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Focus

Plaintiffs Can't Avoid Facing Anti-SLAPP Motions' Merits

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In July, the California 2nd District Court of Appeal in *S.B. Beach Properties v. Berti*, 2004 DJDAR 8951 (Cal. App. 2nd Dist., July 22, 2004) made it official: whenever a complaint is filed, there is no way for a plaintiff to avoid confronting an anti-SLAPP motion on the merits.

Anti-SLAPP motions are now a standard tool in the defense litigators' toolbox. Although SLAPP stands for Strategic Lawsuits Against Public Participation, a complaint is subject to an anti-SLAPP motion if it is based on any written or oral statement made before a government entity, made in connection with an issue under consideration of a government entity, or made in a public forum in connection with an issue of public interest. California Civil Procedure Code Section 425.16(e).

These categories are broad enough that anti-SLAPP motions are filed in a wide variety of different types of cases far afield from the archetypal SLAPP suit.

It is not always obvious whether a complaint will or will not fall within the anti-SLAPP statute. Under the current case law, however, there is no room to correct a mistake. If the complaint falls within the anti-SLAPP statute, there is nothing a plaintiff can do to avoid the anti-SLAPP motion and the potential for paying the defendant's attorney fees.

In the recent decision in *S.B. Properties*, the 2nd District Court of Appeal ruled that even dismissing a complaint before an anti-SLAPP motion is filed will not prevent a defendant from filing an anti-SLAPP motion and obtaining an award of attorney fees. The plaintiff in *S.B. Properties* had dismissed its complaint after being notified that the defendant intended to file an anti-SLAPP motion, but before the motion was actually filed. The trial court held that it did not have jurisdiction to entertain an anti-SLAPP motion filed after dismissal, because the case was over.

The appellate court reversed, however, reasoning that merely learning of a SLAPP suit damages defendants.

"Visions of financial loss and public mortification may loom like a horrific specter before defendant's eyes," the court said. "The likelihood of answering mind-numbing interrogatories, and enduring wearisome hours of contentious depositions can leave the most stalwart defendant dispirited.

"And this is just the prelude to the trial. But even if the complaint is dismissed relatively soon after

service, the defendant is unlikely to forget the trauma."

The anti-SLAPP statute's attorney-fee provision is designed to punish plaintiffs for bringing suits that fall within the statute's purview. *Liu v. Moore*, 69 Cal.App.4th 745 (1999). That punishment cannot be avoided by dismissing a SLAPP suit before the anti-SLAPP motion is filed.

Similarly, amending a complaint does not avoid an anti-SLAPP motion. In *Roberts v. Los Angeles County Bar Association*, 105 Cal.App.4th 604 (2003), the defendant filed an anti-SLAPP motion against the plaintiff's complaint. The trial court denied the anti-SLAPP motion, and at the same time allowed the plaintiff to amend the complaint. The defendant filed a timely appeal to the order denying the anti-SLAPP motion. On appeal, the plaintiff argued that the anti-SLAPP motion was moot because the amended complaint superseded the complaint that had been attacked by the anti-SLAPP motion. The appellate court disagreed.

The *Roberts* court held that the operative pleading for purposes of the appeal was the complaint attacked by the anti-SLAPP motion, not the subsequent, amended version.

The court reasoned that "[a]n implied stay in the proceedings where the plaintiff files an amended complaint prior to the defendant's appeal of the denial of a SLAPP motion to strike is necessary so that a plaintiff cannot deprive a defendant of the right to the appellate review granted by the Legislature so that the appellate court can determine if the defendant had made a prima facie showing."

Anti-SLAPP motions are favorites of the defense bar. If a complaint falls within the purview of the anti-SLAPP statute, the plaintiff immediately must demonstrate a probability of prevailing at trial, usually without the benefit of discovery. Code of Civil Procedure Section 425.16(b)(1)(g).

If the plaintiff fails, the defendant is automatically entitled to attorney fees. Civil Procedure Code Section 425.16(c). In contrast, if the defendant loses the motion, the defendant does not have to pay the plaintiff's attorney fees unless the court finds that the motion was frivolous or solely intended to cause delay within the meaning of Civil Procedure Code Section 128.5. Thus, the risks to the plaintiff are much greater than the risks to the defendant.

S.B. Properties and *Roberts* are just the latest installments in a long line of cases where the courts refuse to allow plaintiffs any opportunity to avoid confronting an anti-SLAPP motion directly. Plaintiffs have tried voluntarily dismissing

complaints after an anti-SLAPP motion is filed, but a voluntary dismissal does not moot the motion. *Ecash Tech. v. Guagliardo*, 127 F.Supp.2d 1069, (C.D.Cal. 2000). A court's sua sponte dismissal does not moot an anti-SLAPP motion. *Pfeiffer Venice Properties v. Bernard*, 101 Cal.App.4th 94 (1998). Even resolution of the underlying action does not moot an anti-SLAPP motion. *Moraga-Orinda Fire Protection District v. Weir*, 105 Cal. App.4th 477 (2004).

In short, once a complaint is filed, if it falls within the ambit of the anti-SLAPP statute, there is nothing the plaintiff can do to avoid the anti-SLAPP motion. The plaintiff cannot dismiss before the filing of the anti-SLAPP motion and the plaintiff cannot dismiss after the filing of the motion. Nor can the plaintiff amend the complaint to avoid the motion. The only thing a plaintiff can do is be prepared.

Because the anti-SLAPP statute freezes the complaint, it is critical that plaintiffs scrutinize their allegations before filing to determine whether the allegations will trigger the anti-SLAPP statute. This process should happen as well every time a plaintiff amends a complaint, because every time the complaint is amended the defendant has a fresh opportunity to attack it with an anti-SLAPP motion. *Yu v. Signet Bank/Virginia*, 103 Cal.App.4th 298 (2002).

If there is even the possibility that the lawsuit will trigger the anti-SLAPP statute, plaintiffs should expect an anti-SLAPP motion. In addition to having legal research ready to oppose the inevitable anti-SLAPP motion, the plaintiff should assemble the evidence it will need to demonstrate a probability of prevailing at trial. The plaintiff will not be able to count on discovery to establish its case. The time to gather evidence, therefore, is before initiating the lawsuit, not after the anti-SLAPP motion is filed.

Because of its importance in modern litigation in California, every attorney should be aware of the anti-SLAPP statute. Once a complaint is filed or amended, for good or for ill, its allegations are frozen in time and there is no way to avoid facing an anti-SLAPP motion.

Litigants from both sides of the bar need to be prepared.

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