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Asserting an Anti-SLAPP Petition in Arbitration

FORUM COLUMN

By Eric van Ginkel

The 6th District Court of Appeal has ruled that an anti-SLAPP motion to strike brought in court cannot extend to a claim made in arbitration. Reversing the Santa Clara County Superior Court, the appellate court denied a party's motion to strike his former employers' claim of breach of the nondisclosure provision in his employment contract, which they had brought in arbitration. *Sheppard v. Lightpost Museum Fund*, 2007 DJDAR 84 (Cal. App. 6th Dist. Dec. 29, 2006).

Terrance Sheppard's employment with Lightpost Museum Fund and Art for Children Charities Inc. ended in September 2003. The next year, Lightpost and ACC (which are closely linked to the well-known painter Thomas Kinkade) submitted an arbitration claim to Christian Dispute Resolution Professionals, the arbitration provider specified in Sheppard's employment agreements. The claim accused Sheppard of disclosing information in violation of the agreements' nondisclosure clauses. In response, Sheppard submitted a wrongful-termination claim. The arbitrator awarded no relief to any of the parties.

In April 2005, the employers asked the arbitrator to "revisit" their claim, saying that, after the arbitration, Sheppard had turned over confidential documents and testified about confidential information in unrelated arbitration proceedings. Because Sheppard purportedly continued to violate the nondisclosure clauses, the employers sought an injunction forcing Sheppard to return company documents and immediately stop releasing confidential information. They also sought an award of damages. Sheppard did not appear in this second round of arbitration, which the arbitrator treated as a new arbitration proceeding.

Sheppard sued the employers in Santa Clara County Superior Court, saying that they were attempting to obtain a prior restraint on his right of free speech by precluding him from writing a book involving Kinkade. Such conduct, he stated in his complaint, violated Code of Civil Procedure Section 425.16 and was subject to a special motion to strike. A month later, he filed his anti-SLAPP motion, which was followed by a motion to compel arbitration by the employers.

Section 425.6(b)(1) provides for a special motion to strike any cause of action arising from any acts in furtherance of a person's constitutional right of petition or free speech in connection with a public issue, unless the court has established that the party alleging that cause of action probably will prevail on the claim.

The employers asserted that Sheppard's motion to strike was fatally flawed because the subject of the motion, the arbitration demand, was not before the court and thus there was no complaint or cross-complaint to strike. They argued that the court had no jurisdiction to strike a pleading submitted to a completely different adjudicatory body. If Sheppard wanted to pursue a motion to strike, he should be required to do so in the arbitration.

The Superior Court granted Sheppard's motion in part, on the ground that the motion to compel arbitration related to defendants' arbitration claim. Because this part of the claim violated his constitutional right of free speech, the court reasoned, it was properly subject to an anti-SLAPP motion.

Reversing the lower court's order, the Court of Appeal concluded that Section 425.16 does not authorize a superior court to grant a motion to strike an arbitration claim filed only in an agreed arbitral forum, not asserted by the claimant in any complaint, cross-complaint or petition filed in court.

Justice Nathan D. Mihara, writing for the court, explained that Section 425.16(a) is intended to target "abuse of the judicial process." In addition, Section 425.16 does not expressly make arbitration claims "subject to" a motion to strike: "Arbitration claims ... are very different because they are not filed in courts and they do not initiate judicial proceedings. These distinctions indicate that the Legislature did not intend to include such claims within the term 'complaint,'" he wrote.

Mihara also pointed out that arbitration proceedings are generally not controlled by the Code of Civil Procedure. Instead, they are governed by arbitration rules, the parties' contract or other provisions of law. The fact that Sheppard brought his matter into a judicial proceeding could not change the court's analysis, as Sheppard's motion targeted only the arbitration claim, not the employers' subsequent motion to compel.

In a concurring opinion, Justice Richard J. McAdams said he would have remanded the matter for further consideration of the issue of arbitrability, which under California law is a matter to be decided by the courts, not the arbitrator.

Interestingly, the court did not rule on whether or not Sheppard was free to bring an anti-SLAPP motion in the arbitration proceeding, as was at least hinted at by the employers. It simply ruled that the motion is not available in court with respect to a concurrent arbitration proceeding. Given the "inartful pleadings and the unusual procedural posture of the case," as McAdams called it, this is not surprising.

Even if it is obvious from the language of Section 425.16 that the Legislature never contemplated anything other than judicial proceedings when it drafted the section, the stated goal as expressed in subsection (a) is to prevent the "chilling" of the valid exercise of the constitutional rights of free speech and petition, for which purpose it calls for a "broad construction" of Section 425.16. Obviously, the effect of a claim in arbitration to stop or prevent the exercise of free speech is just as "chilling" as a complaint in a court proceeding.

Without subparagraph (a), I believe the anti-SLAPP motion probably would have to be limited to motions to strike in judicial proceedings. But with the explicit statement of the legislative intent demanding broad construction of the section, an arbitrator could well find that an anti-SLAPP petition is available in arbitral proceedings against claims aimed at chilling the exercise of freedom of speech.

Thus, the ruling in *Sheppard v. Lightpost Museum Fund* does not appear to prevent a respondent from asserting an anti-SLAPP petition in arbitration. Nor does the issue necessarily raise a question of arbitrability, as McAdams suggested in his concurring opinion. Instead, the question ought not to come before a court except in a vacatur proceeding under Section 1286.2(4), on the possible ground that, by allowing and ruling on an anti-SLAPP petition in the arbitration proceeding, the arbitrator exceeded his authority. Within that framework, given the language of Section 425.16(a), a court would be correct in deciding that the motion is available in arbitration proceedings. In that scenario, the arbitrator decides whether to grant or deny the petition to strike.

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