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PERSPECTIVE

State Supreme Court closes an anti-SLAPP loophole

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The California Supreme Court began 2017 with another significant anti-SLAPP decision, confirming the broad reach of the state's statute designed to protect freedom of expression. In *Barry v. State Bar of California*, 2017 DJDAR 83 (Jan. 5, 2017), the high court ruled that a lack of subject matter jurisdiction over a claim does not preclude a court from granting a special motion to strike under the anti-SLAPP statute, or from awarding statutory attorney fees and costs to the defendant. This latest ruling — decided in the context of attorney disciplinary proceedings — continues the trend of Supreme Court opinions that favor an expansive reading of the anti-SLAPP statute, thus allowing greater use of the statute as a defensive tactic.

In 2010, attorney Patricia Joan Barry stipulated to discipline by the California State Bar for filing and maintaining frivolous cases and failing to comply with the terms and conditions of a 2005 reproof order requiring her to take and pass the Multistate Professional Responsibility Examination (MPRE). Barry agreed to accept 60 days of actual suspension, two years suspension stayed, and two years of probation for willfully violating Section 3-200 (B) of the California Business and Professions Code, and Rule 1-110 of the California Rules of Professional Conduct. Despite stipulating to the facts, conclusions of law and discipline imposed by the State Bar, Barry subsequently filed a petition for writ of review to the Supreme Court to set aside the stipulation and dismiss the disciplinary charges against her. After the high court denied her petition, Barry filed an action in superior court asserting, among other allegations, that the State Bar's actions were retaliatory and discriminatory.

The State Bar demurred to the complaint in superior court and filed a special motion to strike pursuant to Code of Civil Procedure Section 425.16, California's anti-SLAPP statute. The anti-SLAPP statute allows a defendant to strike claims that are asserted to suppress constitutionally protected expression, known as "Strategic Litigation Against Public Participation." A defendant who prevails on an anti-SLAPP motion can also recover associated attorney fees and costs.

The trial court resolved the State Bar's anti-SLAPP motion by applying the two-step analysis recently re-affirmed by the California Supreme Court in *Baral v. Schnitt*, 1 Cal. 5th 376 (2016). First, the defendant must establish that the challenged claim arises from activity protected by the anti-SLAPP statute. If the defendant succeeds in that showing, the second step requires the plaintiff to establish a probability of success on the merits of the challenged claim. The trial court found that the State Bar satisfied the first step by successfully demonstrating that all of the challenged claims arose out of State Bar disciplinary proceedings and were, therefore, related to constitutionally-protected activity covered by Section 425.16. Proceeding to the second step of the anti-SLAPP analysis, the trial court concluded that Barry had not shown a likelihood of prevailing on her claims because the court lacked subject matter jurisdiction over attorney disciplinary matters. Accordingly, the trial court granted the anti-SLAPP motion and awarded costs and attorney fees to the State Bar as the prevailing party.

The 2nd District Court of Appeal reversed in a brief order. The appellate court agreed with the trial court's ruling that it lacked subject matter jurisdiction over the claims alleged in plaintiff's complaint because the authority to discipline

attorneys in California is expressly reserved to the California Supreme Court. However, the Court of Appeal held that the trial court's lack of subject matter jurisdiction precluded it from making any ruling on the anti-SLAPP motion. The appellate court reasoned that the adjudication of the second step of the anti-SLAPP analysis necessarily required a determination on the merits of plaintiff's claim.

On appeal to the Supreme Court, Barry advanced the Court of Appeal's rationale that the lower court's lack of subject matter jurisdiction precluded it from granting the anti-SLAPP motion and fee award. Barry argued that any ruling on the special motion inevitably went to the merits of the case. The Supreme Court disagreed. Justice Leandra Kruger, writing for a unanimous court, opined that "while a ruling on an anti-SLAPP motion may involve a determination of the merits of the plaintiff's claim, it may in other cases involve a determination that the plaintiff's claim fails for another, nonmerits-based reason, such as lack of subject matter jurisdiction." The high court concluded that the second prong of an anti-SLAPP motion may be satisfied where a court finds that it lacks power to adjudicate the plaintiff's claims. In reaching this decision, the Supreme Court reasoned that to hold otherwise "would open up new avenues for harassing and retaliatory litigation; it would permit plaintiffs to bypass the protections of the anti-SLAPP statute simply by filing suit in a tribunal that has no power to entertain the claim."

The Supreme Court also rejected Barry's arguments that the lack of subject matter jurisdiction prevented the trial court from awarding attorney fees and costs on the anti-SLAPP motion. Justice Kruger cited several California and federal appellate decisions affirming a

court's power to award attorney fees or costs even where a case is dismissed for lack of jurisdiction. The high court concluded that to hold otherwise would erode the statute's procedural protections of defeating improper SLAPP lawsuits "early and without great cost to the SLAPP target" (citing *Varian Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005)).

The Barry decision closes the "loophole" of being able to defeat an anti-SLAPP motion simply because an improper lawsuit that actually suppresses expression is also jurisdictionally flawed. The Supreme Court's ruling continues to expand California's anti-SLAPP jurisprudence by confirming that defendants are entitled to the statute's protection even when a lawsuit can be dismissed on jurisdictional grounds. Moreover, the court's reasoning affirms the continuing importance of the anti-SLAPP motion as a defensive tool in California courts.

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