Superior Court of California
800 Ninth Street, 3rd Floor
Raymond M. Cadei, Judge
Diane Ahee, Clerk
C. Chambers/J. Green, Bailiff
Thursday, May 26, 2016, 9:00 AM
Tentative Ruling (Final 5/26/2016)

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Item 8 **2015-00185560-CU-NP**

Susan Reyes vs. The State of California

Nature of Proceeding: Motion to Strike (SLAPP)

Filed By: Peterson, Glenn W.

Defendant State of California's ("State") Special Motion to Strike (CCP §425.16) is ruled upon as follows.

Both parties' requests for judicial notice are granted.

Background

This is an action for damages pursuant to Rev. & Tax Code §21021 ("Section 21021"). Plaintiffs Susan ("Susan") and Jose Reyes ("Jose"), dba Global ATM Network ("Global") (collectively "Plaintiffs") allege that in 2008 the Franchise Tax Board ("FTB") targeted Plaintiffs for a criminal tax evasion investigation. Plaintiffs allege that FTB misled the magistrate judge to issue search warrants for Plaintiffs' home and Global's office by creating a false impression the Jose never filed a tax return or paid taxes for Global. According to Plaintiffs, based on the filing of articles of incorporation with the Secretary of State, FTB agents asserted that Global was a corporation, rather than a sole proprietorship, and that the corporation did not file tax returns or pay taxes. Plaintiffs contend that the corporation became defunct because Jose decided not to transact Global as a corporation and that he reported taxes as a sole proprietorship.

Susan is a Certified Public Account ("CPA") and was an employee of the FTB prior to and at the time of the investigation. Susan was eventually terminated from the FTB due to the investigation. After an administrative appeal, the SPB reinstated Susan's employment.

Plaintiffs allege that the FTB engaged in other wrongful conduct, such as persuading the EDD to pursue criminal charges against Plaintiffs for failing to pay unemployment insurance, and referring the case to the District Attorney to initiate and continue

prosecution of Plaintiffs. The criminal investigation and prosecution lasted more than six years. The District Attorney withdrew the charges in December 2014.

Section 21021 allows an aggrieved taxpayer to bring an action for damages against the State "if any officer or employee of the board recklessly disregards board published procedures." Plaintiffs allege that FTB's officers and employees "violated board published procedures applicable to the FTB which procedures include those published in the Criminal Investigation Bureau Resource Manual, Policy Manual, Procedure Manual, the Taxpayer Bill of Rights, the FTB Statement of Principles of Tax Administration, applicable code provisions, and other administrative procedures within the meaning of Revenue and Taxation Code section 21021." (FAC, ¶ 317.)

Legal Standard

The California legislature enacted Code of Civil Procedure section 425.16, known as the anti-SLAPP statute, to provide a procedural remedy to dispose of lawsuits and causes of action that are brought to chill the valid exercise of the constitutional rights to free speech and to petition the government for redress of grievances. (*See Rusheen v Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) "The analysis of an anti-SLAPP motion thus involves two steps. First, the court decides whether the defendant moving to strike has made a threshold showing that the challenged cause of action is one "arising from" protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. Only a cause of action that satisfies both prongs of the anti-SLAPP statute - i.e., that arises from protected speech or petitioning and lacks even minimal merit-is a SLAPP, subject to being stricken under the statute." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820 [citations omitted].)

In order to sustain the initial burden on an anti-SLAPP motion, a defendant need only show that plaintiff's lawsuit "arises from" defendant's exercise of free speech or petition rights as defined in Section 425.16(e). (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) In other words, Defendants only need to make a prima facie showing that Plaintiff's FAC "arises from" their constitutionally-protected free speech or petition activity. (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458-459.) Once a defendant makes such a showing, the burden shifts to plaintiff to establish a "probability" that plaintiff will prevail on the claims asserted against defendant. Code of Civil Procedure § 425.16(b). "(P) laintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." (*Premier Med. Mgmt. Systems. Inc. v. California Ins Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476.) Plaintiff's burden is to produce evidence that would be admissible at trial: i.e., to proffer a prima facie showing of facts supporting a judgment in plaintiffs favor. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

In order to satisfy the second prong, 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." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 citations omitted.) In considering the second prong, the court "accept[s] as true the evidence favorable to the plaintiff and evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Id*. citations omitted.)

Protected Activity

The State contends that the gravamen of Plaintiffs' FAC arises from protected activity because it is based on: (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. (CCP §425.16(e)(1),(2).) According to the State, "the FAC contains numerous allegations relating to a six-year investigation and subsequent criminal prosecution conducted by the State. Plaintiffs' claim arises directly from the filing and prosecution of that action." (Motion, 6:23-25.)

In opposition, Plaintiffs argue that "not all of the conduct at issue in this case arises 'protected activity.'" (Opposition, 9:7.)

Causes of action that do include any allegations of protected activity will not be stricken under the anti-SLAPP statute. On the other hand, the gravamen of a "mixed" cause of action, i.e., one based on protected and unprotected activity, is protected activity unless the protected activity is "merely incidental" to the cause of action. (*See Burrill v. Nair* (2013) 217 Cal.App.4th 357, 379-381.) If the alleged protected activity can fairly be characterized as more than merely incidental, then the gravamen of the cause of action is protected activity. (*Id*.)

After reviewing the FAC, the Court concludes that Plaintiffs' allegations of protected activity are not merely incidental to the cause of action. The Court thus finds that the State has met its initial burden. By meeting its burden, the burden now shifts to Plaintiffs to produce admissible evidence supporting the elements of their cause of action against the State.

Probability of Prevailing

Litigation Privilege

The State claims that the FAC is barred by the litigation privilege. "The litigation privilege in section 47 applies to 'any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. ' Prelitigation statements are protected under section 47 when

they are made in connection with a proposed litigation that is 'contemplated in good faith and under serious consideration.'" (*Rohde v. Wolf* (2007) 154 Cal. App. 4th 28, 37.) The State proffers no legal authority that the litigation privilege bars causes of action based on Section 21021.

Plaintiffs do not dispute that the litigation privilege generally applies to such quasi-judicial proceedings as the FTB investigation and criminal prosecution. Plaintiffs instead note that the litigation privilege does not bar all actions, such as malicious prosecution, perjury and subordination of perjury. Plaintiffs insist that because Section 21021 is more specific than the litigation privilege and virtually any actions taken by employees of the FTB would be privileged, the protections provided to the taxpayers in Section 21021 would be vitiated. (*See Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232, 1246 [statutes for the crime of perjury and subordination of perjury are more specific than the litigation privilege and would be significantly or wholly inoperable if their enforcement were barred when in conflict with the privilege]; *see also Komarova v. National Credit Acceptance, Inc*. (2009) 175 Cal. App. 4th 324, 338-339 [holding that the litigation privilege did not bar plaintiff's Rosenthal Fair Debt Collection Practices Act claims because "the privilege would protect defendant's prosecution of judicial proceedings-the arbitration and subsequent petition to confirm the arbitration award-to collect the alleged debt, when it knew that service of process in the arbitration had not been effected, in violation of section 1788.15."].)

The Court agrees with Plaintiffs. Section 21021 allows an aggrieved taxpayer to bring an action for damages against the State "if any officer or employee of the board recklessly disregards board published procedures." If the FTB's officer and employees' "reckless disregard" of "board published procedures" were privileged, then the taxpayer would have no cause of action pursuant to Section 21021 and the statute would be rendered significantly inoperable.

The State has not satisfied its burden to show that the defense of the litigation privilege applies.

Governmental Immunity - Gov't Code §821.6

The State argues that because its employees are immune from claims for prosecutorial misconduct, that it cannot be held vicariously liable for its employees' conduct. (Gov't Code §821.6 ["A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."].) Here, however, Plaintiffs are not asserting vicarious liability against the State for the acts of its employees. There are no allegations of vicarious liability in the FAC. Instead, Plaintiffs assert direct statutory liability against the State pursuant to Section 21021.

The State has not satisfied its burden to show that the defense of immunity pursuant to

Gov't Code §821.6 applies.

Governmental Immunity - Gov't Code §860.2

Government Code §860.2 provides "neither a public entity nor a public employee is liable for an injury caused by: (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax. (b) An act or omission in the interpretation or application of any law relating to a tax." The State insists that Gov't Code §860.2 applies because Plaintiffs would have been required to pay restitution if convicted of the five counts of tax fraud. The State claims that the investigation and subsequent prosecution were "incidental to the collection of taxes, as restitution is a necessary component of a tax fraud case." (Motion, 17:11-13.) To support its argument the State cites to Rev. & Tax Code §19722, which allows the FTB to collect on criminal restitution orders.

The Court is not persuaded. The State does not offer legal authority to support its position that the investigation and criminal complaint were "incidental to the collection of taxes" or that the payment of "restitution" in a criminal tax fraud case is akin to the "collection of a tax."

The State has not satisfied its burden to show that the defense of immunity pursuant to Gov't Code §860.2 applies.

Prima Facie Elements of Section 21021

The Court now turns to the prima facie elements of a Section 21021, that "any officer or employee of the board *recklessly disregard[ed] board published procedures."*

"Board Published Procedures"

Plaintiffs allege that FTB's officers and employees "violated board published procedures applicable to the FTB which procedures include those published in the Criminal Investigation Bureau Resource Manual, Policy Manual, Procedure Manual, the Taxpayer Bill of Rights, the FTB Statement of Principles of Tax Administration, applicable code provisions, and other administrative procedures within the meaning of Revenue and Taxation Code section 21021." (FAC, ¶ 317.)

Both parties acknowledge that the term "published procedures" has not been defined and that there is no guidance regarding the term.

The State argues that Plaintiffs cannot establish that the "majority" of the procedures upon which they rely are "board published procedures." Specifically, the State contends that the majority of Plaintiffs' claim is based upon the "Internal Manuals for the FTB's Criminal Investigation Bureau." (Motion, 18:1-2.) According to the State, "none of the Internal Manuals were created for and are not made publicly available to

the tax paying public." (Motion, 18:5-6 [citing Declaration of Chris Beach, ¶ 3].)

In opposition, Plaintiffs' counsel, Matthew Carlson ("Carlson"), proffers his declaration. Carlson avers that on April 4, 2014, he visited the FTB's website for the FTB Criminal Investigation Bureau. He found the following procedure manuals that were available to the public for download on the website: (1) Criminal Investigation Bureau Resource Manual, (2) Criminal Investigation Bureau Policy Manual, and (3) Criminal Investigation Bureau Procedure Manual. (Declaration of Matthew Carlson, ¶ 3, Exs. A-C.)

Given that there is no guidance as to the meaning of "published", the Court finds that for the purposes of this motion only, Plaintiffs have satisfied their burden to establish that their claims is based on "board published procedures."

"Reckless Disregard"

Again, there is no guidance as to the term "reckless disregard" in connection with Section 21021. The State insists that the term as used in the law of negligence should apply here - "that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." (Motion, 19:21-20:4 [citing *New v. Consolidated Rock Products, Co.* (1985) 171 Cal.App.3d 681, 689].) The State contends that the declarations of the FTB agents establish that they "at all times endeavored to follow applicable law, policy and procedure" in the investigation and prosecution. (Motion, 20:4-6.)

In opposition, Plaintiffs argue that the Court should look to the Federal Treasury Regulations for guidance. (*People v. Hagen* (1998) 19 Cal.4th 652, 651, *Rihn v. Franchise Tax Board* (1955) 131 Cal.App.2d 360 [where "federal and state tax statutes and regulations are substantially identical, the interpretations and effect given them by the federal courts are highly persuasive"].) 26 CFR 1.6662-3 provides penalties for when taxpayer by negligence or disregard of rules or regulations underpays income tax. The regulation states that "[a] disregard is 'reckless' if the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable person would observe." (26 CFR 1.6662-3.)

The Court agrees with Plaintiffs that it should apply the standard set forth in the Federal Treasury Regulations. Here, Plaintiffs proffer evidence that that the FTB agents disregarded the FTB's published policies, by, for example: making misrepresentations, false statements or omitting information during the investigation, seizing property that was outside the scope of the search warrant, improperly contacting Jose's clients, interfering with the IRS audit by withholding evidence, and testifying falsely under oath. (See Opposition, 18:21-21:25 and evidence cited therein.)

The Court concludes, for the purposes of this motion only, that Plaintiffs have satisfied their burden to establish the prima facie elements of their cause of action. Accordingly, the motion to strike is DENIED.

The Court declines to rule on the State’s objections to evidence as the evidence was not material to the disposition of this motion.

The State shall file and serve its answer by no later than June 6, 2016.

Item 9 **2015-00185560-CU-NP**

Susan Reyes vs. The State of California

Nature of Proceeding: Motion to Permit Specified Discovery

Filed By: Carlson, Matthew D.

Plaintiff's motion is DROPPED as the Court has denied the State's Anti-SLAPP motion. (See Item 9.)

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