SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 03/09/2020 TIME: 10:22:00 AM DEPT: C12

JUDICIAL OFFICER PRESIDING: Layne H. Melzer
CLERK: Lorena Mendez
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2019-01078776-CU-DF-CJC** CASE INIT.DATE: 06/24/2019
CASE TITLE: **Bellino vs. McDonald**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Defamation

EVENT ID/DOCUMENT ID: 73240690

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 2/20/2020 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court does not find any authority for the proposition that the "stay" created under CCP 916 applies to cases other than the one in which the appeal was taken. In pertinent part the statute provides: "the perfecting of an **appeal stays** proceedings in the trial court upon the judgment or order **appealed** from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." The ostensible purpose of the CCP 916 "is to protect the appellate court's jurisdiction by preserving the status quo until the **appeal** is decided. The [automatic **stay**] prevents the trial court from rendering an **appeal** futile by altering the **appealed** judgment or order by conducting other proceedings that may affect it." *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.

The Court recognizes it has the inherent power to control proceedings before it including the discretionary ability to enter a stay of proceedings when such a **stay** will accommodate the ends of justice. *OTO, L.L.C. v. Kho,* (2019) 8 Cal. 5th 111, 251.
But this authority must be weighed against the strong public policy underlying the SLAPP statute--that targets of litigation arising out of the exercise of free speech have a prompt disposition at an early stage. "Such early resolution is consistent with the statutory design 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'" *Equilon Enterprises v. Consumer Cause, Inc.,* (2002) 29 Cal. 4th 53, 65. The Court finds this latter consideration to outweigh any considerations of judicial economy that might derive from deferring this Court's ruling in favor of a discretionary stay.

Consequently, Plaintiff's request for a stay is denied and the Court now adopts its tentative ruling as its final ruling. For convenience, that ruling is repeated below:

Defendant Heather McDonald's motion for order striking the defamation complaint of plaintiffs James Bellino and Jump Management Co., LLC ("JMC") under Code Civ. Proc. § 425.16 is granted. The requests for judicial notice are granted. The evidentiary objections are overruled.

Code Civ. Proc. §425.16 provides in relevant part: "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 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." This section is to be construed broadly. Cal. Code Civ. Proc. § 425.16(a).

The court's determination of an anti-SLAPP motion is a two-step process. First, the court determines if the party moving to strike a cause of action has met its initial burden to show that the cause of action arises from an act in furtherance of the moving party's right of petition or free speech. Then, if the court determines that showing has been made, the court determines whether the opposing party has demonstrated a probability of prevailing on the claim. *Navelier v. Sletten* (2002) 29 Cal.4th 82, 88.

Step One: Protected Speech?

There are four categories of protected speech for an anti-SLAPP motion (Code Civ. Proc. § 425.16(e)):

. - statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
. - statements 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;
. - statements made in a place open to the public or a public forum in connection with an issue of public interest; 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.

It is not entirely clear, but based on the case cited by Defendant, it appears she contends asserts protection under category (3).

In the Judge/Beador action, the court previously considered whether the statement at issue are protected speech under section 425.16(e)(3) or (4). The appeal in that separate action does not automatically stay proceedings in this action. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 198.

The statements at issue took place at the Irvine Improv, which is a public forum and the podcast was publicly posted on the internet – another public forum. *Wong v. Jing* (2012) 189 Cal. App. 4th 1354, 1366 ("It is settled that 'Web sites accessible to the public ... are public forums for purposes of the anti-SLAPP statute.'").

Defendant contends Plaintiff Bellino is a person in the public eye such that information about him is a matter of public interest. He contends he is not, or that the statements are otherwise not on a matter of public interest.

Although CCP §425.16 does not itself provide any definition for "public interest," case law has established three basic categories of qualifying statements:
. - statements involving persons in the public eye;
. - statements which could affect large numbers of people beyond the direct participants;
. - statements involving a topic of widespread interest.

Carver v. Bonds (2005) 135 Cal. App. 4th 328, 343; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal. App. 4th 90, 111.

Even in the absence of a public figure, however, there may be a public interest. "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. Matters of public interest .. include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal. App. 4th 468, 479 (internal citations and quotations omitted). The protection applies even where the issue is not of interest to the public at large but to a limited, but definable portion of the public, when the statements are in the context of an ongoing controversy or discussion such that it warrants protection by a statute intended to encourage participation in matters of public significance. *Terry v. Community Church* 131 Cal. App. 4th at 1549-50 ("[section 425.16](e)(4) applies to private communications concerning public interest); *Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal. App. 4th 107, 115-16. Where, however, there is no controversy or on-going discussion giving rise to the speech in question, and the target of the speech (that is, the plaintiff responding to an anti-SLAPP motion) is not a person in the public eye, then the speech is not protected as "public interest" speech. *Du Charme, supra,* 110 Cal. App. 4th at 116-19 (and cases cited there).

Here, there is no real dispute that Defendants' comments were made at a public forum, but Plaintiffs dispute that the comments were on a matter of public interest. Plaintiffs dispute that Bellino is a person in the public eye for purposes of Defendant's comments – that is, to the extent he is in the public eye through his (limited) exposure on the show, Defendant's comments were not about any topic raised by his exposure through the show but were about purely private and/or unrelated matters.

Just because a person is in the public eye, that does not mean that everything about him is a matter of public interest. *Albanese v. Menounos* (2013) 218 Cal. App. 4th 923, 929, 933-34 (*citing D.C. v. R.R.* (2010) 182 Cal. App. 4th 1190, 1214-15.) To be protected, the comment about a person in the public eye should be related to the aspect about the public figure that is of public interest/in the public eye. *Id.* at 933-36 (*noting* in *D.C.* bullying comments about plaintiff were not connected to his limited fame as a singer, so were not a matter of public interest and *distinguishing Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal. App. 4th 1027 where public was particularly interested in the very topic discussed (the internationally famous CEO's wealth and lifestyle)). *See also Seelig v. Infinity Broadcasting Corporation* (2002) 97 Cal. App. 4th 798, 807-08 (finding contestant's participation on TV show "Who Wants to Marry a Multimillionaire" was a matter of public interest *as to that participation*); *Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1132–1133 (noting curiosity is not enough and there must be connection between comment and asserted public interest).

On the other hand, in *Jackson v. Mayweather* (2017) 10 Cal. App. 5th 1240, the court found that the ex-boyfriend's social media postings and radio interview about the termination of their relationship and his ex-girlfriend's abortion and cosmetic procedures were protected speech "in the public interest" because both of them had routinely sought public attention to their lives and lifestyle. 10 Cal. App. 5th at 1253-54. *See also Hall v. Time Warner* (2007) 153 Cal. App. 4th 1337 (finding that while Brando's housekeeper was a private person, when she became the beneficiary of the will of such a famous person she became, as far as that aspect of her life, a matter of public interest).

Bellino's situation shares some similarities with the case of *Albanese v. Menounos, supra*. There, the stylist sought and obtained public attention to a degree to enhance her professional status and business, but not to the point that she was an international celebrity of all-consuming interest to a group of people like the plaintiff in *Nygard*. As the Court remarked:

"We distinguish this case from *Seelig,supra,* 97 Cal.App.4th 798, 119 Cal.Rptr.2d 108, in which the

plaintiff, by voluntarily appearing on *Who Wants to Marry a Multimillionaire,* had invited public comment regarding her appearance on that program. Similarly, we distinguish this case from *Sipple,supra,* 71 Cal.App.4th 226, 83 Cal.Rptr.2d 677, in which the plaintiff, by advising prominent political candidates to campaign against domestic violence, had invited public comment regarding his alleged abusive conduct toward his own ex-wives. There was no similar evidence in this case that Albanese, for example, by publicly promoting her own moral superiority had invited public comment regarding her alleged theft of property from Menounos or Dolce and Gabbana. Albanese v. Menounos, 218 Cal. App. 4th at 936.

The record shows that Bellino too has sought public attention – he has his own public website where he posts about some aspects of his life and he chose to appear, at least on some occasions, on the show. However, he has not sought such pervasive attention to all aspects of his life such that everything about him can reasonably be deemed in the public interest.

Accordingly, the question is whether Defendants' comments, or any of them, were connected to that part of Bellino and/or JMCO in the public interest. In *Albanese* the statements at issue dealt largely with a private dispute involving the plaintiff and the speaker on matters unrelated to plaintiff's public persona or participation in the public eye. Here the commentary instead relates to the public interest that is connected to plaintiffs' public persona and public participation.

In this regard, this case more closely resembles those distinguished by the Court in *Albanese* and discussed above.

The California Supreme Court's decisions in *Rand Resources v. City of Carson* (2019) 6 Cal. 5th 620 and *Filmon.com Inc. v. Doubleverify Inc.* (2019) 7 Cal. 5th 133 do not change the analysis.

In *Rand Resources*, the Court found that alleged private, false representations by public offices, which statements were not actually linked to an existing issue before the city council were not statements concerning an issue of public interest. There no question here that the statements in issue are directly connected to the issue of public interest – that real Housewives' cast members' lives.

In *Filmcom*, the Court clarified that that context matters in determining whether speech fits into 425.16(e)(4) – the catchall provision. It is not enough if the speech in issue is on the same topic as one in the public interest, it must also be sufficiently linked to that public discussion to be protected. In *Filmcom*, the court found that private communication made by a for profit entity to its clients only – and intended to remain confidential – were not speech in connection with a matter of public interest as they communication were not intended to further the public debate on the issue. Again, here there is no question about the public nature – and link to public conversation—of the comments in issue.

Step Two: Showing of Probability of Prevailing on the Merits?

To show a likelihood of success in the face of an anti-SLAPP motion, a plaintiff must present evidence that could be admitted at trial. *Fashion 21 v. Coal for Human Immigrant Rights of Los Angeles* (2004) 117 Cal. App. 4th 1138, 1146-47. Accordingly, lack of foundation is not grounds to exclude evidence from consideration on an anti-SLAPP motion but a substantive evidentiary objection, such as hearsay, is. *Id.*

In determining whether the plaintiff has shown a reasonable probability he will prevail on the merits at trial, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, as well as defenses to them. *McGarry v. University of San Diego* (2007) 154 Cal. App. 4th 97, 108. The court considers, but does not weigh, the evidence. *Id.* The test is the same as that governing a motion for summary judgment, nonsuit, or directed verdict – that is, whether the plaintiff's evidence, if credited, would be sufficient to meet the burden of proof. *Taus v. Loftus* (2007) 40 Cal. 4th 683, 714. Thus, the showing required "is not high." *Hecimovich v. Encinal School Parent Organization,* 203 Cal. App. 4th

450, 469. The "plaintiff needs to show only a minimum level of legal sufficiency and triability." *Id.* (internal quote marks and citations omitted).

Plaintiffs' action against McDonald is not barred by virtue of the prior action against Judge/Beador. It is not claim splitting when the claims are against different defendants. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-82, as modified (Nov. 30, 1994).

To prevail on a claim for defamation, a plaintiff must show that: (i) defendant published the statement, (ii) the statement was about plaintiff, (iii) the statement was false, and (iv) the statement was defamatory (that is, it exposed the plaintiff to contempt or ridicule); and, if the statement it is not defamatory on its face, (v) plaintiff suffered special damages. *Wong v. Tai Jing* (2010) 189 Cal. App. 4th 1354, 1369. *See also* CACI 1700-01.

When the plaintiff is a public figure or limited public figure, she must also prove malice – that is, that the defendants made the defamatory statements knowing they were false or with doubts as to their truth. *Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510, 111 S .Ct. 2419, 115 L.Ed.2d 447.

Expressions of opinion do not fall within the category of "false" statements for purposes of libel and slander. *Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal. App. 4th 434, 445; *see also*, *Summit Bank v. Rogers* (2012) 206 Cal. App. 4th 669, 696. Thus, "'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of ... contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal. App. 4th 798, 809.) "Consequently, courts have frequently found the type of name calling, exaggeration, and ridicule … to be nonactionable speech." *Summit Bank v. Rogers* (2012) 206 Cal. App. 4th 669, 699.

"To ascertain whether the statements in question are provably false factual assertions, courts consider the 'totality of the circumstances.' … 'First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense . . . . [¶] Next, the context in which the statement was made must be considered.... [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.' … This crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court." *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th at 809-10.) "[C]ourts as well have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." *Summit Bank v. Rogers*, 206 Cal. App. 4th at 697; *see also*, *Chaker v. Mateo* (2012) 209 Cal. App. 4th 1138, 1148.)

The court finds that at least one of the statements published in the podcast – "He is going to jail [or, is going to go to jail]" -- is an assertion of fact and can give rise to defamation liability.

But Defendant raises two issues that bar Plaintiffs' attempt to assert such liability against McDonald.

First, Defendant asserts Civ. Code § 48a bars a claim for general damages since Plaintiffs did not demand a retraction. Plaintiffs contend that Civ. Code § 48a does not apply because a podcast is not a publication. But section 48a applies to radio broadcasts as well as weekly news publications. Civ. Code § 48a(a). Neither side has cited a case addressing the issue of podcasts and section 48a. But on its face a podcast would seem to be the equivalent of a broadcast.

Second, Defendant notes Plaintiff has not submitted any evidence of damages caused by *this Defendant's publication* – as opposed to Judge's and Beador's statements before an audience – in the absence of any evidence that the podcast was downloaded by anyone in the 12 hours from midnight until noon before the statements at issue were edited out. [*See* McDonald Decl., ¶¶11-12.]

As to whether the podcast was actually heard by anyone, there is a complete absence of evidence. Citing *Sweetwater Union High School District v. Gilbane Building Company* (2019) 6 Cal. 5th 931, 944-45, 949, Plaintiffs contend that it can be inferred that at some point in the 12 hours it was available the original version podcast was downloaded. But this is not inference; in the absence of any evidence, it is speculation. Plaintiffs simply have not shown any causation between his claimed harm and the podcast as distinct from the original statements themselves.

Accordingly, Plaintiffs have not shown a likelihood of prevailing on the merits of their defamation claim.

Court orders Clerk to give notice.