactics," and had an "awful moral compass." The reviewer warned readers to "stay away from this firm."

On November 21, 2017, an "anonymous" user posted an identical review on Avvo, an online lawyer directory. On December 13, 2017, "Angela Helder" posted a review on the firm's Facebook page that read: "Unprofessional and unethical group of attorneys ... will botch your home owners insurance claim." On December 14, 2017, reviews identical to the Yelp review were posted on the website Ripoff Report by "Nancy" in "Redondo Beach" and on Google by "Nahid Lahiji."

Cohen and the firm sued Arta for defamation. Although the above recounted postings purported by name or content to be from Nahid, Cohen and the firm alleged a "good faith belief" that Arta was the poster. Cohen and the firm sought compensatory damages, punitive damages and a post-judgment order enjoining Arta from publishing further defamatory statements and requiring her to remove the existing posts.

After the suit was filed, Nahid sent an email to Cohen explaining that she, and not her daughter, had posted the various reviews. Rather than add Nahid as a defendant, Cohen and the firm proceeded to promulgate discovery against Arta. Specifically, they served her with one set of general interrogatories and with 119 special interrogatories.

Arta filed an anti-SLAPP motion seeking dismissal of the defamation claim on the grounds that (1) the postings constituted "protected activity" within the meaning of the anti-SLAPP law, and (2) Cohen and the firm could not establish that the defamation claim had minimal merit. In support of the motion, Nahid submitted a sworn declaration attesting that *she* had "left [the] reviews" underlying the defamation claim and Arta submitted a sworn declaration attesting that she had not "post[ed]" any of the reviews at issue but was "aware" of Nahid's posts on Yelp, Avvo, Ripoff Report, and Google.

The trial court granted the motion. It ruled that posting the online reviews constituted "protected activity" within the meaning of the anti-SLAPP law. The court then ruled that Cohen and the law firm had not carried their burden of showing that their defamation claim had minimal merit. Cohen's and the firm's "assertions that ... Arta ... posted the social media statements at the heart of [their] [c]omplaint," the court reasoned, "are speculative and not supported by the evidence in the record."

The Court of Appeal affirmed. The court first rejected the firm's argument that, because Arta denied making the posts, she could not establish that she had engaged in any protected activity in furtherance of her right to free speech or her right to petition. The court noted that this argument had been rejected in an earlier case, which held that a defendant who denies engaging in the alleged conduct "may rely on the plaintiff's allegations alone" in assessing whether the conduct at issue is protected activity. If the rule were otherwise, anti-SLAPP relief would be unavailable when a plaintiff alleges a baseless claim, which is precisely the kind of claim that the anti-SLAPP law was intended to address.

The court also agreed with the trial court's conclusion that Cohen and the firm did not make a prima facie showing that Arta was legally responsible for the postings that underly their defamation claim. The posts themselves do not establish that Arta was the author or poster, as none of the posts are in Arta's name and their content suggests that the author was the one represented by Cohen and the firm – that is, Nahid. The court then examined the evidence relied on by the firm to suggest otherwise and found that it was insufficient. "Because, . . . Cohen and the firm have not advanced anything beyond speculation that Arta was the author of the posts at issue, their

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

defamation suit against her lacks minimal merit regardless of the persuasiveness of the evidence offered by Arta."

Short(er) takes:

Anti-SLAPP; protected activities; breach of implied covenant of good faith: *Miller Marital Deduction Trust v. Zurich American Insurance Company* (2019) __ Cal.App.5th __ (First Dist., Div. 3.)

Landowners brought action against former landowner's liability insurer for breach of contract and bad faith by failing to provide independent counsel to defend them against former tenant's counterclaim in landowners' suit alleging environmental contamination. Insurer filed special motion to strike allegations under anti-SLAPP statute. The trial court denied the motion. Insurer appealed. Affirmed.

The plaintiff landowners (Millers) sought relief against Zurich – and not against any counsel – based on the overarching premise that Zurich did not meet its duty to defend as it failed to provide independent conflict-free counsel to represent them in defending against the DuBois counterclaim. Zurich seeks to strike the cause of action for breach of implied covenant of good faith and fair dealing or certain allegations regarding communications between counsel that are alleged in the complaint.

Despite Zurich's blanket contention to the contrary, [n]ot all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16. Although a party's litigation-related activities constitute act[s] in furtherance of a person's right of petition or free speech, it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute. There is a distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim. And assertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute.

While a breach of the implied covenant of good faith and fair dealing may be carried out by means of communications between the parties' respective counsel, the fact of counsels' communications does not transform the claim to one arising from protected activity within the meaning of section 425.16. The allegations of counsels' communications do not concern the substantive issue of the Millers' liability as alleged in the DuBois counterclaim or any coverage matter. Instead, the communications concern procedural matters regarding "discovery," "correspondence with Zurich's claims handlers," and "payments" to the Millers, directedly related to Zurich's duty to defend obligations owed to the Millers by appointing panel counsel to represent them in defending the DuBois counterclaim.

Thus, what gives rise to liability is not the fact of counsels' communications, but that Zurich allegedly denied the Millers the benefit of panel counsel's independent professional judgment in rendering legal services to them. The Court therefore rejected Zurich's argument that the allegations of counsels' communications give rise to its liability for an action for breach of the implied covenant of good faith and fair dealing. The lawsuit concerns a breach of duty that does not depend on Zurich's exercise of a constitutional right. In other words, and contrary to Zurich's contention, the allegations of counsels' communications are only evidence that provides the context for the allegation that Zurich unreasonably and without proper cause interfered with panel counsel's representation of the Millers in defending against the DuBois counterclaim.

The court therefore affirmed the denial of the anti-SLAPP motion, "on the ground that the anti-SLAPP statute does not apply to the cause of action for breach of implied covenant of good faith and fair dealing."

Arbitration; Federal Arbitration Act; grounds for vacatur of award; arbitrator's failure to disclose dealings with party that might create impression of bias.

***Monster Energy Company v. City Beverages, LLC* (9th Cir. 2019) 940 F.3d 1130.**

City Beverages (doing business as Olympic Eagle) signed an agreement with Monster Energy (Monster) giving Olympic Eagle exclusive rights to distribute Monster's products in a specified territory. After Monster terminated the agreement, the parties entered into an arbitration to determine whether Monster had improperly terminated the agreement. From a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement, the parties chose the Honorable John W. Kennedy, Jr. (Ret.) (the Arbitrator). At the outset of arbitration, the Arbitrator provided a series of disclosure statements. In the final arbitration award (the Award), the Arbitrator determined that Olympic Eagle did not qualify for protection under Washington law.

The parties filed cross-petitions in the district court, with Monster seeking to confirm the Award and Olympic Eagle moving to vacate it. The latter motion sought to vacate the award based on later-discovered information that the Arbitrator was a co-owner of JAMS – a fact that he did not disclose prior to arbitration. Olympic Eagle also requested information from JAMS regarding the Arbitrator's financial interest in JAMS, and Monster's relationship with JAMS. When JAMS refused to divulge this information, Olympic Eagle served JAMS with a subpoena. In the face of further resistance, Olympic Eagle later moved to compel JAMS's response to the subpoena.

Ultimately, the district court confirmed the Award, denying Olympic Eagle's cross-petition and finding its motion to compel moot. The district court then awarded Monster attorneys'

See Ehrlich, Next Page

fees from both the arbitration and the post-arbitration proceedings. Judgment was entered, and Olympic Eagle timely appealed. Reversed.

The Federal Arbitration Act permits a court to vacate an arbitration award "where there was evident partiality ... in the arbitrators." (9 U.S.C. § 10(a)(2).) Olympic Eagle seeks vacatur of the Award based on the Arbitrator's failure to fully disclose his ownership interest in JAMS. Monster contends that the district court correctly found Olympic Eagle's argument waived, and, alternatively, that the Arbitrator's disclosures were sufficient. The court rejected both arguments.

The district court held, and Monster continues to argue, that Olympic Eagle waived its evident partiality claim because it failed to timely object when it first learned of potential "repeat player" bias and the Arbitrator disclosed his economic interest in JAMS.

The court found no waiver because Olympic Eagle lacked the requisite constructive notice for waiver. To be sure, it knew that the Arbitrator had some sort of "economic interest" in JAMS. But the Arbitrator expressly likened his interest in JAMS to that of "each JAMS neutral," who has an interest in the "overall financial success of JAMS." The Arbitrator also disclosed his previous arbitration activities that directly involved Monster, in which he ruled against the company. In context, these disclosures implied only that the Arbitrator, like any other JAMS arbitrator or employee, had a general interest in JAMS's reputation and economic well-being, and that his sole financial interest was in the arbitrations that he himself conducted. Thus, even if the number of disputes that Monster sent to JAMS was publicly available, that information alone would not have revealed that this *specific* Arbitrator was potentially non-neutral based on the totality of JAMS's Monster-related business.

The crucial fact – the Arbitrator's ownership interest – was not unearthed through public sources, and it is not evident that Olympic Eagle could have discovered this information prior to arbitration. In fact, JAMS repeatedly stymied Olympic Eagle's efforts to obtain details about JAMS's ownership structure and the Arbitrator's interest post-arbitration. Accordingly, Olympic Eagle did not have constructive notice of the Arbitrator's ownership interest in JAMS – the key fact that triggered the specter of partiality.

The Supreme Court has held that vacatur of an arbitration award is supported where the arbitrator fails to "disclose to the parties any dealings that might create an impression of possible bias." Here, the Arbitrator submitted a disclosure statement in accordance with JAMS's rules. He disclosed that within the past five years he had served as a neutral arbitrator for one of the parties, firms, or lawyers in the present arbitration; that within the past two years he or JAMS had been contacted by a party or an attorney regarding prospective employment; and that he "practice[s] in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS." The Arbitrator also disclosed that he arbitrated a separate dispute between Monster and a distributor, resulting in an award against Monster of almost $400,000. He did *not*, however, disclose his ownership interest in JAMS and JAMS's substantial business relationship with Monster.

As a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts. This ownership interest – which greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization – is therefore substantial. Second, Monster's form contracts contain an arbitration provision that designates JAMS Orange County as its arbitrator. As a result, over the past five years, JAMS has administered 97 arbitrations for Monster: an average rate of more than one arbitration per month. Such a rate of business dealing is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained. In sum, these facts demonstrate that the Arbitrator had a "substantial interest in [JAMS,] which has done more than trivial business with [Monster]" – facts that create an impression of bias, should have been disclosed, and therefore support vacatur.

Insurance, duty to defend, employment-practices coverage, cost-reimbursements

***Southern Cal. Pizza Co. v. Certain Underwriters at Lloyd's, London* (2019) __ Cal.App.5th __ (Fourth Dist, Div. 3.)**

Plaintiff owns and operates over 250 Pizza Hut and Wing Street restaurants. Defendant provided to plaintiff an employment practices liability insurance policy, which covered certain losses arising from specified employment-related claims brought against plaintiff. An endorsement added to the policy included an exclusion (the "wage and hour exclusion"), which said, "This Policy does not cover any Loss resulting from any Claim based upon, arising out of, directly or indirectly connected or related to, or in any way alleging violation(s) of any foreign, federal, state, or local, wage and hour or overtime law(s), including, without limitation, the Fair Labor Standards Act; however, we will pay Defense Costs up to, but in no event greater than $250,000 for any such Claim(s), without any liability to us to pay such sums that any Insured shall become legally obligated to pay...."

After being named a defendant in a putative class action lawsuit alleging violations of a variety of Labor Code provisions, plaintiff sought coverage under the Policy. Defendant largely denied coverage, stating that the alleged violations fell within the wage and hour exclusion. It, however, provided $250,000 in defense cost coverage as specified in the exclusion. Plaintiff's lawsuit seeking additional coverage was dismissed on demurrer, based on the wage and hour exclusion. Reversed.

Using the ordinary meanings of the words, the phrase "wage and hour ...

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

law(s)" refers to laws concerning duration worked and/or remuneration received in exchange for work. In addition to seeking recovery of wages – claims that fall within the wage and hour exclusion – the underlying lawsuit also alleged plaintiff failed to fully reimburse its delivery drivers for necessary business-related expenses they incurred while doing their job, including travel for required training, mileage driven for deliveries and cell phone usage. Among the relief requested was reimbursement due on those expenses, plus interest, pursuant to Labor Code sections 2800 and 2802. Plaintiff contends the trial court erred in concluding such a claim falls outside the scope of the Policy's general coverage, or alternatively, within the scope of the wage and hour exclusion. The court agreed.

Both sections 2800 and 2802 require an employer to indemnify its employee for certain losses or expenditures under specified circumstances. Neither statute mentions wages or hours, nor do they appear in the parts of the Labor Code titled "compensation" or "working hours." While not determinative of the question before us, this observation supports the notion that one would not expect them to be considered wage or hour laws in the absence of an express indication otherwise.

Lending further credence is the function of, and the purpose underlying, each statute. Disbursements for losses and work-related expenditures are not payments made in exchange for labor or services. The former protects employees from an employer's lack of reasonable care and diligence as well as ensures employers are "bear[ing] all of the costs inherent in conducting [their] business[es]" (In re Acknowledgment Cases (2015) 239 Cal.App.4th 1498, 1506.) And the latter prevent[s] employers from passing their operating expenses on to their employees. Given section 2802's language, function and purpose, it is unsurprising our Supreme Court previously characterized claims seeking reimbursement of business expenses as "nonwage" claims. For these reasons, we hold the claim in the underlying lawsuit brought pursuant to sections 2800 and 2802 falls outside the scope of the wage and hour exclusion.

The claim was potentially covered under the policy because the Policy covers as "Inappropriate Employment Conduct." The two categories of conduct listed in the Policy to which it directs our attention are the following: (1) "any failure to adopt, implement, or enforce employment related policies or procedures"; and (2) "any other employment related workplace tort."

Taking the latter first, as we find it determinative of the issue, we agree the claim at issue likely qualifies as an employment-related workplace tort. In the ordinary sense, "[a] tort is defined to be 'any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer.'" (*Denning v. State* (1899) 123 Cal. 316, 323, 55 P. 1000.) Here, the wrong alleged (failure to reimburse business expenses) is not grounded in the breach of a contract, and the Legislature enacted a statute which gives the injured party (an employee) a remedy against the wrongdoer (an employer).

Conversion; wage claims; damages

***Voris v. Lampert* (2019) 7 Cal.5th 1141 (Cal. Supreme).**

Terminated employee, after successfully invoking against his former employers contract-based and statutory remedies for nonpayment of wages, brought action against employers' part-owner to hold part-owner personally responsible for the unpaid wages on a theory of common-law conversion. The trial court entered summary judgment for the owner, the Court of Appeal affirmed, and the Supreme Court affirmed.

The employment relationship is "fundamentally contractual," meaning it is governed in the first instance by the mutual promises made between employer and employee. The promise to pay money in return for services rendered lies at the heart of this relationship. Historically, when that promise has been broken, the "usual remedy" has been an action for breach of contract. Even in the absence of an explicit promise for payment, the law will imply one, and thus authorize recovery, when circumstances indicate that the parties understood the employee was not volunteering his or her services free of charge.

Beginning more than a century ago, the Legislature began to supplement existing contract remedies with additional worker protections designed to "safeguard" the worker "in his relations to his employer in respect of hours of labor and the compensation to be paid for his labor." As relevant here, the Legislature has repeatedly acted to ensure employees receive prompt and full compensation for their labor. Recognizing that the problem of wage nonpayment can take a number of forms, the Legislature has responded with a variety of targeted legislative solutions.

Plaintiff Voris relied on existing contract and statutory remedies in obtaining judgments against his three former employers. But he claims he has been unable to collect on the judgments because defendant Lampert deliberately ran down the companies' accounts and "managed the employer startups into insolvency." To ensure effective relief, Voris seeks to supplement the existing remedial scheme with a common law cause of action for conversion of unpaid wages. Although the obligation to pay wages belongs to the employer, Voris further seeks to assert his claim against individual officers who have either directed or participated in the employer's failure to pay.

As it has developed in California, the tort of conversion comprises three elements: (a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

(c) resulting damages. Although the question was once the matter of some controversy, California law now holds that property subject to a conversion claim need not be tangible in form; intangible property interests, too, can be converted.

Equally important, the "specific thing" at issue must be a thing to which the plaintiff has a right of ownership or possession – a right with which the defendant has interfered by virtue of its own disposition of the property. This means that a cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's possessory interest in a specific, identifiable sum; the simple failure to pay money owed does not constitute conversion.

Here, Voris claims a right to money that did once exist, but which he believes was squandered. At least in such cases, Voris argues, the nonpayment of wages should be treated as a conversion of property, not as a failure to satisfy a mere contractual right of payment. But to accept this argument would require us to indulge a similar fiction: Namely, that once Voris provided the promised services, certain identifiable monies in his employers' accounts became Voris's personal property, and by failing to turn them over at the agreed-upon time, his employers converted Voris's property to their own use. The majority declined to adopt this view and held that a conversion claim is not an appropriate remedy to address the nonpayment of wages.

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