

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - November 06,2008**

EVENT DATE: 11/07/2008 EVENT TIME: 08:30:00 AM DEPT.: C-65

JUDICIAL OFFICER: Joan M. Lewis

CASE NO.: 37-2008-00087001-CU-NP-CTL

CASE TITLE: THEODORE A PINNOCK VS JULIAN CHAMBER OF COMMERCE

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: SLAPP / SLAPPback Motion Hearing
CAUSAL DOCUMENT Motion for SLAPP, 10/10/2008
/DATE FILED:

Defendants David Warren Peters and Lawyers Against Lawsuit Abuse, APC, request the Court strike the complaint in this case pursuant to CCP Sec. 425.16. The claims the subject of this complaint appear to arise from (1) an action filed against Plaintiff in the United States District Court (the "federal court action"); (2) conduct occurring in a probate matter (the "probate action"); (3) comments made by Defendant Erik Wyatt to a Sacramento newspaper; and (4) various Internet postings.

Preliminarily, the Court notes that Defendants' moving points and authorities violated CRC 3.113(d). In the future, the Court will not consider any papers that are not filed in conformance with all applicable rules.

The determination of a special motion to strike "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were undertaken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67).

The Court concludes that these Defendants have met their burden of demonstrating that Plaintiff's claims against them arise out of protected petition and speech activities.

The claims concerning the federal court action and the probate action constitute litigation activity and are protected by CCP Sec. 425.16. See, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.

The claims concerning Internet postings are statements made in a public forum. See, *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, fn. 4. Moreover, the Court concludes that the subject of litigation abuse is a matter of public interest.

As to the newspaper article, this claim appeared to be brought only against Defendant Wyatt and not the moving Defendants.

Because the Defendants met their initial burden, the burden then shifts to Plaintiff to present sufficient evidence to establish "that there is a probability that the plaintiff will prevail on the claim." (CCP Sec. 425.16(b)(1)).

As to the federal court action, notwithstanding having titled his claim as one for "abuse of process," Plaintiff appears to limit the cause of action to malicious prosecution. The elements of a malicious prosecution action are that the underlying action (1) was initiated by or at the direction of the defendant; (2) was terminated in plaintiff's favor; (3) was brought without probable cause; and (4) was initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871).

Although not appearing as named Plaintiffs in that action, Defendants appear to concede they were involved in bringing the federal court action. Therefore, Plaintiff has satisfied the first element for a malicious prosecution action. However, the Court concludes Plaintiff has not demonstrated a probability of prevailing on the remaining elements. As to the element of favorable termination, the Court notes that the only evidence submitted – the District Court's order – demonstrates the federal action was dismissed due to lack of subject matter jurisdiction. In *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857 the court commented that "a dismissal for lack of jurisdiction does not involve the merits and cannot constitute favorable termination." See also *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592. The Court therefore concludes Plaintiff has failed to meet his burden as to the favorable termination element. Additionally, the Court concludes that Plaintiff failed to submit evidence demonstrating a lack of probable cause and/or malice.

Plaintiff also complained in his complaint about a probate proceeding. However, Plaintiff did not address this matter in his papers and submitted no evidence to show that he would be able to avoid the litigation privilege of Civ. Code Sec. 47 or otherwise prevail on this claim.

Plaintiff's final causes of action all appear predicated on various postings to the Internet. The Court concludes that Plaintiff has failed to establish that there is a probability that the plaintiff will prevail on the claim. The Court finds the Plaintiff failed to submit any competent evidence that would suggest that the moving Defendants made the postings to the Internet or were otherwise involved with the postings to support liability against them. Plaintiff's arguments in this regard appear to simply be based on speculation and conjecture.

Based on the foregoing, Defendants David Warren Peters and Lawyers Against Lawsuit Abuse, APC's special motion to strike pursuant to CCP Sec. 425.16 is granted.

Any request for fees should be brought by separately noticed motion.