UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

PRIORITY SEND

Case No.	CV 12-4095 GW (FMOx)	Date	September 19, 2013
Title	*eDrop-Off Chicago LLC, et al. v. Burke, et al.*		

Present: The Honorable	GEORGE H. WU, United States District Judge

Kane Tien	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: (IN CHAMBERS): **ORDER ON SUPPLEMENTAL BRIEFING**

In an August 9, 2013, Order ("the Order"), the Court analyzed the anti-SLAPP motion filed in this case by defendant Midley, Inc. dba Purseblog.com ("Midley"). *See* Docket No. 122. At the close of that analysis – which resulted in a conclusion that the affirmative defense Midley championed in its motion would preclude plaintiffs eDrop-Off Chicago LLC and Corri McFadden (collectively, "Plaintiffs") from prevailing on *parts* of their common law claims – the Court gave the parties the opportunity to "address only the issue of whether parts of causes of action may survive anti-SLAPP analysis or whether, instead, anti-SLAPP analysis is, of necessity, an all-or-nothing proposition." *See* Order at 43; *see also id.* at 42 ("[W]hen a court finds that part of a cause of action could be stricken under anti-SLAPP law but a remaining portion cannot, does that result in the entire claim being stricken, or merely part of it, or none of it[?]"). In considering their response, the Court asked the parties to keep in mind that the analysis required by Midley's anti-SLAPP motion rested upon the application of an affirmative defense that can often lead to partially-successful and partially-unsuccessful outcomes. The parties thereafter agreed to, and the Court ordered, a further briefing schedule. *See* Docket Nos. 123, 126.

The Parties' Supplemental Arguments

Plaintiffs' opening supplemental brief (Docket No. 125) argues that where any portion of a claim has some "minimal" merit or possibility of success, the entire claim survives (and

Midley is therefore not entitled to any attorney fees[1]).

In its own opening brief (Docket No. 124), Midley now emphasizes that Plaintiffs must show a reasonable probability of prevailing by proving – or at least properly stating, to the extent a Rule 12(b)(6)-like standard applies – every element of every claim (and provides reasons for why it believes Plaintiffs cannot). Apart from the fact that this argument has nothing to do with the issue on which the Court requested further briefing, this is in relatively stark contrast to Midley's prior focus on its belief in a CDA section 230 defense. Midley also argues that the burden of proof under the anti-SLAPP statute is on Plaintiffs to show a probability of prevailing, not on Midley to show that Plaintiffs will *not* probably prevail.

In their Supplemental Reply Brief (Docket No. 130), Plaintiffs concur with the aforementioned view of Midley's supplemental papers – that they are an effort to redirect the argument towards something Midley has not heretofore pressed. Plaintiffs take that as a concession that they are correct on the issue the Court actually asked the parties to address – whether, in appropriate circumstances, parts of claims can be stricken under California's anti-SLAPP statute. However, Plaintiffs also state therein that Midley's opening supplemental brief "urges the Court to reconsider its Order based on the same asserted pleading deficiencies it raised in its motion attacking Plaintiffs' common law claims." Docket No. 130, at 1:23-25. If Plaintiffs are correct that Midley already argued these pleading deficiencies, then perhaps the Court was incorrect in focusing only upon Midley's CDA section 230 defense. In addition, Plaintiffs view the Court's ruling as having "narrow[ed] the facts upon which the common law claims may proceed," *id.* at 2:1-2, thereby appearing to concede that a court *can* strike *parts* of claims under California's anti-SLAPP statute (seemingly in contrast to Plaintiffs' position in their opening supplemental brief). As a result of these two statements, therefore, one might view

[1]Although in the Order the Court briefly addressed whether a fee award would be mandatory given that Midley had achieved partial success, the Court left the issue of any fee entitlement to further briefing upon the parties' digestion of the Order. *See* Order at 42. It was not the Court's intention to resolve the attorneys' fee issue – as to either liability or amount – by way of either the Order or the instant supplemental briefing. Indeed, the parties' stipulation (and the resulting order) setting up the briefing schedule for the instant supplemental briefing referred only to the issue the Court had identified on page 43 of the Order, not the attorney fee issue referenced on page 42 of the Order. *See* Docket Nos. 123, 126. Unless, therefore, the parties are in agreement that nothing more need be said from either side on the attorneys' fee question, the Court anticipates still further briefing on that point (if the fee issue survives this analysis). Midley's Supplemental Reply brief suggests both a belief that the issue is not fully exhausted and that there are legal arguments to be made in fuller form both for and against a fee award should the Order stand in its present form. *See* Docket No. 129 at 5:3-4 & n.7. The parties can file a stipulation to that effect – indicating either agreement to rest on the briefing as thus far submitted or a further briefing schedule devoted to fees – following the issuance of this order, if the fee issue is still a live one at that point.

Plaintiffs' latest brief as adding more uncertainty to the mix, rather than reducing it.

In its Supplemental Reply Brief (Docket No. 129), Midley argues that it did not waive the requirement that Plaintiffs' show a probability of success simply because the focus of the briefing was on the CDA section 230 defense. In that brief, Midley also argues that cases like those Plaintiffs' rely on do not support Plaintiffs' position on the question the Court actually asked because the plaintiffs in those cases supported every element of every claim under at least one theory of recovery, if not all theories.

Further Analysis of the anti-SLAPP "Merits"

While Midley is undoubtedly correct about the placement of the burden of proof on the anti-SLAPP statute's second-step, *see, e.g.*, *Oasis W. Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011), the Court is no party's advocate. As the Court's August 9, 2013, Order explained the Court's view of the parties' arguments to that point, Midley's approach to the second step of the anti-SLAPP analysis was focused upon whether or not Plaintiffs could overcome a defense founded upon section 230 of the Communications Decency Act, 47 U.S.C. § 230. *See* Order at 30, 38, 42 n.40. To the extent Midley chose to argue the strength of its affirmative defense instead of attempting to poke holes in the elements of Plaintiffs' claims, presumably it expects the Court to have done the latter work for it.

The upshot of Midley's position is that a defendant should be able to file an anti-SLAPP motion, satisfy the first prong of the analysis, and then sit back, fold its figurative arms, and do nothing more, with no impact whatsoever on its likelihood of prevailing on the motion. The closest Midley has gotten to support for that proposition is language in a footnote in *Direct Shopping Network, LLC v. James*, 206 Cal.App.4th 1551 (2012). There, the California Court of Appeal rejected a plaintiff's argument that a moving defendant had not challenged a particular element of its claims in its motion to strike: "We pointed out that once a defendant has established that a cause of action arose from protected activity, the burden is on the plaintiff to state and substantiate a legally sufficient claim with admissible evidence supporting a judgment in the plaintiff's favor." *Id.* at 1558 n.5 (omitting internal quotation marks and brackets) (quoting *Mann v. Quality Old Time Serv., Inc.*, 120 Cal.App.4th 90, 105 (2004)). Although this Court is not averse, in the cases it presides over, to raising issues for the parties' consideration when they appear not to have contemplated such issues, it is an entirely different thing for a court to resolve arguments not made to it, let alone to be *expected* to do so. Even if the *Direct Shopping Network* case is support for the proposition that a court *can* do so, it nowhere states or intimates that a court *must* do so.

As noted above, Midley rejects the idea that it somehow waived addressing Plaintiffs' ability to prevail on their claims (or at least successfully state them). In its Supplemental Reply brief, however, Midley explains its reading of the Ninth Circuit's decision in *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009), by noting that "there was no dispute that the plaintiff stated all elements of her right of publicity claim; rather the only issue was whether she could overcome the defendant's affirmative defenses." Docket No. 129, at 1:25-27. Even if Midley did not "waive" the issue of Plaintiffs' second-step burden on the anti-SLAPP motion, it does not explain why the Court would not have been within reason to conclude, given Midley's affirmative defense-based emphasis, that there was "no dispute" about Plaintiffs' ability to satisfy their burden.

That being said, Midley has cited to portions of its earlier briefs and arguments where it feels it made arguments attempting to hold Plaintiffs to their anti-SLAPP second-step burden beyond the CDA section 230-based argument. In addition, as noted above, Plaintiffs could be understood in their latest supplement brief to concede as much. *See* Docket No. 130, at 1:23-25. Among the locations Midley points to for these arguments are the following briefs and hearing transcripts: Docket No. 48, at 6:7-13; Docket No. 74, at 19:19-20:20, and 21:19-22:6; Docket No. 97, at 10:17-11:13; Docket No. 101, at 7:4-10:9, 10:15-19, 10:23-11:11, 11:19-28, and 12:20-24; and Docket No. 104, at 9:12-12:18.

Going through these record references chronologically, the first, Docket No. 48, at 6:7-13, simply identifies the second-step anti-SLAPP analysis burden and standard; it does not reflect an actual *argument* assessing Plaintiffs' ability to demonstrate their probability of prevailing on their claims.

The second reference, Docket No. 74, at 19:19-20:20, is contained within Midley's opposition brief relating to Plaintiffs' motions to file the First Amended Complaint and to conduct discovery. Not surprisingly, given the context of the motion to amend, Midley's discussion in its opposition brief is directed at the question of whether such planned amendment would be futile, *see id.* at 18:6-8, a customary factor for consideration on such a motion. This reference, therefore, was not an anti-SLAPP argument at all. In any event, the discussion cited consisted primarily of quoting the five comments attributed to Vlad Dusil, not in arguing the deficiency of such allegations in the context of any particular claim for relief. While the second citation to that opposition brief, at 21:19-22:6, consists of Midley arguing a deficiency in Plaintiffs' planned promissory estoppel claim, it is again an argument made in the context of opposing a motion for leave to amend, not in support of an anti-SLAPP motion.

Next, Docket No. 97 is the transcript from an October 29, 2012 hearing held in

connection with the anti-SLAPP motion and the motions for leave to amend and/or conduct discovery. At page/line 10:17-11:13 of that hearing, Midley's counsel again addresses futility: "But I do want to move to futility because, again, an amendment even in federal court even under the liberal pleading standards isn't to be allowed if it would be futile." *Id.* at 10:9-12. Arguing futility in connection with what is, in essence, a Fed. R. Civ. P. 15 motion, does not serve as a placeholder for arguing deficiency at the second step of an anti-SLAPP analysis.

The fourth location cited is Docket No. 101, at various places therein. Midley argued that the Court could grant its anti-SLAPP motion under a Rule 12 standard (in order to avoid a conflict between the anti-SLAPP law and Fed. R. Civ. P. 56). *See id.* at 7:4-8:5. Again, however, that argument was an aspect of Midley's overall CDA section 230 contention. *See id.* at 8:4-9:9, 9:15-18 & nn. 5, 7. Although Midley does argue that Dusil's posts themselves are not alleged to be defamatory, *see id.* at 10:15-19, that argument directly relates to one of the actions CDA section 230 immunity does not reach. *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (*en banc*) ("Where it is very clear that the website *directly participates* in developing the alleged *illegality* . . . immunity will be lost.") (emphasis added). In any event, it would (at most) only relate to Plaintiffs' defamation claim.[2]

The last document Midley cites to is Docket No. 104, its Reply brief in support of its anti-SLAPP motion – in other words, the final brief filed before the Court's issuance of the Order. Of course, if Midley had not sufficiently argued Plaintiffs' inability to make out or prove their claims (as opposed to Midley's ability to establish its CDA section 230 defense) by that point in time, it was too late to start doing it then without allowing Plaintiffs a still further opportunity for additional briefing. In any event, the very first sentence of the segment of the Reply brief Midley cites makes clear that, yet again, it was referring to application of a Rule 12 standard to the question of CDA immunity: "Despite colorful rhetoric and vehement arguments that the FAC alleges that Purseblog 'directly posted unlawful content,' plaintiffs ultimately cannot point to anything but conclusory allegations unsupported by facts, which are insufficient under Rule 12 *to plead around the CDA's broad immunity*." *Id.* at 9:15-18 (emphasis added). Indeed, the discussion that follows only serves to emphasize that Midley attempted to distance itself from ownership over various alleged thread comments, in line with the *Fair Housing* warning-shot excerpted above. *See id.* at 10:1-25 & n.6, 12:1-7 & n.7.

In sum, notwithstanding the somewhat strange statement in Plaintiffs' Supplemental

[2]This last limitation would also apply to the portions of Footnote 10 Midley cites from that brief. *See* Docket No. 101, at 11:19-28, 12:20-24.

Reply Brief, the Court stands by its understanding of Midley's anti-SLAPP motion/argument as fixating upon the avenue for victory it understood CDA section 230 to provide. Thus, unless it was incumbent upon the Court to assess the deficiencies in each of Plaintiffs' common law claims without – with the possible exception of the defamation claim – Midley's slightest advocacy in that direction, there is no reason to conclude that the Order needs revision with respect to its analysis of the anti-SLAPP procedure's second step.

Even if the Court were open to allowing Midley to change the nature of its anti-SLAPP argument at this point in the proceedings, its argument is that Plaintiffs have not shown a probability of prevailing based on Dusil's alleged posts and Midley's alleged deletions. Putting aside Dusil's posts for the moment, as to the alleged deletions Midley admits that the substance of such deletions is "not even identified on the face of the FAC." Docket No. 124, at 1:8-9. If that is the case, the Court would question why – considering that it is not possible to perform an evidence-based anti-SLAPP analysis at this stage – Plaintiffs would not be given yet another opportunity to amend their allegations in order to provide more substance to the deletions-based allegations.

Result of Partial Success at Second Step

On the issue the Court actually asked the parties to address, Plaintiffs appear to have the stronger position. The *Mann* decision expresses the more convincing line of authority most succinctly:

> [T]he anti-SLAPP procedure may not be used like a motion to strike under [California Code of Civil Procedure] section 436, eliminating those parts of a cause of action that a plaintiff cannot substantiate. Rather, once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands. Thus, 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 and need not parse the cause of action so as to leave only those portions it has determined have merit.

Mann, 120 Cal.App.4th at 106; *see Oasis West*, 51 Cal.4th at 820 ("If the plaintiff 'can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless' and will not be stricken; 'once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands.'") (quoting *Mann*, 120 Cal.App.4th at 106); *id.* at 821 ("The complaint identifies a

number of acts of alleged misconduct and theories of recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, it is sufficient to focus on just one."); *id.* at 825 ("Our task is solely to determine whether any portion of Oasis's causes of action have even minimal merit within the meaning of the anti-SLAPP statute."); *Mann*, 120 Cal.App.4th at 100 (indicating that, upon satisfaction of the anti-SLAPP statute's first requirement, "the plaintiff need only show a probability of prevailing on *any part of its claim*. Once the plaintiff makes this showing, the court need not determine whether the plaintiff can substantiate *all theories* presented within the single cause of action."); *id.* at 106 ("Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure."); *see also Burrill v. Nair*, 217 Cal.App.4th 357, 379-82 (2013) (distinguishing and disagreeing with *City of Colton v. Singletary*, 206 Cal.App.4th 751 (2012)). *But see cf. City of Colton*, 206 Cal.App.4th at 772-75 (concluding that it is permissible for a court to strike that portion of a claim which concerns protected activity, but as to which plaintiff has not demonstrated a probability of prevailing, while leaving untouched the portion of the same claim that concerns unprotected activity and as to which the plaintiff has demonstrated a probability of prevailing).

Burrill's criticism of the *City of Colton* case – founded largely upon the dissent in *City of Colton* – is convincing, leading this Court to discount the *City of Colton* decision. As a result, if the Order stands notwithstanding the tenor of Midley's most recent supplemental briefing, every cause of action would remain in the case and there would be no need to brief the attorneys' fee question, as Midley would be denied them. Of course, Midley would be free to proceed with additional motions (to the extent they are allowed at this stage of the action) as it sees fit in order to address 1) those aspects of Plaintiffs' claims the Court has already found flawed under CDA section 230 and/or 2) any other aspect of Plaintiffs' action.

A status conference is set for **September 30, 2013 at 8:30 a.m.** Counsel may appear telephonically provided that notice is given to the clerk by September 26, 2013.

Initials of Preparer: KTI