



Alerts

Anti-SLAPP Applies to Concealment Claim

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Suarez v. Trigg Laboratories Inc., Court of Appeal, Second District, Division 4, California, September 7, 2016, Case No. B26511

The California Court of Appeal for the Second District holds that anti-SLAPP statute applies to rescission of settlement agreement cause of action arising from concealment of facts material to the negotiations.

Brief Summary

The California Court of Appeal for the Second District held that the plaintiff's cause of action for rescission of a settlement agreement arose from litigation activities protected by the anti-SLAPP statute under California Code of Civil Procedure 425.16, and thus the trial court's dismissal of the lawsuit without leave to amend was affirmed. The Court held that the targeted conduct, i.e., concealment of communications under the guise of the attorney-client privilege that would have influenced the plaintiff's settlement position, fell within the ambit of protected petitioning activity under prong I of the statute.

Complete Summary

Plaintiff Rafael Suarez (Suarez), a business consultant, entered into an arrangement with Trigg Industries (Trigg) and its principal Michael Trygstad (Trygstad) under which Suarez would consult on preparing Trigg for sale. Eventually the arrangement soured and Trygstad terminated the relationship. Suarez sued Trigg for quantum meruit (*Suarez I*). Meanwhile, Trygstad hired Bell Holdings Inc. and George Segal Associates Inc. (GSA) to assist with selling Trigg. Bell found a potential buyer, Ansell, and advised Trygstad accordingly. Trygstad instructed Bell to send all communications through counsel, including the anticipated letter of intent: "Just a reminder that the letter of intent cannot come to me directly. Must go to the attorney you referred to keep contents with attorney client privilege for the Rafael case." The letter of intent was sent, but the sale to Ansell did not occur. Thereafter, Suarez agreed to settle *Suarez I* for \$175,000. The email communications about the potential Ansell sale and the letter of intent were subsequently discovered by Suarez.

Suarez sued Trigg for rescission of the settlement agreement (*Suarez II*), alleging that "Trygstad knew that disclosure of the [letter of intent] to Plaintiff while [*Suarez I*] was pending would be extremely harmful to Trigg's negotiating position . . . Trygstad directed that the existence of the [letter of intent] be suppressed and not disclosed [as] part of a fraudulent strategy by Trigg to protect the [letter of intent] from being disclosed under the guise of the attorney-

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client privilege and other acts of concealment." Trigg argued in its anti-SLAPP motion that prong I of the anti-SLAPP statute — whether the gravamen of the cause of action is based on protected speech or petitioning activity — was satisfied because Suarez's claims arose out of communications that occurred during the course of the settlement negotiations in *Suarez I*. See, *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963, *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, and *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 842 ("The protection applies, even against allegations of fraudulent promises made during the settlement process").

The Second District agreed, rejecting Suarez's argument that *concealment* and *nondisclosure* are not protected *communications*. The Court explained that silence is protected under well-established free speech jurisprudence. The right "encompasses what a speaker chooses to say, and what a speaker chooses not to say; it is a right to speak freely and also a right to refrain from doing so at all." Thus, the concealment of the letter of intent was protected litigation-related activity, expressly aimed at *Suarez I*. case: Bell was instructed "to keep this information within the attorney-client privilege for purposes of [*Suarez I*]." As Suarez's rescission claim was based on this activity, the Court held that prong I was satisfied. (The Court did not address prong II — whether Suarez could prove a probability of prevailing on his rescission claim — because it had not been raised at the trial court.)

Significance of Opinion

This case represents another effort by the courts to clarify the definition of protected activity (which can include refraining to act or speak) and the requirement that the SLAPP cause of action arises from, or targets, protected activity. The analysis involves an examination of the *injury-producing* conduct. Here, Suarez theorized that had he known about the letter of intent, Trigg would have paid more in settlement. Therefore, the concealment was the injury-producing conduct. The omission of any discussion by the Court concerning whether the attorney-client privilege applied to justify the concealment also signifies that this question is irrelevant to the prong I analysis.

For more information, please contact [Cassidy E. Chivers](#).

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