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Kosor, Jr. v. Olympia Co.'s LLC, 136 Nev. Adv. Op. 83 (Dec. 31, 2020)

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DEFAMATION AND NEVADA'S ANTI-SLAPP STATUTES

Summary

This case focuses on Nevada's anti-SLAPP statutes' public forum component as it relates to defamation. Michael Kosor, a homeowner in the Southern Highlands community, criticized the developer/managers of the community, Olympia Companies, LLC and its president, Garry V. Goett, during homeowner association board meetings, in written materials distributed to the community, and online. Olympia sued Kosor for defamation, which Kosor unsuccessfully moved to dismiss under Nevada's anti-SLAPP statute in the district court. This Court concluded that Kosor met his burden to prove that all his statements were made in a public forum on an issue of public interest pursuant to the anti-SLAPP statutes and thus remanded the case for further consideration.

Background and Procedural History

Michael Kosor is a homeowner in the Southern Highlands community where he served as an outspoken board member of the homeowners' sub-association and began campaigning for his election to the overarching Southern Highlands Community Association ("HOA"). In the process of his campaign, Kosor opposed the HOA's decision to continue its contracts with its developer, manager, and operator, Olympia, LLC ("Olympia"). Kosor believed these contracts served to the benefit of the HOA and Olympia at the cost of the homeowners within the community.

Subsequently, Olympia filed a defamation complaint and sued Kosor for defamation and defamation per se. The complaint alleged that Kosor first started making defamatory statements at HOA sub-association board meetings. According to the complaint, Kosor also posted his criticisms on the social media platform, Nextdoor.com. Olympia claimed that despite sending Kosor a cease-and-desist letter, Kosor continued making these defamatory statements.

The complaint alleged that Kosor continued to make defamatory statements during his campaign for his election to the HOA board of directors. On his personal campaign website, Kosor compared Olympia to a dictatorship while perpetuating the previously mentioned allegations against Olympia. The complaint also details how Kosor distributed a pamphlet and letter to the Southern Highlands community mirroring the language on his website.

Kosor moved to dismiss the claims under Nevada's anti-SLAPP statute, NRS 41.660.² The district court held that Kosor did not establish a prima facie claim for dismissal under NRS 41.660 and denied the motion. Kosor appealed the decision, as provided by NRS 41.670(4), to the trial court and Nevada Supreme Court. While the appeal was pending at the Nevada Supreme Court, the trial court denied Kosor's motion for reconsideration.

Discussion

Lawsuits that target good-faith speech on an important public matter are deterred by Nevada's anti-SLAPP statutes.³ The Nevada Supreme Court reviews the district court's refusal to dismiss under the anti-SLAPP statutes de novo.⁴

¹ By Jorge "Coco" Padilla.

² NEV. REV. STAT. § 41.660.

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

⁴ Abrams v. Sanson, 136 Nev. 83, 86, 458 P.3d 1062, 1065–66 (2020).

To establish a prima facie case for dismissal under the anti-SLAPP statute, the movant needs to show:

- 1) By a preponderance of the evidence
- 2) That the underlying defamation claim is based upon a good faith communication
- 3) In furtherance of the right to petition or right to free speech
- 4) In direct connection with an issue of public concern in a public forum

NRS 41.660(3)(a); NRS 41.637. The Nevada Supreme Court leaves the question of whether Kosor's communications were in good faith to the district court on remand, and instead focuses its analysis on the fourth element, "any... [c]ommunication made in direct connection with an issue of public interest in a place open to the public or public forum."⁵

The Court relies on five guiding principles found in *Shapiro* to determine whether Kosor's statements were about an issue of public interest.⁶ First, public interest is not equivalent to mere curiosity.⁷ The Court found that Kosor's statements against Olympia related to support for democratic participation and was not merely a disagreement between private parties. Second, a matter of public interest is of concern to a substantial number of people.⁸ The Southern Highlands' 8,000 residences satisfy this requisite. Third, the statements need to be directly tied to the public interest asserted.⁹ Here, Kosor's statements relate to the governance and democratic participation in the Southern Highlands HOA. The fourth and fifth *Shapiro* factors prohibit statements meant to prosecute a private grievance.¹⁰ Kosor's main focus was airing grievances about the Southern Highlands' governance, and not a private issue against Olympia. Therefore, the Court concluded that all the statements were related to matters of public interest pursuant to NRS 41.637(4).

The Court then focuses on whether Kosor's statements were made "in a place open to the public or in a public forum."¹¹ The Court acknowledged that it does not have a test to determine this answer nor does the statute's plain language provide guidance for this question. The Court looks to California case law relating to the anti-SLAPP statute and federal First Amendment precedent for further guidance.

In determining whether Kotor's allegedly defamatory statements at HOA open meetings classified as open to the public or in a public form, the Court looks to California's *Damon*.¹² In *Damon*, a group of homeowners were making defamatory statements against the HOA manager at the HOA board meetings.¹³ In California, HOA board meetings are public forums under the anti-SLAPP statute because (1) the HOA's decision-making impacts such a large community that the Legislature has mandated that community members must be able to speak publicly at the meetings; (2) the HOA is like a quasi-government entity.¹⁴ In light of *Damon*, the Court concludes that Kosor's statements at the board meetings were public forum under the anti-SLAPP statute because meetings were open to community members and the Southern Highlands HOA was similar to a governmental body.

⁵ NEV. REV. STAT. § 41.637(4).

⁶ *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017).

⁷ *Id.* at 39, 389 P.3d at 268.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ NEV. REV. STAT. § 41.637(4).

¹² *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205, 209, 212 (Ct. App. 2000).

¹³ *Id.*

¹⁴ *Id.*

As for the pamphlets and letter that Kosor distributed to the Southern Highlands community, the Court looks to *Damon* to determine if written material classifies as a public forum. They do. In *Damon*, homeowners distributed a newsletter which only allowed like-minded criticisms to be published.¹⁵ The *Damon* court concluded that the newsletter was a public forum because a public forum can include other means of public communication besides in the physical setting so long as the communication is about a public matter distributed to a larger audience.¹⁴¹⁶ Here, Kosor's written material related to participation in the HOA's election process. Thus, the Court found that Kosor's alleged defamatory statements in the written material was written in a public forum.

Lastly, the Court determined that Kosor's statements posted on Nextdoor.com and his personal website qualify as public forum under the anti-SLAPP statute. In coming to this conclusion, the Court was unable to rely on California case law because the California anti-SLAPP statute is interpreted broadly so as to include internet websites available to the public to qualify as a public forum.¹⁷ Nevada's anti-SLAPP statute does not mandate such a broad construction of public forum, so the Court turns to United States Supreme Court First Amendment precedent on the issue. The Court has previously looked to federal precedent for applying its anti-SLAPP statute, especially because the First Amendment has previously been applied to public forums in the electronic context.

The Court used Fourth Circuit and Second Circuit First Amendment precedent to determine that the issue turns on whether the internet page or post creates a forum for citizen involvement.¹⁸ The Court concluded that Kosor's Nextdoor.com post qualifies as a public forum because the webpage is freely accessible, and the content of the post serves to open communication and get feedback from Southern Highlands community members. As for Kosor's personal website, the Court found the content and purpose of the website relates to the topic of public interest mentioned earlier, paired with the page's interactive components, like "Contact Me" and "Frequently Asked Questions" tabs allow the Court to conclude the website qualifies as a public forum under the anti-SLAPP statutes.

Conclusion

The Court reverses the district court's denial of the motion for reconsideration and remands the case to the district court because "Kosor met the prima facie burden to demonstrate that the statements in questions were all made in public forums on a matter of public interest." On remand, the district court will need to determine whether Kosor's statements were made in good faith, which this Court did not answer.

¹⁵ *Id.* at 210.

¹⁶ *Id.* at 211.

¹⁷ *Barrett v. Rosenthal*, 146 P.3d 510, 514 n.4 (Cal. 2006).

¹⁸ *See Davison v. Randall*, 912 F.3d 666, 682 4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018).