Hearing Date: 1/24/2023
Department: 61
Defendant Los Angeles Magazine's Anti-SLAPP Motion is GRANTED as to the first and second causes of action in the First Amended Complaint, and DENIED as to the third cause of action for breach of contract.

Defendant to provide notice.

I. OBJECTIONS

Plaintiff Yashar Ali objects to portions of the declarations submitted by Defendant Los Angeles Magazine in support of its anti-SLAPP motion. Specifically, Plaintiff objects to the declarations of Peter Kiefer and Maer Roshan, who testify that the article in question was rigorously fact-checked, and that they believe its claims are true. These objections are OVERRULED.

Defendant in reply objects to portions of Plaintiff's declaration submitted in opposition to this motion. Objections No. 4–6 and 9–12 are SUSTAINED, as they concern reputational damage from specific statements made without foundation or only on information and belief. (*See Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497–1498.) The other objections are OVERRULED.

II. SPECIAL MOTION TO STRIKE

In 1992 the Legislature enacted Code of Civil Procedure section 425.16 as a remedy for the "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." (Code Civ. Proc., §425.16, subd. (a); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817.) The lawsuits are commonly referred to as "SLAPP" lawsuits, an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.) A defendant opposing a SLAPP claim may bring an "anti-SLAPP" special motion to strike any cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (Code Civ. Proc., § 425.16, subd. (b)(1).) An anti-SLAPP motion may be addressed to individual causes of action and need not be directed to the complaint as a whole. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.app.4th 141, 150.)

In ruling on an anti-SLAPP motion, a trial court uses a "summary-judgment-like procedure at any early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) This is a two-step process. First, the defendants must show that the acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States of California Constitution in connection with a public issue." (Code Civ. Proc., §425.16 subd. (b)(1).) Next, if the defendant carries that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (Code Civ. Proc., § 425.16 subd. (b)(3).)

In making both determinations the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2); *Equilon Enterprises*, *supra*, 29 Cal.4th at p. 67.)

A. PROTECTED ACTIVITY

The anti-SLAPP statute defines protected activities as:

(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, or (4) 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.

(Code Civ. Proc., § 425.16, subd. (e), emphasis added.)

Defendant Los Angeles Magazine (Defendant) here claims that Plaintiff Yashar Ali's (Plaintiff) claims against it arise from protected activity within the meaning of subdivisions (3) and (4) of the above statute, as Plaintiff's claims derive from allegedly false statements made in an article published "in a place open to the public or a public forum, in connection with an issue of public interest," and said article was published "in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest." (Motion at pp. 8–12.)

Defendant notes that the article in question was published online at Defendant's website and promoted across various social media platforms. (Roshan Decl. ¶¶ 3, 6.) Such publicly accessible websites have been held to be public forums for the purposes of the anti-SLAPP statute. (*See Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41 fn. 4.) Moreover, the article concerned the life and career of Plaintiff, whom his First Amended Complaint (FAC) characterizes as "a renowned journalist" who won Time Magazine's recognition "as one of the twenty-five most influential people on the internet in 2019." (FAC ¶ 1.) Defendant's article concerned Plaintiff's relationships with other figures of note in the political and media landscape, as well as Plaintiff's reporting and comment on other stories of public importance, such as sexual harassment in the Los Angeles mayor's office, and misconduct by prominent media figures. (Roshan Decl. Exh. 1; Christianson Decl. Exh. 1.) Given Plaintiff's prominence, the article thus concerned a matter of public interest. (*See Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23 [holding that website publication concerning qualifications of plastic surgeon was matter of public interest].)[1]

Thus Defendant has satisfied the first prong of the anti-SLAPP inquiry by showing that Plaintiff's claims arise from protected activity. Plaintiff in opposition does not contest that his claims arise from protected activity. Accordingly, the burden now shifts to Plaintiff on the second prong of the anti-SLAPP analysis.

B. LIKELIHOOD OF PREVAILING

After a defendant meets their burden of showing that the gravamen of the complaint involves protected activity, the plaintiff must then "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." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) A defendant can meet its burden if it can establish that the plaintiff cannot overcome an affirmative defense. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275 at 285.)

"[A] plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence." (*Grenier v. Taylor*(2015) 234 Cal.App.4th 471, 480.)

"Legally sufficient" means that the cause of action would satisfy a demurrer. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1421.) The evidentiary showing must be made by competent and admissible evidence. (*Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1444.) Proof, however, cannot be made by declaration based on information and belief. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497–1498.) The question is whether the plaintiff has presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

1. Defamation

Defamation is "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." (*Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) Defendant argues that Plaintiff is an all-purpose public figure by virtue of his social media following on sites like Twitter and Substack (with more than 700,000 followers on the former site), as well as his acknowledged connection to celebrities like Gavin Newsom, Kathy Griffin, and others. (Roshan Decl. ¶ 7.) Plaintiff, who alleges that he is a renowned journalist, does not dispute that he is a public figure, whether for all purposes or for the limited purpose of the matters covered in the publication at issue. (*See McGarry v. University of San Diego*(2007) 154 Cal.App.4th 97, 113 [describing all-purpose and limited-purpose public figures].)

Because Plaintiff is a public figure, he "may not recover defamation damages merely by showing the defamatory statement was false. Instead, the plaintiff must also show the speaker made the objectionable statement with malice in its constitutional sense 'that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114.) This is a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." (*Ibid.*) Moreover, such malice must be proven "by clear and convincing evidence," i.e. evidence "so clear as to leave no substantial doubt." (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.) A public figure, in opposition to an anti-SLAPP motion against a defamation claim, must "must therefore establish a probability that she will be able to produce clear and convincing evidence of actual malice." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167.)

Plaintiff in opposition to the motion provides his own declaration, in which he testifies concerning the three statements at issue in his defamation claim. Where the article states that Plaintiff "required that all of his on-the-record quotes be pre-approved," Plaintiff contends that it was the author of the article who "voluntarily offered he would keep all interviews 'on background" in return for Plaintiff's participation. (Ali Decl. ¶¶ 6, 9b.) Next, while the article states that the author "discovered [Plaintiff] had been secretly recording me" after interviewing him, Plaintiff contends that the author was on notice that Plaintiff was recording him when Plaintiff requested "an agreement

that all interviews be recorded," and then placed his phone next to the author's phone, both of which then recorded the conversation. (Ali Decl. ¶¶ 6, 9a.) Finally, where the article states that Plaintiff, in response to a request for references provided "personal emails and cellphone numbers" for several high-profile celebrities, including nine specifically named, Plaintiff states that he sent only personal contact information for some of the names mentioned, and only sent personal contact information for people "who did not object to that." (Ali Decl. ¶ 9c.)

Plaintiff has not presented evidence sufficient to support a defamation claim on any of the statements mentioned. Plaintiff has not presented evidence that the statement concerning his pre-approval of all quotes was false, or made with actual malice. Plaintiff argues that the statement that he "required" pre-approval privileges for all on-the-record statements implies that he is self-centered and hypocritical, demanding protections for himself that he does not allow for the subjects of his own reporting. (Ali Decl. ¶ 9b.) Yet at the same time, Plaintiff acknowledges that the offer of pre-approval was "[i]n return" for Plaintiff's interview availability. (Ali Decl. ¶ 6.) Indeed, Plaintiff pleads that if the interviews had not been "on background," he "would not have agreed to submit to nearly as much interview time." (FAC ¶ 30.) Although Plaintiff states that Defendant "voluntarily offered" to keep the interviews on background (as opposed to Plaintiff himself demanding that they be so conducted) the charge that Plaintiff required pre-approval of his quotes as a condition for participation in the profile is not false, even in Plaintiff's own framing of the claims.

Plaintiff also does not show that statements concerning his "secret" recording were made with actual malice. Notably, Plaintiff does not state that he told the author of the piece that he was recording him. He rather states that he told the author that he wanted the interviews to "be recorded." (Ali Decl. ¶ 6.) The author agreed, "and took out his phone to record the rest of the conversation, as did [Plaintiff]." (Ali Decl. ¶ 6.) The argument that Defendant knew the falsity of the claim that Plaintiff "secretly" recorded the interviews rests upon the contention that Plaintiff took out his phone and placed it on the table next to the author's phone while the interviews took place. (Ali Decl. ¶ 6.) While this testimony is evidence that Defendant should have known that Plaintiff was recording the interviews, it does not reach the threshold that Plaintiff must make on this motion: that he is able to produce clear and convincing evidence that Defendant knew or recklessly disregarded the falsity of the charge of secrecy. No such showing has been made.

Plaintiff has also not shown the falsity of the claim that he provided the personal contact information of many celebrities to Defendant. Plaintiff produces a redacted copy of the spreadsheet that contained the contact information, and states that it was his policy "to send personal contact information only for those contacts who did not object to that." (Ali Decl. ¶ 9c.) Plaintiff thus contends — not that he never sent personal contact information to Defendant — but that he did not do so for four of the nine celebrities mentioned by name in the article, and that those he did provide information for did so willingly. (*Ibid.*) Yet in this respect, the article was not false; it made no intimation that Plaintiff had shared the information improperly, but included the statement to indicate the breadth of Plaintiff's connections. (Roshan Decl. Exh. A at p. 2.)

Accordingly, Plaintiff has not satisfied his burden to make a prima facie showing of facts sufficient to sustain a favorable judgment on any of the statements submitted to form the basis for his defamation claim. Accordingly, the motion is GRANTED as to the first cause of action.

2. Promissory Fraud / Breach of Oral Contract

The elements of fraud are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "Promissory fraud" is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Ibid*.) ""An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Ibid.*)

"The elements of a breach of oral contract claim are the same as those for a breach of written contract: a contract; its performance or excuse for nonperformance; breach; and damages." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.)

The fraudulent promise at issue here is one the author of the article made to Plaintiff concerning the latter's relationship to Kathy Griffin: namely that all of Plaintiff's comments about Griffin would be off-the-record. (Ali Decl. ¶ 7.) But when the article was published, it attributed a statement about Griffin to Plaintiff: that he had stayed at Griffin's home at her urging, and left of his own volition." (Ali Decl. ¶ 18; Roshan Decl. Exh. A at p. 8.) Plaintiff argues that he specifically told Defendant that he would not speak about Griffin unless such comments were on background, and that, in his experience, it would have been reckless to have made such a promise without adhering to it. (Ali Decl ¶ 19.) Plaintiff also claims that on the day of publication, Defendant's editor in chief "acknowledged that LA Magazine had, without my authorization and contrary to the prior promise from Kiefer [the author], included some of my purported statements about my relationship with Griffin based on off-the-record conversations." (Ali Decl. ¶ 19.)

This evidence does not establish a claim for promissory fraud. Plaintiff has presented only evidence that a promise was made and not kept. He has not presented evidence that the promise was fraudulently made, i.e. without any intent that it be carried out. "A promise of future conduct is actionable as fraud only if made without a present intent to perform." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.) Moreover, "something more than nonperformance is required to prove the defendant's intent not to perform his promise." (*Ibid.*) Here, Plaintiff has presented non-performance only. He has not satisfied his burden to establish the factual sufficiency of his claim for fraud. Thus the motion is properly GRANTED as to the second cause of action.

Plaintiff's breach of contract claim, however, rests upon a different promise: not just that any comments related to Griffin be off-the-record, but that Plaintiff would have the power to approve which comments of his were used in the article. (FAC ¶¶ 30–32.) It is alleged that Defendant breached this agreement by publishing and mischaracterizing quotes that Plaintiff did not approve. These quotes include one in which Plaintiff stated that he "never" regretted attacking people "who once considered him a friend," when the substance of Plaintiff's statement had been that he never regretted "attacking people in his articles." (FAC ¶ 32a.) Another unauthorized quote was a characterization that Plaintiff was a "friend" of one Barbara Fedida before he had published an unfavorable story about her, when Plaintiff had never characterized Fedida as a friend and had told his interviewer the same. (FAC ¶ 32a.) The article also includes a statement attributed to Plaintiff in which he says, "Something that frustrates me is that people don't take care of people like me," without including the subsequent clause, "because they don't think I need it." (FAC ¶ 32b.)

Here, Plaintiff has presented evidence of an agreement that he would submit to interviews in exchange for the authority to pre-approve what quotes were used. (Ali Decl. ¶ 6.) He has submitted evidence that he performed his part of the bargain by participating in the interviews, and that Defendant breached its agreement by publishing his quotes without his authorization. (Ali Decl. ¶ 21.) Plaintiff claims to have been alienated from his friends as a result of the publication of the comments, and to have suffered from anxiety and mental anguish. (Ali Decl. ¶ 21b.) Plaintiff also notes that nominal damages are available for a breach of contract under Civil Code § 3360. (Opposition at p. 14, citing *Elation Systems, Inc. v. Fenn Bridge LLC* (2021) 71 Cal.App.5th 958, 965 ["When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."].)

Defendant in reply does not argue that Plaintiff has failed to plead the elements of a breach of contract claim, but rather that this claim is in reality one for defamation, without proof of either falsity or actual malice. (Reply at pp. 11–13.) This rebuttal, however, is unpersuasive. Defendant cites authority for the proposition that the constitutional protection applicable against defamation claims brought by public figures "does not depend on the label given the stated cause of action." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265; *see also Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042.) But these cases address the ability of public figures to bring *tort* claims for reputational damage under various labels; they do not address such a figure's ability to bring a claim for breach of contract. Indeed, a person may "validly contract[] not to speak or petition," and if evidence is presented to support a claim for breach of that contract, an anti-SLAPP motion will not dispense with the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94.)

Here, the gravamen of Plaintiff's breach of contract claim is the disclosure of quotes not authorized by Plaintiff, in contradiction of a prior oral agreement. Although Plaintiff's FAC contains objections to the way his quotes were framed, this does not make his claim for breach of non-disclosure contract into a tort for reputational damage. As Plaintiff has submitted evidence sufficient to state a contract claim, the motion is DENIED as to the third cause of action.

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[1] Plaintiff's claims also falls within subdivision (e)(4), as they arise from conduct in furtherance of the exercise of free speech, as "[r]eporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest." (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164.)