

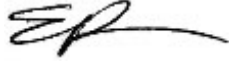
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Khoa vs. Thang**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC
SERVICE****CASE NUMBER:**
30-2021-01201012-CU-DF-CJC

I certify that I am not a party to this cause. I certify that a true copy of the above Minute Order dated 09/16/22 has been placed for collection and mailing so as to cause it to be mailed in a sealed envelope with postage fully prepaid pursuant to standard court practice and addressed as indicated below. This certification occurred at Santa Ana, California on 9/16/22. Following standard court practice the mailing will occur at Santa Ana, California on 9/16/22.

VOSS, SILVERMAN & BRAYBROOKE LLP
4640 ADMIRALTY WAY SUITE 800
MARINA DEL REY, CA 90292


Clerk of the Court, by:  , Deputy

I certify that I am not a party to this cause. I certify that the following document(s), Minute Order dated 09/16/22, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on September 16, 2022, at 9:20:28 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

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CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 09/16/2022

TIME: 09:03:00 AM

DEPT: C24

JUDICIAL OFFICER PRESIDING: Stephanie George

CLERK: E. Perreault

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2021-01201012-CU-DF-CJC** CASE INIT.DATE: 05/13/2021

CASE TITLE: **Khoa vs. Thang**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Defamation

EVENT ID/DOCUMENT ID: 73848214

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 08/11/2022 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Defendants Nguyen Dinh Thang and Boat People S.O.S., Inc.'s ("Defendants") Special Motion To Strike Plaintiff Le Xuan Khoa's ("Plaintiff") Complaint is **GRANTED in part** and **DENIED in part as follows:**

Objections

Defendants' objection to the Declaration of Nguyen Khoa Thai Anh ("Anh Dec.") in its *entirety* is sustained as speculative, not based on personal knowledge (lacks foundation), and consists of impermissible opinion testimony. The Court can think of no avenue in which the proffered evidence of Nguyen Khoa Thai Anh, a Vietnamese to English translator, would be admissible at trial. In light of this ruling, the Court declines to rule on Defendants' remaining objections to the Anh Dec.

Defendants' objections to the Declaration of Le Xuan Khoa ("Plaintiff Dec.") are overruled. However, if Plaintiff intends to provide a different interpretation of Defendants' statement *at trial*, he must be prepared/able to *factually backup his opinion*.

Analysis

"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." (Code Civ. Proc. § 425.16(b)(1).) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc. § 425.16(b)(2).) In doing so, the court must construe the section broadly. (Code Civ. Proc. § 425.16(a).)

DATE: 09/16/2022

MINUTE ORDER

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"Section 425.16 provides ... that [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." (*Navellier v. Sletten*, (2002) 29 Cal.4th 82, 87-88 [citations and quotations omitted].) An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (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 ..." (*Id.*, at 89); (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.

To determine if an action is a SLAPP, the court must first decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)." (*Navellier v. supra*, 29 Cal.4th, at 88, [citations and quotations omitted].) "When moving to strike a cause of action under the anti-SLAPP statute, a defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of proving the plaintiff's subjective intent. Nor need a moving defendant demonstrate that the action actually has had a chilling effect on the exercise of such rights." (*Ibid.*) "If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "[I]n order to establish the requisite probability of prevailing, the plaintiff need only have [a] stated and substantiated 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." (*Id.*, at 88-89.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning and lacks even minimal merit — is a SLAPP, subject to being stricken under the statute." (*Navellier v. supra*, 29 Cal.4th, at 89, [citations and quotations omitted].) "[T]he mere fact that an action was *filed after* protected activity took place *does not mean the action arose from that activity* for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been *triggered* by protected activity *does not entail it is one arising from such*. In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. In deciding whether the initial arising from requirement is met, a court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*Ibid.*, [emphasis added].)

Application

There are "three situations in which statements may concern a public issue or a matter of public interest: (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; or (3) *the statement or activity precipitating the claim involved a topic of widespread public interest*." (*Mann v. Quality Old Time Service, Inc.*, (2004) 120 Cal.App.4th 90, 111 [citation omitted, emphasis added].)

"The definition of public interest within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad

segment of society and/or that affects a community in a manner similar to that of a governmental entity. Matters of public interest ... include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 [citations and quotations omitted].) Additionally, protection has been held to apply "in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute, or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance." (*Terry v. Davis Community Church*, (2005)131 Cal.App.4th 1534, 1549 [citations and quotations omitted].)

The act in question involves a series of articles published on a public website. Defendants contend the articles are written statements/writings "made in a place open to the public or a public forum in connection with an issue of public interest." [Motion MPA at 6:22-25.] The parties agree that "[w]eb sites accessible to the public . . . are public forums for purposes of the anti-SLAPP statute." (*Wong v. Jing*, (2010) 189 Cal.App.4th 1354, 1366, [quotations omitted], citing *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.) However, Plaintiff *does not agree* the statements contained within the specific article in question were made in connection with a matter of public interest.

The topic of the online articles was the creation of the Resettlement Opportunity for Vietnamese Returnees ("ROVR") program; a program that assisted tens of thousands of Vietnamese boat people living in asylum camps, find refuge in the United States. Defendants argue the articles, ergo, the statements contained inside the targeted article, were/are on a topic of widespread interest in the Vietnamese American community. Defendants further contend that by writing Dr. Thang *acted deviously* and employed *shady tricks* in a preceding article, Plaintiff placed his own credibility in issue, necessitating/prompting their response.

Plaintiff concedes ROVR is a matter of public interest in the Vietnamese American community, but argues Defendants' personal attacks on him, (that he falsely claimed a doctoral credential on an unrelated government grant application and supported the Communist government of Viet Nam) do not contribute to the public debate, citing to *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133. However, in *FilmOn.com*, the act in furtherance of a person's right of petition or free speech was analyzed using category (4) - 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, *not* category (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. The question before this Court, is whether the statements Defendants made about Plaintiff in the online article were *made* in a place open to the public or a public forum *in connection with an issue of public interest*.

Plaintiff is correct that ROVR is a matter of public interest. Further, when an article is *written and published* on a public website by someone purporting to have first-hand and/or inside/expert knowledge on the subject, such as those written and published here, their credibility is placed into issue. Thus, when Plaintiff characterized Dr. Thang's motivations as devious and shady, he placed his credibility front and center in a matter of public interest to the Vietnamese American community - whether he knew it or not.

Therefore, the Court finds Defendants' statements are protected speech.

Probability of Prevailing on the Merits

"In order 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; though 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. (*Taus v. Loftus*, (2007) 40 Cal.4th 683, 714 [italics original, citations and quotations omitted].) "[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim, past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities." (*Ibid.* [italics original, citations and quotations omitted].)

"It is well settled that in opposing a SLAPP motion the plaintiff's showing of a probability of prevailing on its claim must be based on admissible evidence." (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, (2004) 117 Cal.App.4th 1138, 1147 [citations omitted].) "[T]he proper view of admissible evidence for purposes of the SLAPP statute is evidence which, by its nature, is *capable* of being admitted at trial, i.e., evidence which is competent, relevant and not barred by a substantive rule. Courts have thus excluded evidence which would be barred at trial by the hearsay rule, or because it is speculative, not based on personal knowledge or consists of impermissible opinion testimony. This type of evidence cannot be used by the plaintiff to establish a probability of success on the merits because it could never be introduced at trial. On a SLAPP motion "[a]n assessment of the probability of prevailing on the claim looks to trial, and the evidence that will be presented at that time." (*Id.*, at 1147-48 [citations and quotations omitted].) However, "[t]o strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes. Ultimately, the SLAPP Act was intended to end meritless SLAPP suits early without great cost to the target" (*Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, (2006) 6 Cal.5th 931, 949 [citations and quotations omitted].) "In sum, at the second stage of an anti-SLAPP hearing, the court may consider affidavits, declarations, and their equivalents if it is reasonably possible the proffered evidence set out in those statements will be admissible at trial. Conversely, if the evidence relied upon cannot be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection. If an evidentiary objection is made, the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable." (*Ibid.*)

First Cause of Action (defamation)

"The tort of defamation involves (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." (*Taus, supra*, 40 Cal.4th., at 720 [citations and quotations omitted].)

Defendants' Statements In Controversy

"In the Consortium, Mr. Khoa was the most dangerous member because he is Vietnamese. The Department of State in the Clinton Administration used this card enthusiastically against Congress, which was backing us at the time.

Immediately after the two hearings, Congressman Smith sent an official letter requesting the Inspector General of the Department of State to investigate Mr. Khoa and SEARAC on a fraudulent background statement used when applying for a federal grant: Mr. Khoa falsely claimed that he held a doctoral degree in the application for a grant from the Department of State. That was a criminal offense.

When investigated, Mr. Khoa explained that other people showed respect to him and addressed him by the title Doctor, even though he objected. But such an explanation was not good because Mr. Khoa

himself had claimed to have a doctoral degree in the resume he attached to the grant application.

*Perhaps Congressman Smith's purpose was not to **criminally** prosecute Mr. Khoa or SEARAC but only to neutralize this trump card of the Department of State. Indeed, the Department of State later stopped using this trump card."*

First Statement

In their rebuttal article, Defendants' allege that "Congressman Smith sent an official letter requesting the Inspector General of the Department of State to investigate Mr. Khoa and SEARAC on a fraudulent background statement used when applying for a federal grant: Mr. Khoa falsely claimed that he held a doctoral degree in the application for a grant from the Department of State. That was a criminal offense." Defendants claim "truth" as a defense.

"[C]auses of action arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to the anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law, without regard to the circumstances in which they were made — a result that would be inconsistent with the purpose of the anti-SLAPP statute and would unduly undermine the protection accorded by paragraph 1 of Civil Code section 46, which includes as slander any false and unprivileged communication charging a person with a crime, and the California rule that false accusations of crime are libel per se (Civ. Code, § 45a; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 482, p. 566)." (*Weinberg v. Feisel*, (2003), 110 Cal.App.4th 1122, 1136.)

In opposition, Plaintiff adamantly declares, "I have never made any grant or other application claiming to have a Ph.D. credential." Moreover, Defendants' article does *not* accurately describe the content of the Congressman's letter. Contrary to Defendants' assertion, the letter does *not* contain an accusation that "*Mr. Khoa falsely claimed that he held a doctoral degree in the application for a grant from the Department of State.*" Likewise, the statement "*That was a criminal offense*" appears nowhere in the letter. In fact, the letter does not mention a criminal offense.

The Court finds Plaintiff has presented sufficient evidence to show a probability of prevailing on his defamation claim based on the first statement.

Accordingly, Defendants' ***motion to strike as to allegations as to the first statement in Plaintiff's first cause of action is denied.***

Second Statement in Controversy

"Libel is recognized as either being per se (on its face), or per quod (literally meaning, "whereby"), and each requires a different standard of pleading. If no reasonable reader of a publication could impute to a statement therein a meaning which tended to harm the reputation of the plaintiff in any of the respects enumerated in Civil Code section 45, then there is no libel at all. If however, the defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club v. Rangel*, (1999) 73 Cal.App.4th 1, 5 [citations omitted].)

In their online article, Defendants also write "*Mr. Khoa was the most dangerous member because he is Vietnamese. The Department of State in the Clinton Administration used this card enthusiastically against*

Congress, which was backing us at the time." Defendants contend they are simply stating that as a Vietnamese American citizen, Plaintiff could be easily used by the Clinton Administration Department of State [as a "card"] against Congress. However, Plaintiff claims Defendants' statement falsely accuses him of supporting the Communist government of Viet Nam and actively fighting against members of Congress who were assisting Vietnamese asylum-seekers - both of which he denies. However, Plaintiff's declaration filed in support of position merely recites Plaintiff's interpretation of Defendants second statement and its implications without providing a *factual basis* for his opinion. "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Bartholomew v. YouTube, LLC.*, (2017) 17 Cal.App.5th 1217, 1232 [citations omitted]. As for Nguyen Khoa Thai Anh's declaration, it, too, provided no *factual basis* for his opinion. Moreover, unlike Plaintiff who appears to have some level of expertise in the subject matter in controversy, Mr. Anh's expertise is as an Vietnamese to English interpreter. His lay opinion is per se inadmissible.

The Court finds Plaintiff has not shown a likelihood of prevailing on the second statement.

"Typically, a pleaded cause of action states a legal ground for recovery supported by specific allegations of conduct by the defendant on which the plaintiff relies to establish a right to relief. If the supporting allegations include conduct furthering the defendant's exercise of the constitutional rights of free speech or petition, the pleaded cause of action [arises] from protected activity, at least in part, and is subject to the special motion to strike authorized by section 425.16(b)(1). Some courts, including the Court of Appeal in this case, have held that the motion lies only to strike an entire count as pleaded in the complaint. However, this rule leads to anomalous results when the count is supported by allegations of unprotected activity as well as protected activity." (*Baral v. Schnitt*, (2016) 1 Cal.5th 376, 381-82 [quotations omitted].) "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 ... shall be subject to a special motion to strike, unless the court determines ... there is a probability that the plaintiff will prevail on the claim.* These terms express the Legislature's desire to require plaintiffs to show a probability of prevailing on the claim" arising from protected activity" (*Id.*, at 393 [quotations omitted; italics original].) "When the Legislature declared that a "cause of action" arising from activity furthering the rights of petition or free speech may be stricken unless the plaintiff establishes a probability of prevailing, it had in mind allegations of protected activity that are asserted as grounds for relief." (*Id.*, at 395.) "By referring to a "cause of action against a person arising from any act of that person in furtherance of" the protected rights of petition and speech, the Legislature indicated that *particular alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion.* (*Ibid.* [emphasis added].)

Accordingly, Defendants' ***motion to strike allegations of the second statement in Plaintiff's first cause of action is granted.***

Second Cause of Action (negligent infliction of emotional distress)

"Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply." (*Ess v. Eskaton Properties, Inc.*, (2005), 97 Cal.App.4th 120, 126 [citations omitted].)

Plaintiff provides no evidence of damages. Thus, he has not shown a likelihood of prevailing on this cause of action.

Accordingly, Defendants' ***motion to strike Plaintiff's second cause of action is granted.***

Counsel for Defendants to give notice.