

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Denver, CO 80202	DATE FILED: March 1, 2021 11:29 AM FILING ID: 3E1FE59F3599C CASE NUMBER: 2020CV34319
ERIC COOMER, Ph.D., Plaintiff, vs. DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC dba THE GATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK, and NEWSMAX MEDIA, INC., Defendants.	<p style="text-align: center;">COURT USE ONLY</p> <hr/> Case Number: 2020CV34319 Division:
<i>Attorneys for Defendant Eric Metaxas:</i> Thomas B. Quinn, #17955 Margaret Boehmer, #45169 Kendra Stark (<i>*Pro Hac Vice Pending</i>) GORDON REES SCULLY MANSUKHANI LLP 555 Seventeenth Street, Ste. 3400 Denver, Colorado 80202 (303) 534-5160 tqinn@grsm.com mboehmer@grsm.com; kstark@grsm.com	
SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S.A. § 13-20-1101	

Defendant Eric Metaxas, (“Defendant”), by and through undersigned counsel, moves the Court to dismiss Plaintiff’s Amended Complaint with prejudice, pursuant to C.R.S.A. § 13-20-1101.

Certificate of Compliance

Undersigned counsel for Defendant has conferred with counsel for Plaintiff, pursuant to C.R.C.P. 121, § 1-15(8), before filing this Motion and states that Plaintiff opposes the relief requested herein.

Introduction

On July 1, 2019, Colorado enacted C.R.S.A. §13-20-1101, commonly known as Colorado's Anti-SLAPP (strategic lawsuit against public participation) law. According to section 1(a) of the statute, the Colorado General Assembly enacted this law in order to "encourage continued participation in matters of public significance," and so that such participation would not be "chilled through abuse of the judicial process." Specifically, the law allows defendants who have been sued for exercising their right of free speech to file a special motion to dismiss that lawsuit for interfering with their right of free speech. "The general assembly finds that the purpose of this part 11 is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." C.R.S.A. §13-20-1101(1)(b).

The current matter is precisely the type of case this statute was designed to protect against. On December 22, 2020, Plaintiff Eric Coomer ("Plaintiff") filed suit against Defendant Metaxas, along with multiple other Defendants. Plaintiff filed his Amended Complaint on February 4, 2021. In the Amended Complaint, Plaintiff alleges that Defendant Metaxas, a member of the media, utilized his radio program and podcast to broadcast a story about Plaintiff, regarding Plaintiff's alleged interference with the 2020 presidential election. (Amended Complaint, ¶ 59) Plaintiff is, and was at all relevant times, the Director of Product Strategy and Security for Dominion Voting

Systems, Inc., a company that provided election support services to over 1,300 jurisdictions in the 2020 election. (*Id.*, ¶ 4) Plaintiff alleges that Defendant Metaxas hosted Defendant Joseph Oltmann on his program, and interviewed Defendant Oltmann about Plaintiff's alleged interference in the election. (*Id.*, ¶ 59) During the interview, Defendant Oltmann allegedly made defamatory statements regarding Plaintiff. Plaintiff now seeks to hold Defendant Metaxas liable for defamation for reporting those statements.

The United States Supreme Court has consistently held that the freedom of the press to report on issues of public concern is granted broad protections under the First Amendment to the United States Constitution. "We have long recognized that not all speech is of equal First Amendment importance. It is speech on matters of public concern that is at the heart of the First Amendment's protection." *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59, (1985). By enacting anti-SLAPP legislation, the Colorado General Assembly followed the lead of multiple other states in bolstering the free speech protections provided by the United States Constitution and recognized in the United State Supreme Court's long and well-established line of precedent.

In bringing this SLAPP suit against Defendant Metaxas, Plaintiff is making a strategic attempt to limit Defendant Metaxas's participation in the national conversation regarding the election, including unanswered questions about various electronic voting machines. "SLAPP suits are lawsuits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Makaeff v. Trump Univ., LLC*, 26 F. Supp. 3d 1002, 1006 (S.D. Cal. 2014). Plaintiff does not deny in the Amended Complaint, nor could he, that the 2020 presidential election is a matter of public concern, and that

countless other news media organizations found the debate over the election to be newsworthy. Instead, Plaintiff essentially alleges that those members of the media who provide a platform to voices raising questions about the election should be silenced. Allowing Plaintiff to pursue these allegations would allow for the exact chilling effect on free speech that Colorado's anti-SLAPP law was designed to avoid.

Because Colorado just enacted its anti-SLAPP law in July 2019, only one appellate decision, from the United States District Court for the District of Colorado, has been published regarding its application. Unfortunately, that case is factually entirely dissimilar to the instant action. However, Colorado's law was modeled closely after California's anti-SLAPP law, Calif. Code of Civ. Proc. § 425.16, in many instances copying the exact language of the California law. "*Colorado Enacts Anti-SLAPP Law.*" Forman, Wayne F., White, Carolynne C. July 1, 2019 (<https://www.lexology.com/library/detail.aspx?g=4f847fe1-5be3-4583-a4f0-e13e2d9c95da>).

California's courts have provided a substantial number of rulings regarding its anti-SLAPP law, so, while not controlling, Defendant Metaxas references those rulings and opinions in this Motion, as guidance in the absence of any controlling Colorado precedent.

Statement of the Case

In the Amended Complaint, Plaintiff brings claims of defamation, intentional infliction of emotional distress, and civil conspiracy against all Defendants. Plaintiff further requests that the Court grant a preliminary and permanent injunction requiring Defendants to remove all defamatory statements upon final adjudication of the claims at issue. (*Id.*, ¶ 98) Finally, Plaintiff demands that Defendants "immediately and publically retract" their allegedly defamatory statements about Plaintiff and threats made by Defendants against Plaintiff. (*Id.*, ¶ 99)

Defendant Metaxas now files this Special Motion to Dismiss pursuant to C.R.S.A. § 13-20-1101(3), and requests that this Court dismiss each of Plaintiff's claims against him.

Legal Argument

I. Standard of Review- C.R.S.A. § 13-20-1101(3)(a)

Pursuant to C.R.S.A. §13-20-1101(3)(a), “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 state constitution in connection with a public issue is subject to a special motion to dismiss... .” C.R.S.A. § 13-20-1101(3)(a). In ruling on such a motion, “the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” C.R.S.A. § 13-20-1101 (3)(b). In order to defeat the motion, a plaintiff must show that there is “a reasonable likelihood that the plaintiff will prevail on the claim.” C.R.S.A. § 13-20-1101(3)(a). The statute provides multiple categories of acts that are “in furtherance of a person’s right of petition or free speech” including:

(II) 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; “(III) 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 (IV) Any other conduct or communication 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.”

C.R.S.A. § 13-20-1101(2)(a).

California’s statute requires that courts presented with these special motions to dismiss undertake a two-step process:

Under the first part, the party bringing the anti-SLAPP motion has the initial burden of showing that the lawsuit, or a cause of action in the lawsuit, arises from an act in furtherance of the right of free speech or petition—i.e., that it arises from a protected activity. Once the defendant has met its burden, the burden shifts to the

plaintiff to demonstrate a probability of prevailing on the lawsuit or on the cause of action. (Ibid.)

Tamkin v. CBS Broad., Inc., 193 Cal. App. 4th 133, 142 (2011). “Only a cause of action that satisfies both parts 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.* See also *Daniels v. Robbins*, 182 Cal. App. 4th 204, 214 (2010).

II. This Motion to Dismiss is Timely

As a preliminary matter, Defendant Metaxas’s Special Motion to Dismiss is timely. Under C.R.S.A. § 13-20-1101(5), “The special motion must be filed within sixty-three days after the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.” According to the Verified Return of Service filed by Plaintiff on January 12, 2021, Plaintiff served Defendant Metaxas with the Complaint in this matter on December 31, 2020. This Motion is being filed within sixty-three (63) days of that date of service and is, therefore, timely.

Furthermore, because the relief this Motion seeks is statutory, it is appropriate for this second, separate motion to dismiss. Defendant Metaxas did not waive his right to seek dismissal under the statute by timely filing his previous motion to dismiss under C.R.C.P. 12. Dismissal of the claims against Defendant Metaxas remains appropriate under C.R.C.P. 12(b)(2) and 12(b)(5), as well as separately under Colorado’s anti-SLAPP statute.

III. Defendant Metaxas’s actions are protected under anti-SLAPP law.

California courts have consistently held that a defendant’s actions are considered protected under its anti-SLAPP law if, “(1) defendants' acts underlying the cause of action, and on which the cause of action is based, (2) were acts in furtherance of defendants' right of petition or free speech (3) in connection with a public issue.” *Tamkin* 193 Cal. App. 4th at 142–43. It is undisputed in this

matter that Plaintiff's cause of action arises from Defendant Metaxas's publication of allegedly defamatory statements, made by Defendant Oltmann, on his radio show and podcast. (*Amended Complaint*, ¶ 59). The dispositive questions for the purposes of this Special Motion, then, are 1) whether Defendant Metaxas's actions were in furtherance of his right of free speech, and 2) whether that speech was in connection with a public issue.

A. Defendant Metaxas's actions were in furtherance of his right of free speech.

As a preliminary matter, it should be noted that Plaintiff's allegation that the statements published by Defendant Metaxas were defamatory is irrelevant to a determination as to whether that publication was an act in furtherance of his right to free speech. "Accordingly, California courts consistently hold that defendants may satisfy their burden to show that they were engaged in conduct in furtherance of their right of free speech under the anti-SLAPP statute, even when their conduct was allegedly unlawful." *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 954 (9th Cir. 2013).

Moving forward, it is clear under the plain language of Colorado's anti-SLAPP statute that Defendant Metaxas's actions were in furtherance of his right to free speech. As noted above, Colorado's statute outlines multiple categories of acts that are in furtherance of free speech, including written or oral statements made 1) in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law, or 2) in a place open to the public or a public forum in connection with an issue of public interest. C.R.S.A. § 13-20-1101(2)(a)(II-III). Defendant Metaxas's publication falls under both of these categories.

First, the statements published by Defendant Metaxas were concerning an issue under

review by multiple judicial bodies. As Plaintiff alleges in the Amended Complaint, the Trump campaign, and its supporters, brought over sixty (60) separate lawsuits across the country challenging the legitimacy of the election results. (*Amended Complaint*, ¶ 50) At the time of Defendant Metaxas's broadcast, made on November 24, 2020, many of these lawsuits were still pending in various jurisdictions. In fact, the opinion cited directly by Plaintiff in the Amended Complaint is dated November 27, 2020- three days after Defendant Metaxas's broadcast. Therefore, by Plaintiff's own admission, the topic of Defendant Metaxas's reporting was indisputably an issue under review by at least one, if not several, judicial body.

Second, Defendant Metaxas published the allegedly defamatory statements "in a place open to the public ... in connection with an issue of public interest." C.R.S.A. § 13-20-1101(2)(a)(III). In the Amended Complaint, Plaintiff alleges that Defendant Metaxas made the publication on his radio show and podcast. (*Amended Complaint*, ¶ 38) These platforms are certainly accessible by the general public. Therefore the statements were clearly published "in a place open to the public." In addition, the speech at issue was directly related to an issue of public interest- namely, the 2020 presidential election. "[A] matter is of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008). A presidential election is arguably one of the most important political issues that a community, or that the entire country, may be concerned with. For these reasons, Defendant Metaxas's publication falls squarely within this category of acts in furtherance of the right of free speech as well.

In addition to the above, the Colorado statute also defines acts in furtherance of free speech as "[a]ny other conduct or communication 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.” C.R.S.A. § 13-20-1101(2)(a)(IV). Once again, the plain language of the statute indicates that Defendant Metaxas’s broadcast meets this definition. Additionally, it is well-established under California law that publications made by the media qualify as such acts. The *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* case is instructive. In that case, a university brought a libel action against a newspaper, and the newspaper filed a special motion to dismiss under California’s Anti-SLAPP statute. The Court of Appeals held that the statute’s plain language makes clear that it applies to libel suits brought against media defendants based on their reporting activities. “Furthermore, More’s argument is based on a faulty premise, i.e., that news reporting activity cannot be characterized as ‘free speech.’ In fact, courts have consistently described such activity as “free speech.” *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 37 Cal. App. 4th 855, 864 (1995).

In addition, the Ninth Circuit Court of Appeals has specifically held that the actions of interviewing a guest, and broadcasting that interview, are acts in furtherance of the right to free speech. “Plaintiff’s claims are based on Defendants’ acts of interviewing Plaintiff for a documentary television show and broadcasting that interview. These acts were in furtherance of Defendants’ right of free speech.” *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 953 (9th Cir. 2013). Therefore, it is clear that Defendant Metaxas’s interview of Defendant Oltmann, and broadcast of that interview, should also be considered acts in furtherance of Defendant Metaxas’s right to free speech.

B. Defendant Metaxas’s speech was related to an issue of public concern.

“Reporting the news is speech subject to the protections of the First Amendment and

subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest.” *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164 (2003). When determining whether speech is related to an issue of public concern, the question is “whether the broad topic of defendant's conduct, not the plaintiff, is connected to a public issue or an issue of public interest.” *Doe*, 730 F.3d at 956.

It is clear from Plaintiff's own allegations that the subject of the allegedly defamatory statements broadcasted by Defendant Metaxas was an issue of public concern- namely, the legitimacy of the 2020 presidential election. As explained above, Colorado courts have defined matters of public concern as those “relating to any matter of political, social, or other concern to the community.” *McIntyre*, 194 P.3d at 525. (*See also* *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83–84 (2004), holding, [P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”) (*See also* *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1121 (Colo. App. 1992), holding that a statement “addresses a matter of public concern whenever it embraces an issue about which information is needed or is appropriate.”) It is undeniable that the 2020 presidential election is a matter that is of concern to the nation, and is certainly a subject of interest and value to the public. Likewise is any story concerning fraudulent interference in that election a matter of concern to the public. Therefore, an interview surrounding alleged interference with voting machines used in the presidential election is certainly an issue of public concern, and Defendant Metaxas's publication of it must therefore be speech entitled to anti-SLAPP law protection.

For all of the above reasons, Defendant Metaxas's actions giving rise to the Amended

Complaint clearly constitute protected actions under Colorado's anti-SLAPP statute, and Defendant Metaxas is therefore entitled to bring this Special Motion to Dismiss the Amended Complaint under said statute.

IV. The burden now shifts to Plaintiff to demonstrate that he will prevail on his claims.

Because Defendant Metaxas has demonstrated that Plaintiff's suit arises out of Defendant Metaxas's protected activity, the burden now falls to Plaintiff to demonstrate a probability that he will succeed on his claims. "Once the defendant has met its burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the lawsuit or on the cause of action." *Tamkin*, 193 Cal. App. 4th at 142. As noted above, Plaintiff asserts four claims for relief against Defendant Metaxas in his Amended Complaint: 1) defamation, 2) intentional infliction of emotional distress, 3) civil conspiracy, and 4) preliminary and permanent injunction. Defendant Metaxas filed a Motion to Dismiss these claims, pursuant to Colorado Rule of Civil Procedure 12(b)(5), on February 22, 2021. In that Motion, Defendant Metaxas laid out comprehensive arguments as to why Plaintiff's claims against him are factually and legally insufficient. Defendant Metaxas hereby incorporates those arguments into this Motion.

For the reasons set out in Defendant Metaxas's Rule 12(b)(5) Motion to Dismiss, Plaintiff's allegations fail to demonstrate that Plaintiff has any chance of succeeding on his claims against Defendant Metaxas.

Conclusion

For the foregoing reasons, Defendant Metaxas's actions that are the subject of Plaintiff's Amended Complaint were actions taken in furtherance of Defendant Metaxas's right of free speech and were related to issues of public concern. As a result, Defendant Metaxas's actions are subject

to the protections of C.R.S.A. § 13-20-1101. Therefore, Defendant Metaxas requests that the Court grant his Special Motion to Dismiss and dismiss all of Plaintiff's claims against him with prejudice.

Dated this 1st day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 1, 2021, a true copy of the above and foregoing was electronically filed through ICCES and will send notification to all counsel of record.

/s/ Fran Aragon Eaves

For Gordon Rees Scully Mansukhani, LLP