

Not Reported in Cal.Rptr.2d
Not Officially Published
(Cal. Rules of Court, Rules 976, 977)

(Cite as: 2001 WL 1192304 (Cal.App. 1 Dist.))



Only the Westlaw citation is currently available.

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Court of Appeal, First District, Division 5,
 California.

Stephen **TESSLER** et al., Plaintiffs and Appellants,
 v.

CALIFORNIA DEPARTMENT OF
 CORRECTIONS et al., Defendants and Appellants.

Nos. A092657, 310148.

Oct. 9, 2001.

Review Denied January 3, 2002.

JONES, P.J.

*1 This is an appeal and cross-appeal from an order denying a special motion to strike under [Code of Civil Procedure section 425.16](#) [\[FN1\]](#), the SLAPP [\[FN2\]](#) statute. In their appeal, the California Department of Corrections (CDC) and several of its employees [\[FN3\]](#) contend the trial court erred when it declined to strike the complaint filed by respondents Stephen **Tessler** and the **Tessler** Counseling Group, Inc. [\[FN4\]](#) CDC contends the motion should have been granted because every cause of action alleged was subject to a motion to strike, and **Tessler** failed to show it was probable he would prevail. **Tessler** cross-appeals contending the trial court should have awarded him attorney fees because the motion to strike was frivolous. We conclude CDC has failed to satisfy its burden of proving the causes of action alleged were within the scope of [section 425.16](#), and that the trial court properly denied the motion to strike. We also conclude the court did not err when it declined to award **Tessler** attorney fees. Accordingly, we will affirm the order in full.

[FN1](#). Unless otherwise indicated, all further section references will be to the Code of Civil Procedure.

[FN2](#). SLAPP is an acronym for strategic lawsuit against public participation. ([Briggs v. Eden Council For Hope & Opportunity \(1999\) 19 Cal.4th 1106, 1109, fn. 1.](#))

[FN3](#). Appellants are CDC, Cora Monson, Carol Jurcak, Mark Gregson, Raymond Ito, Ana Ramirez-Palmer, Michael Pappa, and Linda Willis. Unless the context requires otherwise, we will refer to appellants collectively as CDC.

[FN4](#). Unless the context requires otherwise, we will refer to respondents collectively as **Tessler**.

I. FACTUAL AND PROCEDURAL BACKGROUND

[Labor Code section 3214](#) [\[FN5\]](#) states that CDC is required to develop and implement a workers' compensation early intervention program to assist CDC employees who are injured on the job. The goal of the program is to help employees return to work, or if that is not possible, to help them obtain appropriate disability or retirement benefits. In June 1990, **Tessler** and his company, **Tessler** Counseling Group, Inc., were hired to provide services to injured CDC employees under the early intervention program.

[FN5](#). [Labor Code section 3214](#), subdivision (a) states, in part, "The Department of Corrections ... shall, in conjunction with all recognized employee representative associations, develop policy and implement the workers' compensation early intervention program ... for all department employees who sustain an injury. The program shall include, but not be limited to, counseling by an authorized independent early intervention counselor ... to assist in timely decisions

regarding compensability."

Over the following years, disputes arose between **Tessler** and various CDC employees. Many of the disputes involved Cora Monson, the CDC Health and Safety Officer. **Tessler** for his part, believed Monson had unilaterally breached the terms of his agreement with CDC, reducing his hourly rate of pay, and refusing to reimburse him for travel expenses he had incurred. Monson, by contrast believed that **Tessler** had agreed to provide services at facilities that were so far from his residence that he could not perform effectively or economically.

In addition, a dispute arose over **Tessler's** billing practices. Linda Willis, a return to work coordinator, believed **Tessler** had submitted bills that were fraudulent. She contacted the Solano County District Attorney about her concerns. The district attorney investigated the charges, and in June 1998, charged **Tessler** with insurance fraud.

After the charges were filed, Monson instructed CDC institutions not to use **Tessler** as a counselor. **Tessler** believed that action violated the regulations governing the early intervention program. He filed a petition for a writ of mandate in the Sacramento Superior Court to reverse the directive. That court agreed and it issued a writ prohibiting CDC from suspending **Tessler** without taking the appropriate steps.

The criminal charges against **Tessler** were dropped in October 1998. However the Solano County District Attorney, in conjunction with CDC and several of its employees, continued to investigate **Tessler**. In March 1999, **Tessler's** house and office were searched pursuant to a search warrant. **Tessler** believed the search was illegal.

*2 In February 2000, **Tessler** filed the complaint that is at issue in the current appeal. As eventually amended, the complaint contained 11 causes of action that sought relief on the following 15 grounds: [\[FN6\]](#) violation of [article 1, section 1 of the California Constitution](#); injury to property in violation of [Civil Code section 1708](#); violation of [Civil Code sections 43, 44, 45 and 46](#); violation of [Civil Code sections 51, 51.5, and 51.7](#); breach of contract; breach of the covenant of good faith and fair dealing; tortious breach of contract; promissory estoppel, equitable estoppel; violation of the Unfair Practices Act, ([Bus. & Prof.Code, § 17200](#) et seq.); unlawful search and seizure; violation of due process; violation of free speech; violation of the right to petition under [article 1, section 3 of the California Constitution](#); and an accounting.

[FN6](#). Several of the causes of action contain multiple counts. Thus while the complaint lists 11 causes of action, 15 theories of recovery were in fact alleged.

CDC demurred to the complaint and filed a special motion to strike under [section 425.16](#). As to the motion to strike, CDC argued that every cause of action alleged arose from acts of the defendants that were taken in furtherance of their right of free speech in connection with a public issue as that term is defined in the SLAPP statute.

Tessler opposed the petition arguing the CDC had failed to prove that the suit was governed by the SLAPP statute. Furthermore, **Tessler** argued CDC's motion was frivolous and thus justified an award of sanctions under section 128.5.

The trial court denied the motion to strike finding none of the causes of action alleged were governed by the SLAPP statute. The court did not mention **Tessler's** request for sanctions. In addition the court sustained without leave to amend, CDC's demurrer to the causes of action for estoppel, violation of the Unfair Practices Act, and for violation of due process. This appeal followed. [\[FN7\]](#)

[FN7](#). While this case was being briefed, CDC and **Tessler** each filed motions asking this court to take judicial notice of certain facts and documents. We deferred ruling on the motions until a decision on the merits of the case.

Having reviewed the motions, we rule as follows:

CDC's "motion to take judicial notice," filed on January 22, 2001, is denied. CDC has asked this court to judicially notice a criminal complaint that allegedly was filed by the Solano County District Attorney against **Tessler** on October 16, 2000. Since that document was not presented to the trial court, we decline to consider it. (Cf. [Brosterhous v. State Bar](#) (1995) 12 Cal.4th 315, 325.) Furthermore, the fact in question is not relevant to our analysis. Judicial notice is therefore denied. ([Mangini v. R.J. Reynolds Tobacco Co.](#) (1994) 7 Cal.4th 1057, 1063.)

Tessler's "alternative motion to take judicial notice" filed on January 30, 2001, is also denied. As the title of **Tessler's** motion suggests, he has asked this court to judicially

notice certain facts *if* we had granted CDC's motion for judicial notice. Since we have denied CDC's motion, we deny **Tessler's** motion as moot.

Tessler's "second motion to take judicial notice" filed on September 17, 2001, is denied. **Tessler** has asked us to take judicial notice of the fact that CDC has not paid the outstanding bills that are the subject of his underlying breach of contract cause of action; (2) that he is currently being prosecuted by the Solano County District Attorney's office; and (3) that both these events occurred after his underlying suit was filed. We decline to take judicial notice of these facts because they were not presented to the trial court in the first instance. (*Brosterhous v. State Bar, supra*, 12 Cal.4th at p. 325.) Furthermore, the facts in question are not relevant to our analysis. Judicial notice is therefore denied. (*Mangini v. R.J. Reynolds Tobacco Co., supra*, 7 Cal.4th at p. 1063.)

II. DISCUSSION

A. Appeal

1. SLAPP Ruling

CDC contends the trial court erred when it denied its motion to strike under the SLAPP statute.

[Section 425.16](#) was enacted to combat lawsuits which are brought primarily to chill the valid exercise of the constitutional right to free speech and to petition for redress of grievances. [Section 425.16](#), subdivision (b)(1) states, "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 ... 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." An "act in furtherance of a person's right of petition or free speech ... in connection with a public issue" is defined in [section 425.16](#), subdivision (e) to include "(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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, (4) 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."

*3 A defendant who files a motion to strike "must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue." (*Paul For Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365.) If the defendant makes that prima facie showing "the burden shifts to the plaintiff to make a prima facie showing of facts which, if proven at trial, would support a judgment in the plaintiff's favor." (*Ibid.*, citation omitted.) On appeal, we review de novo, whether the defendant carried his burden, and if so, whether plaintiff made an adequate showing. (*Id.* at p. 1364.)

Here, CDC contends the trial court should have granted its motion to strike because all of the causes of action alleged arose out of acts of the defendants in furtherance of their right to free speech as that term is defined; and **Tessler** failed to show it was probable he would prevail. We reject this argument because the briefs CDC submitted to the trial court, and has submitted on appeal, are inadequate to satisfy its burden of proof.

As we mentioned, a defendant who files a motion to strike "must present a prima facie showing that the plaintiff's *causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition* in connection with a public issue." (*Paul For Council v. Hanyecz, supra*, 85 Cal.App. 4th at p. 1365, italics added.) Here CDC offers nothing to show that the 11 causes of action that remained after the demurrer was sustained [\[FN8\]](#), "arose from" acts that were taken by the defendants in furtherance of their right of free speech. Instead, CDC has isolated various allegations contained in the complaint regarding the defendants, and then attempted to establish that each of those allegations can be characterized as "free speech" as that term is defined in the SLAPP statute. Even if we were to assume that the actions CDC has identified can be characterized as "free speech" within the meaning of the SLAPP statute, this does not prove that the 11 causes of action that remained *arose from* those acts. [\[FN9\]](#)

[FN8.](#) The 11 remaining causes of action were for violation of [article 1, section 1 of the California Constitution](#); injury to property in violation of [Civil Code section 1708](#); violation of [Civil Code sections 43, 44, 45 and 46](#); violation of [Civil Code sections 51, 51.5, and 51.7](#); breach of contract; breach of the covenant of good faith and fair dealing;

tortious breach of contract; unlawful search and seizure; violation of free speech; violation of the right to petition under [article 1, section 3 of the California Constitution](#); and an accounting.

[FN9](#). CDC's reply brief has remedied this omission in some respects. We do not address arguments that are raised for the first time in a reply brief. ([Stoll v. Shuff \(1994\) 22 Cal.App.4th 22, 25, fn. 1.](#))

Two examples should prove the point. **Tessler's** complaint contains a cause of action for an accounting. He alleged he provided services to injured CDC employees but that had not been paid fully. Thus **Tessler** asked for "a full accounting from the CDC of all sums relating to the payment for services rendered, the outstanding bills that remain unpaid, proof of payment of uncontested billing and ... statutory penalties...." Even if we were to assume that some of the actions taken by the defendants might possibly be characterized as "free speech" under the SLAPP statute, this does not mean that the cause of action for an accounting "arose from" those actions.

Similarly, the complaint contains a cause of action for violating [Civil Code section 51.7](#) which states, "[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their position in a labor dispute." According to the complaint, CDC and its employees "intimidated and threatened **Tessler** with violence, and committed violence against **Tessler**" The acts allegedly included threats that **Tessler** should "watch [his] back" and the fact that **Tessler's** car was vandalized while parked at CDC institutions. Again, the fact that defendants may have taken some actions that might be characterized as "free speech" within the definition of the SLAPP statute, does nothing to make a prima facie case that **Tessler's** cause of action for damages caused by those illegal threats "arose from" those acts.

*4 Our conclusion on this point should not be interpreted as meaning it would have been impossible for CDC to prevail, at least partially, on its motion in the court below. Some of the causes of action alleged, if properly briefed and argued, may well have come within the scope of the SLAPP statute, and thus have been subject to a motion to strike. However CDC has simply failed to carry its burden of establishing that fact on appeal. We decline to abandon our status as an

impartial arbiter and to formulate arguments on CDC's behalf. (Cf. [Estate of Hoffman \(1963\) 213 Cal.App.2d 635, 639](#) [an appellate court not obligated to perform the duty resting on counsel].)

CDC seems to contend its showing was adequate under [Fox Searchlight Pictures, Inc. v. Paladino \(2001\) 89 Cal.App.4th 294](#) (*Fox Searchlight*). However that case simply holds that a cause of action can come within the scope of the SLAPP statute even if it contains allegations of non-protective activity. As the court explained, "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and non-protective activity under the label of one 'cause of action.'" (*Id.* at p. 308, fn. omitted.) We have no quarrel with *Fox Searchlight* or the rule it articulates. However that rule is not applicable here. We do not hold the causes of action alleged are outside the scope of the SLAPP statute because they contain allegations of protected and non-protective activity. Rather, we simply hold that CDC has failed to carry its burden of proving that the causes of action alleged come within the scope of the SLAPP statute at all. *Fox Searchlight* is inapposite.

We conclude the trial court properly denied CDC's motion to strike because CDC failed to carry its burden of showing that the causes of action alleged came within the scope of the SLAPP statute. [\[FN10\]](#)

[FN10](#). Having reached this conclusion, we need not address CDC's argument that **Tessler** failed to carry his burden of proving that it was likely he would prevail on his causes of action at trial.

We note that CDC's opening brief on this point is virtually identical to the brief it submitted to the trial court in support of its demurrer. To the extent CDC is contending on appeal, that the trial court should have granted its demurrer to the remaining causes of action, we decline to address the argument. A ruling on a demurrer is not an appealable order. (See, e.g., [Hill v. City of Long Beach \(1995\) 33 Cal.App.4th 1684, 1695.](#))

B. Cross-Appeal

Tessler asked the trial court to award him sanctions under [section 425.16](#), subdivision (c) because CDC's motion to strike was frivolous. The trial court denied the motion to strike, but failed to rule explicitly on **Tessler's** request for sanctions. In his cross-appeal, **Tessler** contends the court's failure to rule on his motion was itself an abuse of discretion that is

reviewable on appeal. (Cf. [Richards, Watson & Gershon v. King](#) (1995) 39 Cal.App.4th 1176, 1180.)

Before we can address this argument, we must address a procedural issue. CDC contends we do not have jurisdiction to consider this argument because an order declining to award sanctions is not appealable. While CDC correctly cited the general rule (see, e.g., [Wells Properties v. Popkin](#) (1992) 9 Cal.App.4th 1053, 1055), an order granting or denying a motion to strike under [section 425.16](#) is appealable. (See [§ 425.16](#), subd. (j).) We conclude a court's decision not to award sanctions under [section 425.16](#) subdivision (c) is encompassed within a court's ruling denying a motion to strike and thus may be reviewed on an appeal from the latter order. (Cf. [Paul For Council v. Hanvecz, supra](#), 85 Cal.App.4th at p. 1368 ["if upon remand of this case the trial court determines that defendants' motion to strike was frivolous or was solely intended to cause unnecessary delay, the trial court shall award plaintiff his trial court costs pursuant to [section 128.5 of the Code of Civil Procedure.](#)"])

*5 Turning to the merits, **Tessler** contends we must remand this case to the trial court because it failed to rule on his request for sanctions under [section 425.16](#), subdivision (c). We are unpersuaded. While the order signed by the trial court did not mention **Tessler's** request for sanctions, the record also shows **Tessler's** attorney approved the order before it was signed by the trial court. We conclude that by failing to object in the court below, **Tessler** waived the right to contend on appeal that the court erred when it failed to rule on his request for sanctions. (See 9 Witkin, Cal. Procedure (4th ed.1997) § 388, p. 439; see also [Andrus v. Estrada](#) (1995) 39 Cal.App.4th 1030, 1043- 1044.)

III. DISPOSITION

The order denying the motion to strike is affirmed.

[STEVENS](#) and [SIMONS](#), JJ., concur.

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