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Panik v. TMM, Inc., 139 Nev. Adv. Op. 53 (Nov. 30, 2023)

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THE SCOPE OF ANTI-SLAPP STATUTES IS NOT LIMITED TO SPECIFIC KINDS OF CLAIMS FOR RELIEF, AS THE FOCUS IS ON THE DEFENDANT’S ACTIONS, NOT THE FORM OF THE PLAINTIFF’S CLAIMS FOR RELIEF.

Summary

Anti-SLAPP statutes in Nevada follow a two-pronged analysis. The first prong asks whether the moving party has established, by a preponderance of the evidence, that the claims are based upon a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. Similarly, the defendant must establish that the communication is truthful or was made without knowledge of its falsehood. The second prong asks whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on its claims. Anti-SLAPP statutes are not limited to specific kinds of claims for relief, but rather focus on the defendant’s actions and are available regardless of the relief the plaintiff seeks.

Background

In 2000, Panik, the CEO of Dimension, Inc., invested in Digital Focus, Inc. for the purpose of purchasing the license to a computer code. Digital Focus transferred their interest in the code to Digital Focus Media, Dimension, Inc.’s predecessor in interest. TMM, Inc. later purchased Digital Focus, and sued Digital Focus Media along with Dimension, Inc seeking to establish their rights to the code. The district court found that Dimension owned the rights to the code, and this court affirmed.

In 2019, Dimension brought suit against TMM, Inc., for abuse of process relating to TMM’s suit against them. During settlement discussions, it was discovered that Dimension possessed multiple code derivatives that TMM believes belong to them. TMM then filed counterclaims against Dimension, alleging that Dimension converted the code derivatives.

TMM later filed a third-party complaint against Panik, asserting claims for trade libel, misappropriation of trade secrets, conversion; injunctive relief, abuse of process, and alter ego liability. TMM alleged that Panik made statements to prospective and current shareholders, directors, and officers, that TMM owned the code derivatives, and that Panik was defrauding these individuals by claiming ownership to the code derivatives. Panik filed an anti-SLAPP special motion to dismiss, arguing that TMM filed their third-party claim in retaliation for the statements made. This motion was dismissed at the district court, and was then appealed.

Discussion

The district court erred in its interpretation and application of the anti-SLAPP statutes

Nevada’s anti-SLAPP statutes direct the district courts to apply a two-pronged analysis, where it must first “determine whether the moving party has established, by a preponderance of

¹ By Evan Callahan.

the evidence, that the claims are based upon a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern.”² To meet this burden, a defendant must show that the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637.³ The defendant must then establish that the communication is truthful or was made without knowledge of its falsehood.⁴

Panik argues that the district court failed to use the correct standard under the first prong of the anti-SLAPP statute when it concluded that the claims against Panik do not fall within the categories of claims subject to the anti-SLAPP statute. The purpose of the anti-SLAPP statutes is to provide the defendant with a mechanism for speedy resolution of meritless SLAPPs regardless of what form the SLAPP takes. If the focus were instead on the plaintiff’s claims for relief then the plaintiff would assume control over anti-SLAPP statute’s application, thus frustrating the Legislature’s clear intent to limit the effect that SLAPPs have on the right to petition and speech, as well as frustrate the quick resolution of SLAPPs. Nevada has recognized that anti-SLAPP protections may apply to a variety of claims of relief, and has not limited what claims that anti-SLAPP protections apply to.

Here, the district court considered whether the third-party claims TMM brought against Panik were the kind entitled to anti-SLAPP protections, rather than considering the statements that were the basis for these claims. Because the anti-SLAPP statutes do not limit the kinds of relief that anti-SLAPP protections apply to, the district court erred when it denied Panik's motion based on its finding that the subject claims do not fall within the categories of claims subject to the anti-SLAPP statute.

Panik met his burden under the first prong

Panik then argued that he met his burden under the first prong, that he showed by a preponderance of the evidence that his statements fell within one of the four statutorily defined categories of protected speech.⁵ TMM, Inc. alleged that Panik made statements to his shareholders, directors, and officers in connection with TMM’s claim to the code derivatives. These statements were made in direct connection with an issue under consideration by a judicial body, thus falling within one of the categories named by the anti-SLAPP statute. Similarly, looking to *Patin*, the statement must (1) relate to substantive issues in the litigation and (2) be directed to persons having some interest in the litigation.⁶ Here, Panik’s statements related to the substantive issues in the litigation, and were directed to persons who certainly had some interest in the litigation, those being his shareholders, directors, and officers.

Panik also showed that his statements were truthful or made without knowledge of their falsehood.⁷ Panik offered the final judgment from the 2013 lawsuit, holding that Dimension was

² NEV. REV. STAT. §41.660(3)(a) (1993).

³ *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020).

⁴ *Id.* (quoting NRS 41.637).

⁵ *See* NEV. REV. STAT. §41.637 (1997).

⁶ *Patin v. Lee*, 134 Nev. 722, 726, 429 F.3d 1248, 1251 (2018).

⁷ NEV. REV. STAT. §41.637 (1997).

the sole owner of the code license, along with several addendums to the code license agreement which support his belief that Dimension was the sole owner of any code derivatives. Similarly, Panik also provided the court with a declaration stating that he believed the statements concerning Dimension's exclusive rights to be true. Under *Stark*, absent any contradictory evidence on the record, this declaration is sufficient evidence to show that the statements were made in good faith.⁸

The district court applied an incorrect standard in evaluating TMM's claims under the second prong.

Panik also argued that the district court erred when it evaluated TMM's claims under the second prong because the court applied the wrong test, finding that TMM's claims were brought as a result of TMM's good faith belief in a material issue of fact. This language indicated that the court treated Panik's motion as one for summary judgment, rather than applying the correct test of whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on its claims.⁹

In 2013, the Legislature removed the language instructing the courts to treat a special motion to dismiss as a motion for summary judgment, and set forth the new burden-shifting framework.¹⁰ In conducting this analysis, the district court must assess the plaintiff's probability of prevailing on their claim, which is determined by comparing the evidence presented with the elements of the claim.¹¹

Here, the district court failed to consider whether TMM produced prima facie evidence sufficient to demonstrate that its third-party claims against Panik have minimal merit.¹²

Conclusion

Ultimately, Panik met his burden of proof under the first prong of the anti-SLAPP test by showing that the claims in the complaint are based on good faith communications in direct connection with an issue of public concern. Similarly, the district court failed to apply the correct analysis under the second prong of the test. For these reasons, the Supreme Court of Nevada reversed the district court's order and remanded with instructions for the district court to determine, consistent with NRS 41.660(3)(b), whether TMM has demonstrated with prima facie evidence a probability of prevailing on its claims.

⁸ *Stark*, 136 Nev. at 43, 458 P.3d at 347.

⁹ NEV. REV. STAT. §41.660(3)(b) (1993).

¹⁰ *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019).

¹¹ *Smith v. Zilverberg*, 137 Nev. 65, 67, 481 P.3d 1222, 1226 (2021).

¹² *Id.* at 1229.