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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MILES WHITAKER, Plaintiff and Respondent, v. A & E TELEVISION NETWORKS et al., Defendants and Appellants.	G040880 (Super. Ct. No. 30-2008-00106095) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory Munoz, Judge. Judgment affirmed; motion to dismiss the appeal and request for sanctions denied.

Quinn Emanuel Urquhart Oliver & Hedges, LLP, Jeffrey D. McFarland, Christopher E. Price, Stan Karas, George R. Hedges, and Timothy L. Alger for Defendants and Appellants.

Turner Green Afrasiabi & Arledge LLP and Todd A. Green for Plaintiff and Respondent.

A & E Television Networks (A & E) appeals from an order denying its special motion to strike Miles Whitaker's complaint for defamation, invasion of privacy, intentional infliction of emotional distress, and injunctive relief.[1] A & E argues the trial court erroneously granted the motion because the challenged causes of action arise from protected activity and Whitaker did not demonstrate a probability of prevailing on those causes of action. A & E also contends it is entitled to attorney fees. None of A & E's contentions have merit, and we affirm the order.

FACTS

A & E produced, broadcasted, and released on DVD a multi-part documentary called, "'The History of Sex.'" During the chapter on the 20th Century, the documentary discusses the HIV/AIDS epidemic. The narrator states: "AIDS had exacted a deadly toll on gay men and [intravenous] drug users as well as hundreds of thousands of heterosexuals in Africa and Haiti. But it wasn't publicly acknowledged by [President] Ronald Reagan until well after Rock Hudson died of the disease in 1985." During the first part of the above quoted sentence, the documentary shows the back view of two men walking down the street at night apparently holding hands. Just before the narrator says "users," the documentary shows a picture of Whitaker on the street at night shaking what appears to be a cup and nodding at people walking by. Just prior to the narrator saying "heterosexuals," the documentary cuts away from Whitaker and shows the front view of two men walking arm in arm at night. The documentary clearly shows a left profile view of Whitaker for approximately three seconds, but does not mention his name or say he has HIV/AIDS, or is a homosexual or intravenous drug user.

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[1] Code of Civil Procedure section 425.16 authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action, and is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Whitaker filed a complaint against A & E alleging the following causes of action: defamation/defamation per se, invasion of privacy—false light, intentional infliction of emotional distress, and injunctive relief. A & E filed a special motion to strike, supported by declarations from Kate Winn, A & E's vice-president, Timothy Alger, A & E's attorney, and Louis Garcia, A & E Managing Producer. Whitaker opposed the motion, supported by his declaration. A & E replied.

After considering the moving papers and hearing counsels' argument, the trial court denied A & E's special motion to strike. In a minute order, the court ruled: "Although the film in which . . . Whitaker was shown, indeed involved matters of public interest, Whitaker was not part of any such public discussion and [A & E] ha[s] not shown that he was in any way connected to such public discussion. . . . [T]here has been no showing that Whitaker was somehow connected to the main topic of the film in question which was the HIV/AIDS epidemic. Thus, [A & E] [has] failed to carry [its] burden of proof in establishing that the challenged conduct arises from protected activity."

DISCUSSION

A. General Principles

Section 425.16, subdivision (b)(1), states: "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." Section 425.16 is to be "construed broadly."

Consideration of a section 425.16 special motion to strike anticipates a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review a trial court's ruling on a special motion to strike de novo. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675.)

B. Protected Activity

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] '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) . . . .' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).)

Section 425.16, subdivision (e), states: "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 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; (4) or 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."

It is clear a media defendant may file a special motion to strike (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1044), and nothing in section 425.16 prohibits a "powerful corporate defendant[] [from] employing the anti-SLAPP statute against individuals of lesser strength and means[]" (*M. G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 (*M. G.*)). Here, A & E was permitted to file a special motion to strike Whitaker's complaint to protect its First Amendment rights, and contrary to Whitaker's suggestion, there is nothing in the record to support the conclusion A & E did so merely to delay litigating the matter. We must determine whether A & E's act underlying Whitaker's causes of action was an act in furtherance of A & E's free speech rights. But first we must determine what exactly was the act. The parties frame it differently.

"In determining whether the anti-SLAPP statute applies in a given situation, we analyze whether the defendant's act underlying the plaintiff's cause of action *itself* was an act in furtherance of the right of petition or free speech. [Citation.] Accordingly, we focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it. [Citation.] The '*principal thrust* or *gravamen*' of the claim determines whether section 425.16 applies. [Citation.]" (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279 (*Dyer*); *City of Cotati, supra,* 29 Cal.4th at p. 78.)

A & E contends the act was the "exercise of their free speech rights on an issue of clear public interest, the AIDS epidemic." Whitaker concedes, "It is surely true that the AIDS epidemic and the history of sexuality are topics of public interest." Whitaker, however, asserts the act was "[A & E] . . . stating (by clear implication) that he is a homosexual or an intravenous drug user and that he suffers from AIDS." Whitaker claims this latter point was not a matter of public interest and should not be protected by the anti-SLAPP statute.

We agree, "'whenever possible, [courts] should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not its curtailment[.]'" (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119.) A & E's documentary concerning the history of sex and specifically its discussion of the HIV/AIDS epidemic was, as Whitaker concedes, clearly a matter of public interest. (See 22 U.S.C. § 7601.)

However, A & E's act of speaking on the AIDS epidemic is not the principal thrust or gravamen of Whitaker's complaint. The principal thrust or gravamen of Whitaker's causes of action is the assertedly false portrayal of Whitaker as an intravenous drug user and HIV/AIDS sufferer.[2] A & E does not suggest Whitaker is a public figure, and therefore, whether he is an intravenous drug user who is an HIV/AIDS sufferer is not a matter of public interest. *Dyer, supra,* 147 Cal.App.4th 1273, is instructive here.

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[2] In his complaint's common allegations section, Whitaker states: "[He] is not and never has been an intravenous drug user. [He] is not and never has suffered from HIV or AIDS. [He] did not consent to [A & E's] use of his likeness in the DVD, nor would he have done so had [A & E] informed [him] of their intended use of his likeness." Nowhere in his complaint does Whitaker suggest any implication he is a homosexual also forms the basis of his complaint.

It is not until his opposition to A & E's special motion to strike that Whitaker asserts the implication he is a homosexual also forms the basis of his complaint. In his affidavit supporting his opposition, Whitaker denied he is homosexual.

In *Dyer*, *supra*, 147 Cal.App.4th at pages 1276-1277, plaintiff financial consultant claimed the screenwriter, director, and producers of the motion picture "Reality Bites" used his name for the main character in the story and misrepresented his actual persona, even though he was not in any way connected with the movie or its subject matter. The court stated the central issue "concern[ed] the asserted misuse of [plaintiff's] persona." The court explained that although the movie may have addressed topics of widespread public interest, there was no connection between those topics and plaintiff's causes of action. (*Id.* at p. 1280.) Distinguishing *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, and *M. G.*, *supra*, 89 Cal.App.4th 623, the court reasoned plaintiffs in those cases "directly were connected to an important issue of public significance" whereas plaintiff financial consultant "was not part of any public discussion and was not connected to any such discussion." (*Dyer*, *supra*, 147 Cal.App.4th at p. 1282.) Finding no connection between the movie's subject matter and plaintiff, the court concluded defendants failed to show the activity underlying plaintiff's complaint was in furtherance of defendants' constitutional right of free speech in connection with a public issue or issue of public interest. (*Id.* at p. 1284.) Similarly, here, there is no apparent connection between Whitaker and the HIV/AIDS epidemic.

A & E attempts to distinguish *Dyer* because the documentary did not mention Whitaker by name, Whitaker's appearance was brief and the documentary was not about him, the documentary depicted Whitaker accurately—standing on the street, and the movie in *Dyer* was a fictional comedy. These are distinctions without a difference. The issue is whether the showing of Whitaker, even briefly, while the narrator stated, "AIDS had exacted a deadly toll on gay men and [intravenous] drug users" *implied* Whitaker belonged to this group of people.

Additionally, we reject A & E's contention *Dyer's* reasoning is faulty because it conflated the first and second steps of the two-step process and rendered the anti-SLAPP statute's protections illusory. The *Dyer* court discerned the principal thrust or gravamen of plaintiff's claim in determining defendants' act did not arise from protected activity. (*Dyer, supra,* 147 Cal.App.4th at pp. 1278-1279.) The *Dyer* court did not, as A & E suggests, base its determination defendants failed their burden on the conclusion plaintiff's claim was legitimate.

While we agree courts should interpret section 425.16 broadly, in a manner favorable to the exercise of freedom of speech, we are constrained by the legal principles applicable to a determination whether the anti-SLAPP statute applies. Whether section 425.16 applies is determined by the principal thrust or gravamen of plaintiff's claim. (*City of Cotati, supra,* 29 Cal.4th at p. 78.) Whitaker did not sue A & E because it produced, broadcasted, and released "The History of Sex." Nor did he sue because there was a segment dealing with the HIV/AIDS epidemic. Instead, he sued on the basis the segment implied he was an intravenous drug user who was an HIV/AIDS sufferer.[3] Because we have concluded the trial court properly denied A & E's special motion to strike, we need not address its contention it was entitled to attorney fees.

Separately, Whitaker filed a motion to dismiss the appeal and request for sanctions arguing A & E's appeal is frivolous. Although we conclude the appeal is unmeritorious, we cannot conclude the "appeal has been prosecuted for an improper motive[.]" (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 288.) We deny Whitaker's motion to dismiss the appeal and request for sanctions.

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[3] In concluding A & E did not satisfy its threshold burden of showing the challenged causes of action arise from protected activity, we express no opinion on the merits of Whitaker's complaint.

DISPOSITION

The judgment is affirmed. The motion to dismiss the appeal and request for sanctions are denied. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.