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FILED

SEP 06 2013

SAN LUIS OBISPO SUPERIOR COURT
BY Erin Brown
Erin Brown, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

DEE TORRES, an individual,

Plaintiff,

v.

MICHAEL BRENNLER, dba
BRENNLER INVESTIGATIVE
SERVICES, an individual and DOES 1
through 100, inclusive,

Defendants,

Case No.: CV 130145

**RULING ON DEFENDANT'S
SPECIAL MOTION TO STRIKE**

Dee Torres (Plaintiff) brings this defamation action against Michael Brennler (Defendant). Allegedly, Defendant in a March 2013 telephone conversation with Plaintiff's ex-husband, Charles Barber, stated that Plaintiff had been stealing money from homeless clients at the homeless shelter and that she had stolen money from a homeless man named Cliff Anderson.

Defendant now brings this special motion to strike (Anti-SLAPP). Pursuant to CCP §425.16, a cause of action arising from an act in furtherance of a person's constitutional right of free speech is subject to a special motion to strike, unless the plaintiff establishes a probability he or she will prevail on the claim. (*Du Charme v.*

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1 *International Broth. of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 111.) In
2 order to invoke the protection of CCP §425.16, the defendant need only make a prima
3 facie showing that the plaintiff's claims arise from the defendant's constitutionally
4 protected free speech or petition activity. (CCP §425.16(e); *Equilon Enterprises, LLC v.*
5 *Consumer Cause* (2002) 29 Cal.4th 53, 61.) The plaintiff then has the burden to establish
6 a "probability" of prevailing on the causes of action in the complaint. (CCP §425.16(b).)

7 Pursuant to Section 425.16(e), acts in furtherance of a person's right to petition or
8 free speech include: (1) any written or oral statement or writing made before an official
9 proceeding; (2) any written or oral statement or writing made in connection with an issue
10 under consideration or review by a legislative, executive or judicial body; (3) any written
11 or oral statement or writing made in a place open to the public or in a public forum in
12 connection with an issue of public interest; and (4) any other conduct in furtherance of
13 the exercise of the constitutional right of petition or the constitutional right of free speech
14 in connection with a public issue or an issue of public interest.

15 Defendant declares his actions were constitutionally protected as they were either
16 made in connection with an issue under consideration or review by a legislative,
17 executive or judicial body; or, were in furtherance of his constitutional right of free
18 speech in connection with a public issue or an issue of public interest.

19 Subdivision (e)(1) provides that any written or oral statement made in connection
20 with an issue under consideration or review by a legislative, executive or judicial body is
21 protected. This can include statements that are not actually made before an official body,
22 but there must be a nexus between the statement and the issue under consideration by a
23 public body. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866.)

24 Defendant cites to Civil Code §47(b) (litigation privilege) in support of his
25 position that investigative activity in preparation for the filing of a lawsuit or other
26 proceeding is protected constitutional activity under CCP §425.16(e)(2). Pre-litigation
27 communications made in a good faith belief of contemplated litigation are potentially
28 subject to both the litigation privilege and CCP §425.16(e)(2) protection. (*Briggs v. Eden*

1 *Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) However, in this
2 instance, there is no showing that the alleged statements were made in contemplation of
3 litigation or in connection with a matter under review by any legislative, executive, or
4 judicial body for purposes of CCP §425.16(e)(2) protection. Rather, as affirmed in
5 Karen Velie’s declaration, the statements were made during Defendant’s investigation
6 into leads for Cal Coast News’ articles on the homeless. Indeed, even in Defendant’s
7 latest August 30 Declaration, he confirms that his task was to develop information for Cal
8 Coast News.

9 Alternatively, Defendant argues his statements constitute conduct in furtherance
10 of the exercise of his constitutional right of free speech in connection with a public issue
11 or an issue of public interest. (CCP §425.16(e)(4).) “Public interest” is broadly construed
12 and includes both governmental matters and private conduct that impacts a broad
13 segment of society and/or affects the community in a manner similar to a governmental
14 entity. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) Any
15 issue that the public takes an interest in is a “public interest.” (*Nygaard, Inc. v. Uusi-*
16 *Kerttula* (2008) 159 Cal.App.4th 1027, 1039.) Subdivision (e)(4) applies to private
17 communications concerning issues of public interest. (*Terry v. Davis Community Church*
18 (2005) 131 Cal.App.4th 1534, 1546.) Accusations that church group leaders were
19 having inappropriate sexual relations with minor females in the youth group were
20 protected because they involved the societal interest in protecting a substantial number of
21 children from predators. (*Terry v. Davis Community Church*, 131 Cal.App.4th 1534,
22 1547.)

23 In opposition, Plaintiff attempts to distinguish an abstract public interest in the
24 homeless with Defendant’s statements that were specifically related to Plaintiff’s alleged
25 stealing from the homeless. In other words, there is no “public interest” in Plaintiff’s
26 alleged theft of money from other individuals. To the contrary, Defendant’s statements
27 were made in connection with the investigation of Plaintiff’s activities as the Homeless
28 Services Coordinator for CAPSLO. While the statements made were limited to

1 accusations against Plaintiff, they were made in the context of an investigation of the
2 delivery of homeless services and mismanagement of services by CAPSLO, which can
3 broadly be construed as an issue of public interest. Whether a matter is in the public
4 interest is a question which must be “construed broadly” to safeguard “the valid exercise
5 of the constitutional rights of freedom of speech and petition for the redress of
6 grievances”. (*Nygard, Inc. v. Uusi-Kerttula, supra*, 159 Cal.App.4th 1027, 1039 quoting
7 CCP §425.16(a).)

8 The burden now shifts to Plaintiff to demonstrate a probability of prevailing on
9 her defamation cause of action. Plaintiff must make a prima facie showing of facts that
10 would support a judgment in her favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714; Weil
11 & Brown, *California Practice Guide, Civil Pro. Before Trial*, §7:1008.)

12 Defamation involves a publication that is false, defamatory, and unprivileged, and
13 that has a natural tendency to injure or that causes special damage. (*Smith v. Maldonado*
14 (1999) 72 Cal.App.4th 637, 645.) Defamation may be either libel or slander. Pursuant to
15 Civil Code §46(1), slander is a false and unprivileged publication, orally uttered, that
16 charges any person with crime. Defendant accused Plaintiff of theft which she contends
17 is untrue and which would support a prima facie defamation claim.

18 Defendant does not dispute that the alleged statements are defamatory if the
19 statements are in fact false. Rather, he contends he is immune from liability under the
20 absolute privilege set forth in Civil Code §47(b). Defendant also argues Plaintiff cannot
21 show the necessary “actual malice” under the *New York Times v. Sullivan* (1964) 376
22 U.S. 254 test to establish liability.

23 As briefly discussed above, the litigation privilege under Civil Code §47(b)
24 applies to any communication made in judicial or quasi-judicial proceedings; by litigants
25 or other participants authorized by law; to achieve the objects of the litigation; and that
26 have some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50
27 Cal.3d 205, 212.) Defendant relies on *Hagberg v. California Federal Bank FSB* (2004)

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1 32 Cal.4th 39, for the proposition that Civil Code §47(b) shields pre-investigation
2 statements from being the subject of a slander suit.

3 *Hagberg* involved statements made to the police to report suspected criminal
4 activity. Nevertheless, Defendant points to the *Hagberg* court's acknowledgment that the
5 privilege is applicable to statements made in preparation for or to prompt investigation
6 that may result in the initiation of judicial or quasi-judicial proceedings. (*Id.* at 368)
7 Defendant's statements in this case were to a private individual and not to a law
8 enforcement agency. Defendant's inquiry was for an investigative news article.
9 Defendant does not cite to any case law that suggests his statements or activities made in
10 the investigation for a news story would fall under Civil Code §47(b).

11 In his reply brief, Defendant argues he was gathering information to provide to
12 law enforcement or other governmental entities; but in his declaration, he admits his
13 phone call to Barber was to "gather information on an issue of important public concern,
14 and to confirm or debunk other reports concerning taking of things donated to the
15 homeless by a public figure...." Again, this affirms the purpose was for an investigative
16 news report which does not appear to fall within the absolute privilege of Civil Code
17 §47(b). (See, also, Defendant's August 15, 2013 Declaration at p. 2, line 25, et seq.)

18 In *New York Times v. Sullivan* (1964) 376 U.S. 254, the United States Supreme
19 Court used the First and Fourteenth Amendments to create a qualified privilege related to
20 defamation actions filed by public officials or figures. The *New York Times* court stated:
21 "The constitutional guarantees require, we think, a federal rule that prohibits a public
22 official from recovering damages for a defamatory falsehood relating to his official
23 conduct unless he proves that the statement was made with 'actual malice'-that is, with
24 knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.*
25 at 279-280.) The required state of mind for malice is generally referred to as "actual
26 malice" or "*New York Times* malice" and is best defined as follows:

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28 It also is worth emphasizing that the actual malice standard is not satisfied
merely through a showing of ill will or "malice" in the ordinary sense of
the term. See *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S.Ct.

1 197 (1967); *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992 (1965) (*per*
2 *curiam*) Actual malice, instead, requires at a minimum that the
3 statements were made with a reckless disregard for the truth. And although
4 the concept of ‘reckless disregard’ ‘cannot be fully encompassed in one
5 infallible definition,’ *St. Amant v. Thompson*, 390 U.S. 727, 730, 88 S.Ct.
6 1323, 1325 (1968), we have made clear that the defendant must have made

7 the false publication with a ‘high degree of awareness of ... probable
8 falsity,’ *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or must have
9 ‘entertained serious doubts as to the truth of his publication,’ (*St. Amant*,
10 *supra*, 390 U.S. at 731; *Harte-Hanks Communications, Inc. v.*
11 *Connaughton* (1989) 491 U.S. 657, 666-67.)

12 However, it must first be decided whether or not Plaintiff is a “public figure.”

13 There are two different types of public figures as summarized in *Stolz v. KSFM 102 FM*
14 (1994) 30 Cal.App.4th 195:

15 For the most part those who attain this status [of public figure] have
16 assumed roles of especial prominence in the affairs of society. Some
17 occupy positions of such persuasive power and influence that they are
18 deemed public figures for all purposes. (*Gertz, supra*, 418 U.S. at p. 345.)
19 This category is designated ‘all purpose’ public figure. (418 U.S. at p. 351,
20 94 S.Ct. at p. 3013.) All-purpose public figurehead will not be lightly
21 assumed; in order for a plaintiff to be deemed an all-purpose public figure,
22 there must be ‘clear evidence of general fame or notoriety in the
23 community, and pervasive involvement in the affairs of society....’ (418
24 U.S. at p. 352, 94 S.Ct. at p. 3013.)

25 More commonly, those classed as public figures have thrust themselves to
26 the forefront of particular public controversies in order to influence the
27 resolution of the issues involved. (*Gertz, supra*, 418 U.S. at p. 345.) This
28 ‘limited purpose’ or ‘vortex’ public figure is an individual who
‘voluntarily injects himself or is drawn into a particular public controversy
and thereby becomes a public figure for a limited range of issues.’ (418
U.S. at p. 351, 94 S.Ct. at p. 3013.) ‘Unlike the ‘all purpose’ public figure,
the ‘limited purpose’ public figure loses certain protection for his
reputation only to the extent that the allegedly defamatory communication
relates to his role in a public controversy.’ (*Reader's Digest Assn., supra*,
37 Cal.3d at pp. 253–254; *Stolz v. KSFM 102 FM, supra*, 30 Cal.App.4th
195, 203.)

1 In the moving papers, Defendant concludes Plaintiff is a public figure. Plaintiff
2 argues Defendant cannot meet his burden to show she is a “public figure” as defined in
3 *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569. In *Ampex*, a limited purpose
4 public figure was defined as follows:

5 First, there must be a public controversy, which means the issue was
6 debated publicly and had foreseeable and substantial ramifications for
7 nonparticipants. Second, the plaintiff must have undertaken some
8 voluntary act through which he or she sought to influence resolution of the
9 public issue. In this regard it is sufficient that the plaintiff attempts to
10 thrust him or herself into the public eye. And finally, the alleged
11 defamation must be germane to the plaintiff's participation in the
12 controversy. (*Id.* at 1577.)

11 Plaintiff is the Homeless Services Coordinator for CAPSLO and the focus of her
12 employment is to assist San Luis Obispo's homeless population. Nonetheless, Plaintiff
13 asserts she has never intentionally thrust herself personally into any public controversy
14 with the intention of affecting the outcome of that controversy. In reply, Defendant
15 points out that Plaintiff was appointed by the Board of Supervisors to the Homeless
16 Services Oversight Council, a position that requires a public application. Plaintiff, in her
17 application, stated she is involved in the County's 10 year plan to end homelessness and
18 represented her passion, knowledge, and direct experience working with the homeless
19 population would provide a voice which is unique and beneficial to the Council.
20 Defendant also provides copies of multiple newspaper articles in which Plaintiff is quoted
21 as an advocate for the homeless.

22 Addressing the homeless in San Luis Obispo can be classified as a public
23 controversy which is debated publicly. Plaintiff has admittedly undertaken to address the
24 homeless issues in her role as Homeless Services Coordinator for CAPSLO, and has
25 voluntarily assisted the City and the County in developing plans to end homelessness.
26 This includes applying for her position on the Homeless Services Oversight Council.
27 Finally, the alleged defamation is germane to Plaintiff's participation in the controversy.
28 It appears Plaintiff is a limited public purpose figure. (See, *Christian Research Institute v.*

1 *Alnor* (2007) 148 Cal.App.4th 71, in which a president of a nonprofit organization that
2 disseminates religious information was a public figure.)

3 Because Plaintiff is a public figure she has the burden of proving that the alleged
4 defamatory statement is false and that the Defendant acted with “actual malice.”
5 (*Christian Research Institute v. Alnor, supra*, 148 Cal.App.4th 71, 81.) Plaintiff must
6 also demonstrate “actual malice” by clear and convincing evidence. (*Id.* at 84.) In this
7 special motion to strike, Plaintiff, in order to meet her burden, must present sufficient
8 evidence to satisfy the standard of proof required under the applicable substantive law;
9 which in this instance is clear and convincing evidence of actual malice. (*Id.*)

10 To establish actual malice, Plaintiff must show that Defendant either knew his
11 statements were false or that he subjectively entertained serious doubts that his statements
12 were truthful. (*Id.*) A defamation plaintiff may rely on inferences drawn from
13 circumstantial evidence to show actual malice. (*Id.*) Thus, the plaintiff could establish
14 that the defendant relied on unreliable sources or sources known to be biased which
15 would indicate the publisher of the statements had serious doubts about the truth of his or
16 her publication. (*Id.* at 85.) Also, if the statements are fabricated or are so inherently
17 improbable or where there is obvious reason to doubt the veracity of the informant, there
18 may be sufficient evidence of actual malice. (*Id.*) However, failure to conduct a thorough
19 and objective investigation alone does not prove actual malice. (*Id.*)

20 Plaintiff fails to provide clear and convincing evidence that Defendant acted with
21 actual malice. There is no evidence that Defendant fabricated the story or that the
22 statements were so inherently improbable that there was an obvious reason to doubt the
23 veracity.

24 Plaintiff provides supplemental evidence that Ralph Almirol (Almirol) has a
25 “deep hatred” for her and is not a credible source of any information that may have been
26 provided to Defendant. According to Plaintiff, the public record is replete with
27 documents showing Mr. Almirol’s dislike for her and affirming his lack of credibility.
28 Under the appropriate circumstances, reliance on an unreliable source could show a

1 defendant had serious doubts about the truth of his or her statements. Here, there is no
2 showing that Defendant was aware of any issue with Mr. Almirol's credibility. More
3 importantly, Mr. Almirol was not the only source of the information. According to Karen
4 Velie, on March 1, 2013 over a dozen sources, many former and current CAPSLO
5 employees, came forward. A confidential source related information about Plaintiff
6 when Plaintiff was working in Orange County. Additional sources related that Plaintiff's
7 former cohabitants and spouses had information concerning misappropriation of gift
8 cards. Thus, Defendant was tasked with investigating these allegations.

9 Defendant also provides a lengthy declaration from Gerald May (May), a
10 recipient of homeless services at the Maxine Lewis Shelter and Prado Day Center. May
11 states packages of gift cards were donated to the shelter and were directed to Plaintiff's
12 office, but Mr. May rarely ever observed any homeless persons being provided with the
13 gift cards. In addition, Defendant provides the Declaration of Veronica Nevarez which
14 tends to defeat Plaintiff's proof of actual malice.

15 Plaintiff had requested at an informal discovery conference on August 14, 2013,
16 and at an ex parte hearing on August 20, 2013, and at the September 3, 2013 hearing, that
17 the stay of discovery be lifted to allow Plaintiff to take Defendant's deposition on the
18 issue of actual malice. The Court had indicated that it would consider such discovery if
19 Plaintiff demonstrated that such a deposition could lead to evidence which could prove
20 by clear and convincing evidence that Defendant harbored actual malice. Under the
21 circumstances of Defendant's alleged conduct here, and the declarations filed by
22 Defendant, Almirol, Velie, May, and Nevarez, the Court denies the request for discovery
23 because it is not likely to aid Plaintiff in meeting her burden of proof. The supplemental
24 evidence related to Mr. Almirol's credibility does not change that outcome.

25 Additionally, Plaintiff asserts the *New York Times* test is not applicable because it
26 has not been extended to non-media defendants. Both sides acknowledge that in *Miller v.*
27 *Nestande* (1987) 192 Cal.App.3d 191, the privilege was properly asserted by a non-media
28 defendant. In *Miller*, the defendant was a political candidate that mailed statements to

1 voters accusing his opponent, a former prison of war, of cooperating with the enemy.
2 The *Miller* court emphasized that the U.S. Supreme Court would most likely not make
3 any distinction based on the identity of the defendant. Rather, the protection is rooted in
4 providing special protection to communications concerning public affairs. (*Miller v.*
5 *Nestande, supra*, 192 Cal.App.3d 191, 199.) In reaching that conclusion, the *Miller* court
6 specifically disapproved its ruling in *Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 834
7 suggesting the constitutional standard does not apply to non-media defendants. (*Miller v.*
8 *Nestande, supra*, 192 Cal.App.3d 191, fn. 7.)

9 More importantly, as pointed out by Defendant, in *Nadel v. Regents of University*
10 *of California* (1994) 28 Cal.App.4th 1251, 1260, the appellate court noted numerous state
11 courts, including California, have held the *New York Times* rule applies to nonmedia
12 defendants, usually on the theory that there is no basis for affording greater protection to
13 the media than to ordinary citizens.

14 Defendant's special motion to strike is granted. Defendant meets his burden to
15 establish his alleged activity arises from his constitutionally protected free speech under
16 CCP §425.16(e)(4). Plaintiff fails to meet her burden of establishing a probability of
17 prevailing on her defamation claim because she, as a public figure, fails to show clear and
18 convincing evidence of actual malice.

19 The Case Management Conference scheduled for September 3, 2013, is ordered
20 off calendar. Defendant shall prepare, file and serve a proposed Judgment in his favor.

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22
23 DATED: September 6 2013


24 BARRY T. LA BARBERA
25 JUDGE

26 BTL:jn
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STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

Civil Division

CERTIFICATE OF MAILING

DEE TORRES VS. MICHAEL BRENNLER	CV130145
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Ogden, Roy E.

Attorney for Plaintiff

OGDEN & FRICKS LLP

656 Santa Rosa Street, Suite 2B

San Luis Obispo CA 93401

Jenkins, Stewart D.

Attorney for Defendant

Post Office Box 511

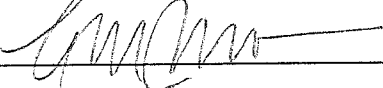
San Luis Obispo CA 93406 0511

Attached order dated 09-06-13

Under penalty of perjury, I hereby certify that I deposited in the United States mail, at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the foregoing addressed to each of the above
OR

If counsel has a pickup box in the Courthouse that a copy was placed in said pickup box this date.

SUSAN MATHERLY, Court Executive Officer

by , Deputy

Dated: 09-06-13