



WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

LIPPUNG and VARATHIP
AROONSAKOOL,

Debtors.

GREGORY A. AKERS, CHAPTER 7
TRUSTEE,

Plaintiff,

v.

LUXURY JEWELS, LLC;
LOXSUNIPON POMSAVANH;
NIMIT AROONSAKOOL;
NAKON AROONSAKOOL;
TARRAH AROONSAKOOL,

Defendants.

LUXURY JEWELS, LLC; LOXSUNIPON
POMSAVANH,

Counterclaimants,

v.

GREGORY A. AKERS,

Counterdefendant.

Case No. 11-06927-LA7

Adv. No. 11-90299

MEMORANDUM DECISION

Date: December 22, 2011

Time: 2:00 p.m.

Dept: 2

1 **I.**

2 **INTRODUCTION**

3 At the hearing on held December 22, 2011, in the above-referenced
4 adversary proceeding, the Court took under submission the motion of Luxury
5 Jewels, LLC *et al.* (“Counterclaimant” or “Luxury Jewels”) for attorney’s fees and
6 costs incurred to successfully oppose the special motion of Gregory A. Akers
7 (“Counterdefendant” or “Trustee”) to strike its counterclaim as a strategic lawsuit
8 against public participation. For the reasons more fully set forth below, the Court
9 reaffirms its tentative ruling to DENY the motion.

10 **II.**

11 **FACTS**

12 This adversary proceeding, and the related counterclaim, arise from a
13 dispute between the Trustee and Luxury Jewels over ownership of a jewelry
14 business and the related assets and inventory.

15 Prior to the petition date, Lippung and Varathip Aroonsakool (“Debtors”)
16 leased certain business premises wherein they had operated a family-owned
17 jewelry business, Thai Export, LLC (“Thai Export”). When the Debtors filed their
18 voluntary chapter 7 bankruptcy petition, the Debtors’ interest in Thai Export and
19 their leasehold interest became property of the above-referenced bankruptcy
20 estate. The Trustee is the duly-appointed representative of the bankruptcy estate.

21 Luxury Jewels claims it is a distinct and separately owned jewelry business.
22 Shortly before the petition date, Luxury Jewels began operating at the Debtors’
23 business premises, and it was added to the lease. However, there is no written
24 purchase agreement, and the Trustee alleges that Luxury Jewels has provided few
25 documents to prove its ownership of the property located therein.

26 Without obtaining a court order, the Trustee shut down the business and
27 secured the premises pending a determination of the parties’ respective ownership
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1 rights. Additionally, the Trustee filed this adversary proceeding for declaratory
2 relief, turnover of property and avoidance and recovery of fraudulent transfers.

3 In response, Luxury Jewels filed its counterclaim against the Trustee for
4 violation of duties, conversion, trespass and declaratory and injunctive relief. The
5 Trustee moved to dismiss the counterclaim for failure to state a claim for relief,
6 and he filed a special motion to strike the pendant state law claims pursuant to
7 California’s Anti-Strategic Lawsuits Against Public Participation statute,
8 California Code of Civil Procedure § 425.16 (“Anti-SLAPP Motion”).¹

9 The Court granted, in part, and denied, in part, the Trustee’s motion to
10 dismiss the counterclaim. Additionally, the Court denied the Trustee’s Anti-
11 SLAPP Motion, finding that the motion bordered on frivolous because he was not
12 entitled to seize nondebtor assets first and ask questions later. Luxury Jewels is
13 now seeking to recover its attorney’s fees and costs incurred to oppose the
14 Trustee’s Anti-SLAPP Motion pursuant to § 425.16(c) on the grounds that it was
15 “frivolous” or was “solely intended to cause unnecessary delay.”

16 **III.**

17 **ANALYSIS**

18 Code of Civil Procedure § 425.16 provides the procedural remedy of a
19 special motion to strike a complaint as a strategic lawsuit against public
20 participation to quickly dispose of lawsuits brought to chill the valid exercise of
21 the constitutional right of petition or free speech. *Chitsazzadeh v. Kramer &*
22 *Kaslow*, 199 Cal. App. 4th 676, 681 (2011). The statute expressly provides that its
23 provisions shall be construed broadly. Code Civ. Proc. § 425.16(a).

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28 ¹ Hereinafter, all section references refer to the California Code of Civil Procedure unless otherwise specified.

1 In ruling on an anti-SLAPP motion, § 425.16(b)(1) sets forth a two-step
2 inquiry: First, the court decides whether the moving defendant has made a
3 threshold showing that the challenged conduct arises from protected activity.
4 Second, if the defendant meets the threshold inquiry of showing that the
5 challenged conduct is protected, then the burden shifts to the plaintiff to
6 demonstrate a probability that it will prevail on the claims challenged in the
7 complaint. If the court determines that the plaintiff has established a probability
8 that the plaintiff will prevail on the challenged claims, the motion to strike must be
9 denied. *Scalzo v. Am. Express Co.*, 185 Cal. App. 4th 91, 97-98 (2010); *In re*
10 *Keenan*, 2008 U.S. Dist. LEXIS 25064, *22 (S.D. Cal. 2008).

11 With respect to the first inquiry, the statute defines protected activity to
12 include: (1) all petition-related activity made *before* a legislative, executive, or
13 judicial proceeding, or any other official proceeding authorized by law; and (2)
14 any petition-related activity made *in connection with* an issue under consideration
15 or review by a legislative, executive, or judicial proceeding, or any other official
16 proceeding authorized by law.” Code Civ. Proc. §§ 425.16(e)(1)(2)(emphasis
17 added); *Scalzo*, 185 Cal. App. 4th at 97-98; *Keenan*, 2008 U.S. Dist. LEXIS at
18 *22-23.

19 If first inquiry is met, then the court moves to the second inquiry. However,
20 if the court has granted with prejudice a motion to dismiss for failure to state a
21 claim upon which relief can be granted, necessarily the plaintiff cannot establish a
22 probability that the plaintiff will succeed on the merits of that claim. *Keenan*,
23 2008 U.S. Dist. LEXIS at *24.

24 Section 425.16(c)(1) provides for an award of attorney’s fees and costs to
25 the prevailing party in certain circumstances. It provides that a plaintiff who
26 prevails in opposing an anti-SLAPP motion shall be entitled to an award of
27 attorney’s fees and costs if the court finds that the anti-SLAPP motion was
28 “frivolous” or “solely intended to cause unnecessary delay” pursuant to the

1 procedures and substantive standards set forth in Code of Civil Procedure § 128.5.
2 *Chitsazzadeh*, 199 Cal. App. 4th at 683; *Moore v. Shaw*, 116 Cal. App. 4th 182,
3 198-99 (2004). Accordingly, a plaintiff who prevails on an anti-SLAPP motion
4 must satisfy § 128.5 to recover its attorney’s fees and costs.

5 Pursuant to § 128.5(b)(2), an anti-SLAPP is “frivolous” if it is “(A) totally
6 and completely without merit; or (B) for the sole purpose of harassing an opposing
7 party.” *Chitsazzadeh*, 199 Cal. App. 4th at 683-84. An anti-SLAPP motion is
8 “totally and completely without merit” as defined by § 425.16(c) and § 128.5 only
9 if, measured objectively: “[A]ny reasonable attorney would agree such motion is
10 totally devoid of merit.” *Id.* at 683-84 (citing *Moore v. Shaw*, 116 Cal. App. 4th at
11 199 (emphasis in original)). When an anti-SLAPP motion has *partial merit*, it is
12 not “totally and completely” without merit, nor can it be said that its sole purpose
13 is to harass. *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, 193 Cal. App. 4th 435,
14 450 (2011). Therefore, the standard for awarding the plaintiff’s fees and costs is
15 extremely high.

16 Here, the Court finds no evidence to support a finding that the Trustee
17 solely intended his Anti-SLAPP Motion to cause unnecessary delay or to harass.
18 Therefore, the sole basis to award Luxury Jewels’ fees and costs is if the motion
19 was “frivolous” as that term is defined in § 128.5(b)(2). The Trustee argues that
20 he brought his Anti-SLAPP motion in reliance upon *In re Keenan*, 2008 U.S.
21 Dist. LEXIS 25064 (S.D. Cal. 2008). He contends that his reliance on this case
22 was objectively reasonable because it was decided by the district court in the same
23 district that the Debtors’ bankruptcy case is pending. Also, similar to the instant
24 counterclaim, the complaint in the *Keenan* case challenged the *propriety* of a
25 bankruptcy trustee’s actions taken *in connection with* his administration of the
26 bankruptcy estate. *Id.* at *24. Since the trustee had acted in connection with his
27 administration of the estate, the district court found that the trustee had met his
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1 threshold burden of showing that the state law claims arose from actions in
2 furtherance of his right to petition the Bankruptcy Court. *Id.*

3 Likewise, in this case, the Trustee asserts that a reasonable attorney would
4 agree that the first prong of the anti-SLAPP statute was met because his
5 challenged actions of shutting down the business and securing the business
6 premises occurred *in connection with* his protected activity of administering the
7 bankruptcy estate. He asserts that a reasonable attorney would agree that the issue
8 of the *propriety* of his actions is relevant to the second prong of the anti-SLAPP
9 statute which considers the probability of success on the counterclaims, but not the
10 first prong which merely requires the Trustee to show that he acted *in connection*
11 *with* his protected activity of administering the bankruptcy estate.

12 The Court agrees that the Trustee's construction of the *Keenan* case is not
13 totally devoid of merit. The *Keenan* case is factually distinguishable because, in
14 *Keenan*, the trustee had obtained court orders authorizing his challenged activities.
15 However, this distinguishing fact does not mean that any reasonable attorney
16 would agree that the Trustee's challenged activities were not protected by the anti-
17 SLAPP statute. For purposes of anti-SLAPP, a protected activity must be
18 *criminal* as a matter of law to lose the protections of the anti-SLAPP statute. *See*
19 *Scalzo v. Am. Express Co.*, 185 Cal. App. 4th 91, 100-101 (defendant who
20 "burglarized" the defendant's premises and violated a "penal statute" could not
21 meet threshold burden of showing his activity was protected); *see also Mendoza v.*
22 *ADP Screening & Selection Services, Inc.*, 182 Cal. App. 4th 1644, 1654 (2010)
23 (holding that only *criminal* conduct – as opposed to violations of a statute or a
24 duty at common law – loses the protection of the anti-SLAPP statute). The
25 counterclaim does not allege, nor has the Trustee admitted, that his challenged
26 activities were criminal as a matter of law.

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1 Finally, the Court observes that it granted the Trustee's motion to dismiss
2 the fraud claim with leave to amend. Thus, at the time the Trustee filed his
3 Anti-SLAPP Motion, he was objectively reasonable in arguing that the fraud claim
4 should be stricken for lack of merit.

5 IV.

6 CONCLUSION

7 The Court reaffirms its tentative ruling to deny Luxury Jewels' motion for
8 attorney's fees and costs. Luxury Jewels is entitled to an award of its fees and
9 costs only if the Court finds the Trustee's Anti-SLAPP Motion was "frivolous" or
10 "solely intended to cause unnecessary delay." The Court finds that the Trustee's
11 reliance on *Keenan* was objectively reasonable. Further, it agrees that the fraud
12 claim had virtually no merit so the Trustee's argument that it should be stricken
13 was objectively reasonable at that time. The Court shall prepare its own order.

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Dated: 9 Feb 2012



LOUISE DE CARL ADLER, JUDGE