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ANTI-SLAPP STATUTE - CALIFORNIA

City of Rocklin v. Legacy Family Adventures-Rocklin, LLC

Court of Appeal, Third District, California - December 21, 2022 - Cal.Rptr.3d - 2022 WL 17827565 - 2022 Daily Journal D.A.R. 12,782

City brought action against theme park operator and its chief executive officer (CEO) for claims arising from joint undertaking to construct and operate theme park, including claims for fraud, negligent misrepresentation, and violation of Unfair Competition Law (UCL).

Defendants filed special motion to strike fraud, negligent misrepresentation, and UCL claims under anti-SLAPP (strategic lawsuit against public participation) statute. The Superior Court, sitting by assignment, denied anti-SLAPP motion and found motion was frivolous. Subsequently, the Superior Court, sitting by assignment, granted city's motion for statutory attorney fees and costs. Defendants appealed.

The Court of Appeal held that:

- Trial court was not bound to accept expert's legal conclusion that theme parks could constitute "artistic works" under anti-SLAPP statute;
- Portions of expert's report describing theme park contained case-specific hearsay;
- Operator and CEO failed to timely present evidence that reasonable attorneys could disagree on whether theme parks could constitute "artistic works";
- As a matter of apparent first impression, theme park was not "artistic work";
- Argument that theme park was "artistic work" was frivolous;
- Absence of published decision conclusively establishing frivolity of such argument did not preclude award of attorney fees as a matter of due process; and
- Adjudication of matter by three trial judges did not violate due process.

On theme park operator's anti-SLAPP motion to strike claims that city asserted against it, including for fraud, arising from construction and operation of theme park, trial court, in determining whether challenged claims arose from activity protected by anti-SLAPP statute, was not bound to accept opinion of operator's expert that theme parks could qualify as "artistic works" for purposes of artistic work exception to commercial speech exemption from protection of anti-SLAPP statute; expert's opinion amounted to pure conclusion of law as to interpretation of anti-SLAPP statute, which was matter for judge, not expert, to decide.

Portions of design expert's opinion describing theme park, which theme park operator submitted in support of its anti-SLAPP motion to strike claims that city asserted arising out of joint undertaking to construct and operate theme park, relayed case-specific hearsay, and thus trial court was not required to consider such portions in determining whether artistic work exception to commercial speech exemption from protections of anti-SLAPP statute applied to claims; portions of opinion described case-specific characteristics of park as envisioned by operator's principal and related to expert via renderings.

General rule of non-consideration of evidence newly submitted with reply papers did not preclude

theme park operator from submitting new evidence, namely that reasonable attorneys could disagree on whether theme parks could be deemed artistic works, in reply to city's response to operator's anti-SLAPP motion, in which city requested sanctions for frivolous motion practice, and thus trial court was not required to admit new evidence when operator filed it in opposition to city's subsequent noticed motion for attorney fees; city raised issue of frivolity of artistic-work argument under anti-SLAPP statute for first time in its response to anti-SLAPP motion, and trial court was to determine frivolity issue upon submission of operator's reply, tentative ruling, and oral argument.

Theme park was not "artistic work" within meaning of artistic work exception to commercial speech exemption in anti-SLAPP statute; theme park was not involved in activities similar to news or information gathering or dissemination and did not involve constitutionally protected artistic works, such that theme park was not like examples of "artistic works" provided by statute and did not fall within scope of activities discussed in statute's legislative history, and defining "artistic work" to include anything with artistic qualities would make artistic work exception so broad as to encompass almost all commercial speech.

Any reasonable attorney would agree that theme park was not "artistic work" within meaning of artistic work exception to commercial speech exemption in anti-SLAPP statute, and thus theme park operator's assertion of exception as basis for anti-SLAPP motion to strike city's fraud claims was frivolous, warranting award of statutory attorney fees to city, even though term "artistic work" was ambiguous; reasonable attorney, finding ambiguity, would have consulted legislative history and case law to find, consistent with statute's non-exhaustive list of excepted activities, that exception applied to conduct similar to news or information gathering or dissemination or conduct involving constitutionally protected artistic works, and theme park was not similar to such conduct.

Theme park operator forfeited its argument, on appeal from trial court's order awarding attorney fees to city as sanction for operator's frivolous anti-SLAPP motion to strike fraud claims, that trial court failed to follow procedural requirements of statute generally governing sanctions for frivolous litigation conduct and that strict compliance with such procedures was required, where operator failed to raise argument before trial court.

Issue of whether strict compliance with procedures set forth in statute governing sanctions for frivolous litigation conduct was necessary before trial court could award attorney fees to city as sanction for theme park operator's frivolous anti-SLAPP motion did not present matter of vital public policy, and, thus, Court of Appeal would not exercise its discretion to review argument after operator forfeited it by failing to present it to trial court.

Absence of published decision indicating, without a doubt, that theme park operator's argument that theme park qualified for artistic work exception to commercial speech exemption in anti-SLAPP statute was frivolous did not preclude trial court, under Due Process Clause, from awarding attorney fees to city as sanction for frivolous anti-SLAPP motion; published authority confirming that argument was devoid of merit was not necessary to support determination that argument was frivolous.

Issuance of tentative ruling on theme park operator's anti-SLAPP motion to strike city's fraud claims by first judge, followed by second judge's signing of order denying anti-SLAPP motion and finding it frivolous, and then by third judge's order granting city's motion for attorney fees based on frivolous anti-SLAPP motion, did not violate theme park operator's due process right to be heard; operator did not file motion to reconsider second judge's order finding frivolity, but, rather, sought to re-litigate issue of frivolity in opposing city's motion for specific fees, possibility that second judge might have reconsidered frivolity finding on his own motion did not deprive operator of due process, and involvement of multiple judges did not make third judge less capable of evaluating fees.

City was entitled to award of attorney fees incurred on theme park operator's appeal from trial court's order, which had awarded attorney fees to city based on operator's frivolous anti-SLAPP motion to strike city's fraud claims, where Court of Appeal affirmed trial court's finding that anti-SLAPP motion was frivolous, and provision of anti-SLAPP statute authorizing attorney fees as sanction for frivolous anti-SLAPP motions did not explicitly preclude recovery of appellate attorney fees.