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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

LANDMARK EDUCATION CORPORATION, Plaintiff, vs. STEVEN PRESSMAN, Defendant.	Case No: 989890 OPPOSITION TO MOTION FOR SANCTIONS Date: January 16, 1998 Time: 9:30 A.M. Dept: 301 Judge: Hon. David A. Garcia Date Action Filed: September 26, 1997 Trial Date: Not set

I. INTRODUCTION.

In 1994 plaintiff Landmark Education Corporation ("Landmark") filed suit against Cult Awareness Network ("CAN") and certain affiliates in Cook County, Illinois, case number 94-L-11478 ("the Illinois action"). Steven Pressman ("Pressman") is not a defendant in the Illinois action. Moreover, the only mention of Pressman in the voluminous complaint is in an exhibit reproducing content from CAN's website, where Pressman's book, Outrageous Betrayal: The Dark Journey of Werner Erhard from Est to Exile, was offered for sale. Declaration of Judy Alexander filed in connection with Defendant's Motion to Strike Complaint ("First Alexander Decl."), ¶2 and Exh. A. The complaint contains no allegation that any facts in Outrageous Betrayal are false or that Outrageous Betrayal in any other way injured Landmark. Id.

Nonetheless, claiming without stated basis that Landmark has reason to believe that Pressman provided information about Landmark directly to the Illinois defendants (Motion to Compel, 2:7-9), which he did not (Declaration of Steven Pressman filed in connection with Defendant's Motion to Strike Complaint ("Pressman Decl."), ¶ 8), Landmark served a subpoena for Pressman's deposition. Pressman appeared and responded to all questions except those he was instructed not to answer by his counsel based on his rights as a journalist. Answering the questions Pressman was instructed not to answer would have revealed his unidentified news sources and other unpublished information obtained or prepared by Pressman while he was a journalist engaged in newsgathering for dissemination of information to the public. Pressman Decl., ¶ 9. Most of these questions also have absolutely no relevance to the Illinois action.

During the meet and confer process, Pressman offered to answer some of the questions if Landmark agreed not to assert that supplying such answers was a waiver of Pressman's rights as a journalist. Declaration of Carol LaPlant in Support of Motion for Order Compelling Answers to Deposition Questions, and for Sanctions ("LaPlant Decl."), Exhs. D-3 and D-5. Pressman also agreed to provide under oath answers to all the remaining questions to which Landmark sought answers for all periods of time except when he was directly engaged in newsgathering. Id., Exhs. D-5 and D-7. Landmark rejected these offers of further answers. Id., Exhs. D-4 and D-6. Landmark then filed a complaint and a motion to compel answers to deposition questions.

Because Pressman believes that Landmark's efforts to compel disclosure of his sources and unpublished information is an unmeritorious attempt to harass and punish him for writing a book critical of Landmark and its predecessors, Pressman responded to the complaint by filing a special motion to strike under Code of Civil Procedure section 425.16 ("section 425.16"). Pressman also demurred to the complaint because it is clear from the face of the complaint and other papers filed by Landmark of which the court can take judicial notice that Pressman was entitled under the federal and California constitutions to refuse to answer the deposition questions at issue.

In an effort to have all of the issues in this matter decided in a single hearing, Pressman applied to have the motion to strike and demurrer heard and decided before Landmark's motion to compel was heard, believing that the motion to compel would thereafter be unnecessary. Declaration of Judy Alexander in Support of Opposition to Motion for Sanctions ("Second Alexander Decl."), ¶ 2 (Exh. A). This Court decided that the issue of the applicability of the journalist's privilege should be decided by the Discovery Commissioner prior to the hearing on the motion to strike and demurrer. Id.[1] However, both the Court and Landmark's counsel agreed that Pressman was entitled to have his motion to strike and demurrer heard. Id. Nonetheless, Landmark now seeks sanctions because Pressman declined to withdraw his motion to strike and demurrer. Landmark's sanction motion is without merit and should be denied.

II. LANDMARK'S MOTION FOR SANCTIONS IS ITSELF FRIVOLOUS AND MUST BE DENIED.

A. The anti-SLAPP statute applies to this action because Pressman's refusal to testify regarding unpublished information and undisclosed sources was an exercise of his free speech rights under the federal and California Constitutions.

Landmark bases its argument that the motion to strike its complaint is improper on two premises. First, Landmark asserts that section 425.16 does not apply unless an action arises from "defendant's exercise of free speech on a public issue and in a public forum," and that the present suit is not such an action. Memorandum of Points and Authorities in Support of Motion for Sanctions ("Motion"), 5:14-20. Second, Landmark asserts section 425.16 applies only to "complaints based on the exercise of free speech or the right of petition," and that this action does not arise from the exercise of such rights. Motion, 5:20-23. Both of these premises are false.

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[1] Landmark's discovery motion was heard on December 19, 1997 by Commissioner Richard E. Best and has been taken under submission. On January 6, 1998 Pressman's counsel suggested to Landmark's counsel that the hearing on the demurrer and motion to strike be continued until after Commissioner Best has issued a ruling on the motion to compel. Landmark's counsel felt such a continuance was unnecessary and wished to proceed with the hearing as scheduled. Second Alexander Decl., ¶ 3.

At the outset, Landmark's argument is built on the false assertion that this action is based exclusively on deposition questions posed to Pressman and his responses to those objections. See Motion, 5:17-23. However, this deposition did not occur in a vacuum. As Landmark's complaint and moving papers make clear, but for Pressman's newsgathering for and publication of a book concerning Werner Erhard and Landmark the deposition would never have occurred. See, e.g., Complaint, ¶ 4; Motion to Compel, 2:4-9, 3:16-4:11. Pressman's conduct in gathering information for and publishing this book, and the unsupported and unverified (and false) allegation that Pressman provided information to defendants in the Illinois action, are the only explanation that Landmark has ever provided for taking his deposition. Thus, Landmark's complaint and motion to compel arise not so much from Pressman's exercise of his constitutional free speech rights during the deposition as from his conduct in gathering and publishing information concerning Werner Erhard and Landmark that Landmark deems objectionable.

As explained in greater detail in Pressman's motion to strike the complaint, there can be no doubt that the publication and distribution of a book concerning a prominent and controversial public figure such as Werner Erhard constitutes an act "in furtherance of [Pressman's] right of petition or free speech under the United States or California Constitution in connection with a public issue." Civ. Proc. Code § 425.16(b)(1) (West 1998). Similarly, given the protection afforded to the newsgathering process by both the First Amendment and the California Constitution, there is no question that the process of gathering information for such a book also constitutes the exercise of speech rights within the meaning of section 425.16.[2] Landmark's claim that this is merely a discovery matter cannot obscure the fact that this action arises from the research, writing, and publication of a book, and not merely the refusal to answer improper deposition questions. Indeed, Landmark's attempt to ignore this fact betrays the spuriousness of this motion.

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[2] The authority and facts supporting these conclusions are set out in detail in Pressman's Memorandum of Points and Authorities in Support of Motion to Strike Complaint ("Motion to Strike"), at pages 3-6, and are hereby incorporated by Pressman into his opposition to Landmark's motion for sanctions. Therefore, that discussion will not be repeated here.

However, even if this action arose purely from Pressman's conduct at the deposition, Landmark's claim that section 425.16 is inapplicable would still be without merit. The courts have consistently recognized that the process of gathering information for dissemination to the public is protected by the First Amendment. United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978), citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Davis v. East Baton Rouge Parish School Board, 78 F.3d 920, 926 (5th Cir. 1996) ("The First Amendment provides at least some protection for the news agencies' efforts to gather the news."); Boddie v. American Broadcasting Co., Inc., 881 F.2d 267, 271 (6th Cir. 1989), cert. denied, 493 U.S. 1028 (1990) ("newsgathering does 'qualify for First Amendment protection'" because "'without some protection for seeking out news, freedom of the press would be eviscerated.'"); Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 513, 519 (1986) ("The First Amendment therefore bars interference with this traditional function of a free press in seeking out information by asking questions."). Protection for newsgathering is also guaranteed by the California Constitution. Mitchell v. Superior Court, 37 Cal. 3d 268, 274-75, 283-84 (1984). The courts have also consistently held that a person involved in newsgathering has a constitutional right to refuse to disclose unidentified sources and unpublished information obtained in the newsgathering process.[3] Therefore, it is beyond dispute that, even considering

[3] The First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia circuits have all expressly recognized a qualified privilege for newspersons to resist compelled discovery. See Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir.1980), cert. denied, 449 U.S. 1126 (1981); LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir.1980), cert. denied, 450 U.S. 1041 (1981); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir.1972), cert. denied, 409 U.S. 1125 (1973); Farr v. Pitchess, 522 F.2d 464, 467-69 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir.1977); Zerilli v. Smith, 656 F.2d 705, 714 (D.C.Cir.1981). The Eleventh Circuit inherited the privilege from the Fifth Circuit (see Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981), and has since recognized the privilege itself (see United States v. Caporale, 806 F.2d 1487, 1503-1504 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987) and, cert. denied, 483 U.S. 1021 (1987). The Seventh Circuit Court of Appeals itself has not ruled on the question, but a number of district courts in the Seventh Circuit have recognized and applied the privilege. See, e.g., Warzon v. Drew, 155 F.R.D. 183, 186-87 (E.D. Wis. 1994); May v. Collins, 122 F.R.D. 535 (S.D. Ind. 1988); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978). The Sixth Circuit, in dicta, refused to apply the privilege to prevent enforcement of a grand jury subpoena. See In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) (declining to recognize the privilege but holding that even if the First Amendment provided a qualified privilege it was overcome in the circumstances of that case). However, at least one federal district court in the Sixth Circuit

only Pressman's invocation at the deposition of his right not to disclose unidentified sources and unpublished information, the present action arises from the exercise of rights provided by the free speech provisions of the First Amendment and the California Constitution.

Nor is there any merit to Landmark's contention that section 425.16 does not apply because Pressman's exercise of his constitutional right not to respond to its improper deposition questions does not constitute the exercise of free speech rights in connection with a public issue and in a public forum. It is clear that, contrary to Landmark's assertion, the application of section 425.16 is *not* limited to speech that concerns a public issue and is made in a public forum. Rather, the term "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" is expressly defined to include all of the following:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) 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; (4) *or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*

Civ. Proc. Code § 425.16(e) (West 1998) (emphasis added).[4] Thus, the anti-SLAPP statute, by its own terms, applies to *any* conduct in furtherance of free speech rights in connection

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has since recognized that holding as dicta, limited it to its facts, and applied the First Amendment privilege to preclude discovery in a civil case. Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1310-12 (W.D. Mich. 1996).

In California, the privilege has been accepted as arising from the free speech provision of the California constitution (Cal. Const., art. I, sec. 2(a)), as well as from the First Amendment. See Mitchell, 37 Cal. 3d at 274, 283-84 (recognizing that reporters asserted "a nonstatutory privilege" based on the First Amendment and the California constitution, and holding that, contrary to the superior court's holding that there "was no reporter's privilege in California," "the California courts should recognize a qualified reporter's privilege . . . .").

[4] Section 425.16(e) was amended in August 1997 to include the additional definition of "act in furtherance of a person's right of petition or free speech . . ." set out in section 425.16(e)(4) ("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.") First Alexander Declaration, ¶ 3 (Exh. B). The amendment became effective on January 1, 1998. However, this language was added not to expand the scope of the statute, but to clarify that this was the original intent of the legislation, and correct the overly narrow construction of the statute by some courts such as the court in Zhao v. Wang, 48 Cal. App. 4th (1996), cited by Landmark. Id., ¶ 4 (Exh. C). Thus,

with an issue of public interest. Furthermore, the legislature has made it clear that the statute is to be "construed broadly." Civ. Proc. Code § 425.16(a) (West 1998). See also Averill v. Superior Court, 42 Cal. App. 4th 1170, 1176 (1996) ("we conclude the Legislature intended the statute to have broad application"). Any doubt as to the statute's scope must be resolved in favor of finding it applicable.

It is also clear that Pressman's invocation of his constitutional right to refuse to disclose unidentified sources and unpublished information constitutes the exercise of free speech rights in connection with an issue of public interest. The entire purpose of the Shield Law and the privilege afforded by the First Amendment and the California Constitution is to promote the public interest in receiving information by ensuring that the newsgathering process is not unduly hampered by entities such as Landmark. As the California Supreme Court has stated:

> "Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establish a relationship with an informant."

Mitchell, 37 Cal. 3d at 274-75, quoting Zerilli, 656 F.2d at 710-11. Therefore, Pressman's invocation of these rights and the attempt by Landmark to intrude on the newsgathering process is inherently a matter of public interest. In addition, as discussed above, there can be no doubt that the gathering and dissemination of information concerning a controversial public figure such as Werner Erhard is a matter of public interest.

Moreover, Landmark's action shares a number of the "conceptual features" of a typical SLAPP suit (see Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815-17 (1994)). As discussed in Pressman's Motion to Strike, another entity associated with Werner Erhard, the Global Hunger Project, previously filed and then dismissed a defamation action against Pressman. Now Landmark, which is also closely associated with Werner Erhard and which is a large corporate entity with considerable financial resources, has sued Pressman, an

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the effect of the amendment was not to revise the statute, but to clarify what had always been its intended application.

individual with very limited resources, in order to subject him to a purposeless and unnecessary deposition. Landmark has pursued this action despite Pressman's testimony that he never provided any information to any defendant in the Illinois action, so that there is no conceivable relevance to *any* of the information sought by Landmark (as Landmark would have known had it bothered to ask any of the defendants before noticing Pressman's deposition). Pressman Decl., ¶ 8. In addition, Landmark has persisted in vigorously litigating this matter in the most burdensome manner possible, even though the Illinois litigation upon which it is purportedly based has now been almost entirely resolved. Landmark has settled with all but one of the Illinois defendants, and as to the sole remaining defendant a summary judgment motion is pending that may very well resolve the case. Second Alexander Decl., ¶ 4. In light of these facts, Landmark cannot seriously contend it was necessary to take Pressman's deposition, much less that the continued litigation of this matter serves any purpose other than the harassment of Pressman.

All of this legal harassment arises directly from Pressman's exercise of his free speech rights—his work on and publication of a book regarding Werner Erhard. This history of harassment of Pressman with unmeritorious litigation by Erhard-associated entities, together with Landmark's conduct in this action, strongly indicates that Landmark filed this action primarily "for delay and distraction" and "to punish [him] by imposing litigation costs on [him] for exercising [his] constitutional right to speak. . . ." Dixon v. Superior Court, 30 Cal. App. 4th 733, 741 (1994). See also Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 648-49 (1996) (a "course of oppressive litigation conduct" justifies application of the anti-SLAPP statute).

In short, Landmark's claim that section 425.16 is not applicable to this action is entirely without merit. Indeed, this motion for sanctions is simply another example of Landmark's efforts to intimidate and harass Pressman. Such efforts cannot be countenanced. Landmark's motion should be denied.

B. Landmark's assertion that the demurrer is improper is contrary to the well established principles that a demurrer may be based on matters of which the court may take judicial notice, and that a court need not accept as true legal conclusions pleaded in a complaint.

Landmark asserts that Pressman's demurrer is improper for three reasons, each of which is wholly without merit. First, Landmark claims that the demurrer is not made on any ground contained in Code of Civil Procedure section 430.10. However, it is well-established that "[w]here an affirmative defense appears on the face of the complaint that defense may be raised by a demurrer for failure to state a cause of action." Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 800 (1985); accord Barton v. New United Motor Manufacturing, Inc., 43 Cal. App. 4th 1200, 1210 (1996) (demurrer proper where statute of limitations defense shown on face of complaint); Carroll v. Puritan Leasing Company, 77 Cal. App. 3d 481, 490 (1978) (demurrer proper where collateral estoppel defense appeared on face of complaint). Furthermore, "'[w]here the existence of privilege is disclosed on the face of the complaint, the privilege is available as a matter of defense on demurrer.'" Green v. Uccelli, 207 Cal. App. 3d 1112, 1124 (1989), quoting Whelan v. Wolford, 164 Cal. App. 2d 689, 693 (1958). Thus it is not improper for Pressman to base his demurrer on the assertion that the relief sought by Landmark is barred by the journalist's privilege under the federal and California constitutions.

Second, Landmark contends that the asserted ground for Pressman's demurrer is not based on any matter appearing on the face of the complaint or from any matter of which the Court may take judicial notice. To the contrary, all of the facts necessary to determine that Pressman's refusal to answer the deposition questions at issue was justified by his rights under the federal and California constitutions are contained in the complaint and Landmark's papers filed in support of its motion to compel. See Complaint for Order Compelling Answers to Deposition Questions (¶¶ 4, 8), Separate Statement of Questions and Responses in Dispute, and LaPlant Decl. and the exhibits thereto. These are all matters within the scope of judicial notice. Evidence Code section 452(d) (West 1998) (judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of

any state of the United States"); Day v. Sharp, 50 Cal. App. 3d 904, 914 (1975) (same); Del E. Webb Corporation v. Structural Materials Company, 123 Cal. App. 3d 593, 604-605 (1981) (court may take judicial notice of plaintiff's affidavits).

Finally, Landmark asserts that because the complaint alleges that the questions in dispute are proper discovery and not within the scope of the newsman's shield, the demurrer is improper because it must admit these allegations. Although for purposes of a demurrer all properly pleaded *facts* must be assumed true, the court may not assume the truth of contentions, deductions or conclusions of fact or law. Moore v. Regents of University of California, 51 Cal. 3d 120, 125 (1990), cert. denied, 499 U.S. 936 (1991). Landmark's allegations that the deposition questions in dispute are proper discovery and not within the scope of the journalist's privilege are clearly legal conclusions and not factual allegations. Thus Pressman's demurrer is not improper for failing to admit these allegations.

III. CONCLUSION.

Landmark filed a complaint against Pressman to which he was obligated to respond. Pressman's response--a motion to strike and demurrer--was filed in good faith based on his legitimate belief that he is being harassed by Landmark for writing a book critical of Landmark and Werner Erhard. Landmark's arguments for why the motion to strike and demurrer are improper are all without merit. Pressman is entitled to a hearing on his motion and demurrer and should not be sanctioned for refusing to give up that right. Pressman thus respectfully asks this Court to deny Landmark's motion for sanctions.

Dated: January 9, 1998.

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