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723 Fed.Appx. 463 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

Stephen YAGMAN, Plaintiff-Appellant,

v.

Joseph Curtis EDMONDSON; Michael J. Colello,
Defendants-Appellees.

No. 16-56911

Submitted May 15, 2018*

Filed May 18, 2018

Appeal from the United States District Court for the Central District of California, Dale S. Fischer, District Judge, Presiding, D.C. No. 2:15-cv-07210-DSF-SS

Attorneys and Law Firms

Joseph Reichmann, Esquire, Attorney, Yagman & Reichmann, Venice Beach, CA, for Plaintiff-Appellant

Stephen Yagman, Pro Se

Danielle R. Sokol, Kaufman Dolowich & Voluck, LLP, Los Angeles, CA, for Defendant-Appellee Joseph Curtis Edmondson

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

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Joseph Curtis Edmondson, Attorney, Law Office of J. Curtis Edmondson, Hillsboro, OR, for Defendant-Appellee Michael J. Colello

Before: SILVERMAN, BEA, and WATFORD, Circuit Judges.

MEMORANDUM**

Stephen Yagman appeals pro se from the district court's summary judgment and dismissal order in his action alleging Racketeer Influenced and Corrupt Organizations Act ("RICO") and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Living Designs, Inc. v. E. I. Dupont de Nemours & Co.*, 431 F.3d 353, 360 (9th Cir. 2005) (summary judgment); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) (grant of an anti-SLAPP motion to strike). We affirm.

The district court properly granted Colello's motion to strike Yagman's state law claims pursuant to California's anti-SLAPP statute because Colello met his *prima facie* burden of showing that each cause of action arose out of protected activity and Yagman failed to demonstrate a probability of prevailing on the merits. *See Vess*, 317 F.3d at 1110 (two-step analysis under California's anti-SLAPP statute).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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The district court properly granted summary judgment on Yagman's RICO claim because it is time-barred. *See Living Designs, Inc.*, 431 F.3d at 365 (four-year statute of limitations period for civil RICO claims begins to run when a plaintiff knows or should know of the injury that is the basis for the action); *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996) (discussing "separate accrual rule" in the RICO context). Contrary to Yagman's contention, his RICO claim did not accrue in April 2015 when Colello received property from the bankruptcy estate.

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Yagman's request for costs on appeal, set forth in his opening brief, is denied. Colello's request for costs on appeal, set forth in his answering brief, is denied without prejudice to filing a timely bill of costs. *See Fed. R. App. P. 39.*

AFFIRMED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 15-7210 DSF (SSx) Date 12/17/15
Title Stephen Yagman v. Joseph Curtis Edmondson,
et al.

Present: The DALE S. FISCHER, United States Dis-
Honorable trict Judge

<u>Debra Plato</u>	<u>Not Present</u>
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Mo-
tion for Judgment on the Pleadings
and Special Motion to Strike (Dkt.
Nos. 64 and 69)¹

Defendant Michael J. Colello moves for judgment
on the pleadings and for a special motion to strike un-
der the California anti-SLAPP statute, California Code
of Civil Procedure 425.16. Because the anti-SLAPP

¹ The Court deems this matter appropriate for decision with-
out oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The
hearing set for January 4, 2016 is removed from the Court's cal-
endar.

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motion succeeds, the Court need not consider the other aspects of the motion for judgment on the pleadings.²

In analyzing an anti-SLAPP motion, a court must first decide “whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.” *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 819 (2011) (internal quotation marks omitted). Under the statute, 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, (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.

² The motion suggests that it applies to the entire complaint, but nothing in the motion addresses Plaintiff’s RICO claim or even shows that Defendant is aware of its existence. Therefore, that claim is not dismissed by this order.

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Cal. Civ. Pro. § 425.16(e). “In deciding whether the ‘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.” *City of Cotati v. Cashman*, 29 Cal. 4th 69, 79 (2002) (internal quotation marks omitted).

“If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” *Oasis West*, 51 Cal. 4th at 819-20 (internal quotation marks omitted). To meet this requirement, “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 820 (internal quotation marks omitted). Courts consider the pleadings and supporting and opposing affidavits, but do not make credibility determinations or compare the weight of the evidence. *Id.* Instead, courts “accept as true the evidence favorable to the plaintiff and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” *Id.* (internal quotation marks and brackets omitted).

“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.” *Id.* (internal quotation marks omitted).

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The first prong of the anti-SLAPP statute is obviously satisfied because the state law claims in the complaint are all based on Defendant's petitioning activities in bankruptcy court in New York. *See* FAC ¶¶ 8-24. The second prong is also satisfied. Defendant argues that the California litigation privilege bars claims based on his activities in the bankruptcy court. Plaintiff fails to respond at all to this facially valid argument other than in three conclusory sentences that the litigation privilege does not apply. *See* Opp'n at 13. Plaintiff claims that “[i]t is not argued that [Defendant's] litigation-related conduct is not actionable, to the extent it is illegal. All of it was illegal. Cal. Civ. Code § 47(b) is inapplicable.” *Id.* This is incorrect as to both Defendant's argument and the underlying law. Defendant directly – and correctly – argues that “the privilege applies even where the communications are themselves ‘fraudulent, perjurious, unethical, or even illegal.’” Mot. at 9 (citing and quoting *Kashian v. Harriman*, 98 Cal. App. 4th 892, 920 (2002)); see also *Kashian*, 98 Cal. App. 4th at 913 (“The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm.”).

Even setting aside the litigation privilege, Plaintiff provides no support for his claims, let alone support that 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.” He does discuss the conversion claim, but seems to believe that anyone holding

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property of another is liable for conversion and fails to address the bankruptcy court order allowing Defendant's lawyer to hold the disputed funds in an escrow account. Given the weakness of Plaintiff's arguments, the Court is left only knowing that Plaintiff claims to have a money judgment against Defendant, that Defendant has taken some actions in the bankruptcy court that have – via court order – prevented Plaintiff from gaining immediate possession of that money, and that Plaintiff believes that Defendant's actions in the bankruptcy court were "illegal" for unstated or, at best, difficult to understand reasons. This falls far short of the showing required to defeat an anti-SLAPP motion.

In lieu of a more substantive opposition, Plaintiff claims he needs discovery to oppose the motion. Discovery can be allowed in the anti-SLAPP context in federal court. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-47 (9th Cir. 2001). However, *Wornick* allows discovery pursuant to a Rule 56(d)-style request. *See id.*³ Rule 56(d) requires a nonmoving party to support "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." In order to obtain a continuance for discovery, an opposing party must make "(a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists." *Emp'rs Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1129 (9th Cir. 2004)

³ The current Rule 56(d) was, at the time, Rule 56(f).

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(internal quotation marks omitted). In other words, “[a] party requesting a continuance pursuant to [now Rule 56(d)] must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment.” *Tatum v. San Francisco*, 441 F.3d 1090, 1100 (9th Cir 2006).

Plaintiff’s declaration fails to do any of this. Most obviously, Plaintiff fails to explain how anything he could discover would change the application of the California litigation privilege. Beyond that problem, most of the declaration is a reiteration of the allegations in the complaint. Much of Plaintiffs complaint, as noted above, is based on filings in the bankruptcy court in New York. Those filings are part of the public record and there is no need for discovery as to whether they happened or what their contents are. Otherwise, the declaration is mostly phrased in terms of general conclusions, not specific evidence – *e.g.*, “Whether, by taking the above-suggested actions, [Defendants] engaged in conduct that constitutes conspired [sic] to steal money from plaintiff, to convert plaintiff’s money, and stole and converted plaintiff’s money.” In the very few cases of references to specific pieces of information that are not already in the judicially noticeable record, Plaintiff fails to tie them into any explanation of how that information would avoid an adverse ruling on the anti-SLAPP motion. In short, Plaintiff fails to give the Court any reason to believe that discoverable facts would allow Plaintiff to avoid losing an anti-SLAPP motion. The request for discovery is denied.

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Defendant's motion to strike pursuant to California Code of Civil Procedure § 425.16 is GRANTED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, Plaintiff-Appellant, v. JOSEPH CURTIS EDMONDSON; MICHAEL J. COLELLO, Defendants-Appellees.	No. 16-56911 D.C. No. 2:15-cv-07210- DSF-SS Central District of California, Los Angeles ORDER (Filed Oct. 4, 2018)
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Before: SILVERMAN, BEA, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Yagman's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 37) are denied.

No further filings will be entertained in this closed case.

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28 U.S.C.A. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

- (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
- (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
- (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

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West's Ann.Cal.C.C.P. § 425.16

§ 425.16. Anti-SLAPP motion

Effective: January 1, 2015

(a) The Legislature finds and declares that there has been a 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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 Constitution or the 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.

(2) 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.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at

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any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. 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.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection

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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, (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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes

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“cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

