2nd Civil No. B229358

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

PERSONAL COURT REPORTERS, INC. *Plaintiff and Respondent,*

vs.

GARY RAND dba RAND & RAND-LEWIS, SUZANNE RAND-LEWIS dba RAND & RAND-LEWIS; and DOES 1-10, inclusive. *Defendants and Appellants.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE MICHAEL HARWIN, JUDGE
TRIAL COURT CASE NO. LC088468

RESPONDENT PERSONAL COURT REPORTERS, INC.'S OPENING BRIEF

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I. INTRODUCTION

This is an appeal brought by Appellants after the trial court denied their anti-SLAPP motion (*Code of Civil Procedure* section 425.16). AA118.

Respondent's underlying case is a simple debt collection case. Respondent is a court reporting agency which provided greater than $30,000 in deposition services to Appellants. For reasons unknown, Appellants have made heroic efforts to avoid paying their invoices. Appellants alleged in their anti-SLAPP motion, AA14-60, that the depositions were taken in connection with ongoing litigation, so that they should be afforded protection of the anti-SLAPP statute, California *Code of Civil Procedure* section 425.16, and not have to pay their bills. As will be explained below, Division 6 of this Court has rejected a similar argument in connection with one of the same Appellants in the past,[1] and this Division should also reject it here. In filing their motion and this appeal, Appellants also seek to set a dangerous precedent which would prevent court reporters from ever collecting on outstanding invoices.

II. STATEMENT OF FACTS

A. The Trial Court's Decisions

On December 3, 2010, after a hearing on Appellant's special motion to strike brought pursuant to *California Code of Civil Procedure* section 425.16, the Trial Court, the Honorable Michael Harwin, Judge presiding, denied the motion, and held that the motion is not appropriate. AA118.

III. ISSUE PRESENTED FOR REVIEW

In a collection case to recover unpaid deposition reporting fees from the

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[1] *See California Back Specialists Medical Group v. Rand* (Div. 2, 2008) 160 Cal.App.4th 1032.

attorneys who requested such services, was the Trial Court correct in determining that such suit should not be stricken as a SLAPP action under *California Code of Civil Procedure* section 425.16?

IV. STANDARD OF REVIEW

The Trial Court's determination in an anti-SLAPP special motion to strike is subject to *de novo* review on appeal. *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal. App. 4th 719, 727, disapproved on other grounds in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal. 4th 192; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal. App. 4th 1228, 1245; *Annette F. v. Sharon S.* (2004) 119 Cal. App. 4th 1146, 1159.

The anti-SLAPP statute was enacted in response to what the California Legislature described as a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." It provides that any such lawsuits "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." *Cal. Civ. Proc. Code* § 425.16(b).

Deciding an anti-SLAPP motion requires a court 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 that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.

To establish a probability of prevailing on the claim, a plaintiff

responding to an anti-SLAPP motion must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. Although the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19; *Fontani v. Wells Fargo Investments, LLC*, *supra*, 129 Cal.App.4th at 727. This Court need not reach the second prong of this analysis and, additionally, Appellants have not provided sufficient evidence to overcome Respondent's sufficient prima facie showing that it can prevail.

V. STATEMENT OF APPEALABILITY

Respondent agrees with the Statement of Appealability set forth by the Appellants.

VI. STATEMENT OF THE CASE

A. Procedural History

Respondent agrees with the Procedural History set forth by the Appellants, except that the Trial Court had opted to consider Respondent's brief that was only one day late and caused no prejudice to Appellants. A late-filed paper will be accepted for filing but a court, in its discretion, may refuse to consider it in ruling on the motion. Where a court refuses to consider a late-filed paper, the minutes or order must so indicate. Rule 3.1300(d),

California Rules of Court. The minutes here did not so indicate and, instead, reflect that the Trial Court considered Respondent's opposition. AA118, ¶ 2.

B. Statement of Facts

Respondent agrees with Appellant's position as to why the case is before this Court.

1. Appellants' Special Motion to Strike Was Filed Untimely

Appellants in the underlying lawsuit were served with the summons and complaint on _____. A special motion to strike under *California Code of Civil Procedure* section 425.16 must be filed no later than 60 days after service of the summons and complaint. *California Code of Civil Procedure*§ 425.16(f) provides as follows:

> (f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

Appellants never sought leave of Court to file a late motion. Accordingly, the anti-SLAPP motion of Appellants is untimely and should be denied on that basis.

2. Background Information

Respondent Personal Court Reporters, Inc. (hereinafter Respondent) had its court reporters report several depositions ordered by appellants Gary Rand dba Rand & Rand-Lewis and Suzanne Rand-Lewis dba Rand & Rand-Lewis (hereinafter Appellants) beginning in January 2009, in a case entitled

Bates v. Otis Elevator Company, Superior Court case number EC045777,[2] and continuing for one year in several other litigated matters. After Respondent provided Appellant with verified transcripts of the depositions and accompanied the transcripts with invoices, Appellants failed to pay the invoices within a reasonable time although they presumably made use of such transcripts to their and their clients' advantage in their numerous cases. On April 22, 2010, Respondent brought suit in Superior Court for payment plus interest. AA4-8.

3. The Allegations of Respondent's Complaint

In the complaint, Respondent alleged causes of action for breach of contract and common counts, and sought damages that totaled $32,323.45, interest at the rate of 18.0 percent from April 5, 2010, and attorney's fees according to proof. The breach of contract cause of action alleged that written invoices were provided to defendants on January 14, 2009, and defendants breached the invoices – which constituted written agreements – on or about April 5, 2010. On the common counts cause of action, Respondent alleged that within the last four years, Appellants became indebted to Respondent on an open book account for money due and, because an account was stated in writing between the parties, it was agreed that Appellants would become indebted to Respondent.

4. Appellants' Special Motion to Strike

Rather than answer the straightforward complaint, on November 8, 2010, Appellants filed a special motion to strike pursuant to *Code of Civil Procedure* section 425.16. AA9-55. They alleged, among other things, that because depositions were taken in connection with court proceedings that were

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[2] Appellant dismissed that case with prejudice on February 22, 2011.

being prosecuted by Appellants on behalf of their clients, no suit can be maintained by Respondent for collection of deposition reporting fees. They also alleged that since they protested what they considered "excessive" fees charged by Respondent, Respondent violated Appellants' free speech rights by bringing suit to collect monies owed.

5. Respondent's Opposition

On November 19, 2010, Respondent filed its opposition to the special motion to strike, and attached authenticated copies of the unpaid invoices. AA56-87. Respondent alleged that Appellant's office manager scheduled numerous meetings to discuss establishing a payment plan to satisfy the debts, but cancelled each meeting. Respondent also alleged that it sought from Appellants information regarding any dispute as to any portion of the debt, but no document disputing the debt ever was received. Appellants also never responded to Respondent's attorney's letters regarding the outstanding debt.

More importantly regarding the motion, Appellants incorrectly claimed that their refusal to pay their obligations invokes "free speech," Appellants' conduct did not occur in court proceedings, and Respondent's suit was not filed to "chill" Appellants' right to free speech, but merely to collect debts owed.

6. Appellants' Reply

On November 24, 2010, Appellants filed their reply memorandum, along with their objections to evidence. AA88-117.

7. The Trial Court's Ruling on Appellants' Special Motion to Strike

After hearing argument on December 3, 2010, the trial court, Judge Michael Harwin presiding, denied Appellants' motion brought under the anti-SLAPP statute, *California Code of Civil Procedure* section 425.16, and tersely

wrote in its minute order:

> "The Court is not satisfied that the motion under CCP Section 425.16 is appropriate to this action and the motion is denied."

AA118.

VII. RESPONDENT'S RECORD

Respondent has no additional documents to supplement the record filed as Appellant's Appendix. Respondent's references herein are to pages within Appellant's Appendix, denominated as *AA*.

VIII. ARGUMENT

Respondent agrees with the issues raised by the Appellants with the exception that no case law supported Appellants' motion, that it was frivolous and it was interposed for the purpose of delay, as is this appeal.

A. Respondent's Lawsuit Is Not Subject to the SLAPP Statute

California Code of Civil Procedure §425.16 provides as follows:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b) (l) 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 or 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.

Unless Appellants can demonstrate that Respondent's complaint somehow interferes with these rights or the litigation privilege, they have not satisfied the first prong of the test of a *Code of Civil Procedure* § 425.16 motion and there is then no need to determine if Respondent likely can prevail on its Complaint as Appellants' Motion must be denied as it was in the Trial Court.

The Trial Court and this reviewing Court each must determining whether the underlying complaint arises from protected activity. Thus, the Court must focus on the substance of the claim.

> "[T]he critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech."

City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78. The principal thrust or gravamen of a cause of action determines whether the anti-SLAPP statute applies. *California Back Specialists Medical Group v. Rand*, *supra*, 160 Cal.App.4th at p. 1037.

> The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning.

Navellier v. Sletten (2002) 29 Cal.4th 82, 92. The anti-SLAPP statute does not apply since the alleged protected activity is only collateral or incidental to the act forming the basis for the complaint. *California Back Specialists Medical Group v. Rand*, *supra*, at p. 1037. *See also Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 794 ["The anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the purpose of the transaction or occurrence underlying the complaint"]. This Court can take judicial notice that court reporters stenographically record the words of deponents and others who testify at deposition, arbitration, a court

hearing, or trial.[3]

As can be expected, Appellants provide plenty of theory, but no facts or conflicting facts to work with. Appellants never cite the prior underlying personal injury and other cases, including full captions identifying the parties, nor ever show how refusing to pay Respondent's deposition invoices could remotely apply to the substance of those cases. Respondent and Appellants are not adversaries in the multiple underlying lawsuits. This is not a suit against the defense attorneys in the prior cases. Respondent had no interest in the dismissed prior litigation or in any of the other cases, other than seeking compensation for its reporters' services. Appellants' failure to pay Respondent's deposition reporting invoices never was under consideration in any court or official proceedings until Respondent filed the underlying action. *See California Back Specialists Medical Group v. Rand*, *supra*, at p. 1037.

As in their previous futile attempt to convince the Court of Appeal to throw common sense to the wind,[4] Appellants cite numerous cases, but none is on point. *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8 involved a developer who instigated litigation in a prior matter to prevent the building of a shopping mall in Barstow. The City of Barstow sued him for instigating litigation. The parties in *Ludwig* were adversaries or used a proxy as an adversary in the prior underlying litigation. Respondent had not instituted the prior elevator accident-related litigation or any of the other cases involving a different party.

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[3] The absurd position of Appellants would have this Court find that court reporters – including those who report law and motion hearings in any court – could never charge or collect payment for their services.

[4] *California Back Specialists Medical Group v. Rand*, *supra,* 160 Cal.App.4th 1032.

Vergos v McNeal (2007) 146 Cal.App.4th 1387 offers no help to Appellants. The opening paragraph of that case tells it all. Plaintiff Randy Vergos, who alleges he was sexually harassed in his employment at the University of California at Davis (UCD), filed a civil rights claim against the manager who denied his administrative grievances – defendant Julie McNeal (acting director of UCD's Facilities Services Department). The defendant in that case was acting in her official capacity as a hearing officer. Here, there is no issue of public interest, nor action by a state employee.

The facts of *Briggs v. Eden Council For Hope & Opportunity* (1999) 19 Cal.4th 1106 are of no assistance either. The facts of that case obviously demonstrated interference with free speech.

> Plaintiffs Dan and Judy Briggs own residential rental properties. Defendant Eden Council for Hope and Opportunity (ECHO), a nonprofit corporation partly funded by city and county grants, counsels tenants and mediates landlord-tenant disputes. Seeking damages for defamation and intentional and negligent infliction of emotional distress, plaintiffs allege ECHO harassed and defamed them.

Here there was no question that no one interfered with free speech. AA85, ¶18.

Rohde v. Wolf (2007) 154 Cal.App.4th 28 is a suit by a former litigant against her former opponents' attorney for his prelitigation activities. Other than a scathing attack on a certain attorney, *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, offers Appellants no assistance. The opening paragraph again says it all:

> Sometimes lawyers seem to forget that, in their professional capacities, they owe a duty of loyalty to their clients – even when they no longer like them. And when a lawyer becomes convinced his client is on the wrong side of a particular legal dispute, the lawyer generally has the option of staying out of that dispute. He does not, however, have the option of switching sides and suing a client on behalf of a third party,

> alleging that the very settlement he obtained for the client in prior litigation actually belongs to the third party. And when the client objects to such an attempt, and sues the lawyer for breach of his professional obligations, the lawyer probably shouldn't cross-complain back against her, apparently outraged that she has dragged him into the controversy and caused him to expend money to defend himself.

In this matter, there is no conflict of interest, side-switching, or cross-complaint.

Likewise, *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347 is not helpful to Appellants. In *Philipson*, after a settlement in an underlying suit, the litigant sued his own attorneys for breach of fiduciary duties and other causes of action involving the settlement. The law firm cross-complained for, among other things, fraud and negligent misrepresentation. The Court of Appeal found that these two causes of action in the cross-complaint were barred by the litigation privilege, as the conduct alleged by the firm involved activities during the settlement conference. The case was remanded on the grounds that the causes of action for breach of contract and of implied covenant of good faith and fair dealing should not have been subject to an anti-SLAPP motion. Here, Respondent and Appellants had no relationship in connection with the underlying litigation.

Similarly, even *Wilcox v. Superior Court* (Peters) (1994) 27 Cal.App.4th 809 (disapproved on other grounds, 29 Cal.4th 53 (2002)), does not resuscitate Appellants' moribund argument. The Court of Appeal held that a cross-complaint against Saunders, among others, a person who helped fund litigation involving alleged anti-competitive activities by a few court reporters, is a SLAPP action because the issues involve a direct connection to litigation and invoked the right to petition and free speech in connection with a public issue. The Court of Appeal ordered issuance of a writ of mandate for the

Wilcox trial court to enter an order striking the cross-complaint in its entirety.

In the instant case, Respondent simply is seeking payment of its deposition reporting invoices. It is not funding litigation, nor are Appellants speaking out against any illegal activities by Respondents. A private dispute over unpaid invoices does not rise to the level of "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." *Cal. Civ. Proc. Code* § 425.16(e)(4).

1. Respondent's Lawsuit Is Not Barred by the Litigation Privilege

Invocation of the litigation privilege is misplaced. The Court of Appeal in *A.F. Brown Electrical Contractor, Inc. v Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118 examined these issues and stated:

> [W]here a cause of action is based on allegations that include protected and nonprotected activities, the cause of action is vulnerable to a special motion to strike under the anti-SLAPP statute only if the protected conduct forms a substantial part of the factual basis for the claim. (*Mann [v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90], at p. 104.) If the defendant meets its burden on this score, the plaintiff need only demonstrate the cause of action has some merit. (*Id.* at p. 106 ["a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action"].)

Id., 137 Cal.App.4th at p. 1125.

> Under the "'usual formulation,'" the litigation "'privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.]" (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049,

> 1058 [18 Cal.Rptr.3d 882].) The privilege extends to "any publication ... that is required [citation] or permitted [citation] by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked." (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 380-381.)

Id., 137 Cal.App.4th at p. 1126. Appellants' not having paid Respondent in this action has nothing to do with achieving the objectives of the separate personal injury action litigation or of any of the other cases in which Appellants were the attorneys. Telling the Respondent that its invoices will not be paid would in no way advance any of the prior cases.

2. Respondent's Lawsuit Is Not Barred by the Rights of Free Speech or to Petition

In *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, plaintiff alleged that defendant committed litigation-related malpractice. The Court of Appeal affirmed the trial court's decision that such action was not subject to the anti-SLAPP provisions of *Code of Civil Procedure* section 425.16. The malpractice alleged consisted of the lawyers' failure to serve timely discovery responses and to comply with court orders to do so. The trial court held that this "did not consist of any act in furtherance of anyone's right of petition or free speech, but [the lawyers'] negligent failure to do so on behalf of their clients." *Id.*, 114 Cal.App.4th at p. 631.

The facts in the instant case are even more remote, but are consistent with the court's determination in *Jespersen*. Appellants and Respondent agreed that Respondent would provide deposition reporting services for Appellants, and Respondent is suing to collect unpaid invoices. As the Second District Court of Appeal held in *Jespersen*, this does not further "anyone's

right of petition or free speech."

> "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76–77, 124 Cal.Rptr.2d 519, 52 P.3d 695.) And a moving defendant's burden to show a "'cause of action ... arising from'" is not met simply by showing that the label of the lawsuit appears to involve the rights of free speech or petition; he or she **must demonstrate** that the substance of the plaintiff's cause of action was an act in furtherance of the right of petition or free speech. (*Id.* at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) [emphasis added]

Id., 114 Cal.App.4th at p. 630. Respondent is unaware of the "free speech" that allegedly is being abridged by Respondent's collection lawsuit. Respondent and its trial attorney are not aware of Appellant's alleged exercise of their clients' right to free speech when the underlying lawsuits were prepared and filed. Without this knowledge, Respondent's attorney could not have intended to "chill" Appellants' right to free speech.

As the court in *Jespersen* further observed, as is particularly relevant here:

> Respondents' malpractice action is not based upon appellants' having filed an answer or cross-complaint in the action in which appellants represented respondents. It is not, as appellants contend, based upon appellants' having filed declarations, motions, or other papers in that action, or upon appellants' appearance on discovery or other motions.

Id., 114 Cal.App.4th at p. 630. The sole intention of Respondent's attorney in filing the underlying collection lawsuit has been to recover money that Appellants owed to his client, Respondent. Respondent's trial attorney was and is unaware of any speech by Appellants which would be considered protected "free speech" under *Code of Civil Procedure* section 425.16. AA69-70, ¶13.

B. There Exists a Strong Probability That Respondent Will Prevail in this Matter

1. Respondent Has Alleged the Existence of Contractual and Common Count Claims Against Appellants

Although this reviewing Court should not even have to reach this issue, Respondent addresses it briefly here.

Appellants are premature in stating that Respondent cannot prove an express contract with each of the individual Appellants or that there are grounds to recover on the common count claim. There are matters of proof, and not subject to a special motion to strike under Code of Civil Procedure section 425.16. Later, this issue appropriately can be raised as, perhaps, a material fact in a motion for summary judgment/adjudication.

During the pendency of the anti-SLAPP Motion, Respondent is not permitted to conduct any discovery. Respondent would need to know, for example, Appellants' take on who ordered the numerous depositions and the relationship between Appellants and their law firms and/or professional corporations, if any. On these and other disputed factual issues, Appellants are acting as if this case already had gone to trial and Respondent presented no appropriate proof to the Court. They are premature with these issues.[5]

Further, while Appellants disagree that there is any cause of action against them for a common count, the reality might be different.

> A common count is not a specific cause of action ...; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including

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[5] Appellants improperly would have this Court turn the anti-SLAPP motion "into a cheap substitute for summary judgment." *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 31-32.

> that arising from an alleged duty to make restitution under an assumpsit theory.

McBride v. Boughton (2004) 123 Cal.App.4th 379, 394; accord, *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1559–1560.

> A cause of action for money had and received is stated if it is alleged the defendant "is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.'"

Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, 460, quoting *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.

Respondent attached as evidence in its opposition to the anti-SLAPP motion all of the unpaid invoices, and incorporated them within the opposition by reference. AA70, ¶¶15-16; AA72-82; AA85, ¶11. The invoices show that the deposition transcripts were billed to "Susan E. Rand-Lewis" from the law firm of "Rand & Rand." For years prior to the period in question, Respondent had sent invoices to Appellants with the name "Rand & Rand" printed in the "bill to" section and Appellants never notified Respondent that such designation was incorrect. Appellants have provided evidence that they own individual professional law corporations, but no evidence that (a) those law corporations are the debtor owing money to Plaintiff, (b) that "Suzanne E. Rand-Lewis" doing business as "Rand & Rand" is liable, nor (c) that Defendant Gary Rand is the other Rand in "Rand & Rand." In any case, those authenticated invoices are sufficient to establish a sufficient prima facie showing that Appellants are indebted to Respondent.

There is a strong probability that Respondent will prevail on its claim against "Suzanne E. Rand-Lewis" doing business as "Rand & Rand" once this matter reaches the fact-finder. Respondent also has some evidence, and is

likely to develop additional facts once discovery is permitted, to show that Gary Rand was named as the other attorney in his firm, "Rand & Rand." AA85, ¶12.

2. Respondent Has Met Its Statutory Burden for Court Reporting Agencies

Appellants argue that Respondent is not licensed. However, this issue has no relation to an anti-SLAPP motion, and is not one that this Court necessarily must consider, as Appellants have not met the first prong of the threshold showing.

Under *Business & Professions Code* section 8044, "[e]xcept as provided in Section 13403 of the *Corporations Code*, each director, shareholder, and officer of a shorthand reporting corporation shall be a licensed person as defined by Section 13401 of the *Corporations Code*."

California Corporations Code § 13401 does not require a certificate of registration for "any professional corporation or foreign professional corporation rendering professional services by persons duly licensed by... the Court Reporters Board of California...." *Id.,* § 13401 subd. (b). Respondent has complied with the statutory licensing laws for court reporting agencies. AA84, ¶¶3 and 4.

3. Respondent is Entitled to Plead in the Alternative

Without having the ability to conduct discovery when a complaint is first filed as to what can be established by the evidence, the plaintiff may plead in the alternative, and may even plead inconsistent allegations. *See, e.g., Adams v. Paul* (1995) 11 Cal.4th 583, 593; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 690–691; and *Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402. Here, Respondent pleaded both breach of contract and common count causes of action.

C. Appellants' Tactics In Filing the Original Motion Were Frivolous and Interposed for the Purpose of Delay

Appellant criticizes the Trial Court's language in its order, but neglects to mention the old rule that "if the trial court comes to the right conclusion, but expresses the wrong reason, the ruling is affirmed." In this instance, the Trial Court was noticeably terse in its ruling after hearing argument and reviewing all of the briefs. Both in the Trial Court and in their Opening Brief, Appellants cite to no cases on point that would support filing a Code of Civil Procedure §425.16 motion in this case. Nowhere do Appellants cite any legal authority that supports bringing an anti-SLAPP motion against a routine collection lawsuit.

As this Court reviews this matter *de novo*, it has the absolute power to find that the anti-SLAPP motion and appeal are frivolous. The Trial Court did not specifically express its concern that the motion is frivolous; rather, it understatedly wrote: "The Court is not satisfied that the motion under CCP Section 425.16 is appropriate to this action and the motion is denied."

This Court might wish to make a finding that the Appeal is frivolous and impose sanctions, and thereby remand to the Trial Court to determine Respondent's attorney's fees on appeal. The only requirement for the award of attorney's fees to the Respondents under the *Code of Civil Procedure* is that the Court finds the proceeding to be frivolous. It was and still is.

California Code of Civil Procedure section 128.7(b) provides that:

> By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

> (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Cal. Civ. Proc. Code § 128.7(b) (West, 2011).

In *Olsen v. Harbison* (2005) 124 Cal.App.4th 278, the Court of Appeal was cognizant of the potential prejudice caused by inherent delay in pursuing a case in both bringing an anti-SLAPP motion and in a subsequent appeal.

> Both the Legislature[6] and the Supreme Court[7] have acknowledged the ironic unintended consequence that anti-SLAPP procedures, enacted to curb abusive litigation, are also prone to abuse. As to abuse occasioned by the stay of proceedings on appeal of the denial of an anti-SLAPP motion, the Supreme Court has "encouraged" us "to resolve these ... appeals as expeditiously as possible. To this end, reviewing

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[6] "[*Code of Civil Procedure*] Section 425.17, enacted in 2003, commences: 'The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti–SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.'"

[7] "In *Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th 180, 25 Cal.Rptr.3d 298, 106 P.3d 958, the Supreme Court stated: 'In light of our holding [that an appeal from the denial of an anti-SLAPP motion automatically stays further trial court proceedings on the merits], some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial. As the Court of Appeal observed and plaintiffs contend, such a result may encourage defendants to "misuse the [anti-SLAPP] motions to delay meritorious litigation or for other purely strategic purposes."' (*Id.* at p. 195, 25 Cal.Rptr.3d 298, 106 P.3d 958; *see also People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1319, 9 Cal.Rptr.3d 844.)"

> courts should dismiss frivolous appeals as soon as practicable and do everything in their power to ' "prevent ... frustration of the relief granted."'" (*Varian Medical Systems, Inc. v. Delfino,*[(2005) 35 Cal.4th 180,] 196, 25 Cal.Rptr.3d 298, 106 P.3d 958.)

Id., 124 Cal.App.4th at pp. 283-284. Here, the debts were incurred beginning in or about January 2009 and ended in January 2010. The underlying collection lawsuit was filed on April 22, 2010. Thus, the recovery of the debt owed to Respondent by Appellants has been delayed for more than one year and six months, and Respondent is not receiving any benefit from the funds to which it is entitled.

Further at least one of the Appellants had attempted the same ploy in the past by asking this Court (Division 6) for relief in a case with similar legal issues and nearly identical unmeritorious arguments.[8] That Court unanimously sustained the trial court's denial of that anti-SLAPP motion.

D. Respondent Is Entitled to Recover Its Attorneys' Fees and Costs on Appeal

Appellants' appeal is no less frivolous than the original motion.

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[8] *California Back Specialists Medical Group v. Rand*, *supra,* 160 Cal.App.4th 1032.

IX. CONCLUSION

The ruling of the Trial Court should be affirmed, Respondent should be awarded attorney fees and costs of this appeal and the matter should be remanded to the Trial Court for determination of such fees and costs, and for Appellants to respond to Respondent's Complaint.

DATED: October 22, 2011

Respectfully submitted,

LAW OFFICE OF ROBERT F. COHEN

By_____
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CERTIFICATE OF COMPLIANCE

Counsel for Respondent hereby certifies pursuant to Rule 8.520(c) of the California Rules of Court that Respondent's Opening Brief contains 5,726 words, as calculated by WordPerfect that was used to prepare this Brief.

ROBERT F. COHEN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is Post Office Box 15896, San Francisco, California 94115-0896.

On October 22, 2011, I served the following documents described as **RESPONDENT'S OPENING BRIEF, and CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** on the interested parties in this action by placing true copies thereof enclosed, in sealed envelopes and packages, postage fully prepaid, addressed as follows:

SEE ATTACHED SERVICE LIST

On this date, I sealed the envelopes and packages containing the above materials and placed the envelopes for mailing in a mailbox in San Francisco, California, maintained by the United States Postal Service for regular pickup.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on October 22, 2011, at San Francisco, California.

ROBERT F. COHEN