FILED
San Francisco County Superior Court

AUG 29 2022

CLERK OF THE COURT
BY: _____ Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, et al, Plaintiffs, vs. POTTER HANDY LLP, et al., Defendants.	Case No. CGC 22-599079 ORDER SUSTAINING DEMURRER TO THE COMPLAINT WITHOUT LEAVE TO AMEND

Background

On demurrer, the court assumes the facts in the complaint are true. The only issues presented are, assuming the truth of the allegations, whether there are legal reasons why nevertheless the case may not proceed. See generally, Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:43 (Rutter 2022) ("RUTTER").

The complaint was filed by the district attorneys of Los Angeles and San Francisco. It outlines a shakedown scheme operated by the defendant lawyers. They are accused of perpetrating a scam by accusing people and small businesses of violations of the American With Disabilities Act (ADA). The lawyers (it is said) have filed thousands of complaints with false standing allegations, in order to obtained the jurisdiction of federal courts. They extracted millions of dollars in essentially coerced settlement from parties who cannot afford to litigate. The complaint alleges:

> Each year, Potter Handy files thousands of boilerplate "ADA/Unruh" lawsuits on behalf of a few repeat plaintiffs ("Serial Filers") against California small businesses with little regard to whether those businesses actually violate the ADA. These lawsuits are financially onerous, in large part because the Unruh Act (but not its federal counterpart) allows Potter Handy to demand damages of at least $4,000 per alleged violation. Small businesses, particularly those owned by immigrants and individuals for whom English is a second language, who are often less familiar with the complexities of the American legal system, are rarely able to afford the risk and expense of defending themselves in court. As a result, each year Potter Handy uses ADA/Unruh lawsuits to shake down hundreds or even thousands of small businesses to pay it cash settlements, regardless of whether the businesses actually violate the ADA.

Complaint ¶ 2.

Requests for Judicial Notice

Each side has filed unopposed requests. They are granted.

The Demurrer

The demurrer, which I will also refer to as the motion, presents four argument why I should dismiss the case at this stage: collateral estoppel, litigation privilege, Noerr-Pennington, and preemption. The litigation privilege argument is valid; the others are not. I sustain the demurrer; and because the problem cannot be cured, the demurrer is sustained without leave to amend.

1. Collateral estoppel

The argument is based on two earlier cases: (1) July 26, 2019 Order re Defendants' Demurrer to Complaint in *People v. Rutherford et al.*, Case No. RIC 1902577 (Riverside Sup. Ct.); and (2) *People v. Rutherford*, No. E073700, 2020 WL 7640848 (Cal. Ct. App. Dec. 23, 2020).

In state court, the term "issue preclusion" is preferred to 'collateral estoppel'. *Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313, 323 (2022); *Meridian Fin. Servs., Inc. v. Phan*, 67 Cal. App. 5th 657, 684 (2021). The causes of action as between the present and earlier cases don't matter. Re-litigation of issues is barred if

> "... (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." [Citation]
>
> Even if these threshold requirements are satisfied, courts may consider the public policies underlying issue preclusion in determining whether the doctrine should be applied.[Citation]
> These policies include "conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation."

Meridian Fin. Servs., Inc. v. Phan, 67 Cal. App. 5th 657, 686–87.

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

There are flaws with the defendants' argument.

Defendants say the party against whom preclusion is to be applied is the same because it's the "People"- the word appears on the title of the two earlier cases and here as well. If defendants were right, any issue resolved against a district attorney in the state—including those resolved by a superior court judge whose decisions, alas, have not even precedential authority[1]—would then bind all district attorneys throughout the state, including, presumably, the Attorney General, who also presents cases on behalf of the People; and perhaps also binding all

[1] RUTTER at ¶ 9:67.7

"*Civil* statutes for the protection of the public should be interpreted broadly in favor of their protective purpose." *Persolve,* 218 Cal.App.4th at 1276-77 (emphasis supplied).

The essence of the People's position is that if the predicate is a crime and the privilege is not available to defend against the crime, then the privilege cannot possibly be available in a predicated civil UCL action. But that's not true.

> solicitation, is not only a *misdemeanor* when accomplished through the use of agents, but is also subject to discipline by the State Bar. We granted review in this case to consider whether a defendant in an impending civil action may sue the attorneys for the opposing party on the ground that they wrongfully "solicited" the litigation against him. We conclude that this proceeding not only undermines the established policy of allowing access to the courts....

Rubin v. Green, 4 Cal. 4th 1187, 1190 (1993) (emphasis supplied).

> As noted, the conduct of defendants alleged in the complaint is clearly communicative and otherwise within the scope of section 47(b). It is thus absolutely immune from civil tort liability, including plaintiff's interference with contract and related claims. To permit the same communicative acts to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity. If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b).

Rubin, 4 Cal. 4th at 1202–03.

The *Persolve* test is not met here. That test has two components: that (1) the statute at issue is "more specific than the litigation privilege," and (2) application of the privilege would render the statute "significantly or wholly inoperable." *Id.* at 1274. Unlike the two *civil* statutes in *Persolve*, the *criminal* statute here *can* be fully prosecuted—including, by the way, by the very plaintiffs in this case—even if § 47 blocks this UCL suit. That is, the enforcement of § 47 here has no impact on the enforcement of B+P § 6128(a). *Action Apartment*, 41 Cal. 4th at 1246.

At argument plaintiffs noted that in addition to B+P § 6128(a) they had also relied on the state's rules of professional responsibility as predicates for the UCL claim. This is literally, but usefully, true: the Opposition at 12:15-20 says the reasoning applicable to § 6128(a) applies as

well to the two rules plaintiffs cite. The statement is conclusory and without authority. I haven't found any authority supporting plaintiffs' position.

It's true that these rules can be UCL predicates, *People ex rel. Herrera v. Stender*, 212 Cal. App. 4th 614, 633 (2012), but that's not the issue here. The issue is presumably whether the rules would be "significantly or wholly inoperable," e.g., *People ex rel. Alzayat v. Hebb*, 18 Cal. App. 5th 801, 808 (2017). But the rules *are* effective regardless of the impact of § 47 in this case. They are the basis for attorney discipline, which is what they were designed for. *Antelope Valley Groundwater Cases,* 30 Cal. App. 5th 602, 621(2018):

> (b) Function. (1) A willful violation of any of these rules is a basis for discipline. (2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these rules or the Comments to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.
>
> CRPC rule 1.0

The rules are used also "to determine whether a contract or transaction involving lawyers is unenforceable as contrary to public policy or whether lawyers or law firms should be disqualified from representation." Mark L. Tuft, et al., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY ¶4.3 (2021). Plaintiffs offer no argument or authority that these functions of the rules would be jeopardized were the litigation privilege to be honored in this case.

3. Noerr-Pennington

Defendants suggest they are immunized under the *Noerr–Pennington* doctrine, which protects those who petition the Government. E.g., *People ex rel. Gallegos v. Pac. Lumber Co.*, 158 Cal. App. 4th 950, 964 (2008); *Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th 91, 108

(2018). Originally a matter of antitrust law, it covers most activity before the courts and other governmental bodies. *People ex rel. Gallegos*, 158 Cal. App. 4th at 964.

Defendants' central argument is that there is no "sham" exception to the doctrine. That's not true; there is such an exception. E.g., *People ex rel. Gallegos*, 158 Cal. App. 4th at 965; *Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1068 (2009); *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1343 (2011). Defendants' augment is frivolous, because the very case they cite conflicts with their assertion. Here is the assertion from their Reply: "California appellate courts have refused to apply the sham litigation exception. For instance, in *Gallegos, supra,* 158 Cal. App. 4th 950, the Court of Appeal declined to extend the federal sham exception. *Gallegos, supra,* 158 Cal. App. 4th at 967-968." That's not what the case says; it says there is such an exception.

Indeed, the very idea that state courts could refuse to adopt the federal rule is peculiar, because the doctrine *is* a federal rule, in the first place, as the case cited by defendants notes:

> The doctrine derives from the holdings of the United States Supreme Court in *Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight, Inc. et al.* (1961) 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (*Noerr*), and *Mine Workers v. Pennington* (1965) 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (*Pennington*), and "rest[s] on statutory interpretation." (*Blank, supra,* 39 Cal.3d at p. 321, 216 Cal.Rptr. 718, 703 P.2d 58.)

People ex rel. Gallegos, 158 Cal. App. 4th at 964 n.7. And so it is that state cases routinely cite federal cases, including those of the U.S. Supreme Court. E.g., *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1343 (2011).

The sham exception covers the conduct alleged here, such as "unlawful actions," *People ex rel. Harris v. Aguayo,* 11 Cal. App. 5th 1150, 1161 (2017). There is a two part test, involving both objective and subjective factors. *People ex rel. Gallegos,* 158 Cal. App. 4th at 965–66. Both are pled here. See e.g., Complaint ¶¶ 1, 13, 75-85, 96.

4. Preemption

Defendants claim the action is preempted by federal law, i.e., the American With Disabilities Act (ADA, 42 USC §§ 12101 *et seq.*) and its anti-retaliation provisions. The People note that the ADA is directed at the acts of employers in relation to their employees. E.g., §§ 12112, 12203. The People and the defendants here of course are not in such a relationship. In reply, defendants only note that the federal regulation covers public entities. 28 CFR 36.206. This isn't responsive to the point made by the People.

The specific conduct giving rise to preemption, argue defendants, is that the People's complaint is an "adverse action" of retaliation, Demurer at 14:13 *ff.*, citing a magistrate judge's unpublished opinion in "*Marca v. Capella Univ.*, No. SACV 05-642-MLG, 2007 WL 9705859, at *18 (C.D. Cal. Dec. 13, 2007)... Defendants must show ... (2) that Plaintiff has subjected them to an adverse action..."

These are usually adverse *employment* actions. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1049 (2005); *Bagatti v. Dep't of Rehab.*, 97 Cal. App. 4th 344, 360 (2002); *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 303 (5th Cir. 2020); *Parker v. Brooks Life Sci., Inc.*, 39 F.4th 931 (7th Cir. 2022); *Laird v. Fairfax Cnty., Virginia*, 978 F.3d 887 (4th Cir. 2020). There is no such adverse employment action here. While the ADA bars retaliation in other context, the only case offered by the defendants is *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1166 (11th Cir. 2003), which found the duty to refrain from retaliation was applicable to those parties which provide "public services," which parties *as such* have duties under the ADA. There doesn't seem to be a sort of free-floating obligation applicable to all people and entities in the county to refrain from "retaliation."[2]

[2] Defendants repeatedly refer to the ADA's "anti-retaliation" provision. E.g., Reply at 10. But they also invoke the anti-interference provisions of 42 USC § 12203(b), Motion at 13:3, which is quite different. *Wilson v. Murillo*, 163

Defendants present no argument on what type of preemption is at stake here: whether it is express, *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621, __ (2022), or conflict, obstacle, or field preemption. *People v. Salcido*, 42 Cal. App. 5th 529, 537 (2019); *Curtin Mar. Corp. v. Pac. Dredge & Constr., LLC*, 76 Cal. App. 5th 651, 669 (2022); *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1094 (11th Cir. 2021). Thus it is impossible to evaluate their argument. Defendants ignore the long-standing presumption that state law and its causes of action are not preempted. E.g., *Curtin Mar. Corp.*, 76 Cal. App. 5th at 670.

The defense argument simply seems to be that any attack on those filing ADA lawsuits is directly barred by federal law. Perhaps this is express preemption. If so we'd expect a federal law that states, for example, that no one may sue anyone because they have filed ADA suits. Defendants note no such law. It's true that "advocating for members of a protected class is a protected activity for purposes of retaliation claims," *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652, 662 (6th Cir. 2020), but it's not true that all protected activity is immunized under the ADA. For example, even defendants agree they can be criminally prosecuted for their actions in filing the ADA suits. Motion at 8:27-28. They presumably agree that they can be disciplined by the State Bar (if the complaint's allegations are true).

Or perhaps defendants mean a sort of implied conflict preemption, so that it's "impossible" to follow both sets of laws. *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621 __ (2022). Defendants attempt no such showing. Nothing suggests punishing lawyers who do what the complaint alleges would interfere with Congress' attempts to protect people under the ADA. *Cnty. of Butte v. Dep't of Water Res.*, No. S258574, 2022 WL 3023670, at *7 (Cal. Aug.

Cal. App. 4th 1124, 1132–33 (2008). Under the anti-interference provision, it *is* possible that anyone who e.g. interferes with the exercise of a protected right is liable, id. at 1133.

1, 2022) (conflict with Congress' purposes). Indeed, the opposite may be true. Enjoining the scam artists (again, I assume the complaint is accurate) frees up the courts for the worthy.

Conclusion

Plaintiffs have not asked for leave to amend and have not suggested how the § 47 problems can be cured. The demurrer is sustained without leave to amend as a result of the application of CC § 47.

Dated: August 26, 2022

Curtis E.A. Karnow
Judge Of The Superior Court

CGC-22-599079 **PEOPLE OF THE STATE OF CALIFORNIA VS. POTTER HANDY LLP ET AL**

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on August 29, 2022 I served the foregoing **order sustaining demurrer to the complaint without leave to amend** on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: August 29, 2022

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