

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

ANDY NGO,)	
)	Case No: 20CV19618
Plaintiff,)	
)	OPINION AND ORDER RE: DEFENDANT
v.)	BENJAMIN BOLEN’S ORS 31.150 SPECIAL
)	MOTION TO STRIKE; PLAINTIFF’S
ROSE CITY ANTIFA, BENJAMIN)	CROSS-MOTION TO STRIKE
BOLEN, JOHN HACKER, CORBYN)	
(KATHERINE) BELYEA, JOSEPH)	
CHRISTIAN EVANSETAL,)	
)	
Defendants.		

Defendant Bolen’s ORS 31.150 Special Motion to Strike and Plaintiff’s Cross-Motion to Strike came before the Honorable Kathleen M. Dailey on November 19, 2020. James Buchal and Harmeet Dhillon (pro hac vice) appeared for Plaintiff Andy Ngo. Hillary Boyd and Johnathan Henderson appeared for Defendant Benjamin Bolen. Dave Park appeared for Defendant John Hacker.

Defendant Benjamin Bolen moves this Court to apply Oregon’s Anti-SLAPP statute, ORS 31.150. Plaintiff has alleged that Defendant assaulted him by way of a punch. Defendant alleges misidentification and that Plaintiff is targeting him for being at a protest representing opposing views to the Plaintiff. Because ORS 31.150 does not contemplate physical assault as “in furtherance of” Defendant’s First Amendment rights to free speech or petition, his motion is denied.

STATEMENT OF FACTS

Plaintiff Andy Ngo is an independent journalist who reports on, among other things, political demonstrations in Portland, Oregon. As relevant to this motion, Plaintiff alleges that during a

demonstration on May 1, 2019, Defendant Bolen “struck [Plaintiff] in the abdomen with his fist, causing [Plaintiff] significant pain and severe emotional distress.” Plaintiff’s Complaint, ¶ 23. Plaintiff claims Defendant Bolen was among the demonstrators and describes Bolen as “a heavy-set white man” wearing “a brimmed, black beanie, white-framed sunglasses, dark bandanna with white patterning, and black gloves with hard extensions near the knuckle area,” and carrying “a distinctive skateboard.” Plaintiff’s Complaint, ¶ 22. Defendant Bolen does not dispute that he was present at the demonstration at the time of the alleged actions but he denies that he was Plaintiff’s assailant. The other demonstrators in attendance were dressed predominantly in similar clothing, and the clothing itself obscured any potentially identifying features.

Defendant Bolen’s asserts Plaintiff has misidentified him. He moves the Court to strike all of Plaintiff’s claims against him under Oregon’s Anti-SLAPP Statute. Defendant Bolen submits two affidavits to support his motion; a declaration from himself and another from journalist Shane Burley. Plaintiff in turn moves the court to strike these declarations as legally insufficient. For the following reasons, Defendant’s Motion to Strike is denied and Plaintiff’s Cross-Motion to Strike is granted in part, denied in part.

LEGAL ANALYSIS

I. Defendant Bolen’s ORS 31.150 Anti-SLAPP Special Motion to Strike

Defendant Bolen moves to strike all of Plaintiff’s claims against him “because plaintiff named Mr. Bolen as a defendant in this action because of his presence at a political rally where he was engaged in speech or petitioning activities protected under” Oregon’s Anti-SLAPP statute. Defendant Ben Bolen’s ORS 31.150 Special Motion to Strike (“Defendant’s SMTS”), 2-3. The Anti-SLAPP statute protects defendants from actions arising out of certain statements or conduct by permitting a special motion to strike such actions at an early stage in the litigation:

(1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21....

(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

...

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

(d) 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. ORS 31.150(1)-(2).

The statute then establishes a two-prong burden-shifting process by which the Court evaluates the special motion:

(3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document, or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

(4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which liability or defense is based. ORS 31.150(3)-(4).

In short, Defendant Bolen must first show that the claims against him “arise out of” protected statements or conduct. Only then would the burden shift to Plaintiff to demonstrate a probability of success on the claims.

Defendant himself admits that a punch to the stomach is not protected conduct under ORS 31.150(2)(d). Defendant’s SMTS, 17. To overcome this facial flaw in his motion, Defendant argues that Plaintiff’s misidentification of him shifts the conduct in question from the alleged punch to the petitioning activity in which he was engaged at the time. Defendant states—via legal brief and

affidavit—that he was in fact not Plaintiff’s assailant and that Plaintiff instead named him because of his known presence at, and participation in, the demonstration; and because of his political beliefs. Because at the time of the alleged assault, Defendant was engaged in activity which is protected by ORS 31.150, he argues, the claims against him are covered by the statute. To summarize Defendant’s argument in the terms of the statute, Plaintiff’s claims against him “arise out of” the protected conduct he was engaging in and not out of the conduct he is accused of because he was not Plaintiff’s assailant and was therefore named solely because of those protected activities.

The question of what conduct a claim arises from has been explored in both Oregon and California case law.¹ The Oregon Appellate Court has held that this question is “an inquiry into more generally what sort of claim this is.” *Deep Photonics Corp. v. LaChapelle*, 282 Or. App. 533 (2016) (citation omitted); *Mullen v. Meredith Corp.*, 271 Or. App. 698, 705 (2015) (stating the same). In *Deep Photonics*, as here, the parties disputed “what the conduct is from which plaintiffs’ claims ‘arise out of.’” *Id.* at 545. In holding that the conduct in question did not “arise out of” protected activity under subsection 2(b), the Appellate Court explained that “the act underlying the claim *itself* must have been an act in furtherance of the right to petition *and not just associated with it.*” *Id.* at 546 (citation omitted) (emphasis added). The same holds for subsections 2(c) and 2(d).

Plaintiff’s claim *itself* is one of assault, battery, and intentional infliction of emotional distress. The conduct Plaintiff alleges Defendant of engaging in is a punch to the stomach. Whether Plaintiff’s claims arise out of this conduct or some other conduct or statement is a legal question focusing on “what sort of claim” Plaintiff has brought. In answering this question, Plaintiff asks

¹ California case law is relevant because Oregon’s Anti-SLAPP statute is modeled after California’s, and therefore, California precedent before 2001 is binding, and precedent after that, persuasive. *Deep Photonics Corp.*, 282 Or. App. at 543, n. 5.

the Court to focus solely on the claim. Defendant, on the other hand, argues that the Court must consider evidence presented in the supporting and opposing affidavits submitted with the motion. In light of this evidence, he argues, the claim “arises out of” his demonstration activities and political beliefs, and not out of the alleged torts. Defendant Bolen is correct that California law indicates that the Court is not limited to the “four corners” of the complaint under the first prong of the Anti-SLAPP analysis. The Court may consider “the pleadings[] and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (quotation omitted). That prong one does not limit the Court to the Complaint does not change the scope of the Court’s analysis. Even though the Court considers the facts in the Complaint and affidavits, the relevant question for the Court firstly is whether the claim *itself* “arises out of” protected conduct as a matter of law, and not whether there is evidence of the Defendant’s misidentification. Defendant insists that “[a]n Anti-SLAPP motion is an evidentiary motion.” Defendant’s Reply, 3 (citing *Finton Construction, Inc. v. Bidna & Keys, APLC* (“*Finton*”), 238 Cal. App. 4th 200, 213 (2015)). But the *Finton* court noted that the Court engages in the evidentiary analysis only “*once the court reaches the second prong....*” *Finton*, 238 Cal. App. 4th at 213 (emphasis added). At the first prong, the Court considers only the general nature of the claim *itself*. Here, the claim “arises out of” an alleged punch to the stomach.

In *Mullen* and *Deep Photonics*, whether the conduct at issue was in furtherance of a protected act presented a complicated question—in both cases, the conduct was closely tied to the expression of protected rights. *Mullen* held that the claim arose out of a news broadcast and that therefore, the claim *itself* was based on conduct “in furtherance of” free speech. *Mullen*, 271 Or. App. at 705. *Deep Photonics* held that a claim alleging failure to give competent legal representation did not arise out of protected rights because, although the claim involved statements made by

an attorney, the conduct from which the claim arose was in fact incompetency, and not the statements themselves. *Deep Photonics*, 282 Or. App. at 545-46.

This case is not as complicated. Plaintiff alleges that Defendant punched him. The claims of assault, battery, and intentional infliction of emotional distress “arise out of” that alleged conduct. As Defendant Bolen himself concedes, a punch is not “conduct in furtherance of” free speech. ORS 31.150(2)(d). Defendant has failed to make the showing that these claims, as a legal matter, “arise out of” anything other than a “punch to the stomach.” The claims against Defendant do not “arise out of” any protected activity. Therefore, Defendant Bolen’s special motion fails at prong one of the Anti-SLAPP analysis.

Because Defendant’s motion fails at prong one, the Court need not proceed to prong two of the analysis to consider evidence of whether Plaintiff has made a prima facie showing of a probability he will prevail. While the Court will not reach the second prong, Defendant’s objection to inadmissible evidence presented in Plaintiff’s declaration is well taken in part. In paragraph 10 of Plaintiff’s Declaration, he states that “The members of the public were familiar with Mr. Bolen as he has attended violent Antifa protests and riots in Portland since 2016.... Mr. Bolen always brings his skateboard with him to Antifa protests, which he uses as a weapon and to get away quickly from the scene.” These statements are hearsay not based on the personal knowledge of Plaintiff and are therefore inadmissible for this motion.

The caselaw and statutory language of ORS 31.150 compel the Court to deny Defendant’s Special Motion to Strike. In denying Defendant’s motion, the Court is not “permit[ting] plaintiff to name essentially random attendees of a leftist protest, based on their appearance or dress....” Defendant’s SMTS, 17. Rather, the Court is holding only that Defendant has not shown that the

Anti-SLAPP statute reaches the claims against him. Defendant may continue to challenge the issue of misidentification through further motions practice.

II. Plaintiff's Cross-Motion to Strike

Plaintiff asks the Court to strike each of Defendant Bolen's Declarations for (1) insufficient evidence, (2) lack of personal knowledge, and (3) inadmissibility. Plaintiff's Cross-Motion to Strike, ¶ 2. The Court GRANTS Plaintiff's Motions to Strike the following testimony:

(a) Testimony from the Declaration of Benjamin Bolen In Support of Defendant's Special Motion to Strike

The following provisions are ordered stricken from the declaration of Benjamin Bolen:

He appears at these rallies in an effort to dox leftists, which means to uncover their identity and then publicly post personal identifying information online so white nationalist or other right wing groups can access the information and use it to target leftists and their families with harassment, threats, and sometimes even violence. Bolen Decl. ¶ 9.

Mr. Ngo feeds on this attention, even if it is negative. Bolen Decl. ¶ 11

He believes that racially motivated crimes are hoaxes. Bolen Decl. ¶ 12.

Mr. Ngo engages in stochastic terrorism by both demonizing leftists and posting their personal identifying information online. Bolen Decl. ¶ 12.

He knows that this information is used to target his opponents. Bolen Decl. ¶ 12.

He has a practice of embedding with a group of people from one of these groups, and reaches agreements with them whereby they provide him protection while they instigate a skirmish or physical confrontation that Mr. Ngo films and deceptively edits in a manner to further his agenda. Bolen Decl. ¶ 12.

Mr. Ngo does not care about the truth or about being accurate. Bolen Decl. ¶ 17.

Indeed, he is using this lawsuit as a means to raise money. Bolen Decl. ¶ 17.

Mr. Ngo has rushed to judgment with faulty information in an effort to demonize someone with political beliefs that differ from his own. Bolen Decl. ¶ 30.

(b) Testimony from the Declaration of Shane Burley in Support of Defendant's Special Motion to Strike

The following provisions are ordered stricken from the Declaration of Shane Burley:

Andy Ngo uses his clout and funding to identify people leads to a sequence of threats, slanders, and attacks. Burley Decl. ¶ 6.

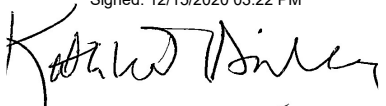
He takes an incident, usually something fairly innocuous like a fiery speech at a political rally or a disagreement on social media, and then traces far reaching allegations often mixed with his opponent's personal information. Burley Decl. ¶ 7.

Activists [] fear for their lives because Andy Ngo wants to make a name for himself. Burley Decl. ¶ 10.

CONCLUSION

Defendant's motion asks this Court to apply the Anti-SLAPP statute to claims of battery, assault, and IIED because of his insistence that he has been misidentified. Because the statute does not cover physical assault as protected conduct, Defendant's Special Motion to Strike is DENIED. Plaintiff's Motions to Strike are GRANTED in part and DENIED in part.

DATED this 15th day of December, 2020.

Signed: 12/15/2020 03:22 PM

By: Circuit Court Judge Kathleen M. Dailey
Kathleen M. Dailey
Circuit Court Judge