

TABLE OF CONTENTS (APPENDIX)

Trial Court Order (This is Order Granting Respondent's Motion per C.C.P. 425.16 from the Trial Court).....P15

Opinion (This is the Opinion from The Court Of Appeal Fourth District, Division 1, affirming the Trial Court Order in full).....P20

Order Denying Rehearing (This is the Order from The Court Of Appeal Fourth District, Division 1, denying the petition for rehearing with a modification to the Opinion)P29

Order Denying Review (This is the Order from The California Supreme Court denying the petition for review).....P30

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY
MINUTE ORDER**

DATE: 06/27/2017

TIME: 02:32:00 PM

DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly

CLERK: Lory Dumo

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2016-00041451-CU-PO-NC** CASE INIT.DATE: 11/28/2016

CASE TITLE: **Johnson vs. Fire Water Saloon [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: SLAPP / SLAPPback Motion Hearing

APPEARANCES

The Court, having taken the above-entitled matter under submission on June 16, 2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The special motion of Defendant Oceans 6 RS, LLC dba Fire Water Saloon is GRANTED.

The Legislature enacted Code of Civil Procedure section 425.16 to deter 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).) "Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.)

Under section 425.16, a court "shall" grant a cross-defendant's motion to strike a cause of action "arising from" an act "in furtherance of" the cross-defendant's constitutional petition or free speech rights unless the cross-complainant establishes a probability of prevailing on the claim. (Code of Civil Procedure § 425.16(b)(1).) To achieve the goal of encouraging participation in matters of public significance, the Legislature has mandated that courts construe this statute "broadly" in favor of the moving party. (Code Civ. Proc., § 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 197.)

In ruling on a special motion to strike, the trial court engages in a multistep process. First, the court must determine whether the defendant met its burden to show the challenged cause of action arises from constitutionally protected activity as defined in the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*)). If this burden is met and the plaintiff asserts his action and/or claim is exempt under the

DATE: 06/27/2017

MINUTE ORDER

Page 1

DEPT: N-31

P15

182
Calendar No.

commercial speech or public interest exemptions set forth in section 425.17, the plaintiff then has the burden to show the applicability of these exemptions. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22-26; *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 717.) If the plaintiff does not make this showing, the plaintiff must then meet his burden to establish a probability of prevailing on the claim. (*Navellier, supra*, 29 Cal.4th at p. 88.)

Subdivision (e) of section 425.16 sets out four categories of activities that are "in furtherance of" a defendant's free speech or petition rights under the United States or California Constitution in connection with a public issue. These acts are (1) written or oral statements made before a legislative, executive, or judicial proceeding; (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body; (3) written or oral statements made in a place open to the public or in 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 free speech in connection with a public issue or an issue of public interest. (Code of Civil Procedure § 425.16(e).)

Protected Activity: In determining whether a claim arises from protected activity [the first step of the analysis], a court must "disregard the labeling of the claim . . . and instead 'examine the *principal thrust or gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies. Courts assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272, italics added; see also *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 269-270.) "The anti-SLAPP statute's definitional focus is [on] the defendant's *activity* that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning." (*Navellier, supra*, 29 Cal.4th at p. 92.)

Defendant moves to strike Plaintiff's malicious prosecution action, which arises out of his arrest on November 27, 2014 for suspicion of a violation of Penal Code § 240 (assault). A review of the allegations contained in Plaintiff's complaint establishes the gravamen of Plaintiff's cause of action is Defendant Wigent's role in Plaintiff's arrest. More specifically, Defendant Wigent's statements to police, which prompted the arrest. Plaintiff alleges he "was arrested on 11/27/14 on suspicion of a PC240 violation where the arrest was commenced at the direction of defendant Wigent." Plaintiff alleges Defendant intentionally provoked Plaintiff to assault Defendant, and "Defendant Wigent did not commence the arrest of plaintiff out of a legitimate desire to see him prosecuted for his supposedly unlawful act, but in an attempt to injure plaintiff." Plaintiff sues both Defendants for what he concludes "was an attempt made by defendant Wigent to interfere with the legal rights of plaintiff." (*Id.* ¶ 5.)

"The law is that communications to the police are within SLAPP." (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941; see also *Kenne v. Stennis* (2014) 230 Cal.App.4th 953; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 712; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286.)

Plaintiff contends his claim does not arise from protected activity, because the conduct precipitating the arrest was illegal, and thus not a *valid* exercise of Defendant Wigent's constitutional rights. Plaintiff alleges, in summary, that Defendant pushed him, and that Plaintiff swung his fist at Wigent in self-defense. His contention is that "defendant Wigent was already in the process of committing an illegal act of battery against plaintiff when plaintiff swung at him," and thus "Defendant Wigent has no legitimate claim to being assaulted under these circumstances." Plaintiff contends *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696 and *Flatley v. Mauro* (2006) 39 Cal.4th 299 support his contention.

While *Lefebvre* and *Flatley* support the premise that illegal conduct is not a valid exercise of

constitutional rights, thereby precluding protection under CCP § 425.16, they are distinguishable from the circumstances of this case. In both cases there was unequivocal proof that the purportedly protected conduct was illegal. In the former, the plaintiff admitted her claim arose out of a false criminal report to police. In the latter, there was uncontroverted evidence the plaintiff's act constituted extortion.

"Our Supreme Court has accordingly held that when it is uncontested or otherwise conclusively established that a person acted *illegally* in exercising his or her First Amendment rights, that activity is not a *valid* exercise of rights, and is accordingly not protected under the anti-SLAPP statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320, 46 Cal.Rptr.3d 606, 139 P.3d 2 (*Flatley*).) Specifically, *Flatley* held that 'where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant *concedes*, or the evidence *conclusively establishes*, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.' (*Ibid.*, italics added.)" (*Zuchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478.)

There is no admissible evidence before the Court that conclusively establishes that the assertedly protected speech or petition activity was illegal as a matter of law. "Our Supreme Court has emphasized that the exception for illegal activity is very narrow and applies only in undisputed cases of illegality. 'If ... a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits.' [Citation omitted.] '[T]he showing required to establish conduct illegal as a matter of law-either through defendant's concession or by uncontroverted and conclusive evidence-is not the same showing as the plaintiff's second prong showing of probability of prevailing.' [Citation omitted.] Applying *Flatley*, subsequent courts have reiterated that it is only in "rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." [Citation omitted.] (*Id.* at 1478-1479.)

The Court concludes Plaintiff's cause of action arises from conduct in furtherance of Defendant Wigent's "valid exercise of the constitutional rights of speech and petition for the redress of grievances" (Code Civ. Proc., § 425.16, subds. (a), (e)(1) and (e)(2)).

Probability of Prevailing: Turning to the second step of the analysis: to establish a probability of prevailing under Code of Civil Procedure section 425.16, a plaintiff must make a prima facie showing of facts that would, if proved at trial, support a judgment in his or her favor. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010.) 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 ... is credited." " (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 20.)

In making this showing, the plaintiff cannot rely solely on the allegations in the complaint and must present evidence that would be admissible at trial. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; see *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679.) However, the plaintiff's burden to show a "probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

In deciding whether a *prima facie* case has been established, the court considers the pleading and evidentiary submissions of both parties. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105.) A plaintiff meets his burden to show a probability of prevailing on a cause of action if any part of a claim has merit. (*Id.* at 100, 106.) The standard is really one of "minimal merit." (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 89.)

To establish a claim for malicious prosecution, Plaintiff must show (1) an action or proceeding commenced by or at the direction of defendant, (2) pursued to a legal termination favorable to the plaintiff, (3) brought without probable cause, and (4) initiated with malice. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1018.)

Plaintiff alleges and submits evidence establishing that no formal charges have been filed against him, defeating both the first and second elements. Further, as set forth by Defendant, "an arrest, without formal charges, is not a sufficient foundation for a malicious prosecution claim[.]" as "[a]n arrest is not a proceeding." (*Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915; see also *Cote v. Henderson* (1990) 218 Cal.App.3d 796 (favorable termination requires more than showing that underlying proceeding was dismissed); and *Contemporary Services Corp. v. Staff Pro, Inc.* (2007) 152 Cal.App.4th 1043 (dismissal of underlying suit did not constitute favorable termination for malicious prosecution).) As to the third element, Plaintiff specifically he alleges in his verified complaint that he attempted to punch Defendant Wigent in the face, admittedly presenting a basis on which to be arrested "on suspicion of a PC240 violation."

Plaintiff has not and cannot show a probability of prevailing on this claim. The cases presented by Defendant establish there is no possibility Plaintiff can succeed on his claim.

Accordingly, the motion to strike Plaintiff's second cause of action for malicious prosecution is GRANTED.

Regarding fees, "Section 425.16, subdivision (c) makes an award of attorney fees and costs to a defendant who prevails on an anti-SLAPP motion mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735.)" (*Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 544.) This mandatory fee provision is both to discourage meritless lawsuits and to provide financial relief to the SLAPP lawsuit victim. (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 627.)

The Court will entertain Defendant's request for attorneys' fees under separate motion. Under rule 3.1702(b) of the California Rules of Court, a motion seeking fees following an order granting an anti-SLAPP motion must be served and filed within the time limits for filing a notice of appeal. (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) ¶ 7:1185, p. 7(II)-53 (rev.# 1, 2009).) Under rule 8.104(a) and (f), a notice of appeal must be filed on or before 60 days after service of a document entitled "Notice of Entry" of the order granting the anti-SLAPP motion by the superior court clerk or a party; otherwise, the notice of appeal must be filed on or before 180 days after the entry of the order granting the anti-SLAPP motion." (*Mallard, supra*, 188 Cal.App.4th 545.)

Defendant shall file and serve its Answer by the close of business on Friday, July 14, 2017.

IT IS SO ORDERED.

Judge Timothy M. Casserly

Timothy M. Casserly

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT T. JOHNSON, III,

Plaintiff and Appellant,

v.

OCEANS 6 RS, LLC,

Defendant and Respondent.

D072674

(Super. Ct. No. 37-2016-41451-CU-
PO-NC)

APPEAL from an order of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Robert T. Johnson, III, in pro. per., for Plaintiff and Appellant.

Murchison & Cumming, LLP, Robert M. Scherk and Scott J. Loeding, for
Defendant and Respondent.

Plaintiff and appellant Robert T. Johnson, III, filed a complaint on November 28, 2016, against defendant and respondent Oceans 6 RS, LLC (Oceans 6), doing business as Firewater Saloon, and John Wigent, a doorman or security guard at the Firewater

Saloon.¹ Johnson stated two causes of action: one for assault and battery and one for malicious prosecution. Oceans 6 moved to strike the cause of action for malicious prosecution under the anti-SLAPP² statute (Code Civ. Proc., § 425.16).³ The trial court granted the motion and Johnson has appealed that order. We affirm.

MOTION TO DISMISS APPEAL

Oceans 6 filed a motion to dismiss the appeal because the opening brief was not timely, and when it was filed it was incomplete and lacking in applicable factual and legal citations. We ordered that this motion be considered concurrently with the appeal.

Oceans 6's motion to dismiss is well-taken both for lack of timeliness and for failure to comply with California Rules of Court, rule 8.204(a), which states the required contents of a brief. Nonetheless in the interest of justice we have reviewed the record and briefs and considered Johnson's contentions.

BACKGROUND

Johnson alleged the following facts in his complaint.

On November 27, 2014, Johnson went to the Firewater Saloon in Oceanside, left, and returned. Wigent told Johnson to leave because there were complaints that Johnson

¹ Wigent was not served with the complaint and is not a party to this appeal.

² " 'SLAPP' is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1.) An order on an anti-SLAPP motion is immediately appealable. (§§ 425.16, subd. (i); 904.1, subd. (a)(13).)

³ Further statutory references are to the Code of Civil Procedure unless otherwise stated.

had been taking pictures of women inside the bar. Johnson alleged that once he was outside, Wigent repeatedly pushed him along the sidewalk, away from the bar. Johnson said he "swung his fist" at Wigent's head in response. Johnson was off-balance from his swing. Wigent pushed him and he fell to the ground.

Johnson called 911. He told the responding police officer that he wanted to press charges against Wigent. The officer spoke with Wigent, then gave Johnson a citation to appear in court for misdemeanor assault. The District Attorney declined to prosecute Johnson and no charges were ever filed against him. Johnson filed a claim for malicious prosecution against Oceans 6 and Wigent, based on Wigent's statement to the police that Johnson assaulted him, resulting in a misdemeanor citation for assault. As noted, the trial court granted Oceans 6's motion to strike the malicious prosecution cause of action and Johnson has appealed the order.

DISCUSSION

A. *General Anti-SLAPP Principles*

SLAPP lawsuits "are generally meritless suits brought primarily to chill the exercise of free speech or petition rights." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).) Section 425.16, the anti-SLAPP law, authorizes the filing of a motion to strike to expedite dismissal of these meritless claims. (*Simpson*, at p. 21.) "[T]he Legislature has specified that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416.) The anti-SLAPP statute and procedure have been found constitutional. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 865–868.)

Section 425.16, subdivision (e), describes the type of free speech or petition rights protected by the anti-SLAPP statute: "(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." (§ 425.16, subd. (e).) The public interest requirement of section 425.16, subdivision (e) is construed broadly. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23.)

Conduct that is unlawful in itself is not protected by the statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*); *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478 (*Zucchet*)). The exception for unlawful conduct is very narrow and applies only when the conduct was shown to be illegal "either through defendant's concession or by uncontroverted and conclusive evidence." (*Flatley*, at p. 320; *Zucchet*, at p. 1478.)

The moving party — Oceans 6, the employer of Wigent — bore the initial burden of establishing that the responding party — Johnson — complained of actions taken by Wigent in furtherance of his "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).)

Once Oceans 6 established that Wigent's act fell within the scope of section 425.16, subdivision (e), Johnson could show that the act was exempt from the protection of the anti-SLAPP statute. Section 425.17 sets forth two exemptions to the anti-SLAPP statute, for public interest lawsuits and for commercial speech. (§ 425.17, subs. (b), (c); *Simpson, supra*, 49 Cal.4th at p. 22.) Both exemptions are narrowly construed, and the moving party has the burden of proving the applicability of the exemption. (*Simpson*, at pp. 22–23.) Johnson claimed that Wigent's act fell within the commercial speech exemption set forth in section 425.17, subdivision (c).⁴ To show that an action fell under the commercial speech exemption, Johnson had the burden of showing that: (1) Oceans 6 was primarily engaged in the business of selling goods or services; (2) Wigent's statement was a representation of fact about the business operations or services, made for the purpose of obtaining or promoting sales of Oceans 6's goods or services; and (3) the intended audience was an actual or potential customer. (§ 425.17, subd. (c); *Simpson, supra*, 49 Cal.4th at p. 30.) Johnson had the burden of proving all of these elements. (*Rivera v. First Data Bank, Inc.* (2010) 187 Cal.App.4th 709, 717–718 (*Rivera*)).

⁴ Section 425.17, subdivision (c) states:

"(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist:

"(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services,

"(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer,"

The final step, after Oceans 6 showed that Wigent's action was taken in furtherance of his right of petition or free speech, and Johnson failed to show that the commercial speech exemption applied, was for Johnson to show that his claim of malicious prosecution had "at least 'minimal merit.'" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).

"On appeal, we apply a de novo review standard to determine whether the parties satisfied their burdens under sections 425.16 and 425.17. [Citations.] We are not bound by the court's findings and conduct an independent review of the entire record. If the trial court's decision is correct on any theory, we must affirm the order." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622.)

B. Analysis

1. *Wigent's Complaint to the Police of Assault by Johnson Was Protected by the Anti-SLAPP Statute*

Johnson claims that Wigent's statements to the police, which caused the police to issue a citation for assault, constituted malicious prosecution. Filing a report with the police, however, is protected activity within section 425.16, subdivisions (e)(1) and (e)(2). (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941–942; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 364.) Wigent's complaint to the police that Johnson assaulted him was taken in furtherance of his right of petition or free speech.

Johnson admitted that he assaulted Wigent by swinging his fist at Wigent's head. He claimed in the trial court, however, that Wigent's report of assault was unlawful because Johnson was allegedly acting in self-defense. Whether Johnson acted in self-

defense when he assaulted Wigent was a disputed issue of mixed fact and law. His assertion of self-defense did not meet the standard necessary to demonstrate unlawfulness: "either through defendant's concession or by uncontroverted and conclusive evidence." (*Flatley, supra*, 39 Cal.4th at p. 320.)

2. *The Exception for Commercial Speech Does Not Apply*

Johnson contends that Wigent's statement to the police was exempted commercial speech, arguing that Wigent's claim that he was assaulted by Johnson "was a statement or conduct that was made in the course of delivering . . . goods or services," and that the officer to whom Wigent complained was "a potential customer of FireWater Saloon" and Johnson was an actual customer. Wigent's statement to the police that Johnson had assaulted him was not a representation of fact about Wigent's or Oceans 6's business made for the purpose of promoting sales, as required by section 425.17, subdivision (c)(1). Wigent's complaint of assault was not commercial speech and was not exempt from the anti-SLAPP statute. (See *Rivera, supra*, 187 Cal.App.4th at pp. 717–718.)

3. *Johnson Cannot Show Minimal Merit*

Johnson has not and cannot show that his claim for malicious prosecution had even minimal merit. (See *Park, supra*, 2 Cal.5th at p. 1061.) There is no claim for malicious prosecution when there is no prosecution, that is, when an arrest did not result in formal charges. (*Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 917–918.) Johnson admitted that no formal charges were ever filed against him.

In sum, the anti-SLAPP statute bars Johnson's cause of action for malicious prosecution. Wigent's complaint to the police of assault was protected activity. It was

not commercial speech. And Johnson had no claim of malicious prosecution because he was never prosecuted for assault as a result of Wigent's report. The anti-SLAPP motion was correctly granted.

DISPOSITION

The order striking Johnson's claim for malicious prosecution is affirmed. Oceans 6 is entitled to its costs on appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal
Fourth Appellate District
FILED ELECTRONICALLY
05/17/2019
Kevin J. Lane, Clerk
By: Scott Busckohl

ROBERT T. JOHNSON, III,

Plaintiff and Appellant,

v.

OCEANS 6 RS, LLC,

Defendant and Respondent.

D072674

(Super. Ct. No. 37-2016-41451-CU-
PO-NC)

ORDER DENYING REHEARING
AND MODIFYING OPINION

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on April 22, 2019, be modified as follows:

1. On page 2, footnote 4 is added after the words "We affirm" at the end of the first paragraph, which will also require the renumbering of the subsequent footnote in the original opinion. The footnote shall read as follows:

4 We deny Johnson's oral request to stay the appeal.

The petition for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties

Court of Appeal, Fourth Appellate District, Division One - No. D072674 JUL 10 2019

S255894

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA Deputy

En Banc

ROBERT T. JOHNSON III, Plaintiff and Appellant,

v.

OCEANS 6 RS, LLC, Defendant and Respondent.

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

Kruger, J., was absent and did not participate.

CANTIL-SAKAUYE

Chief Justice