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FILED

JUN - 4 2015

DAVID H. YAMASAKI
Clerk of the Court
Superior Court of California, County of Santa Clara
BY M. Rosales DEPUTY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

M. Rosales

RAYMONDO McDONALD,

Plaintiff,

vs.

KELLEY WOLFF, ET AL.,

Defendants.

Case No. 1-15-CV-278108
ORDER RE: DEFENDANT'S ANTI-SLAPP MOTION

The anti-SLAPP motion by defendant/cross-complainant Kelley Wolff a.k.a. Keiley Wolff ("Defendant") came on for hearing before the Honorable William J. Elfving on June 4, 2015, at 9:00 a.m. in Department 3. The matter having been submitted, the Court orders as follows:

In this case, plaintiff/cross-defendant Raymondo McDonald ("Plaintiff") alleges that Defendant falsely accused him of rape. Plaintiff further alleges that Defendant's false accusation harmed his career as a professional football player. In the complaint, Plaintiff asserts causes of action against Defendant for (1) defamation/libel per se; (2) false light; (3) intentional interference with contractual relations; (4) intentional interference with prospective economic

1 relations; and (5) negligent interference with prospective economic relations. Defendant brings
2 an anti-SLAPP motion to strike all five causes of action in the complaint, requests an award of
3 costs and fees, and objects to Plaintiff's evidence. (See Code Civ. Proc. ["CCP"], § 425.16.)

4 A defendant may bring a special motion to strike a cause of action "arising from any act
5 of that person in furtherance of the person's right of petition or free speech under the United
6 States Constitution or the California Constitution in connection with a public issue." (CCP,
7 § 425.16, subd. (b)(1).) In the first prong of the two-prong analysis, the initial burden rests with
8 the defendant to make a prima facie showing that the challenged claim arises from protected
9 activity. (*Id.*, subd. (e); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) If the defendant meets that
10 burden, then the burden shifts to the plaintiff to establish a "probability" that it will prevail.
11 (CCP, § 425.16, subd. (b).)

12 The court, "in making its determination, shall consider the pleadings and supporting and
13 opposing affidavits stating the facts on which the liability or defense is based." (CCP, § 425.16,
14 subd. (b)(2).) However, the evidence considered is that which would be admissible at trial.
15 (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 [*Chavez*].) "The plaintiff may not rely
16 on the allegations in the complaint or assertions in a declaration based on information and
17 belief." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1368 [*Wong*]; accord *Evans v. Unkow*
18 (1995) 38 Cal.App.4th 1490, 1497 [*Evans*].) Affidavits or declarations not based on personal
19 knowledge, or that contain hearsay or impermissible opinions, or that are argumentative,
20 speculative, or conclusory, are insufficient to show a "probability" that the plaintiff will prevail.
21 (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 [*Gilbert*].)

22 Defendant's hearsay objection is SUSTAINED as to Plaintiff's Exhibit A at paragraph 4;
23 Exhibit B at paragraphs 8, 10, and 17; Exhibit C at paragraph 15; Exhibit D at paragraph 7;
24 Exhibit F at paragraph 4; Exhibit G at paragraphs 3-6; and Exhibit H at paragraphs 5-9;
25 Defendant's speculation, lack of foundation, and/or improper opinion objection is SUSTAINED
26 as to Plaintiff's Exhibit B at paragraphs 5, 10-11, 15, and 17 and Exhibit C at paragraphs 5-6, 8,
27 10, 14, and 16; Defendant's improper character evidence objection is SUSTAINED as to
28 Plaintiff's Exhibit B at paragraphs 2 and 8 and Exhibit C at paragraph 13; Defendant's Evidence

1 Code section 1106 objection is SUSTAINED as to Plaintiff's Exhibit B at paragraph 16 and
2 Exhibit F at paragraph 9; and Defendant's lack of authentication objection to Plaintiff's Exhibit I
3 is SUSTAINED. Otherwise, Defendant's evidentiary objections are OVERRULED.

4 Turning to the first prong, the defendant meets the initial burden by demonstrating that
5 the act underlying each claim fits one of the following categories: (1) a statement or writing
6 made before a legislative, executive, judicial, or other official proceeding authorized by law;
7 (2) a statement or writing made in connection with an issue under consideration or review by a
8 legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) a
9 statement or writing made in a place open to the public or a public forum in connection with an
10 issue of public interest; or (4) any other conduct in furtherance of the exercise of the
11 constitutional right of petition, or the constitutional right of free speech in connection with a
12 public issue or an issue of public interest. (CCP, § 425.16, subd. (e).) The court disregards the
13 labeling of the claim and examines its "principal thrust or gravamen." (*Hylton v. Frank E.*
14 *Rogozinski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

15 With the moving papers, Defendant relies on the pleadings.¹ To support each of his
16 claims, Plaintiff alleges that Defendant defamed him, placed him in a false light, and
17 intentionally or negligently interfered with existing or potential economic relationships by
18 making a false statement to third persons. The only third persons to whom Defendant allegedly
19 spoke are the officers and detectives of the San Jose Police Department ("SJPD"). (Compl.,
20 ¶ 12.) This alleged statement is incorporated by reference into each of the five claims, and
21 Plaintiff vaguely refers to "the statements" and "the aforesaid statements" elsewhere in the
22 complaint. (*Id.*, ¶¶ 18-21, 23-25, 28, 31-32, 35, 38-42, 44, & 47-49.) However, there are no other
23 alleged statements in the complaint that could give rise to his claims. Accordingly, the gravamen
24 of the five causes of action is that Defendant allegedly falsely accused him of rape when she
25 spoke to the SJPD. A defendant's reporting of suspected criminal activity to law enforcement
26 "clearly" arises from protected activity, that is, the right to petition the government by making

28 ¹ With the reply papers, she attempts to introduce new evidence. However, the defendant bringing an anti-SLAPP motion cannot submit new evidence with the reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 [stating that "additional evidentiary matter with the reply should only be allowed in the exceptional case"].)

1 statements before an official judicial proceeding. (*Chabak v. Monroy* (2007) 154 Cal.App.4th
2 1502, 1511 [*“Chabak”*]; see also *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570 [*“Siam”*];
3 see also *Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 364; see also CCP,
4 § 425.16, subd. (e)(1).) Accordingly, all five of Plaintiff’s claims arise from protected activity.

5 Plaintiff insists that his claims are based on Defendant’s statements to persons other than
6 law enforcement personnel. Even construing Plaintiff’s reference to “other persons” to include
7 persons other than SJPD agents, the principal thrust of all of his claims would still arise from
8 protected activity.² (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*
9 (2005) 133 Cal.App.4th 658, 672 [providing that, where a claim arises from both protected and
10 unprotected conduct, “the cause of action will be subject to section 425.16 unless the protected
11 conduct is ‘merely incidental’ to the unprotected conduct”].) Moreover, Plaintiff alleges that he
12 played as a professional football player in the NFL, and he was terminated as a result of
13 Defendant’s statements. (Compl., ¶¶ 3, 30-32, 40-41, 45, & 49.) He further alleges that alleged
14 incidents of NFL players abusing women have gained national attention—including Plaintiff’s
15 fiancée’s prior abuse accusation against him—and that Defendant knew of that public issue and
16 intended for her statements be made public. (*Id.*, ¶¶ 14-17, 29-30, 36-37, 39, 46, & 48.) Courts
17 have found similar cases subject to the anti-SLAPP statute. (See *McGarry v. University of San*
18 *Diego* (2007) 154 Cal.App.4th 97, 109-110 [*“McGarry”*] [finding that the plaintiff’s position as
19 head coach of a local university’s football team made him a public figure, and his employment
20 termination was a topic of widespread public interest]; see also *Sipple v. Foundation For Nat.*
21 *Progress* (1999) 71 Cal.App.4th 226, 238-239 [*“[d]omestic violence is an extremely important*
22 *public issue in our society,”* and public statements concerning alleged instances of domestic
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25 ² At the hearing, Plaintiff argued that the claims for intentional interference with contractual relations (third
26 cause of action), intentional interference with prospective economic relations (fourth cause of action), and negligent
27 interference with prospective economic relations (fifth cause of action) are not subject to a special motion to strike
28 under CCP section 425.16. Plaintiff cites no legal basis in support of his position. Contrary to Plaintiff’s assertion,
claims for interference with contractual relations and prospective economic advantages are subject to an anti-SLAPP
motion where the defendant’s protected conduct gives rise to the claims. (E.g., *Salma v. Capon* (2008) 161
Cal.App.4th 1275, 1285-1288.) Since all of Plaintiff’s claims—including the third, fourth, and fifth causes of
action—arise from the same protected activity, his argument lacks merit.

1 violence—especially accusations involving public figures—are protected].³ Thus, even if
2 Plaintiff’s claims arise from statements Defendant made to persons other than the SJPD, the
3 principal thrust of the claims still arises from protected activity.

4 At the hearing, Plaintiff additionally asserted that Defendant cannot satisfy the first prong
5 because the statements giving rise to his claims have already been made, and the legislative
6 purpose of CCP section 425.16 is only to prevent the chilling of future speech. The legislative
7 purpose of the statute is to encourage public participation in matters of public significance and
8 not chill protected speech through the judicial process. (CCP, § 425.16, subd. (a).) There is no
9 legal basis that supports Plaintiff’s assertion that an anti-SLAPP motion cannot be based on
10 speech that has already occurred. “Indeed, ‘[t]he point of the anti-SLAPP statute is that you have
11 a right not to be dragged through the courts because you *exercised* your constitutional rights.’
12 ([Citation].)” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193, italics added.)
13 Here, Defendant has shown that all five of the claims arise from her protected activity. Plaintiff’s
14 argument therefore lacks merit.

15 In sum, Defendant has satisfied the first prong of the anti-SLAPP analysis. The burden
16 therefore shifts to Plaintiff.

17 The plaintiff’s burden in the second prong “is subject to a standard similar to that used in
18 deciding a motion for nonsuit, directed verdict, or summary judgment.” (*Siam, supra*, at
19 p. 1570.) It requires the plaintiff to show that the complaint is both legally sufficient and
20 supported by a sufficient prima facie evidence to sustain a favorable judgment. (*Premier Med.*
21 *Mgmt. Systems, Inc. v. Cal. Ins. Guar. Ass’n* (2006) 136 Cal.App.4th 464, 476.)

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27 ³ Plaintiff argued at the hearing that these cases are inapplicable because the defendants were members of
28 the media that allegedly republished defamatory statements. To the contrary, the defendant in *McGarry* was the
plaintiff’s former employer who allegedly defamed him by publically disclosing the reasons for his termination.
(*McGarry, supra*, at pp. 109-111.) In any event, “protection under the anti-SLAPP statute turns on whether the
activity of the defendant involves the right of petition or free speech in connection with a public issue” (*Dyer v.*
Childress (2007) 147 Cal.App.4th 1273, 1282), not the identity of the defendant or the scope of the publication.

1 Plaintiff proffers declarations from: (1) himself (Plaintiff's Ex. A); (2) Jenny Johnson
2 ("Johnson") (*id.*, Ex. B); (3) Melissa Martin ("Martin") (*id.*, Ex. C); (4) Kristin Reynolds (*id.*,
3 Ex. D); (5) Uriel Sotomayor (*id.*, Ex. E); (6) cross-defendant Aldon Smith ("Smith") (*id.*, Ex. F);
4 (7) Mohamed Shabaan (*id.*, Ex. G); and (8) Yvette Avila (*id.*, Ex. H).⁴ He also submits other
5 documents. (*Id.*, Ex. I.) His evidence suggests that Defendant reported rape to the SJPD.
6 However, Defendant's report to the SJPD is privileged. (See Civ. Code, § 47, subd. (b); see also
7 *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361-371; see also *Chabak, supra*, at
8 p. 1514.) Plaintiff proffers no admissible evidence to support his assertion that Defendant made
9 statements to unidentified persons other than law enforcement personnel. The only evidence
10 Plaintiff submits regarding such statements is speculative and inadmissible.⁵ (See *Gilbert, supra*,
11 at p. 714; see also *Evans, supra*, at p. 1497; see also *Wong, supra*, at p. 1368; see also *Chavez,*
12 *supra*, at p. 1087.) Accordingly, Plaintiff has not presented admissible evidence to support his
13 claim that Defendant made non-privileged statements.

14 Even if Plaintiff had submitted admissible evidence of non-privileged statements, he has
15 not presented evidence to support other necessary elements of his claims. With respect to his
16 defamation claim (first cause of action), since Plaintiff alleges that he is an NFL player who has
17 been subject to public scrutiny on the issue of domestic and sexual violence (Compl., ¶¶ 3, 14,
18 39, & 48), he is a public figure (see *Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 934) and
19 must provide clear and convincing evidence to show actual malice (see *Burrill v. Nair* (2013)
20 217 Cal.App.4th 357, 389 [*"Burrill"*]). Plaintiff presents no evidence regarding Defendant's
21 motives or knowledge. Thus, he has not presented clear and convincing evidence—or, for that
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24 ⁴ At the hearing on June 4, 2015, Plaintiff advised that he submitted a supplemental declaration on
25 June 3, 2015, that supposedly set forth evidence of the existence of his contract with the 49ers. There is no legal
26 basis authorizing a plaintiff opposing a special motion to strike under CCP section 425.16 to proffer additional
evidence the day before the hearing on the motion. Accordingly, the Court will not consider Plaintiff's supplemental
declaration.

27 ⁵ For example, Johnson declares that she asked Defendant about the police investigation, and Defendant did
28 not respond. (Plaintiff's Ex. B, ¶ 15.) In fact, Johnson and Martin both declare that Defendant never told them about
the sexual assault at any time. (Plaintiff's Ex. B, ¶¶ 19 & 15-16; Ex. C, ¶ 10.) They each claim to have heard of the
assault from the police, and speculate that Defendant must have told her friends, family, boyfriend, etc. of the
incident. (Plaintiff's Ex. B, ¶ 15-17 & 17; Ex. C, ¶¶ 11, 14, & 16.)

1 matter, any evidence—to support the element of actual malice.⁶ Accordingly, Plaintiff’s evidence
2 is inadequate to show a probability of prevailing on the first cause of action.

3 Since the false light claim (second cause of action) is duplicative of the defamation claim,
4 it follows that Plaintiff also has not established a probability of prevailing on the second cause of
5 action. (See, e.g., *Couch v. San Juan Unified Sch. Dist.* (1995) 33 Cal.App.4th 1491, 1504
6 [“when claims for invasion of privacy . . . are based on the same factual allegations as those of a
7 simultaneous libel claim, they are superfluous and must be dismissed”].)

8 Plaintiff’s remaining claims for intentional interference with contractual relations (third
9 cause of action), intentional interference with prospective economic relations (fourth cause of
10 action), and negligent interference with prospective economic relations (fifth cause of action)
11 require evidence of existing or potential contracts, the defendant’s knowledge, and causation.
12 (See *Pac. Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [intentional
13 interference with contract]; see also *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29
14 Cal.4th 1134, 1153 [intentional interference with a prospective economic advantage]; see also
15 *Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078 [negligent interference with a prospective
16 economic advantage].) Here, however, Plaintiff does not produce evidence to support those
17 elements.⁷ Therefore, Plaintiff has not submitted sufficient evidence to show a probability of
18 prevailing on his third, fourth, and fifth causes of action.

19 Even though he has not presented evidence to support his claims, Plaintiff maintains that
20 the Court should not grant the motion because he has not had the opportunity to conduct
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23 ⁶ At the hearing, Plaintiff contended that the clear and convincing standard does not apply to the evidence
24 submitted by a plaintiff in opposition to a special motion to strike under CCP section 425.16. To the contrary, “in
25 order to successfully defend against [an] anti-SLAPP motion,” a public-figure plaintiff asserting a claim for
26 defamation “must ‘establish a probability that [he or] she will be able to produce clear and convincing evidence of
27 actual malice.’ ([Citation].)” (*Burrill, supra*, at p. 390.) “Stated differently, [the court] must determine whether [the
28 plaintiff] has made a sufficient prima facie showing of facts to sustain [the] burden of demonstrating a high
probability that [the defendant] published the defamatory statements with knowledge of their falsity or while
entertaining serious doubts as to their truth. (See [citations].)” (*Id.*)

⁷ Although the Court has not considered Plaintiff’s supplemental declaration, it notes that the declaration
does not add any information about Defendant’s alleged knowledge of Plaintiff’s existing or potential contractual
and economic relationships. Thus, even if the supplemental declaration had been considered, it would not be
sufficient to establish a prima facie case in support of the third, fourth, and fifth causes of action.

1 discovery. Contrary to his contention, the fact that the Court denied his application for discovery
2 under CCP section 425.16, subdivision (g)—and the fact that Defendant opposed his application
3 by arguing that the motion only involves legal issues—does not affect his evidentiary burden.
4 (See CCP, § 425.16, subd. (b)(1) [providing that a claim arising from protected activity “shall be
5 subject to a special motion to strike, unless the court determines that the plaintiff has established
6 that there is a probability that the plaintiff will prevail on the claim”].) Plaintiff insists that his
7 due process rights have been violated, and cites *Schroeder v. Irvine City Council* (2002) 97
8 Cal.App.4th 174, 190-191 and *Lafayette Morehouse Inc. v. Chronicle Publishing Co.* (1995) 37
9 Cal.App.4th 855, 867-868 (“*Lafayette*”) in support of his position. Nothing in those cases
10 suggests that a denial of a request for a discovery affects a plaintiff’s evidentiary burden. Courts
11 have rejected the assertion that the procedures set forth in CCP section 425.16 violate a
12 plaintiff’s due process rights. (See *Lafayette, supra*, at pp. 867-868; see also *Bernardo v.*
13 *Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 358; see also *1-800*
14 *Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593, fn. 18.) Regardless, even if Plaintiff
15 had submitted the discovery that he seeks as evidence, he still would not have met his burden.⁸


16 In light of the foregoing, Defendant’s special motion to strike all five causes of action in
17 the complaint is GRANTED.

18 Defendant is entitled to an award of fees and costs. (See CCP, § 425.16, subd. (c)(1).)
19 However, Defendant has not provided any evidence regarding the amount of fees and costs she
20 seeks. Nevertheless, “[t]here is nothing in the language of section 425.16 requiring that proof be
21 provided of the amount of fees and costs incurred at the same time of the filing of the special
22 motion to strike.” (*American Humane Ass’n v. Los Angeles Times Communications* (2001) 92
23 Cal.App.4th 1095, 1102.)

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⁸ At the hearing, Plaintiff stated that he seeks discovery to obtain (1) copies of his security tapes that he
submitted to the SJP, and (2) information from Defendant regarding the identities of the persons to whom she
allegedly made defamatory statements. Plaintiff does not suggest that he seeks to discover evidence of Defendant’s
alleged knowledge of the falsity of her statements or the existence of his contracts and potential economic
relationships. Since—as discussed above—evidence of Defendant’s knowledge is necessary for Plaintiff to establish
a prima facie case, the fact that he has not obtained discovery about other matters is of no consequence.

1 Thus, Defendant's request for fees and costs is DENIED WITHOUT PREJUDICE.
2 Defendant may bring another request for an award of fees and costs so long as it is supported by
3 evidence showing the amount of attorney's fees and costs incurred in bringing this motion.
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6 Dated: 6/4/15
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8 Hon. William J. Elfving
9 Judge of the Superior Court
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