

Tentative Rulings for April 6, 2022
Department 402

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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Tentative Rulings for Department 402

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Tentative Ruling

Re: **County of Kern v. Gavin Newsom**
Superior Court Case No. 21CECG03695

Hearing Date: April 6, 2022 (Dept. 402)

Motions: Respondent's Special Motion to Strike SLAPP Suit
Respondent's Demurrer to Petition for Writ of Mandate

Tentative Ruling:

To grant Respondent's Special Motion to Strike Petition for Writ of Mandate of County of Kern. The petition filed September 13, 2021 is hereby stricken.

To take the Demurrer off calendar as moot.

Explanation:

Strategic Lawsuit Against Public Participation (SLAPP) Overview:

The anti-SLAPP statute describes claims within its purview: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 426.16, subd. (b)(1).)

The anti-SLAPP statute defines "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" as "(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, or (4) 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." (Code Civ. Proc., § 425.16, subd. (e).)

As a preliminary issue, Petitioner challenges the motion to strike as being untimely. However, pursuant to Code of Civil Procedure § 425.16, the court has the discretion to allow an anti-SLAPP motion to be heard that is not filed within 60 days of service of the complaint. While the instant action was filed on September 13, 2021, the matter was transferred from Kern County to Fresno County on December 15, 2021. The transfer operated as a stay of proceedings. (See *South Sutter, LLC v. LJ Sutter Partners LP* (2011) 193 Cal.App.4th 634, 655). A motion to transfer and consolidate another related matter was heard in Fresno County on January 19, 2022. A stipulation and order extending time for a response was lodged on January 19, 2022. The present motion was filed on March

10, 2022. The instant action remains at pleading stage. This motion was filed concurrently with a demurrer. In the court's discretion, allowing this motion to strike to proceed is proper.

To determine whether such a motion should be granted, the trial court must engage in a two-step process. (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) “[D]etermining first whether the [respondent] made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the [respondent’s] exercise of a right to petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the statute; and if so, whether the [petitioner] has demonstrated a probability of prevailing on the claim.” (*Jespersen v. Zubiarte-Beauchamp* (2004) 114 Cal.App.4th 624, 628.)

First Prong: Right of Free Speech

The court must first decide whether the challenged cause of action arises from acts in furtherance of the Respondent’s right of free speech or right of petition under one of the four categories set forth above. (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841.) In the instant action, Petitioner concedes Respondent’s statements were made in connection with a public issue or a matter of public interest. (Petitioner’s Opposition to Respondent’s Special Motion to Strike, p. 10.)

Second Prong: Probability of Prevailing on the Claims

Once it has determined that the anti-SLAPP statute applies, “the burden then shifts to the petitioner to demonstrate a probability of prevailing. If the petitioner does so, the motion to strike . . . must be denied. To establish the requisite probability of prevailing, the petitioner must state and substantiate a legally sufficient claim. ‘Put another way, the petitioner “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.”’” (*Navarro v. IHOP Properties, Inc.*, *supra*, 134 Cal.App.4th at p. 843, citations omitted.) “While plaintiff’s burden may not be ‘high,’ he must demonstrate that his claim is legally sufficient.” (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 469.)

“A plaintiff seeking to demonstrate the merit of the claim ‘may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.’” (*Sweetwater Union High School Distr. V. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940; quoting *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 95; see *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 480; *City of Costa Mesa v. D’Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376; *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.)

Violation of Separation of Powers - First Cause of Action

Petitioner alleges that Respondent’s public statements and executive orders amount to direct instructions to California Geologic Energy Management (CalGEM) to cease approving all new Well Stimulation Treatment (WST) and similar extraction

technology permit applications. However, it is not the Respondent, but rather the CalGEM supervisor who possesses the statutory authority to “supervise the drilling, operation, maintenance, and abandonment of wells so as to permit all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons and which, in the opinion of the Supervisor, are suitable for this purpose in each proposed case.” (Gov’t Code § 3106(b).)

The Legislature also charged the Supervisor, not Respondent, with ensuring that oil and gas exploration and production “prevent[s], as far as possible, damage to life, health, property, and natural resources” (§ 3106(a).) The Legislature gave the Supervisor the discretion to determine how to best “reduc[e] and mitigate[e] . . . greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state,” including by coordinating with other agencies to further the goals of the California Global Warming Solutions Act of 2006. (§ 3011, subds. (a), (b).)

The CalGem Supervisor possesses the discretion to approve or deny permit applications: “The [S]upervisor or district deputy shall review the well stimulation treatment permit application and may approve the permit if the application is complete.” (§ 3160, subd. (d)(3)(A).) The Supervisor “shall evaluate the quantifiable risk of the well stimulation treatment.” (§ 3160, subd. (d)(3)(C).) The Supervisor thus evaluates these applications on a permit-by-permit basis. (§§ 3150-3161.)

Petitioner alleges Respondent has enacted a “de facto” ban on new permits by way of his public statements against the issuance of new statements, his directive to CalGEM to initiate new rulemaking procedures to end the issuance of new WST permits, a bill that did not pass committee (SB 467) that would have prohibited new permits and his replacement of the previous CalGEM supervisor. This claim fails because Petitioners failed to join an indispensable party, CalGem. (Code Civ. Proc. §§ 389, 430.10(d).) Petitioner has not identified any specific permit that CalGEM incorrectly denied and/or denied without explanation from CalGEM’s supervisor.

Mandamus will lie to compel a public official to perform an official act required by law. (Code Civ. Proc., § 1085.) Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law. (*Ibid.*) Mandamus will lie to correct an abuse of discretion by an official acting in an administrative capacity. (*Ibid.*) Here, insufficient facts have been shown to prove Respondent abused his discretion by his public statements or implementation of his stated policy. Further, there are no facts to support that Respondent was acting in an administrative capacity.

Respondent’s actions are within his executive authority. The Petitioner has not shown that any of Respondent’s actions exceeded his authority under the California Constitution. There was no admissible evidence to support the claim the Respondent made a “direct instruction to CalGEM to cease approving” WST permits. (Petition ¶ 59.) Additionally, a writ of prohibition, lies only to restrain judicial acts. (CCP § 1102.) There is

no admissible evidence Respondent exercised a judicial function. Finally, this claim is non-justiciable as the "courts may not usurp the governmental functions of the legislative and executive branches, and usurpation includes unwarranted intrusion into the roles of those branches. . . . 'The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the [legislative and executive branches.]' [Citation.]" (Schabrum v. California Legislature (1998) 60 Cal.App.4th 1205, 1213.) The Petitioner has failed to prove a probability of success as to the First Cause of Action.

Violation of California's Administrative Procedure Act - Second Cause of Action

The Respondent's Second Cause of Action alleges a violation of the Administrative Procedures Act in that the Respondent, by way of his public statements and executive decisions, violated the APA by making or enforcing a rule outside of the APA's rulemaking authority. Again, CalGEM was not joined in this action. This cause of action is defective as directed against Respondent. As previously stated, there was no admissible evidence presented that the Respondent made a direct instruction or mandate to deny all well permits. Additionally, the claim fails as a matter of law because the CalGEM supervisor's decisions are discretionary, they are not ministerial acts required "to perform in a prescribed manner . . . and without regard to his own judgment or opinion concerning such act's propriety or impropriety." (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700.) The Petitioner has failed to prove a probability of success as to the Second Cause of Action.

Declaratory Relief - Third Cause of Action

The relief sought would impermissibly limit the Respondent's public statements and/or prevent him from fulfilling his executive duties. (See Gov. Code, § 11150.) The Constitution "vests each branch of government with certain core or essential functions that may not be usurped by another branch." (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) The separation of powers doctrine "limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*In re Lira* (2014) 58 Cal.4th 573, 583.) The Petitioner has failed to prove a probability of success as to the Third Cause of Action.

Given the court's ruling on the Special Motion to Strike, the Demurrer to the Petitioner for Writ of Mandate is moot.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: GLB **on** 4/5/22.
(Judge's initials) (Date)