

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 01/12/18 TIME: 1:30 P.M. DEPT: E CASE NO: CV1700963

PRESIDING: HON. PAUL HAAKENSON

REPORTER:

CLERK: S. HENDRYX

PETITIONER: FRIENDS OF WEST TAM
VALLEY

vs.

RESPONDENT: COUNTY OF MARIN

NATURE OF PROCEEDINGS: 1) NOTICE OF MOTION – AND MOTION TO STRIKE
[RESP] COUNTY OF MARIN

2) NOTICE OF MOTION – AND SPECIAL MOTION TO STRIKE THE CROSS-
COMPLAINT [CRDF] EDWARD E. YATES

RULING

Cross-Defendant Edward Yates’ (“Yates”) motion to strike brought pursuant to Code of Civil Procedure section 425.16 is granted.

California Code of Civil Procedure Section 425.16, subdivision (b)(1) provides that “[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 Constitution or the 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.” “...[I]n applying the statute a court generally is required to engage in a two-step process: ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. ... If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.’” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) “In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).)

Arising From Protected Activity

Cross-Complainant County of Marin (“the County”) argues that the cross-complaint does not arise from protected activity because the allegations relate to Yates’ illegal conduct (alleged perjury). Specifically the County claims that Mr. Yates falsely asserted that the requested records were to be used for the maintenance, operation and use of the building at issue. The County

argues that the statement is patently false, in that the records relate to un-built structures, and thus, there are no buildings to be maintained, operated or used.

The court concludes that County has not shown as a matter of law that Yates committed perjury. The fact that no buildings had yet been built does not mean that Yates was necessarily going to use the plans for something other than “the maintenance, operation, and use of the building” *after* it was built. The County has offered no evidence showing that Yates intended to do so. Moreover, to constitute perjury, the false statement must be material. As discussed below, the statement, even if false, could not be shown to be material. Since the County asserts that the statement was patently and obviously false, (in that no buildings existed) no county representative could have reasonably relied on such representation.

In *Flatley v. Mauro* (2006) 39 Cal.4th 299, the defendant attorney conceded sending a letter and making several phone calls to the plaintiff demanding “a seven-figure payment” and threatening litigation and public exposure of a rape and other alleged crimes if the demand was not met. The parties agreed as to the substance of the letter and phone calls; however, the plaintiff asserted the communications were criminal extortion, while the defendant argued the communications were protected because they constituted a prelitigation settlement offer. (*Id.* at 305-306.) The court held that there was uncontroverted evidence that the defendant’s actions constituted illegal extortion. (*Id.* at 330.) However, the court noted that this conclusion was “based on the specific and extreme circumstances of this case.” (*Id.* at 332, fn. 16.)

In *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, plaintiff brought an action against his former spouse and an alleged coconspirator for malicious prosecution and similar causes of action. He alleged that that defendants conspired to bring a false criminal report against him, that their statements to police precipitated a criminal action, that they repeated their false accusations at trial, and that the trial ended with his acquittal and subsequent finding of factual innocence. On appeal of the trial court’s denial of defendants’ motion to strike the complaint, the Court of Appeal agreed that defendants’ *admittedly* false police report was not protected activity within the meaning of the anti-SLAPP statute. (*Id.* at 703.)

The present case does not involve such “concession or... uncontroverted and conclusive evidence that the conduct is illegal as a matter of law.” Thus, the conduct at issue arises from protected activity. It is therefore necessary to move to the second step.

Probability of Prevailing

The County has not demonstrated a probability of prevailing on its claim.

First, to the extent the County asserts that Mr. Yates violated rule 2-100 of the Rules of Professional Conduct, the County fails to establish any viable cause of action. The County fails to articulate how the alleged violation of rule 2-100 could have caused Friends of West Tam any damages, attorney’s fees, or costs for which the County is entitled to indemnity of any sort.

Second, with regard to the alleged false statement made in connection with a request for documents, as stated above, the County has not shown that Yates made a false statement. As noted, the County's position is that the statement (regarding Yates' intended use of the records) is patently false because there was no building to maintain, operate, or use. However, if the absence of an existing building would necessarily preclude any proper certification regarding the intended use of the plans, the County could have denied the request outright. Instead, Mr. Raab wrote on October 12, 2016,

...[T]he official plans maintained by the County are subject to Health and Safety Code § 19851. While inspection is freely allowed under the Public Records Act, copying of the plans requires permission from the professional who created the plans and the current owner of the property. The request for copies must also include an affidavit by the person requesting the duplication of the plans stating several things, the most significant being that the only purpose of the copy of the plans shall be for the maintenance, operation and use of the building. (H&S Code § 19851(c)(1). There is then a process that is similar to a subpoena for securing permission.

Please let me know if the certification can be made regarding the use of the plans.

Mr. Raab's letter seemingly suggests that acceptable certification regarding the intended use of the plans was feasible. Otherwise, Mr. Raab would have concluded that such a certification is not possible, and thus copying would not be possible.

Ultimately, Mr. Yates submitted his declaration. The County has not provided any evidence as to Yates' intent in using the plans.

More importantly, even if Yates' statement was patently false, on its face (as the County now argues), it could not have been "material." "'Material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services." (Gov. Code, § 12650, subd. (b)(4).) Given the County's position that Yates' statement was clearly and patently false because there was no building to maintain, operate, or use, the statement did not "have a natural tendency to influence" and was not "capable of influencing" the services performed. Put another way, the County could not have relied on the alleged false statement, because the County purportedly knew that Mr. Yates could not have intended to use the records for the maintenance, operation or use of any building. The County's own argument belies any finding of materiality.

Finally, the evidence offered to show that the controversy involves an amount of at least \$500 is conclusory, lacks foundation, and does not show personal knowledge. Therefore, Yates' objection to those portions of paragraph 6 of the declaration of Berenice Davidson is sustained.

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.