

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/14/06

DEPT. 36

HONORABLE GREGORY W. ALARCON

JUDGE

B. GREGG

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

P. MAPSTEAD, C.A.

Deputy Sheriff

none

Reporter

12:00 pm

BC347949

Plaintiff

Counsel

no appearances

LIBAW HOROWITZ INVESTMENT COMPA

ET AL

Defendant

VS

Counsel

SOUTH CENTRAL FARMERS FEEDING

FAMILIES ET AL

NATURE OF PROCEEDINGS:

DECISION ON DEFENDANTS' SPECIAL MOTION TO STRIKE
PLAINTIFFS' COMPLAINT FOR ABUSE OF PROCESS

Hearing Date: September 1, 2006

Moving Party: Defendants South Central Farmers
Feeding Families, Ramon Ballesteros Medina,
Guadalupe Gonzales, Rufina Juarez, Luis Morales,
Juan Reyes Cendejas, Tezozomoc, Maria Luisa Vellejo,
Zeferino Garcia Hurtado, Pedro Barrera, Juan Gamboa,
Margarito Salgado, and Ediogenes Luviano Rumbos

The court, having taken this matter under submission
on 9-1-06, hereby makes its ruling as follows:

I. BACKGROUND

On February 23, 2006, Plaintiffs
Libaw-Horowitz Investment Company, Ralph Horowitz as
trustee/conservator of the Horowitz Family Trust and
the Horowitz Family Trust ("Plaintiffs") commenced
this action against Defendants South Central Farmers
Feeding Families, Elisa Avina Padilla, Ramon
Ballesteros Medina, Pedro Barrera, Felipe Casillas
Ramirez, Juan Gambia, Guadalupe Gonzales, Rufina
Juarez, Luis Morales, Juan Reyes Cendejas,
Tezozomoc, Maria Luisa Vellejo, and Zeferino Garcia
Hurtado ("Defendants") for Abuse of Process.

This lawsuit involves a plot of land (the
"Property") previously owned by the City of Los

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Angeles ("City of LA"). Since approximately 1994, the City of LA, through the Los Angeles Regional Foodbank ("Foodbank"), used the Property as a community garden where certain individuals were allowed to use the land for gardening purposes. Their use was governed by gardening agreements which provided that the individual's use of the Property was subject to the discretion of the Foodbank. On August 13, 2003, the City of LA unanimously approved the sale of the Property to Plaintiffs. On January 8, 2004, written notice was given to the Foodbank that the permit allowing them to use the Property would terminate. On January 27, 2004, the Foodbank mailed notice, in English and in Spanish, to the individuals who used the Property; the notice stated that the community garden could no longer be utilized by them.

On February 24, 2005, several individuals who had previously used the community garden (the defendants in this action) filed suit against Plaintiffs and the City of LA alleging, inter alia, that the City of LA committed waste by selling the Property to Plaintiffs. The underlying case is South Central Farmers Feeding Families, et al. v. City of Los Angeles, Case No. BC31110 ("underlying case"). In the underlying case, Defendants sought a temporary restraining order and preliminary injunction allowing them to continue their use of the land until the lawsuit concluded. Plaintiffs allege that the underlying case was filed for improper ulterior motives and thus, commenced this

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action against Defendants for Abuse of Process.
 On July 31, 2006, Defendants South Central Farmers Feeding Families, Ramon Ballesteros Medina, Guadalupe Gonzales, Rufina Juarez, Luis Morales, Juan Reyes Cendejas, Tezozomoc, Maria Luisa Vellejo, and Zeferino Garcia Hurtado filed a Special Motion to Strike Plaintiffs' Complaint for Abuse of Process pursuant to CCP § 425.16.
 On August 1, 2006, Defendants Pedro Barrera, Juan Gamboa, Margarito Salgado, and Ediogenes Luviano Rumbos also filed a Special Motion to Strike Plaintiffs' Complaint for Abuse of Process pursuant to CCP § 425.16.
 On August 21, 2006, Plaintiffs' filed an Opposition to Defendants' Motion to Strike.
 On August 25, 2006, Defendants filed a Reply.

II. LEGAL STANDARD

"A SLAPP suit - a strategic lawsuit against public participation - seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. The Legislature enacted Code of Civil Procedure section 425.16 - the anti-SLAPP statute - to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1055-56.
 In a motion to strike under CCP § 425.16, the court engages in a two-part analysis: (1) the court decides whether defendant has made a threshold

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showing that the challenged cause of action arises from a protected activity; and (2) if such a showing has been made, the burden then shifts to plaintiff to demonstrate a probability of prevailing on the merits of his or her claims. Id.; see also Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53.

The burden of proof in a special motion to strike pursuant to this section is allocated as follows: "The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue." Kajima Engineering & Construction, Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 928.

Whether a cause of action "arises from a protected activity" depends on whether the defendant's act itself was an act in the furtherance of the right of petition or free speech. See CCP § 425.16(b)(1). The critical question is whether the plaintiff's cause of action itself was based on an action in such furtherance. See City of Cotati v. Cashman (2002) 29 Cal.4th 69. In making this showing, there is no requirement for the defendant to prove that the plaintiff intended to chill the exercise of free speech. Nor is the effect on speech necessary to establish that plaintiff's lawsuit is subject to this special motion to strike. See Equilon Enterprises, 29 Cal.App.4th at 58-67.

CCP § 425.16(e) provides:

As used in this section, "act in furtherance of a person's right of petition or free speech under the

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United States or California Constitution in connection with a public issue" includes:
 (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
 (2) 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;
 (3) 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;
 (4) or 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.

"In order to establish a probability of prevailing for purposes of section 425.16, subdivision (b)(1), the plaintiff need only have stated and substantiated a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal. App. 4th 658, 875 (citation and internal quotations omitted). In

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deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. CCP § 425.16(b) (2).

III. DISCUSSION

The Special Motion to Strike pursuant to CCP §425.16 filed by Defendants South Central Farmers Feeding Families, Ramon Ballesteros Medina, Guadalupe Gonzales, Rufina Juarez, Luis Morales, Juan Reyes Cendejas, Tezozomoc, Maria Luisa Vellejo, and Zeferino Garcia Hurtado, and the Special Motion to Strike pursuant to CCP §425.16 filed by Defendants Pedro Barrera, Juan Gamboa, Margarito Salgado, and Ediogenes Luviano Rumbos, set forth the same arguments, cite the same authority and provide the same exhibits. Accordingly, the court will consider both motions together and refer to both motions as "Defendants' Special Motion to Strike."
A. Threshold Showing that the Challenged Cause of Action Arises from a Protected Activity

The court must first determine whether this case falls within the purview of CCP §425.16 and whether Defendants have made the threshold showing that the challenged cause of action arises from protected activity.

In Defendants' Special Motion to Strike, Defendants assert that "[b]ecause defendants petitioned the court for a temporary restraining order (TRO) and injunction in the valid exercise of their right to free speech, their petition is a

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protected act under section 425.16." Defendants' Special Motion to Strike Plaintiffs' Complaint at 1. Defendants properly argue that Plaintiffs' cause of action arises from Defendants' petition to the court in the underlying action for a temporary restraining order ("TRO") and injunction.

Plaintiffs do not refute these arguments in their Opposition.

An Abuse of Process Cause of Action falls within the purview of the anti-SLAPP statute. Siam v. Kizibash (2005) 130 Cal. App. 4th 1563, 1570. Plaintiffs' Cause of Action for Abuse of Process is clearly based upon Defendants' petition for a TRO and injunction against Plaintiffs in the underlying lawsuit. Thus, the court finds that Defendants have met their burden and made a threshold showing that the challenged cause of action arises from a protected activity.

B. Probability of Prevailing on the Merits

If the court determines that Defendants have met their burden and established that the challenged cause of action arises from a protected activity, the burden then shifts to Plaintiffs to demonstrate a probability of prevailing on the claim. Rusheen, 37 Cal. 4th at 1056. Plaintiffs must show both that the claim is legally sufficient and there is admissible evidence which, if credited, would be sufficient to sustain a favorable judgment. Romona Unified School District v. Tsiknas (2005) 135 Cal. App. 4th 510, 519.

Plaintiffs have filed a claim for abuse of

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process against Defendants. The elements for the tort of abuse of process are (1) an ulterior motive and (2) a willful act in the use of process not proper in the regular conduct of the proceedings. Id. at 520.

(1) First Element: Ulterior Motive

With respect to the first element, Plaintiffs argue that Defendants knew that a preliminary injunction was not an available remedy for waste in the underlying lawsuit and that they sought the preliminary injunction anyway. Plaintiffs argue that Defendants' ulterior motive can be inferred from Defendants' conduct which establish the wrongful motive. Here, the evidence that Defendants pursued the preliminary injunctive remedy under section 526a, knowing a preliminary injunction had never been properly issued under that section, and knowing that even if successful, they had no right to possession ... would be sufficient to overcome this motion to strike. The inference of an abusive ulterior motive could be drawn from the conduct alone.

Plaintiffs' Opposition to Defendants' Motion to Strike at 10. In addition, Plaintiffs state that Patrick Dunlevy, counsel for Defendants' in this case and counsel for Plaintiffs in the underlying case, told the Los Angeles Daily Journal that, "even if we could void the sale [from the city back to Horowitzz [sic]], that still doesn't give the farmers the right to be on the land ... The strategy was to buy time to let the political process catch

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up." Id.

Defendants do not rebut these assertions in their Reply.

To prove the first element of an Abuse of Process Cause of Action, Plaintiffs must show that Defendants acted with an ulterior motive, that is, that Defendants used the power of the court for a purpose that was not germane to the action. Ion Equipment Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876. Accepting Plaintiffs' evidence as true for the purposes of this motion, the court finds that Plaintiffs have made a prima facie showing as to the first element of an Abuse of Process Cause of Action because "buying time" to let the "political process catch up" is not germane to an action by taxpayers against a city for committing waste.

(2) Second Element: Willful Act in the Use of Process Not Proper in the Regular Conduct of the Proceedings

With respect to the second element for an Abuse of Process Cause of Action, Defendants argue that Plaintiffs have provided no evidence and made no showing that there was a willful act in the use of process not proper in the regular conduct of the proceedings by Defendants. Defendants note the lack of any factual allegations and/or evidence supporting this element in both (1) Plaintiffs' Complaint; and (2) Plaintiffs' Opposition to Defendants' Motion to Strike.

Plaintiffs' Opposition argues that the tort of abuse of process "can be established by showing

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either the improper use of process otherwise lawfully obtained or improperly obtaining the process along with an improper ulterior purpose." Plaintiffs' Opposition to Defendants' Motion to Strike at 5-6. Relying on this assertion, Plaintiffs then argue that Defendants engaged in the tort of abuse of process in the underlying action when Defendants filed a meritless claim against Plaintiffs and sought a remedy in an action that the Defendants knew was unavailable. Specifically, Plaintiffs allege that Defendants commenced the underlying action knowing that a preliminary injunction was not an available remedy for waste under section 526a.

There are two fundamental elements to the tort of abuse of process. *Oren Royal Oaks Venture v. Greenberg, Bernard, Weiss & Karma, Inc.* (1986) 42 Cal. 3d 1157, 1168. To prove the second element for an Abuse of Process Cause of Action, Plaintiff must show that Defendants engaged in a willful act in the use of process not proper in the regular conduct of the proceedings. *Siam*, 130 Cal. App. 4th at 1579. "Process is action taken pursuant to judicial authority. ... Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." *Id.*

The court finds that Plaintiffs have not alleged facts or provided the court with evidence

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that tends to establish this second element. Our Supreme Court provided in *Oren Royal Oaks Venture*, "while a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit - even for an improper purpose - is not a proper basis for an abuse of process action." *Oren Royal Oaks Venture*, supra, 42 Cal. 3d at 1169.

Plaintiffs repeatedly argue that Defendants instituted this action for an improper purpose with an ulterior motive and that Defendants knew or should have known that their claim was completely meritless. Similarly, the plaintiff in *Romona Unified School District v. Tsiknas*, argued that it had established the two elements for a prima facie case of abuse of process because (1) there was evidence that the defendants had ulterior motives; and (2) the defendants misused the proceedings by pursuing claims that the defendants knew were substantively meritless. *Romona Unified School District v. Tsiknas* (2005) 135 Cal. App. 4th 510, 519-20. The *Romona Unified School District* court held that, "[a]lthough initiating a meritless claim for an improper purpose can expose a party to damages for malicious prosecution, the mere initiation of a lawsuit, even for an improper purpose, does not support a claim for abuse of process." *Id.* at 520.

Thus, pursuant to *Oren Royal Oaks Venture* and *Romona Unified School District*, an improper purpose,

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an ulterior motive, and misusing proceedings by filing a claim that a party knows is substantively meritless, is not enough. Thus, Plaintiffs have failed to make the prima facie showing required to defeat a special motion to strike.

Accordingly, the court will grant Defendants' Special Motion to Strike Plaintiffs' Complaint pursuant to CCP § 425.16.

IV. CONCLUSION

Based on the above, the court hereby (1) GRANTS Defendants South Central Farmers Feeding Families, Ramon Ballesteros Medina, Guadalupe Gonzales, Rufina Juarez, Luis Morales, Juan Reyes Cendejas, Tezozomoc, Maria Luisa Vellejo, and Zeferino Garcia Hurtado's Special Motion to Strike Plaintiffs' Complaint for Abuse of Process pursuant to CCP § 425.16; and (2) GRANTS Defendants Pedro Barrera, Juan Gamboa, Margarito Salgado, and Ediogenes Luviano Rumbos' Special Motion to Strike Plaintiffs' Complaint for Abuse of Process pursuant to CCP § 425.16.

**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 9-14-06 upon each party or counsel named below by

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depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 9-14-06

John A. Clarke, Executive Officer/Clerk

By: B. GREGG _____

MARK A. BORENSTEIN, ESQ
OVERLAND BORENSTEIN SCHEPER & KIM
300 S. GRAND AVENUE, #2750
LOS ANGELES, CA 90071

CORNELIA DAI, ESQ
PATRICK DUNLEVY, ESQ
HADSELL & STORMER INC
128 N. FAIR OAKS AVENUE, #204
PASADENA, CA 91103

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