NOLI CONSTRUCTION, Plaintiff and Respondent,
v.
GREGG D. MCCLENDON, Defendant and Appellant.

D072531

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

November 29, 2018

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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(Super. Ct. No. 37-2016-00044016-CU-MC-CTL)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Reversed.

Wingert Grebing Brubaker & Juskie, Andrew A. Servais and Amy L. Simonson for Defendant and Appellant.

The Tissot Law Firm and Jeremy L. Tissot for Plaintiff and Respondent.

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I
INTRODUCTION

Gregg D. McClendon appeals from an order denying his special motion to strike the defamation claim that Noli Construction, which does business under the name of GW Construction (Noli), filed against him for negative reviews he posted on crowdsourced review and social media Web sites. (Code Civ. Proc., § 425.16.)[1] McClendon contends the superior court should have granted his motion because he met his burden of showing his reviews were protected activity and Noli did not meet its burden of establishing a probability of prevailing on its claim. Noli disputes both points.

We conclude McClendon established his negative reviews were protected activity because they were made in a public forum and involved an issue of public interest. (§ 425.16, subds. (e)(3) & (e)(4).) We further conclude Noli failed to establish a probability of prevailing on the merits of its claim because Noli failed to present evidence tending to show the disclosed facts underpinning McClendon's negative reviews were false. We, therefore, reverse the order denying the motion and remand the matter to the superior court with directions to vacate the order and enter a new order granting the motion.

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II
BACKGROUND

According to Noli, McClendon entered into two contracts with Noli for home remodeling work. After Noli completed the work required by the contracts, McClendon demanded Noli make changes to the work at no extra charge, which Noli refused to do.

According to McClendon, he contracted with Noli to refinish his sunroom and remodel his kitchen, guest bathroom, and master bathroom. Before entering into the contract, he met with one of Noli's co-owners, Matan Ben-Shlush, and a project coordinator. Ben-Shlush falsely told him Noli used employees, not subcontractors, to perform its work. Ben-Shlush also failed to disclose a previous disciplinary proceeding before the Contractors' State License Board (Board), in

which the Board found a company Ben-Shlush worked for violated the law by, among other actions, unlawfully employing Ben-Shlush as a nonregistered home improvement salesperson. The finding was based in part on undisputed allegations Ben-Shlush entered into a written contract on behalf of the company while identifying himself as an owner of the company.

After McClendon had difficulty obtaining financing for the work, Ben-Shlush proposed McClendon obtain financing through the Hero Financing Program (HERO Program). To obtain a loan from the HERO Program, the parties entered into a second contract for Noli to replace the roof, reinsulate the attic, and replace two slider doors and three windows. Ben-Shlush told McClendon there would be enough loan money left over from the second contract to complete the two bathroom remodeling projects in the first

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contract. Noli arranged for the loan and did not provide McClendon with any documentation of it.

McClendon later learned the HERO Program finances energy efficient and water saving home upgrades and is repaid through annual property tax payments. When McClendon requested a cost breakdown for the items covered by the financing, Ben-Shlush told him Noli does not provide breakdowns of material and labor. Nonetheless, McClendon saw a document in Ben-Shlush's handwriting indicating there was a $25,000 funding surplus.

When workers came to McClendon's home to replace the roof and reinsulate the attic, they wore orange T-shirts inside out. Other workers who came to work on the guest bathroom remodel wore blue T-shirts inside out. One of the workers told McClendon that Ben-Shlush required subcontractors to turn their company shirts inside out and to refrain from talking with homeowners because he did not want homeowners to know Noli used subcontractors instead of employees. Noli's project coordinator, who was actually a salesperson, later admitted Noli had no real employees, just subcontractors. Moreover, Noli failed or refused to pay one of the subcontractors, and McClendon paid the subcontractor directly to preclude the subcontractor from placing a lien on his home.

Although Ben-Shlush assured McClendon that Noli would obtain permits for the contract work, Noli did not provide McClendon with any permits and it appears Noli obtained at least one permit several months after McClendon and Noli's contractual relationship ended. Ben-Shlush also assured McClendon the work would comply with

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applicable building codes. However, some of the work, including the bathroom tile work, did not comply with building codes or industry standards.

Because of the poor quality of Noli's work, its withholding of information about the HERO Program loan proceeds, its misrepresentations about its use of subcontractors, and its refusal to pay at least one of the subcontractors who worked on McClendon's home, McClendon terminated Noli's services. He filed a complaint with the Board the same day.

McClendon subsequently researched online reviews for companies associated with Ben-Shlush. One Web site provided a link entitled "Review Me." Another provided links to online crowdsourced review Web sites along with the advice, "Don't just take our word!" Believing the public should be aware of Noli's business practices and workmanship, McClendon posted negative reviews on several of these Web sites.

As highlighted in Noli's complaint, the reviews stated Noli was a scam, fake, fraud, con artist, rip-off, and criminal; had no employees, except salespeople; had an employee who was a "flim-flam salesman" and was "amped up on energy drinks all day"; and lied about its work, including marketing its work on crowdsourced review and social media Web sites using pictures of work done by other contractors.

In addition to these statements, the reviews included examples of the conduct McClendon found objectionable. Specifically, the reviews stated Noli falsely claimed in marketing materials to be a Better Business Bureau member; used subcontractors instead of employees to perform the work on his home and did not pay some of them; performed poor quality, non-code-compliant work when installing the tile, toilet, and GFI outlets in

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his bathroom; and falsely claimed he owed $22,000 even though he had an invoice indicating he had a $3,000 credit. He also criticized Ben-Shlush for spending too much time on his three cell phones.

McClendon further stated in the reviews he was filing a complaint against the company with the Board and reporting his experience with the company to the San Diego County District Attorney's Office. He advised prospective customers to demand a higher bond than required by state law because he was making a claim against Noli's bond and the bond amount was less than the amount needed to correct Noli's work.

Noli filed a complaint against McClendon alleging causes of action for libel per se and injunctive relief. Noli offered to dismiss the action if McClendon removed the reviews, signed a document stating his Better Business Bureau dispute was resolved, withdrew his complaint to the Board, and withdrew his claim against Noli's bond.

McClendon filed an anti-SLAPP motion. In the motion, he argued the court should strike the complaint because section 425.16 applied and his statements about Noli were either true or nonactionable statements of opinion. He supported his motion with a personal declaration attesting to his version of events and with documents supporting both his version of events and the statements he made in his reviews.

Noli opposed the motion, arguing McClendon had not met his burden of establishing his reviews were protected activity under section 425.16 and, regardless, Noli met its burden of establishing a probability of prevailing on its claim. Noli supported its opposition with declarations from two of its owners. The declarations did not respond to any of McClendon's specific allegations about his experience with Noli.

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Instead, the declarations stated Noli's contractor license was in good standing and flatly denied the company or its principals, including Ben-Shlush, had ever been involved in any criminal or fraudulent activity or had ever had court or administrative proceedings filed against them. The declarations also stated Noli had lost a potential job for $197,000 because of McClendon's reviews.[2]

In reply, McClendon provided additional supporting documents. The documents included an ad given to McClendon by Ben-Shlush falsely claiming Noli was a Better Business Bureau member and a completion certificate submitted by Ben-Shlush to the HERO Program. The certificate indicates it was electronically signed by McClendon; however, McClendon denied ever seeing or signing it. The documents also included one of Noli's boilerplate subcontractor agreements. The agreement's standard terms

instruct subcontractors not to display their company logos on their shirts or trucks and to park their trucks around the corner if their company logos could not be removed from their trucks.

After considering the parties' papers and arguments, the court denied the motion. The court found section 425.16 did not apply to Noli's claim because McClendon's reviews did not involve a public issue or an issue of public interest.

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III
DISCUSSION
A

A plaintiff's claim against a defendant is subject to an anti-SLAPP motion if the claim arises from the defendant's act in furtherance of the defendant's federal or state constitutional right of petition or free speech in connection with a public issue and the plaintiff has not established a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) We review an order granting or denying an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

Resolution of an anti-SLAPP motion "involves a two-step process. First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "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 defendant makes this initial showing of protected activity, the burden shifts to the plaintiff at the second step to establish a probability it will prevail on the claim. [Citation.] The plaintiff need only state and substantiate a legally sufficient claim. [Citation.] The plaintiff's evidence is accepted as true; the defendant's evidence is evaluated to determine if it defeats the plaintiff's showing as a matter of law. [Citation.] The procedure is meant to prevent abusive SLAPP suits, while allowing 'claims with the requisite minimal merit [to] proceed.' " (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 (*Vasquez*); *Barry v. State Bar* (2017) 2 Cal.5th 318, 321.)

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B

Regarding the first step of the anti-SLAPP motion analysis, the parties disagree about whether McClendon's negative reviews were acts in furtherance of his federal or state constitutional right of free speech in connection with a public issue. As relevant to this appeal, such acts include "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" (§ 425.16, subd. (e)(3)), or "any other conduct in furtherance of the exercise of the constitutional right of ... free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

The parties do not dispute the Web sites on which McClendon posted his remarks were public forums. "Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.) Rather, the parties dispute whether McClendon's reviews involved a public issue or an issue of public interest (public interest requirement).

"The anti-SLAPP statute does not define the terms 'public issue' or 'public interest.' 'The terms are, as one court stated, "inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition." [Citation.] Another court has stated, somewhat tautologically, that " 'an issue of public interest' ... is any issue in which the public is interested." [Citations.]

Nevertheless, "judges and attorneys will, or should, know a public concern when they see it." ' " (*MMM Holdings, Inc. v. Reich* (2018) 21 Cal.App.5th 167, 179.)

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Appellate courts have offered guidelines for determining whether an issue is of public interest. One appellate court discussing the public interest requirement in the context of a public corporation indicated "postings about corporate activity constitute an issue of public importance upon considering the following pertinent factors: (1) whether the company is publicly traded; (2) the number of investors; and (3) whether the company has promoted itself by means of numerous press releases." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576; accord, *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 694 (*Summit Bank*).)

Another appellate court discussing the public interest requirement more generally indicated a public issue is an issue "concerned with either (1) 'a person or entity in the public eye'; (2) 'conduct that could directly affect a large number of people beyond the direct participants'; or (3) 'a topic of widespread, public interest.' " (*Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 428 (*Healthsmart*), quoting *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.)

Still other appellate courts have indicated "(1) ' "public interest" does not equate with mere curiosity'; (2) 'a matter of public interest should be something of concern to a substantial number of people,' not merely 'a matter of concern to the speaker and a relatively small, specific audience'; (3) 'there should be some degree of closeness between the challenged statements and the asserted public interest'; (4) 'the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy" '; and (5) ' "those charged with defamation

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cannot, by their own conduct, create their own defense by making the claimant a public figure." ' " (*Healthsmart, supra*, 7 Cal.App.5th at p. 428, quoting *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132-1133; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199.) We previously applied these latter guidelines in the context of statements posted to consumer-oriented Web sites warning about a person's character and business practices and had little difficulty in concluding the statements met the public interest requirement. (*Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1145-1147 (*Chaker*).)

None of these guidelines purports to be exclusive or exhaustive and the California Supreme Court has not as yet relied on any of them. The Supreme Court's own guidance on the public interest requirement has been limited. The Supreme Court has explained the "statutory protection of acts 'in furtherance' of the constitutional rights incorporated by section 425.16 may extend beyond the contours of the constitutional rights themselves." (*Vasquez, supra*, 1 Cal.5th at p. 421, fn. omitted.) Consequently, courts "are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression" in determining whether the public interest requirement had been met.[3] (*Id.* at p. 422.)

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Whatever factors a court considers in determining whether the public interest requirement has been met, the result must be consistent with the Legislature's intent. The Legislature has indicated the public interest requirement "must be ' "construed broadly" so as to encourage participation by all

segments of our society in vigorous public debate related to issues of public interest.' [Citation.] The Legislature inserted the 'broad construction' provision out of concern that judicial decisions were construing that element of the statute too narrowly." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23.)

In this case, McClendon's reviews were posted on publicly accessible Web sites existing, at least in part, to collect existing customer experience information for consideration by potential customers. While McClendon's reviews were unnecessarily rancorous, they included cautions about Noli's use of subcontractors instead of employees, its failure to pay subcontractors, its poor workmanship and failure to comply with building codes, the insufficiency of its performance bond to remedy the defects in its work, and its unwillingness to provide loan documentation and a financial accounting of its work. Members of the public who are consumers of home remodeling services have an interest in learning about issues concerning particular contractors. (See *Healthsmart*, *supra*, 7 Cal.App.5th at p. 429.) Thus, this information is of interest not just to

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McClendon, but to anyone looking for home remodeling contractors in the areas Noli serves.

While the reviews reflect McClendon's personal experience with Noli, such firsthand experience generally increases, not decreases, potential customers' interest in the information. Indeed, the Web sites where McClendon posted his reviews exist, at least in part, for the purpose of allowing consumers to share their firsthand experiences with one another to aid informed decision making. Accordingly, as in *Chaker*, *supra*, 209 Cal.App.4th at p. 1147, we have little difficulty concluding McClendon's statements involved matters of public interest and constituted acts in furtherance of his federal and constitutional free speech rights. (See *Paradise Hills Assoc. v. Procel* (1991) 235 Cal.App.3d 1528, 1544-1545 [truthful information and opinions about a customer's unhappiness with the quality of a business's products and services made to persuade prospective customers not to patronize the business are protected by the First Amendment], disapproved on another point in *Kowis v. Howard* (1992) 3 Cal.4th 888, 897-899; see also *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 ["Consumer information ..., at least when it affects a large number of persons, ... generally is viewed as information concerning a matter of public interest"].) McClendon, therefore, met his burden of establishing his negative reviews were protected activity under section 425.16, subdivisions (e)(3) and (e)(4).

C

Regarding the second step of the anti-SLAPP motion analysis, Noli's burden was similar to that of a party opposing a motion for summary judgment. Noli had to

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demonstrate its claim was both legally sufficient and supported by evidence that, if credited, would be sufficient to sustain a favorable judgment. (*Summit Bank*, *supra*, 206 Cal.App.4th at p. 695.)

" ' "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." ' [Citations.] 'In general, ... a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.' [Citation.] The defamatory statement must specifically refer to, or be ' "of [or] concerning," ' the plaintiff." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259-1260 (*Jackson*).)

The parties dispute whether McClendon's remarks were statements of fact or statements of opinion. Assuming, without deciding, they were statements of opinion, this does not preclude them from being actionable. "In determining whether disparaging remarks are actionable defamation, ' "the question is not strictly whether the published statement is fact or opinion ... [r]ather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." ' " (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527 (*Integrated Healthcare*).) Thus, an opinion may be actionable " ' " 'if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false.' " ' " (*Ibid.*)

Here, McClendon's negative remarks about Noli's integrity, business practices, and workmanship were based on disclosed facts about his firsthand experience with Noli's

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work on his home. " ' "A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning." [Citation.] The rationale for this rule is that "[w]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." [Citation.] When the facts supporting an opinion are disclosed, "readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts." ' " (*Integrated Healthcare*, *supra*, 140 Cal.App.4th at p. 528.)

Consequently, in order to meet its burden for the second step of the anti-SLAPP motion analysis, Noli had to provide evidence tending to show the factual underpinnings of McClendon's statements were false. While Noli provided declarations stating it had never been convicted, sued, or administratively penalized for its work or business practices, Noli did not provide any evidence tending to show that McClendon's statements about his personal experience with Noli were false. Conversely, McClendon provided evidence tending to support the truth of his statements, including declarations and documents tending to show Noli performed poorly, refused to provide him with loan documents or a financial account of its work, submitted an unauthorized completion certificate to the HERO Program, and made misrepresentations about its membership in the Better Business Bureau, its use of subcontractors, and its compliance with building code standards.

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The existence of some inaccuracies between McClendon's statements and his evidence do not preclude McClendon from obtaining relief under section 425.16. " 'To bar liability [for defamation], " 'it is sufficient if the *substance* of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citations] ... [Citation.] ... Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " ' " (*Jackson*, *supra*, 10 Cal.App.5th at pp. 1262-1263; *Summit Bank*, *supra*, 206 Cal.App.4th at p. 697.) We, therefore, conclude Noli did not meet its burden of showing a probability of prevailing on its defamation claim and the court should have granted McClendon's anti-SLAPP motion.

IV
DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate its order denying McClendon's anti-SLAPP motion and to enter a

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new order granting the motion and striking Noli's complaint. McClendon is awarded his appeal costs.

MCCONNELL, P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.

Footnotes:

[1.] Further statutory references are to the Code of Civil Procedure unless otherwise stated. A motion under section 425.16 may also be referred to as "a special motion to strike a 'strategic lawsuit against public participation,' " or an "anti-SLAPP motion." (See *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 773-774.)

[2.] McClendon filed evidentiary objections to the declarations. The court did not rule on the objections.

[3.] The California Supreme Court may provide additional guidance in cases currently under review. (See *Rand Resources v. City of Carson*, review granted Sept. 21, 2016, S235735, which the case summary indicates includes as an issue to be decided: "Did plaintiffs' causes of action alleging the breach of and interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (NFL) stadium and related claims arise out of a public issue or an issue of public interest within the meaning of Code of Civil Procedure section 425.16?" See also, *FilmOn.com v. DoubleVerify, Inc.*, review granted Nov. 15, 2017, S244157, which the case summary indicates includes as an issue to be decided: "In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of [Code of Civil Procedure] section 425.16, should a court take into consideration the commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech?")
