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Superior Court of California
County of Los Angeles

JUN 10 2015
Sherri R. Carter, Executive Officer/Clerk
By Irene Ayala Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

JAMES MURTAGH, M.D., an individual,
Plaintiff,

v.

CLARK BAKER, an individual;
OFFICE OF MEDICAL & SCIENTIFIC JUSTICE, INC., a California corporation; DOES 1-10,
Defendants.

CASE NO.: BC527716
(Assigned to Hon. Michael P. Linfield, Dept. 34)

~~PROPOSED~~ ORDER ON PREVAILING PLAINTIFF'S MOTION FOR ATTORNEYS FEES AND EXPENSES [C.C.P. § 425.16(c)(1)]

DATE: May 12, 2015
TIME: 8:30 a.m.
DEPT: 34

Complaint Filed: Nov. 15, 2013
Trial Date: October 19, 2015

The hearing on Plaintiff James Murtagh, M.D.'s Motion for Attorneys Fees and Expenses [C.C.P. § 425.16(c)(1)] ("Motion") came on for hearing in Department 34 of this Court on May 12, 2015. The parties were represented by counsel as noted on the record. The Court, having considered the moving, opposition and reply papers and oral argument of counsel, and good cause appearing,



IT IS HEREBY ORDERED THAT:

The Court adopts the attached revised Tentative Ruling as its final decision on Plaintiff's Motion and for the reasons stated in the attached revised Tentative Ruling, Plaintiff's Motion is GRANTED and Plaintiff is awarded attorneys' fees and expenses pursuant to C.C.P. § 425.16 in the amount of \$60,000.00, jointly and severally against

1 Defendant CLARK BAKER and Defendants OFFICE OF MEDICAL & SCIENTIFIC
2 JUSTICE, INC.

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Date: JUN 10 2015


The Honorable Michael P. Linfield
Judge of the Superior Court 



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Tentative Rulings

DEPARTMENT 34 LAW AND MOTION RULINGS

The Court often posts its tentative several days in advance of the hearing. Please re-check the tentative rulings the day before the hearing to be sure that the Court has not revised the ruling since the time it was posted.

Please call the clerk at (213) 633-0154 by 4:00 pm. the court day before the hearing if you wish to submit on the tentative.

Case Number: BC527716 **Hearing Date:** May 12, 2015 **Dept:** 34

Moving Party: Plaintiff James Murtagh, M.D.

Resp. Party: Defendants Clark Baker and Office of Medical and Scientific Justice, Inc.

Plaintiff's motion for attorney's fees following defendant's unsuccessful anti-SLAPP motion is **GRANTED** in the amount of \$60,000.00.

Defendants' Objections to Wallace Declaration:

- Objection to ¶
- 5 OVERRULED
- 6 OVERRULED
- 7 SUSTAINED
- 8 OVERRULED
- 9 OVERRULED
- 10 OVERRULED
- 11a OVERRULED
- 11b OVERRULED
- 12 OVERRULED
- 13 OVERRULED
- 14 OVERRULED
- 15 OVERRULED
- 16 OVERRULED
- 17 OVERRULED
- 18 OVERRULED
- 19 OVERRULED
- 20 SUSTAINED
- 21 SUSTAINED
- 22 OVERRULED
- 23 OVERRULED
- 24 SUSTAINED
- 25 OVERRULED

Defendants' Objections to Hiraide Declaration:

Objection ¶
 5 OVERRULED
 6 OVERRULED
 7 OVERRULED
 8 OVERRULED
 9 OVERRULED
 10 OVERRULED
 11 OVERRULED
 12 OVERRULED
 13 SUSTAINED
 14 OVERRULED

Defendants' Objections to Murtagh Declaration:

Objection ¶
 5 OVERRULED
 6 OVERRULED
 7 OVERRULED
 8 OVERRULED
 9 OVERRULED
 10 OVERRULED
 11 OVERRULED
 12 OVERRULED
 13 OVERRULED
 14 OVERRULED
 15 OVERRULED
 16 OVERRULED
 17 OVERRULED

Defendants' Objections to Exhibits:

Objection ¶
 51 OVERRULED
 190 OVERRULED
 191 OVERRULED
 195 OVERRULED
 192 OVERRULED
 217 OVERRULED

PRELIMINARY COMMENTS:

This is a motion for attorneys fees after filing an unsuccessful anti-SLAPP motion. (Code Civ. Proc., § 425.16(c)(1).) The large majority of Plaintiff's motion and exhibits concerns defendant's alleged wrongful conduct, including, e.g., evidence tampering, perjury and contempt of court. (See, e.g., Motion, p. 2:8-16.) However, plaintiff has not filed a motion for discovery sanctions, plaintiff has not filed a request that the court find defendant in contempt, nor has plaintiff a motion for sanctions pursuant to CCP §§ 128.5 or 128.7.

Therefore, the majority of plaintiff's argument is irrelevant for purposes of this motion.

The court also notes that the vast majority of Defendants' objections (>90%) have been overruled. The court expects counsel for both parties to comply with all Rules of Court, and to ensure that all arguments and objections to evidence in future pleadings are filed in good faith. (See, e.g., Reid v. Google, Inc. (2010) 50 Cal.4th 512, 532; Nazir v. United Airlines, Inc., (2009) 178 Cal. App. 4th 243, 290.)

BACKGROUND:

Plaintiff commenced this action on 11/14/13. Plaintiff filed a first amended complaint on 1/24/14. Plaintiff filed a second amended complaint on 8/18/14 against defendants for: (1) intentional interference with contractual relations; (2) inducing breach of contract; (3) intrusion into private affairs; (4) injunction; (5) unauthorized commercial use of name/likeness; and (6) Civ. Code § 3344 [erroneously cited as Code Civ. Proc. § 3344 in the SAC].

Plaintiff alleges that he previously worked for Emory University School of Medicine, but was forced to resign, which resulted in a lawsuit and subsequent settlement with a confidentiality agreement. (See SAC ¶¶ 8-18.) In 2004, plaintiff and others established the Semmelweis Society International (SSI) in order to protect whistleblowers in the medical field. (Id., ¶¶ 20-23.) In connection with the SSI, plaintiff was selected to testify to Congress concerning whistleblower experiences. (Id., ¶¶ 22-23.) Another individual, Dr. Gil Mileikowsky, was not permitted to testify and falsely blamed plaintiff. (Id., ¶¶ 24-25.) At another event in May 2008, Mileikowsky introduced defendant Baker as a private investigator, and Baker was subsequently admitted as a member of the SSI. (Id., ¶¶ 26-28.) At the event, Baker and Mileikowsky advocated for their belief that HIV does not cause AIDS. (Id., ¶¶ 29-34, 37-40, 43-44.) Plaintiff opposed defendant's beliefs and denial of pharmaceutical treatment to HIV positive individuals; in turn, Baker severely criticized and reprimanded plaintiff for his support of treatment for HIV/AIDS patients. (Id., ¶¶ 35-36, 41-42.) After the conclusion of the event, Mileikowsky and Baker remained upset about resistance they received from some SSI members, which created tension amongst the SSI Board. (Id., ¶ 45.) The SSI members unanimously agreed to impeach the SSI Board and impeach defendant Baker. (Id., ¶ 46.) Baker then constructed his own SSI Board, and the SSI fractured into two separate organizations. (Id., ¶¶ 46-47.) Baker's SSI Board thereafter began to specifically target plaintiff by attacking his livelihood. (Id., ¶¶ 48-49.) Plaintiff alleges that Baker improperly obtained confidential and private information belonging to plaintiff regarding his legal defense and strategy related to defendants' harassment, and used such information to contact plaintiff's employers in an attempt to get him terminated from employment. (Id., ¶¶ 50-53.) This includes information about plaintiff's settlement with Emory which is under seal. (Id., ¶ 54.) Plaintiff alleges that defendant has obtained confidential information about plaintiff's whereabouts, including his current employers and places of employment. (Id., ¶ 57.)

On 1/27/15, the Court denied defendants' special motion to strike plaintiff's complaint. The Court found that, although the alleged statements were made in a public forum, they did not pertain to a matter of public interest.

ANALYSIS:

Plaintiff seeks \$102,926.25 in attorney's fees as the prevailing party on defendants' anti-SLAPP motion.

I. Defendant's anti-SLAPP motion was Frivolous

"If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16(c)(1).) "A determination of frivolousness requires a finding the anti-SLAPP motion is "totally and completely without merit" [citation], that is, "any reasonable attorney would agree such motion is totally devoid of merit." [Citation.] [Citation.]" (Moore v. Shaw (2004) 116 Cal.App.4th 182, 199 [italics in original].)

Plaintiff raises several arguments and assertions as to documents submitted by defendants in support of their anti-SLAPP motion and reply. The Court need not consider these issues because such documents were not necessary to the denial of the anti-SLAPP motion. The motion was denied because defendant failed to show that the alleged statements pertained to a matter of public interest, which was based on consideration of Baker's declaration and copies of articles published on defendant's websites. (See Order, 1/27/15 [attached and adopted tentative ruling].) Moreover, the Court sustained the majority of plaintiff's objections to defendants' evidence, and the result was that "defendants ... produced virtually no evidence in support of their anti-SLAPP motion." (Ibid.)

The Court notes that the instant motion is solely a motion for attorney's fees pursuant to CCP section 425.16(c)(1). Plaintiff has not filed a separate motion for sanctions under CCP section 128.5 or 128.7. Therefore, attorney's fees may only be awarded against defendants and not defense counsel. (See Weil & Brown, Civ. Proc. Before Trial (The Rutter Group 2014) ¶ 7:1120 [citing Moore v. Kaufman (2010) 189 Cal.App.4th 604, 614].)

This court finds that the anti-SLAPP motion was frivolous. As stated in the Order denying the anti-SLAPP motion, "defendants made no showing that the claims were based on protected conduct and have produced virtually no evidence to support their anti-SLAPP motion." (See Moore, supra, 116 Cal.App.4th at p. 199-200 [finding an anti-SLAPP motion to be frivolous where the defendant's alleged conduct "clearly did not constitute an act in furtherance of the right to petition or free speech in connection with a public issue"].)

Therefore, plaintiff is entitled to his fees and costs.

II. Determination of the Lodestar

If the Court determines that the anti-SLAPP motion was frivolous, the Court must next determine if the amount of fees requested is reasonable. Pursuant to California Code of Civil Procedure section 425.16, parties may use the "lodestar" adjustment method of determining attorney's fees. (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131; Code Civ. Proc. § 425.16(c).) In setting the amount of attorney's fees under a "lodestar" standard,

'[t]he first step involves the lodestar figure – a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate. The lodestar figure may then be adjusted, based on consideration of facts specific to the case, in order to fix the fee at the fair market value for the legal services provided.'

(Gorman v. Tassajara Development Corp. (2008) 162 Cal.App.4th 770, 774 [internal citations omitted].) In determining whether to adjust the lodestar figure, the Court may consider the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case. (EnPalm LLC v. Teitler (2008) 162 Cal.App.4th 770, 774; PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095.)

In California,

[t]he prevailing defendant seeking fees and costs "bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." [Citation.] To that end, the court may require [a] defendant[] to produce records sufficient to provide "a proper basis for determining how much time was spent on particular claims." [Citation.] The court may also properly reduce compensation on account of any failure to maintain appropriate time records. [Citation.]

(Christian Research Institute v. Alnor (2008) 165 Cal.App.4th 1315, 1320 [quoting ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1020].) Additionally, "[t]he evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." (Ibid.)

However, the Court may deny the motion altogether if the amount of fees requested is unreasonable. "If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful" (Serrano v. Unruh (1982) 32 Cal.3d 621, 635 [quoting Brown v. Stackler (7th Cir. 1980) 612 F.2d 1057, 1059].) "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 990; Ketchum v. Moses (2001) 24 Cal.4th 1122, 1137; Serrano v. Unruh (1982) 32 Cal.3d 621, 635.)

A. Counsel's hourly rates are Reasonable

Plaintiff sufficiently supports the billing rates of attorney's John B. Wallace and Lisa Hirade. (See Wallace Decl., ¶¶ 3-4; Hirade Decl., ¶¶ 3-4.) The Court finds these rates to be reasonable in the Los Angeles market.

Plaintiff also seeks fees paid to other attorneys and consultants, but does not provide admissible evidence showing that such fees were reasonable. (See Wallace Decl., ¶¶ 7, 21-24 [Wallace has not established personal knowledge as to the reasonableness of the fees].)

B. The Number of Hours Spent on the Motion is Unreasonable and Inflated

The fees incurred in the preparation of a separate statement were not reasonably incurred. (See Wallace Decl., ¶ 13; Hirade Decl., ¶ 7.) A separate statement is not required for an anti-SLAPP motion and was not considered by the Court, and it is unclear why plaintiff's counsel found it necessary to spend time on such a document.

Plaintiff may not recover fees for the sur-reply because no sur-reply was filed and plaintiff was never given leave to file a sur-reply. (See Wallace Decl., ¶ 16.) Therefore, fees incurred in connection with the sur-reply were not reasonably incurred.

The requested time for the instant motion also appears inflated. (See Wallace Decl., ¶¶ 17, 18; Hirade Decl., ¶¶ 9, 10.) As discussed above, much of plaintiff's argument attacking the documents submitted by defendants in their anti-SLAPP motion is unnecessary for the instant motion or the Court's determination as to whether the anti-SLAPP motion was frivolous.

Finally, to the extent that the requested fees also pertain to the other motions at issue at the same time as the anti-SLAPP motion (i.e., the motion for an undertaking and demurrer), the fees are not recoverable. The attorneys' fees and costs recoverable are only those incurred as to the special motion to strike, and not as to other litigation events. (Jackson v. Yarbray (2009) 179 Cal.App.4th 75, 92 ["only those attorney fees and costs related to the special motion to strike, not the entire action, may be recovered under section 425.16, subdivision (c)"]; Lafayette Morehouse, Inc. v. Chronicle Pub. Co. (1995) 39 Cal.App.4th 1379, 1383; Weil & Brown, ¶7:1135 ["Section 425.16 (c) is ambiguous as to what 'fees and costs' are recoverable. But legislative history shows it was intended to allow only fees and costs incurred on the motion to strike (not the entire litigation)"]; But see Wilkerson v. Sullivan (2002) 99 Cal.App.4th 443, 446 ["The statute is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating herself from a baseless lawsuit"].)

Therefore, the fees requested in relation to attorney's and consultants other than Wallace and Hirade, preparation of the separate statement in opposition to the anti-SLAPP motion, preparation of the sur-reply, work performed outside the opposition to the anti-SLAPP motion, and preparation of the instant motion must all be reduced.

C. The Court's Determination of a Reasonable Lodestar

Plaintiff has chosen not to submit time/billing records, but instead relies upon his and Hirade's own declarations for the reasonable of the lodestar. (See Wallace Decl., ¶ 19; Hirade Decl., ¶¶ 7-11.) This is permissible, "An attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal.App.4th 285, 293 see also Mardirossian v. Ersoff (2007) 153 Cal.App.4th 257, 269 [same].)

In such a circumstance, when counsel chooses not to put in evidence their time/billing records, the court must peruse plaintiff's opposition to the anti-SLAPP motion to determine a "reasonable" lodestar. The Court has done so. It has also looked at the complexity and novelty of the issues presented in this anti-SLAPP motion and compared the opposition in this anti-SLAPP motions with numerous other anti-SLAPP motions (and subsequent fee requests) upon which this Court has ruled.

Having done so, the Court awards \$60,000 in attorneys fees and costs against Defendant.

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Rosen & Associates, P.C. 444 S. Flower Street, Suite 3010, Los Angeles, California 90071. On May 22, 2015, I served the within documents:

[PROPOSED] ORDER ON PREVAILING PLAINTIFF'S MOTION FOR ATTORNEYS FEES AND EXPENSES [C.C.P. § 425.16(c)(1)]

I caused such envelope/package containing the document(s) to be delivered to the addressee(s) or directly to the addressee(s) in the manner set forth below:

Mark A. Weitz, Esq.
WEITZ MORGAN PLLC
100 Congress Avenue, Suite 2000
Austin, TX 78701
mweitz@weitzmorgan.com
Attorney for Defendant/Respondent

Etan Lorant, Esq.
Etan Z. Lorant Law Offices
5850 Canoga Avenue #400
Woodland Hills, CA 91367
esq8ton@gmail.com
Attorney for Defendant/Respondent

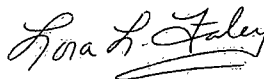
I am familiar with the office practice of Rosen & Associates, P.C. for collecting and processing documents for Mailing with the United States Postal Service, which practice is that when documents are deposited with the Rosen & Associates, P.C. personnel responsible for depositing documents with the United States Postal Service, such documents are delivered to the United States Postal Service that same day in the ordinary course of business with postage thereon fully prepaid. I placed a sealed envelope/package containing the document(s) in Rosen & Associates, P.C.'s outgoing mailbox, addressed as shown above.

I deposited the above document(s) for e-mail transmission in accordance with the office practice of Rosen & Associates, P.C. for collecting and processing e-mails. I am familiar with the office practice of Rosen & Associates, P.C. for collecting, processing, and transmitting e-mails, which practice is that when a e-mail is deposited with the Rosen & Associates, P.C. personnel responsible for e-mails, such e-mail is transmitted that same day in the ordinary course of business. The e-mail of the above document(s) was transmitted as shown above.

I am employed in the office of a member of the Bar of or permitted to practice before the Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 22, 2015, at Los Angeles, California.



Lora Foley