FILED WITH PERMISSION

S235735

IN THE SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC et. al.,

Plaintiffs and Appellants,

v.

CITY OF CARSON, et. al.,

Defendants and Respondents.

SUPREME COURT
FILED
AUG 22 2016
Frank A. McGuire Clerk
Deputy

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE CASE No. B264493

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

INTRODUCTION 1

THE COURT OF APPEAL MISAPPLIED THE PUBLIC INTEREST STANDARD 3

THE COMMUNICATIONS WERE PROTECTED FREE SPEECH 8

RESPONDENT RAND WAS AT ALL TIMES A SUSPENDED CORPORATION 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Baral v. Schnitt 2016 DJDAR 7799 1

Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1115 (1999) 12

Commonwealth Energy Corp. v. Investor Data Exchange, Inc. (2003) 110 Cal.App.4th 26, 33 4

Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 479 (2000) 8

Grell v. Laci Le Beau Corp., 73 Cal. App. 4th 1300, 1306 (1999) .. 14

Ludwig v. Superior Court, 37 Cal App 4th 8, 17 (1995) 2,7,8

Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002) 7,11

Tuchscher Development Enterprises Inc. v. San Diego Unified Port District, 106 Cal. App. 4th 1219, 1232-1235 (2003). 2,4,5, 9,10

Statutes

Cal. Rev. & Tax. Code § 23302 12

Cal. Rev. & Tax. Code § 23304.1 (a) (d) 12

Code of Civil Procedure § 425(e)(2) 11

Code of Civil Procedure § 425(e)(4) 2,7

Code of Civil Procedure § 425.16(a) 6

Code of Civil Procedure § 425.16(b) 7

Code of Civil Procedure § 425.16(b)(1) 8

Code of Civil Procedure section 425.16 (e)(4) 2

INTRODUCTION

Respondent Rand Resources LLC and Carson El Camino LLC (collectively Rand) insist that the issues in this case, "...ha[ve] been addressed by the California Court of Appeal several times. The decision below is firmly in line with those prior decisions, and thus the petitions should be denied." (Ans., p 1.)

Suffice it to say that is not the case. If the Appellate Court were not trying to create an otherwise non-existent exception under *Code of Civil Procedure* 425.16, or further limit Anti-SLAPP Protections, why publish its opinion?

On August 1, 2016, this high court unanimously ruled in *Baral v. Schnitt* 2016 DJDAR 7799 (although with slightly different facts and analyzing Anti-SLAPP under the second step), Plaintiffs cannot rely on "artful pleading" to avoid a California law enacted to protect defendants' free speech rights and discourage meritless lawsuits (i.e. "mixed cause of action"). The particular issue in that decision involved whether a plaintiff could withstand Anti-Slapp scrutiny by combining allegations of activity protected under the statute with allegations of unprotected activity.

An analogous situation is occurring in this matter. While not an artful pleading and Petitioners are understandably of the view the facts even as alleged support a finding of the Public Interest under *Code of Civil Procedure* 425.16, the Trial Court properly found that "an action for breach of an exclusive commercial development with a public entity (containing causes of action for inducing breach of contract, intentional and

negligent interference and Business and Professions Code section 17200) is subject to anti-SLAPP on the basis of rights of petition and free speech in connection with a public issue." *Tuchscher Development Enterprises Inc. v. San Diego Unified Port District*, 106 Cal. App. 4th 1219, 1232-1235 (2003).

The Trial Court further determined "[a]s stated in Tuchscher, communications involving the proposed development of such commercial property fall into the 'matter of public interest' portion of the [anti-SLAPP] statute and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive, or judicial body. *Code of Civil Procedure section 425.16 (e)(4)*; *Id.* 106 Cal App 4th at 1233; *Ludwig v. Superior Court,* 37 Cal App 4th 8, 17 (1995). Therefore both these defendants meet their initial burdens and the burned shifts to the Plaintiffs."

The Court of Appeal misapplied section 425.16 by narrowly and incorrectly focusing on the premise that "[t]he identity of the City's representative is not a matter of public interest." Hence the Anti-SLAPP protections therefore do not apply. That narrow construction of what was alleged in multiple pages of an unverified pleading raises serious questions about the meaning and application of "Public Interest" in a commercial development negotiation between the Public entity and private sector.

Indeed, the repeated theme by Respondents and the Appellate Court is so long as the focus is on the alleged unverified identity of an alleged "agent" and at times claimed "*de facto* agent" for the City of Carson, then Anti-SLAPP does

not apply. That is not the law. Tying the hands of both the Public Entity (in this case the City of Carson and then Mayor Dear collectively (City)), and the Private developer U.S. Capital and Leonard Bloom (collectively Bloom) concerning communications involving the proposed development of such commercial property fall into the 'matter of public interest' portion of the Anti-SLAPP statute.

Finally while given little attention in the Answer, a suspended California corporation does not have standing to prosecute a State Court lawsuit. When a corporation is suspended, it has lost all rights and privileges as a corporation *and cannot legally operate.* In that regard, technically a suspended corporation is required to close its business and stop all business related activity. Moreover, a suspended corporation cannot sue or defend any action in court.

THE COURT OF APPEAL MISAPPLIED THE PUBLIC INTEREST STANDARD

The Opinion erodes the "Public Interest" protections afforded under section 425.16 to the Public Entity and Private sector in commercial development negotiations. *Tuchscher Development Enterprises Inc. v. San Diego Unified Port District*, 106 Cal. App. 4th 1219, 1232-1235 (2003). The Opinion ruled that unverified claims in a First Amended Complaint (FAC) were legally and factually tenable to overcome and prevent the very statutory protections afforded under Anti-Slapp even though (a) the statute does not provide a definition for "an issue of public interest" and (b)

Three general categories of cases have been held to concern an issue of public interest or a public issue: "(1) The subject of the statement or activity precipitating the claim was a person or entity in the public eye. [Citations.] [¶] (2) The statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants. [Citations.] [¶] (3) The statement or activity precipitating the claim involved a topic of widespread public interest." *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33.

Both the Opinion and the Trial Court in reading the FAC actually agree that factually the City was the subject of the activity, the activity of potentially building an NFL stadium in the City was conduct that would affect large numbers of people beyond the direct participants and this activity involved a topic of widespread public interest. Yet the Opinion sought to carve out an exception by claiming if there is an alleged fraud or interference claimed in a complaint (even if just alleged and unverified in the complaint) then the Anti-SLAPP protections no longer exist.

The Court of Appeal has not only created an otherwise non-existent exception to the protections of Anti-SLAPP, the Opinion creates a conflict with the decision in *Tuchscher Development Enterprises Inc. v. San Diego Unified Port District*, 106 Cal. App. 4th 1219, 1232-1235 (2003). While the Appellate court and Rand try to parse out certain facts and create others, in its simplest of terms, *Tuchscher* held that, "Commercial and residential development of a substantial

parcel of bayfront property, with its potential environmental impacts, is plainly a matter of public interest."

The Opinion holds, instead, that if there is an alleged fraud or interference claimed in a complaint (even if just alleged and unverified in the complaint) then the Anti-SLAPP protections no longer exist as such actions are not a matter of public interest lawsuits (i.e. "mixed cause of action"). This approach undercuts the protection afforded by the broad interpretation of "an issue of public interest". The Opinion also encourages civil actions in any case where an individual or entity does not have a public contract renewed and then they can decide to sue the public entity and the party awarded the new contract (not the case presently) to create delay and unnecessary expense.

What the Opinion fails to recognize is that the FAC is also replete with all the references to City and Bloom discussing the commercial development of property for the purposes of building a multifunctional stadium. Obviously parties need to talk before any agreement is reached. Indeed there is no evidence that any agreement was ever entered into between Bloom and the City or that the City did not renew the EAA because of Bloom and as noted Rand at all times was a suspended Corporation and could not legally operate nor even have the EAA renewed.

And finally the Opinion goes on to "...also disagree with the City's contention that this cause of action (as well as each of Plaintiffs' other claims) alleges speech or conduct falling within the scope of section 425.16, subdivision (e)(2). The FAC alleges that the defendants' breach began soon after April

2013. The expiration, and thus the issue of renewal, of the EAA was more than one year away. Thus, the communications and conduct alleged in the cause of action were made solely in connection with the breach of the EAA, and not in connection with the issue of its renewal or any other issue under consideration or review by the City." The Opinion makes multiple assumptions not supported by fact to draw these distinctions to preclude the application of Anti-SLAPP.

California's Anti-SLAPP statute is designed to give defendants the ability to ensure the "prompt exposure and dismissal of SLAPP suits" designed to chill the exercise of free speech. *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16 (1995). (Section 425.16 was intended to "provid[e] a fast and inexpensive unmasking and dismissal of SLAPPs."); *Code of Civil Procedure* § 425.16(b).

In order to prevail on its Motion, Bloom needed only make a prima facie showing that the acts or statements at issue were made "in furtherance of" its rights of free speech "in connection with a public issue." *Code of Civil Procedure* § 425.16(b)(1),(e); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002).

In determining whether a prima facie showing has been made, the California Legislature expressly commanded that the statute be construed "broadly." *Code of Civil Procedure* § 425.16(a); *Navellier*, supra 29 Cal. 4th at 124.

An Exclusive Agency Agreement for the Development of an NFL stadium is a "public issue" and is an "issue of public interest"

The Trial Court correctly found that "an action for breach

of an exclusive commercial development contract between a private developer and a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code section 17200) is subject to anti-SLAPP on the basis of rights of petition and free speech in connection with a public issue." In support of its finding, the Superior Court relied on *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* 106 Cal.App.4th 1219, 1232-1235 (2003).

There can be little doubt that the real estate development alleged in the FAC meets the "broad" standard that it is a public issue or issue of public interest. The anti-SLAPP statute encompasses "any other conduct ... in connection with a public issue or an issue of public interest." *Code of Civil Procedure* § 425(e)(4). "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include ... private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental agency." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000). Developmental projects such as a discount mall "with the potential environmental effects such as increased traffic and impact[s] on natural drainage [are] clearly a matter of public interest." *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 15 (1995); see also *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.*, supra 106 Cal. App. 4th at 1234. ("[C]ommercial and residential development of a substantial parcel of bayfront property, with its potential environmental impacts, is plainly a

matter of public interest.")

THE COMMUNICATIONS WERE PROTECTED FREE SPEECH

The gravamen of the fraud-based causes of action attacks are the communications between City and Bloom on the one hand, and between City and Rand on the other. However, each of these communications was "made in connection with a public issue." *Code of Civil Procedure* § 425.16(b)(1).

In *Tuchscher*, supra, the plaintiff-developer sued a city, public entity and its then-commissioner, and a rival developer, contending that the defendant public officials and rival developer interfered with the developer's exclusive negotiating agreement relating to the commercial development of certain bayfront property. This interference took place by means of communications with other public officials and the rival developer, such as "closed door meetings, telephone calls and emails" designed to take away the exclusivity rights from the plaintiff-developer to the rival developer. *Id.* at 1228.

> The gist of [the plaintiff's] complaint was that respondents conspired with [the rival developer] to deprive [the plaintiff-developer] of the benefits of the negotiating agreement by disrupting the City's staff from negotiating the development agreement and inducing the City to cease negotiations. [The plaintiff-developer] alleged respondents furthered conspired by (1) communicating with the mayor and other agents and employees of the City ..., and (2) facilitating communications and meetings between [the rival developer] and a [city]

representative, and that respondents' objective was to secure the rights to develop both the ... project and [the respondents'] own commercial property...."*Id.*

"Under these circumstances, the fact that the defendants ceased negotiations with a particular developer and sought advice from a rival developer was protected action under the anti-SLAPP statute." *Id.* at 1228, 1233-34.

The parallels between *Tuchscher* and here go beyond the mere fact that a developer under an exclusivity agreement is suing both a city and a rival developer for communications relating to negotiations of whether the current exclusivity arrangement should be extended. (AA:I:2:31¶ 36). Just as the communications that were the target in Tuchscher were "closed door meetings, telephone calls and emails," here, Rand alleges the communications that are the heart of the fraud claims consisted of "clandestine meetings," "talk(s) by the phone or through text messages," and "confidential emails." (AA:I:2:31,35-37¶¶ 36, 54, 63). Moreover, the gist of the communications were designed to "induc[e] the City to cease negotiations" to end the exclusive negotiation agreement (in *Tuchscher* at 1228) just as they were designed here "to cause[] the City to breach its prior representations and agreement to extend the EAA" (AA:I:2:33¶42). Such communications are clearly encompassed by the anti-SLAPP statute per *Tuchscher* regardless of whether they were legitimate, or fraudulent as Rand and the Opinion contend. *Navellier*, supra, 29 Cal. 4th at 94. ("Any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context

of the discharge of the plaintiff's secondary burden to provide a prima facie showing of the merits of the plaintiff's case.").

Here, in contract, the legislative process of determining whether to renew the EAA was not collateral to the allegedly improper communications, it was the very purpose of the alleged communications. Rand acknowledges that the EAA was the subject of legislative deliberation; after all, Rand requested the City Council to extend the EAA, and Rand complains the City Council did not extend it. (AA:2:32-33,35 ¶¶ 40-41,49.) Leading up to the decision about whether the City should continue to retain Rand, the City engaged in communications with Bloom about whether they could take over as agents once the EAA expired. (AA:I:2:31¶36). Even if the City was allegedly prohibited from actually engaging another agent to seek out an NFL stadium deal during the EAA term, (not that this is conceded) nothing in the EAA prevented the City from communicating with others regarding possible future alternatives to the EAA once the EAA expired. (AA:I:2, 4-49).

This suit thus is tantamount to an attempt to freeze the City's right to explore these alternatives with third parties to fully inform itself prior to a very important decision about who should be the City's NFL agent after the EAA expires. Accordingly, the alleged wrongful communications were a necessary and essential part of the legislative process, activity that is protected under the anti-SLAPP statute. See *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) (observing that communications preparatory to or in

anticipation of official proceedings are protected).

Alternatively, the FAC involves alleged conduct "made in connection with an issue under consideration or review by a legislative ... or any other official proceeding authorized by law." *Code of Civil Procedure* § 425(e)(2). The FAC concedes that the EAA and the project as a whole were the subject of multiple legislative and other official proceedings. The exclusive negotiating agreement that was the alleged predecessor to the EAA was entered into between the City's redevelopment agency and Rand. Multiple extensions were granted by the redevelopment agency. The EAA itself was entered into by City Council. More importantly, the City's Economic Development Commission reviewed and voted on whether to extend the EAA, and the City voted on whether to extend the EAA. (AA:I:2:24-34). Given each of these circumstances, the property, agreement, and potential development at issue were all issues "under consideration or review by a legislative ... or ... other official proceeding," and thus properly encompassed by the anti-SLAPP statute. *Code of Civil Procedure* § 425(e)(2).

RESPONDENT RAND WAS AT ALL TIMES A SUSPENDED CORPORATION

The California Secretary of State and Franchise Tax Board reveals that Rand Resources, LLC (Entity Number 199823610096) was a Suspended Corporation, as of *September 13, 2012* (*JUST NINE DAYS AFTER SIGNING THE EAA*) for

all times thereafter and up and until March 19, 2015. (AA:III:19:1066-1071).

As such the claims in the FAC that there was any interference with a EAA by Bloom, the EAA should have been renewed (although clearly not a mandatory requirement based on a clear reading of the EAA and within the City's sole and absolute discretion) and Bloom committed a fraud by having meetings, all is a smoke screen alleged by Rand. In fact the only fraud committed is by Rand and its assignee El Camino as Rand could not assign sell or transfer anything (Partial or otherwise) to El Camino as it was suspended at all times, notwithstanding the lack of any evidence to show City approval or an exception to an assignment by Rand to some third entity. (*See Cal. Rev. & Tax. Code* § 23302) (West); The EAA *is voidable Cal. Rev. & Tax. Code* § 23304.1 (a) (d).

Moreover, a suspended corporation cannot sue or defend any action in court. Furthermore, a suspended corporation that provides a service, or goods, to third parties while suspended may not be able to collect payment for such services or goods since the suspended corporation technically was not permitted to engage in any business transactions. *Grell v. Laci Le Beau Corp.*, 73 Cal. App. 4th 1300, 1306 (1999).

Rand had no legal authority to assign anything to anyone, do any business during the entire term of the EAA and under no circumstance would have been able to have the EAA renewed in September 2014 even if the City decided to do so as it has been suspended at all times up to March 19, 2015. Accordingly, Rand had no standing to assert any of the causes

of actions found in the FAC and the appeal should have been dismissed on this ground as well.

CONCLUSION

The Court of Appeal failed to properly apply the protections of Anti-SLAPP. It has created an otherwise non-existent exception, created conflicts of published opinions and takes away free speech rights.

For the foregoing reasons, Bloom prays that review be granted and the decision be reversed.

Dated: August 8, 2016

Respectfully submitted,

Tamborelli Law Group
John V. Tamborelli

By:

John V. Tamborelli
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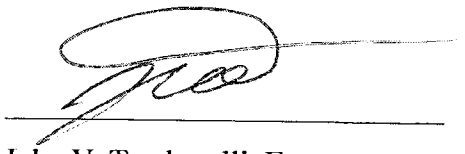
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(l).)

The text of this petition consists of 3,069 words as counted by the Microsoft Word version 2010 word processing program used to generate this Reply to Answer to Petition.

Dated: August 8, 2016



John V. Tamborelli, Esq.

PROOF OF SERVICE:

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 21700 Oxnard Street, Suite 1590, Woodland Hills, California, which is located in the county in which the within-mentioned mailing occurred.

On August 9, 2016, I served true copies of the following document(s) described as REPLY TO ANSWER TO PETITION FOR REVIEW on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Tamborelli Law Group's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9, 2016, at Woodland Hills, California.

Ronnie Gipson

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