



WEEKLY LAW RESUME™

Issue By: NEIL P. CHERUBIN

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Anti-SLAPP Attack to a Malicious Prosecution Action

Darin Johnson v. Ralph's Grocery Company, et al.

Court of Appeal, Fourth District (March 20, 2012)

This case concerns two pre-answer challenges a defendant can make to the legal sufficiency of a plaintiff's complaint: a demurrer, and a special motion to strike under California Code of Civil Procedure § 425.16 (the Anti-SLAPP Statute). While demurrers are a useful tool to test the complaint at an early stage, an Anti-SLAPP motion can accomplish the same goal and it carries the threat of attorney's fees.

Plaintiff Darin Johnson ("Plaintiff") alleged that in November 2008, she purchased a tablecloth from Ralph's Grocery Company ("Ralph's"). She claimed she later returned to the store to exchange it. She did not pay for the new tablecloth, because it was an exchange. During this trip, Plaintiff purchased some other items, including firewood that was kept outside. Plaintiff then left the store and retrieved the firewood.

Employees from Special Operations International ("SOI"), an independent contractor security company hired by Ralph's, then confronted Plaintiff about shoplifting and escorted her inside to a back room. After 90 to 120 minutes, she was placed under citizen's arrest and handcuffed.

A criminal prosecution for shoplifting was initiated, which resolved in Plaintiff's favor. Plaintiff then filed a complaint against Ralph's and SOI, alleging five causes of action, including malicious prosecution, negligence, and intentional infliction of emotional distress ("IIED").

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Both Ralph's and SOI brought special motions to strike the malicious prosecution cause of action, under the Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, CCP § 425.16. These motions were granted by the trial court. The trial court also sustained a demurrer by Ralph's to the negligence and IIED causes of action.

Plaintiff appealed these rulings, and the appellate court held that the trial court properly granted the Anti-SLAPP motion by Ralph's and SOI, and properly sustained the demurrer by Ralph's.

The appellate court's discussion focused on the application of the Anti-SLAPP statute. The statute protects a person's right to free speech or right to petition the government by eliminating lawsuits intended to "chill" the free exercise of these rights. To rule on a special motion to strike, the trial court must first determine if the defendant has made a threshold showing that the cause of action arises from the right of petition or free speech ("protected activity"). If that showing has been made, the court must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.

It is well-established that the Anti-SLAPP statute applies to malicious prosecution actions. In general, communications are protected under the Anti-SLAPP statute if they would be protected by the litigation privilege of Civil Code § 47(b). The litigation privilege applies to communications made by litigants in judicial or quasi-judicial proceedings to achieve the object of the litigation and that have some logical relation to the action. Even certain pre-litigation communications are protected under the privilege.

After finding that the activity was protected by the litigation privilege, the court then examined whether Plaintiff met her burden in showing a probability of prevailing on the merits. Plaintiff was required to show that Ralph's and SOI lacked probable cause. Plaintiff could not produce a store receipt and could not identify a store employee to verify that Plaintiff made any purchase. Objectively, the circumstances raised a reasonable suspicion of shoplifting. Accordingly, plaintiff could not meet her burden of showing a probability of prevailing on the

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merits. Thus, the trial court was correct in striking the malicious prosecution cause of action under the Anti-SLAPP statute.

The appellate court also provided a brief analysis of Ralph's demurrer to the negligence and IIED causes of action. Plaintiff alleged that Ralph's should be vicariously liable in negligence for SOI's actions. However, while one who hires an independent contractor may be liable for the contractor's intentional torts, the general rule of law is that the hiring party is not liable for the contractor's negligence. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.) As to IIED, there was no evidence of outrageous conduct in this case. The trial court properly sustained Ralph's demurrer.

COMMENT

While the demurrer is a fairly common tool to test the legal sufficiency of a plaintiff's complaint, an Anti-SLAPP motion to strike is even more powerful when properly asserted. In many cases, a complaint can be amended to remedy defects identified by a successful demurrer. However, a successful Anti-SLAPP motion awards attorneys' fees to the defendant at the outset of a case, providing significant leverage that cannot be lessened by merely filing an amended complaint. As the Johnson case informs, use of the litigation privilege widens the universe of claims for which an Anti-SLAPP motion can be asserted.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D058312.PDF](http://www.courtinfo.ca.gov/opinions/documents/D058312.pdf)

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