What to Do When Served with an Anti-SLAPP Motion to Dismiss

By: John D. Rowell

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Code of Civil Procedure section 425.16 has become a grave problem for plaintiffs' lawyers. Section 425.16 is the California Anti-SLAPP statute. SLAPP is an acronym foi "Strategic Lawsuit Against Public Participation." The statute was enacted after a numbei of law review articles were published indicating that developers and large corporations were abusing the judicial process, suing persons and entities of limited means in an effort to compel those defendants to abandon their right to free speech. The purpose of such suits was to impose the financial burden of extensive discovery and legal fees upon those who would publicly question developers and the like.

As most of us who have had experience with the anti-SLAPP statute can attest, the statute only rarely finds itself being used in accordance with the stated purposes. Instead, the defense bar has rather gleefully, and very effectively, used the statute wholesale in defamation, unfair competition[1] and consumer legal remedies act cases. To this list must be added, as most recently approved by the California Supreme Court in *Jarrow Formulas, Inc. v. LaMarche* (2003) Cal.4th (S106503, filed 8/18/03), malicious prosecution cases.

From the defense standpoint, a special motion to strike under C.C.P. section 425.16 presents a number of advantages over summary judgment motions or motions for summary adjudication of issues. From the standpoint of a plaintiff, practically speaking, an anti-SLAPP motion is a nightmare. There are three main reasons for this. They are as follows:

1. Discovery.

Once a 425.16 motion is made, there is no right to any discovery whatsoever. C.C.P. section 425.16(g).

Only on noticed motion and for good cause shown may the court order that specified discovery be conducted, *(id.)*

On the other hand, summary judgment motions and motions for summary adjudication of issues are subject to the provisions of 437c(h) providing that if it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot for reasons stated then be presented the court "shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had."

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[1] See, *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562; Sharon J. Arkin, *Recent Developments in Anti-SLAPP Law, CAOC FORUM,* vol. 33, no. 6 (July/August 2003), p. 8.

2. The Complaint Cannot Be Amended.

After a defendant files an anti-SLAPP suit motion, the appellate courts have uniformly held that the plaintiff does not have the right to file an amended complaint. Simmons v. Allstate

(2001) 92 Cal.App.4th, 1068,1074; Roberts v. County Bar Ass 'n (2002) 105 Cal.App.4th 604, 612-613; Nevellier v. Sletten (2003) 106 Cal.App.4th at 773. The reasoning and result in Nevellier is particularly difficult to understand. The plaintiff sought leave to amend to assert a claim for malicious prosecution to avoid the bar of the litigation privilege, Civil Code section 47, which had been asserted as the basis for concluding the plaintiffs case lacked a probability of success. The Court of Appeal refused to even allow the trial court to address the issue. In each case, the courts have held that no permission to amend was contemplated under the statute.

On the other hand, when a demurrer is interposed, or a motion for judgment on the pleadings made, the failure to grant leave to amend is viewed as an abuse of discretion unless repeated attempts to cure the pleading problem have proved unsuccessful. There is nothing in the anti-SLAPP statute that prevents a defendant from making a demurrer ot motion for judgment on the pleadings in the guise of a C.C.P. section 425.16 motion and, in fact, such has been the practice.

3. A third significant problem arises in light of appellate case law requiring the trial court to grant or deny the motion **as to each cause of action.** *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141; *Fox Searchlight Pictures v. Paladino* (2001) 89 Cal.App.4th 294.

This becomes problematic if multiple causes of action are stated. When a defendant makes an anti-SLAPP motion against a complaint, the loss of even one cause of action requires the trial court to grant fees to the defense. Inclusion of marginal or arguably duplicative claims (such as intentional infliction of emotional distress in a libel complaint) will result in an award of fees.

Add to this the fact that after an anti-SLAPP motion is filed, even a voluntary dismissal with prejudice will not prevent an award of fees. In fact, a dismissal with prejudice will result in a guaranteed fee award.

A. THE TEST

As confirmed by the Supreme Court in a trilogy of cases decided last summer, an anti-SLAPP motion to dismiss involves a two-stage inquiry by the trial court. *(City of Cotati v. Cashman* (2002) 29 Cal.4th 69; *Navellier v. Sletten* (2002) 29 Cal.4th 82; *Equillon Enterprises, Inc. v. Consumer Cuase, Inc.* (2002) 29 Cal.4th 53.) The trial court is initially required to decide whether the defendant has made a "threshold showing" that the challenged cause of action is one arising from activity protected by C.C.P. section 425.16.

The activities protected are the right of petition and free speech in connection with a public issue.

With some very limited exceptions, the "arising from" requirement has been construed broadly. (See *Jarrow, supra,* at 3-14.)[2]

If the statute is applicable, the plaintiff must both "state and substantiate a legally sufficient claim." *Rosenthal v. Great Western Fin. Securities Group* (1996) 14Cal.4th394. at 412; *Jarrow v. LaMarche, supra, ail 5.* "Put another way, the plaintiff' must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Wilson v. Parker, Covert & Chichester* (2002) 28 CaUth 811, 821. In deference to the requirements of due process and the constitutional right to a jury trial, our Supreme Court has allowed that:

> "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; although the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendants' evidence suggesting the motion defeats the plaintiffs attempt to establish support for the claim." *Wilson, supra,* at 821.

B. WHAT CAN BE DONE?

First, try to determine, before you file, whether your case is one in which it is likel) an anti-SLAPP motion will be filed. Certain types of cases almost guarantee such motions (malicious prosecution, abuse of process, libel, defamation). If you know you have such a case, try to identify the sources of evidence you will need to prove your claim. If third parties are involved, try to get witness statements signed under penalty of perjury or a recorded statement **before you file.** Knowing that a case is a likely target for a section 425.16 motion, you should try to consolidate or limit the breadth of the claims in your complaint.

Assuming the worst: you have filed a complaint, the defendant has filed a 425.16 motion, this is the first time you have heard of the anti-SLAPP statute, there are some steps you should immediately take upon receiving the motion.

First, try to get declarations supporting the elements of each claim stated in the complaint. Do not rely on your belief that the statute does not apply; address the factual basis of every element of each claim. If you are left in a gray area, for example, a libel case where you may need to show constitutional malice, then you will need to ask for permission to conduct

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[2] The Supreme Court has granted review and presently has before it a case which involves a claim that the SLAPP statute applies to a malicious prosecution claim brought against an attorney who, in direct contravention of the Rules of Professional Responsibility, sued his client for reporting him to the State Bar. The underlying suit by the attorney was dismissed as a SLAPP suit. *(Button v. Hafif, Soukup v. Hafif).*

discovery. Do so immediately. Make an *exparte* application to set a motion on calendar for hearing prior to the date that the anti-SLAPP motion is set for. Concurrently, ask that the anti-SLAPP motion be continued so that your motion can be heard and decided and still afford you the opportunity to provide a written opposition. In any event, good cause must be shown, and the specific discovery must be outlined. A declaration modeled, in part, after that suggested by C.C.P. section 437c(h) is required. Be forewarned, however:

There is no published decision which has ever held that the refusal to allow discovery was an abuse of discretion.

Most recently, in *Jarrow v. LaMarche, supra,* at fn. 9, the Supreme Court addressed in backhanded fashion, this discovery issue:

> "Jarrow argues that applying the anti-SLAPP statute to malicious prosecution actions will particularly prejudice malicious prosecution plaintiffs because such plaintiffs will generally need discovery to establish the malice element of malicious prosecution, and discovery is available under section 425.16 only on a showing of good cause . . . . It is not our role, of course, generally to pronounce on the wisdom of legislative policy in this area. We may nevertheless observe that Jarrow does not demonstrate that it was prejudiced by a lack of discovery in this case, or that the trial court abused its discretion by failing to order discovery. . . ."

Until it is amended by the Legislature, you can count on the fact that the anti-SLAPF statute will be broadly construed. A brief history of the enactment and its construction will tell you why this is true.

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the Legislature overwhelmingly enacted California's anti-SLAPP law, Code of Civil Procedure section 425.16, to protect against these SLAPP's. (Subsequent section references herein are to the Code of Civil Procedure unless otherwise indicated.) The anti-SLAPP law was enacted to facilitate "a fast and inexpensive dismissal of SLAPP's." *(Wilcox* v. *Superior Court* (1994) 27 Cal.App.4th 809, 823.)

In 1997, the Legislature, in response to certain decisions limiting application of the statute, unanimously amended the anti-SLAPP statute to specifically direct that it "shall be construed broadly." (Stats. 1997, ch. 271, § 1; amending § 425.16(a).) In 1999, the Supreme Court issued its first opinion construing the anti-SLAPP law, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" *(Briggs v. Eden Council for Hope and*

Opportunity (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.)

As a result, you must expect and present evidence with the understanding that the trial court will rule on whether or not the plaintiff "has established that there is a probability that the plaintiff will prevail on the claim."

Unfortunately, even if you prevail, it will not end there. The anti-SLAPP statute expressly includes language making denial of a motion, in whole or in part, directly appealable. Most courts have held trial level proceedings are stayed pending resolution of the appeal. Further, on appeal, the Court of Appeals "independently review[s] the entire record to determine whether the [plaintiff] made a sufficient prima facie showing that it would prevail in light of the applicable law relative to the claim." *(Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653.) This Court uses its "independent judgment" in reviewing the trial court's order on defendant's special motion to strike.

If you have been served with a Special Motion to Strike, good luck - even with a lot of hard work you will need all the luck you can get!

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