

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GIAMPIERO MANCINELLI et al.,

Plaintiffs and Respondents,

v.

CREOLA LOVE,

Defendant and Appellant.

A089570

(City and County of San Francisco
Super. Ct. No. 303209)

This appeal by Creola Love is from an order denying a special motion to strike a cause of action for defamation under Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute.¹ (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1 (*Briggs*) [acronym SLAPP stands for “strategic lawsuit against public participation”].) We have concluded that the trial court erred because respondents did not establish the probability that they will prevail on that cause of action. Therefore we reverse the order and remand with directions to the trial court to grant the motion.

BACKGROUND

Appellant owns a two-unit residence on Guerrero Street in San Francisco. She lives in one unit and until recently, rented the other. Respondents are former tenants who moved into the building in 1995. In October 1998, appellant filed an unlawful detainer

¹ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

action against respondents, attempting to evict them under the Ellis Act (Gov. Code, § 7060 et seq.)²

Meanwhile, in the spring of 1998, appellant contributed \$1,000 to the campaign in support of a local ballot measure entitled Proposition E, which, if passed, would have resulted in her building being exempt from the city's rent control ordinance. The campaign distributed a flyer bearing appellant's photograph and signature and headlined in bold letters, " 'My tenant shoved me into a wall . . . and City Hall took his side.' " The flyer stated in part: "But my current tenants are disrespectful and sometimes even violent, and City Hall won't let me ask them to leave. They have destroyed my hardwood floors and make me feel uncomfortable living in my own home. [¶] I feel afraid in my own house. One day, I asked one of my tenants to wait while I finished cleaning the front stairs we share. He shoved me into the wall and walked right past me." The flyer urged a yes vote on Proposition E, "so that homeowners like myself can again share our homes without being afraid we'll be stuck with a tenant who will shatter the peacefulness of our homes."

In 1999, respondents sued appellant, alleging negligence, defamation, unlawful termination of utilities, violation of the city's rent ordinance, breach of contract, intentional infliction of emotional distress, and other claims. With respect to defamation, respondents' first amended complaint alleged that appellant lent her face, name, and story to the Yes on E campaign for use in the printed flyer, that respondents were appellant's only tenants when the flyer was published, and that the flyer contained untrue statements about them, including that they were physically violent against appellant and destroyed her hardwood floors. The complaint also alleged that respondents learned about the flyer from a woman who recognized them from its context.

² We have taken judicial notice of a November 1999 order of the Appellate Division of the San Francisco Superior Court, affirming a summary judgment in appellant's favor in her unlawful detainer action and holding that respondents' affirmative defense of retaliatory eviction was preempted by the Ellis Act.

Appellant moved to strike the defamation cause of action under section 425.16. She argued that the flyer was an act in furtherance of the right of free speech in connection with a public issue within the meaning of the statute and that there was no probability that respondents would prevail on the cause of action. Respondents opposed the motion. The trial court denied the motion, and this appeal followed.³

DISCUSSION

The purpose of section 425.16 is to encourage continued participation in matters of public importance by early and expeditious elimination of meritless lawsuits that are aimed at chilling the valid exercise of constitutional rights to petition the government and of free speech. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; see § 425.16, subd. (a).) The Legislature has decreed that the section is to be broadly construed to effect its purpose. (§ 425.16, subd. (a); see *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at pp. 1119-1121.) Respondents' argument that the statute is to be construed narrowly inexplicably overlooks both its language and our Supreme Court's discussion of its broad scope in *Briggs*.

Under section 425.16, subdivision (b)(1), 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."

³ In urgency legislation effective October 10, 1999, the Legislature amended sections 425.16 and 904.1 to provide that an appeal may be taken from an order granting or denying a special motion to strike. (§§ 425.16, subd. (j) & 904.1, subd. (a)(13); Stats. 1999, ch. 960, §§ 1-3.) For a discussion of the legislative purpose underlying these amendments, see Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope* (2000) 33 Loyola L.A. L.Rev. 801, 808-809 & fn. 42.

As a defendant moving to strike under section 425.16, appellant was required to show that the cause of action against her was based on acts in furtherance of her right of free speech within the meaning of the statute. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566-567; *Sipple v. Foundation for Nat. Progress, supra*, 71 Cal.App.4th at pp. 235-240; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-1176.) Courts have held without exception that lawsuits based on statements made during political campaigns are subject to a motion to strike under section 425.16. (*Conroy v. Spitzer, supra*, 70 Cal.App.4th at p. 1451 [letter to absentee voters and campaign mailers about candidate for county board of supervisors]; *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950 [campaign mailer about congressional candidate]; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [campaign flyer about city council candidate]; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 352 [mailer in connection with recall election].)⁴ “The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech.” (*Matson v. Dvorak, supra*, at p. 548.) While the campaign flyer in the present case was

⁴ Section 425.16, subdivision (e), states that an act in furtherance of the right of petition or free speech in connection with a public issue includes: “(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.” Clause (4) was added in 1997, along with the directive to construe the section broadly. (Stats. 1997, ch. 271, § 1.) The *Briggs* court held that a defendant moving to strike based on an act defined in clauses (1) or (2) of subdivision (e) need not separately demonstrate that the statement concerned an issue of public importance. (*Briggs, supra*, 19 Cal.4th at p. 1123.) Both before and after *Briggs*, the Courts of Appeal have concluded that lawsuits challenging statements made during a political campaign are within the ambit of the statute without reference to the categories enumerated in subdivision (e), presumably considering it self-evident that such statements are in furtherance of the right of free speech on a public issue.

urging the enactment of local legislation rather than promoting the election or recall of a particular candidate, it was unquestionably an act in furtherance of the author's right of free speech in connection with a public issue within the meaning of the statute.

Respondents argue that appellant cannot make the requisite showing under section 425.16 because she also disavows responsibility for publishing the flyer, but the law is otherwise. (See *Matson v. Dvorak, supra*, 40 Cal.App.4th at pp. 544, 548 [defendant sued over campaign flyer argues successfully both that lawsuit arose from act in furtherance of right of his free speech and that the defamation action was unlikely to prevail because he was not responsible for the flyer's publication].) This state has long recognized and permitted inconsistent defenses. (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 613.)

Because appellant made the necessary showing, respondents were required to demonstrate the reasonable probability of prevailing on their defamation claim. (*Conroy v. Spitzer, supra*, 70 Cal.App.4th at p. 1451; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.) Respondents were obligated to show both that their complaint was legally sufficient and that it was supported by a sufficient prima facie showing of facts to sustain a favorable judgment if that evidence was credited. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823-825; *Matson v. Dvorak, supra*, 40 Cal.App.4th at p. 548.) Stated another way, the question before the trial court was whether respondents had “ ‘stated and substantiated a legally sufficient claim.’ ” (*Briggs, supra*, 19 Cal.4th at p. 1123, citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412; see also *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 718-719 & fn. 6 [§ 425.16 and other similar statutes “operate much like a demurrer and summary judgment in reverse”].) Regardless of the trial court's ruling, whether respondents made that showing is a question of law that this court determines de novo. (*Matson v. Dvorak, supra*, at p. 548; *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695.)

We begin by considering whether the allegations of respondents' complaint stated a cause of action for defamation or libel. Libel is defined as “a false and unprivileged

publication by writing [or] printing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ. Code, § 45.) A publication must contain a false statement of fact to give rise to liability for defamation. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.) Statements of opinion, even if objectively unjustified or made in bad faith, cannot form the basis of a libel action. (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970.)

The often difficult determination of whether an allegedly defamatory statement is fact or opinion is a question of law in the first instance. What constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. When potentially defamatory statements are published in a public debate or other setting in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric or hyperbole, language that generally might be considered as statements of fact may assume the character of statements of opinion. (*Gregory v. McDonnell Douglas Corp.*, *supra*, 17 Cal.3d at pp. 601-602 and cases cited.)

A totality of the circumstances test applies to the determination of whether an alleged defamatory statement is fact or opinion. The test requires consideration of the words used in the statement and the facts surrounding its publication. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261.) Allegedly defamatory statements couched in terms of “feeling” cannot be characterized as statements of fact. (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578-579.) When we consider the context in which a statement was made, we must assess the publication in its entirety and may not divide it into segments or treat each portion as a separate unit. We must read the statement as a whole to understand its import and the effect it was calculated to have on the reader, and we must construe it in light of the apparent object of the writer. We consider not only the actual language used, but the sense and meaning that may have been fairly presumed to have been conveyed to those who read it. (*Baker v. Los Angeles Herald Examiner*, *supra*, at p. 261.) When the

statements at issue are made in the arena of public debate or controversy, we must consider the whole record to ensure there is no infringement of the First Amendment guarantee of free expression. (*Campanelli v. Regents of University of California, supra*, at pp. 578-579.)

The context in which the flyer was published was a heated public debate over a controversial ballot proposition that generated strong views in supporters and opponents alike.⁵ Considered in that context, appellant's characterization of her tenants as "disrespectful" or "violent" and her belief that they "ruined" the floors would reasonably be understood to reflect her subjective state of mind about their behavior, not verifiable assertions of fact. Expressions of emotion predominate in the flyer: appellant feels uncomfortable in her own home; she feels afraid; she does not want to feel scared. We have not overlooked the references to the shoving, but we must read the statement in its entirety, not treat each sentence as a separate unit. We conclude that when the flyer is read as a whole and in light of the tenor of the public debate of which it was a part, the only reasonable conclusion is that it constitutes a nonactionable expression of opinion.

We also conclude, based on *Matson v. Dvorak, supra*, 40 Cal.App.4th 539, that even if a reader might have understood the flyer as including some assertions of fact, respondents still failed to make a sufficient factual showing of the probability of prevailing. In *Matson*, an unsuccessful candidate for local office sued a political organization and various individuals for libel based on the content of a campaign flyer mailed by the organization shortly before the election. One of the defendants, who had allegedly made a financial contribution to the organization, moved to strike under section 425.16. The trial court granted the motion and the appellate court affirmed. The court reasoned that the plaintiff had not established the probability of prevailing because he did not make a sufficient showing that the defendant had a responsible role in the publication

⁵ The record in this case includes a copy of an editorial from the May 18, 1998, San Francisco Examiner regarding Proposition E, and stating in part, "It's to be expected that horror stories would dominate arguments on both sides in debate over Proposition E"

at issue. He did not allege or present any evidence that the defendant participated in preparing the mailing, knew of its contents in advance of publication, knew that the charges made in the mailer were false, or held any position in the organization from which his oversight of campaign literature can be inferred. “One whose only contribution to a political campaign is financial, and who is not involved in the preparation, review or publication of campaign literature, cannot be subjected to liability in a defamation action for statements contained in that literature” (*Matson v. Dvorak, supra*, at p. 549.)

In the present case, respondents’ complaint alleged that appellant contributed \$1,000 to the Yes on E campaign, “lent her face, name and story” to the campaign for use on a flyer, knew of its contents before its publication, and participated in its creation. In opposition to the motion to strike, however, respondents did not present any evidence showing that appellant participated in drafting the actual text of the flyer or that she saw or approved that text in advance of its publication. Nor was there any evidence that she held any position of authority in the campaign organization from which it might be inferred that she reviewed the flyer before it was released or had some other responsible part in its publication.⁶ While her financial contribution to the campaign was undisputed, that contribution was not sufficient to subject her to liability. (*Matson v. Dvorak, supra*, 40 Cal.App.4th at p. 539.) Because respondents made no showing that appellant took a responsible part in publication of the flyer, their cause of action for defamation should have been stricken.

Respondents argue that even if appellant did not create the flyer itself, she published the defamatory material because she admitted telling someone involved with the campaign that one of her tenants shoved past her and was rude. First, respondents

⁶ Respondents submitted a declaration from Julie Bullard, a neighbor of appellant, stating that appellant showed her the flyer before the election. According to Bullard, appellant said that she was asked by people at a “Yes on E” meeting if they could use her story and take her picture for the flyer. That declaration does not establish, however, that appellant reviewed the content of the flyer before it was distributed or that she was responsible for its preparation. Respondents also rely on excerpts from a declaration that

have not demonstrated that this remark or anything appellant said to a campaign worker constituted slander. (See Civ. Code, § 46 [defining slander].) Furthermore, respondents do not address the effect of the common-interest privilege codified in Civil Code section 47, subdivision (c). Under that privilege, a defendant who makes a statement to others on a matter of common interest is immunized for liability for defamation as long as the statement is made “without malice.” When the statement was made on an occasion falling within the privilege, the plaintiff bears the burden of proving that it was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1196-1197, 1202-1203.) Malice is a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another, and it is not inferred from the communication. (*Id.* at p. 1204.)

Because both appellant and the “Yes on E” campaign shared a common interest in landlord-tenant and rent control issues, her comments to the campaign about problems with tenants protected by rent control were made on a privileged occasion for purposes of the common-interest privilege. Respondents made no showing that any of appellant’s comments to the campaign were made with malice.

Respondents also argue that regardless of whether appellant was involved in creating the flyer, she published it herself by showing it to Julie Bullard. But Bullard’s declaration itself demonstrates both that the common-interest privilege applies and that appellant’s motives were not malicious. Bullard states that appellant showed her the flyer in support of Proposition E and encouraged her to vote yes on the proposition because they both were landlords and it was “ ‘in our interests.’ ”

To summarize, appellant showed that respondents’ defamation cause of action against her was based on acts in furtherance of her right of free speech within the meaning of section 425.16, and respondents did not establish a reasonable probability that they would prevail on that cause of action. Therefore the trial court erred in denying appellant’s motion to strike the cause of action.

the trial court declined to consider. Because that declaration is not included in the record, we obviously cannot consider it.

DISPOSITION

The order denying the motion to strike the cause of action for defamation is reversed and the matter is remanded to the trial court with directions to grant the motion. Costs on appeal are awarded to appellant.

Strankman, P.J.

We concur:

Stein, J.

Marchiano, J.

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