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PERSPECTIVE

A bad case for lawyers

By Timothy D. Reuben

Sometimes the courts just get it wrong, and it certainly appears they did in *Abir Cohen Treyzon Salo, LLP v Art Lahiji*, 2019 DJDAR 9551 (Oct. 2, 2019). Division 2 of the 2nd District Court of Appeal, with Justice Brian Hoffstadt writing for the court, joined by Justices Elwood Lui and Victoria Chavez, affirmed an order by Los Angeles County Superior Court Judge David S. Cunningham granting an anti-SLAPP motion, dismissing a law firm's defamation case. In so ruling, the court inadvertently highlighted one of the linguistic challenges in anti-SLAPP jurisprudence — what exactly is "minimal merit" and why is it not different from a "probability of prevailing at trial" standard?

Nahid Lahiji lived with her adult daughter, defendant Arta Lahiji, in a home in Redondo Beach and had a dispute with their homeowners' insurance company. Nahid hired the plaintiffs Alexander Cohen and his firm, Abir Cohen Treyzon Salo firm to handle the dispute, and the firm obtained some unspecified recovery from the carrier, resulting in an undisputed $120,000 fee. Importantly, during the representation, although not technically the client, Arta was copied on all correspondence. It was also alleged that Nahid lacked a "command of the English language," clearly implying that Nahid needed Arta's participation in dealing with the legal matter. Moreover, in one set of emails to the firm purportedly from Nahid's email address, the following was included: "Please blind copy my mom and I on the email." Interestingly, this was followed up four minutes later with an email from Arta to the firm stating: "Correction: please blind copy *my daughter Arta and I*." At a minimum, although the mother was the client, the daughter was an active participant in the communications with the firm, and it is a reasonable inference that she was drafting emails for her mother.

For some undiscussed reason (but probably billing), Nahid (and likely Arta) became unhappy with the firm and fired it with a balance still owing. In response the firm asserted a lien on any further recovery from the carrier. Nine days after the firm asserted the lien, a Yelp review of the firm was posted under the name "AI L" (which appear to be Arta's initials) and more importantly with a photograph of Arta, clearly implying that she was author or at a minimum an endorser of the post. The review cited a number of specific facts about the firm's representation of the home insurance claim, including that the firm ignored client requests for information about expenses, withheld disbursements, and improperly deducted expenses. The review went on to state that the firm was "underhanded and shady," was "unprofessional and unethical," used "scare tactics," and had an "awful moral compass." The Yelp review concluded by advising readers to "stay away from this firm." The Yelp review sometimes uses the term "I" and sometimes uses the term "we," clearly suggesting that this was a communication from both Arta and Nahid. Shortly thereafter, an identical "anonymous" review was posted on Avvo. A fake name was used to post a similar review on the firm's own Facebook page, stating among other things: "Unprofessional and unethical group of attorneys ... will botch your home owner's insurance claim." Identical reviews were shortly thereafter posted on Ripoff Report by "Nancy" in "Redondo Beach" and on Google by Nahid.

The firm sued Arta for defamation. In response, an email came from Nahid's website that she, not Arta, had posted all the reviews, although clearly Arta could have written this for Nahid and most assuredly participated in sending it. The firm sought formal discovery from Arta, but this was stayed by Arta's anti-SLAPP motion, and Nahid was never added as a party. Arta's motion was accompanied by a declaration from her mother Nahid stating that she had "left [the] reviews" and Arta testified in declaration that she was "aware" of all the posts but had not posted them. As to the Yelp account, Nahid claimed that mother and daughter supposedly "shared" the account, and although Yelp's terms of service do not allow for shared account, those terms were for some reason ruled inadmissible by the trial court. The trial court also rejected the firm's request to lift the stay to conduct discovery regarding the sender's identity.

Regarding the first prong required under the anti-SLAPP statute, both the trial and appellate courts easily and properly determined that the posts constituted "protected activity," since the posts were clearly "made in a place open to the pubic or a public forum in connection with an issue of public interest." The firm argued that because Arta denied actually making the statements, she could not take advantage of the anti-SLAPP statute because protected activity must result from "any act of that person," but the appellate court quickly dismissed this argument and criticized the firm for ignoring on point precedent.

But of course, under the anti-SLAPP statute, after determination that a statement constitutes protected activity, a court must look at the second prong, and this is where both the

trial and appellate courts went astray. The appellate court "independently" found that the firm had failed to demonstrate a "probability of prevailing on that claim at trial" because the firm had failed to show that it was Arta that posted the reviews. In doing so, the appellate court failed to look at the evidence in the light most favorable to the firm, since the mere facts that (1) Arta's Yelp account was used; (2) her picture was displayed on the post; and (3) her initials were displayed on the post, should have provided sufficient basis to infer that Arta, despite her denial, posted or at least participated with her mother in writing and/or posting the defamatory material. Added to this was the fact that the two had dealt with the firm in unison, and that Arta, not her mother, had "command of the English language." In addition, emails to the firm suggested that it was Arta and not her mother who corresponded with the firm under her mother's email account. Arta even acknowledged her awareness of the reviews (which presumably included her photograph appearing to endorse the review), while denying actively posting them.

Despite this collection of evidence, the appellate court in effect weighed the evidence, rejecting reasonable and obvious inferences that Arta had either authored or participated in authoring or posting the reviews. Dismissing the fact that Arta's photograph and initials were on the review, the opinion states: "both Arta and Nahid explained that they *shared* that Yelp account and that Nahid — not Arta — had been the one to post the review." While the court acknowledged that "each person who takes a responsible part in a publication of defamatory matter may be held liable for the publication," the court essentially accepted entirely Nahid's and Arta's self-serving testimony and found that Arta was only "aware" and thus not liable. This conclusion that these cleverly drafted declarations defeat the competing evidence (like Arta's photo and Nahid's limited English skills) is just weighing the evidence, which is not allowed. Ironically, Division 2 itself reiterated in another anti- SLAPP case published on the same day, *Litinsky v. Kaplan*, 2019 DJDAR 9555, that, per Justice Elwood Lui, "the court does not weigh the credibility or comparative probative strength of competing evidence."

Perhaps the problem results from the language of anti-SLAPP jurisprudence. To meet the requirements of anti-SLAPP's second prong, a plaintiff must show by admissible evidence a "prima facie case," but that is also called in anti-SLAPP jurisprudence showing "minimal merit," and that is also called "probability of prevailing at trial." Indeed, the appellate court here used all of these terms interchangeably as the standard that the firm had to meet under the second prong. Anti-SLAPP cases have likened this standard to what is necessary to create an issue of fact in a summary judgment motion, and a reasonable inference can be sufficient to do that. On the other hand, the term "probability of prevailing" is language also used when seeking a preliminary injunction — which requires a much higher standard of proof than "minimal merit." Simply put, these terms by their plain meaning sound like different standards, so the language used is somewhat confusing. What language best describes the standard? Either way, consistent language should be used — because "probability of prevailing" is just not "minimal merit." The courts need to clean this up.

What is also disappointing in this ruling is that it makes it all the more difficult for law firms or anyone else defamed in social media to protect themselves. Today anyone can easily post malicious comments on multiple social media sites (as was done here) and that can have a devastating effect on any business or profession, since it is virtually impossible to erase the stain of such defamation. Moreover, reviews can be anonymous, so that it becomes challenging to identify the perpetrator of false information which will thereafter easily come up on a Google search, and lawyers are particularly vulnerable to this kind of attack from disgruntled clients who don't want to pay their bill. While the anti-SLAPP statute is a powerful tool to protect the rights of free speech, if as here a law firm can based on reasonable inferences actually identify the proponent of defamation, a court should allow the matter to proceed.

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