

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: Mike Karbassi v. Esmeralda Soria	
LAW AND MOTION MINUTE ORDER	Case Number: 22CECG01710

Hearing Date: **September 14, 2022** Hearing Type: **From Chambers**
Department: **503** Judge: **Kimberly A. Gaab**
Court Clerk: **R. Smith** Reporter/Tape: **Not Reported**

Appearing Parties:	
Plaintiff: No Appearances	Defendant: No Appearances
Counsel:	Counsel:

Off Calendar

Continued to Set for ___ at ___ Dept. ___ for ___

Submitted on points and authorities with/without argument. Matter is argued and submitted.

Upon filing of points and authorities.

Motion is granted in part and denied in part. Motion is denied with/without prejudice.

Taken under advisement

Demurrer overruled sustained with ___ days to answer amend

Tentative ruling becomes the order of the court. No further order is necessary.

Pursuant to CRC 3.1312(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

Service by the clerk will constitute notice of the order.

See attached copy of the Tentative Ruling.

Judgment debtor ___ sworn and examined.

Judgment debtor ___ failed to appear.
Bench warrant issued in the amount of \$ ___

JUDGMENT:

Money damages Default Other ___ entered in the amount of:
Principal \$___ Interest \$___ Costs \$___ Attorney fees \$___ Total \$___
 Claim of exemption granted denied. Court orders withholdings modified to \$___ per ___

FURTHER COURT ORDERS:

Monies held by levying officer to be released to judgment creditor. returned to judgment debtor.
 \$___ to be released to judgment creditor and balance returned to judgment debtor.
 Levying Officer, County of ___, notified. Writ to issue
 Notice to be filed within 15 days. Restitution of Premises

Other: The matter having been under advisement, the court now rules as follows: upon further review, the court adopts its tentative ruling without modification.

(20)

Tentative Ruling

Re: **Karbassi v. Soria**
Superior Court Case No. 22CECG01710

Hearing Date: September 1, 2022 (Dept. 503)

Motion: Defendants' Special Motion to Strike Complaint

Tentative Ruling:

To grant the special motion to strike the complaint on the ground it is a strategic lawsuit against public participation (SLAPP) action. (Code Civ. Proc., § 425.16.) Defendants are directed to submit to this court, within five (5) days of service of the minute order, a proposed judgment consistent with the court's order.

Explanation:

A special motion to strike provides a procedural remedy to dismiss nonmeritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 186.) The court engages in a two-step process in determining whether an action is subject to the anti-SLAPP statute. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories set forth in Code of Civil Procedure section 425.16, subdivision (e). Second, if the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc., §425.16; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 198.)

The instant case is a defamation action brought by Fresno City Councilmember Mike Karbassi ("Karbassi") against fellow Councilmember Esmeralda Soria, and her campaign Soria for Assembly 2022 (collectively, "Soria"). Karbassi and Soria were both running for State Assembly in the 27th District. Soria published a mailer that on one side looked like it claimed Karbassi assaulted a young woman, although on the reverse side (the "explanatory side") it clarifies that the assault was by a consultant hired by Karbassi. The explanatory side also states that Karbassi billed taxpayers over \$13,000 for food, alcohol and travel expenses, and over \$15,000 for public relations, including \$500 for a DJ. The mailer also twice queries what else Karbassi has been hiding. (See Complaint Ex. A.)

Objections

Before addressing the merits, the court rules as follows on the evidentiary objections.

Karbassi's Objections to Pulliam Declaration: Sustain objections 2, 3, 4A (sustaining the objection only as to Exhibits G and H because the declarant cannot authenticate

the records), 5, 5A, 6, 7, 8; overrule objections 1, 4, 9, 10, 11. Most of the objections are sustained because Pulliam bases his declaration on the content of records that he obtained and reviewed regarding Karbassi's expenditures as a councilmember. These records are not authenticated simply by virtue of the fact that Pulliam obtained and reviewed them, as Soria seems to claim in response to the objections.

Karbassi's Objections to Soria Declaration: Sustain objection 1; overrule objection 2.

Soria's Objections to Karbassi Declaration: Sustain objections 1-3, 5, 8-11, 12, 13, 14; overrule objections 4, 6, 7.

Prong 1: Whether Karbassi's Action Arises from Soria's Constitutionally Protected Speech

The moving party first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.) A protected activity is "any act" that is completed "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" (Code Civ. Proc., § 425.16, subd. (b)(1).)

Campaign speech, including distribution of campaign mailers, is a protected activity for the purposes of Code of Civil Procedure section 425.16. (*Edward v. Ellis* (2021) 72 Cal.App.5th 780, 789.) Karbassi does not dispute that Soria has established the first prong—that the cause of action arises out of Soria's protected activity.

Prong 2: Probability of Success

A plaintiff's complaint need only be shown to have "minimal merit." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 95.) The plaintiff must show 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. (*Id.* at pp. 88-89.) In considering this issue, the court looks at " 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' " (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3, citation omitted.)

The plaintiff must show: (1) a legally sufficient claim (i.e., a claim which, if supported by facts, is sustainable as a matter of law); and (2) that the claim is supported by competent, admissible evidence within the declarant's personal knowledge. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-655; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) It has been stated that this test is similar to the standard applied in summary judgment motions pursuant to Code of Civil Procedure section 437c; to wit, the plaintiff's burden is to demonstrate a prima facie case. (*Church of Scientology, supra* 42 Cal.App.4th at p. 654, fn. 10.)

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes

special damage." (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312, internal quotations omitted.)

Whether a statement declares *or implies* a provably false assertion of fact is a question of law for the court to decide (*Eisenberg v. Alameda Newspapers, Inc.* [(1999)] 74 Cal.App.4th [1359,] 1382 ... ; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 ...), unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood (*Kahn v. Bower* [(1991)] 232 Cal.App.3d [1599,] 1608 ... ; *Weller v. American Broadcasting Companies, Inc.* [(1991)] 232 Cal.App.3d [991,] 1001, fn. 8 ...).

(*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385, emphasis added.)

In determining whether a statement is actionable fact or unactionable opinion, or whether the statement communicates or implies a provably false statement of fact, the court is to use a "totality of the circumstances" test. (*Ibid.*) "Under the totality of the circumstances test, '[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.... [¶] Next, the context in which the statement was made must be considered.'" (*Id.* at pp. 385-386, quoting *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261.) "An opinion ... is actionable only ' "if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false." ' " (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471, quoting *Franklin, supra*, 116 Cal.App.4th at p. 386.)

Statements Regarding Sexual Assault

Karbassi contends that the mailer defamed him by making accusations that he:

- "was guilty of battery to a woman, molested a woman" (Complaint, ¶ 14);
- "engaged in criminal acts with students" (Complaint, ¶ 14);
- is a "criminal" and "commits crimes" (Complaint, ¶¶ 10, 14); and
- is "a harasser of women" and "an abuser of women" (Complaint, ¶¶ 10, 14).

It is clear that the side of the mailer with the photo of Karbassi intentionally seeks to make it appear like the allegations in the text boxes refer to Karbassi. That intent is made clear in Pulliam's declaration, as Pulliam states that the mailer was in response to Karbassi's flier's seeming to attribute certain quotes to Soria. But as noted above, the document must be read as a whole, considering the entire context.

Because the document must be read as a whole, the court finds that the mailer is not defamatory because the explanatory side makes clear that the person who allegedly committed the assault and battery was a consultant hired by Karbassi, not Karbassi himself.

Statements Regarding Use of Public Funds

Karbassi alleges that the mailer defamed him by stating that he:

- "causes waste of tax payer dollars unnecessarily" (Complaint, ¶ 10);
- "misused public funds" (Complaint, ¶ 14);
- is "dishonest" (Complaint, ¶ 14); and
- is an "abuser of public trust and funds" (Complaint, ¶ 14).

Truth is a complete defense against a claim of defamation. (See *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1553.) Soria contends that Karbassi cannot establish express defamation on the public funds statements, since the information is provably true. The problem is that the evidence submitted on this point is lacking in foundation and inadmissible. However, because the first prong is indisputably established, the burden lies with Karbassi to show probability of success. He must show that the statements are false.

With regards to use of public funds, the mailer makes a number of factual claims, only one of which is disputed by Karbassi—that he paid a DJ \$500. With the Pulliam declaration, Soria attempts to submit evidence of the truthfulness of this statement. Exhibit H to the Pulliam declaration is the Detail Transaction Report for Karbassi, and it includes a \$500 charge for a DJ. However, Pulliam cannot authenticate the document, so it is not admissible for purposes of proving the truth of the statement.

While Soria fails to show the truth of the statement regarding the \$500 DJ payment, as the reply notes, this is a minor detail in an otherwise larger and unchallenged statement about Karbassi's expenditures. "[T]he law does not require [the defendant] to justify the literal truth of every word of the allegedly defamatory content.... It is sufficient if the defendant proves true the *substance* of the charge" (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 708, internal quotations omitted, emphasis in original.) "Thus, 'the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." ' " (*Ibid.*, quoting *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516–517.) "[An] erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.' " (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271-272, citation omitted.) Here, the substance of the charge is that Karbassi spent \$15,000 for public relations (which included \$500 for a DJ), and \$13,000 on food, alcohol and travel. By challenging only a small component of those expenses, Karbassi fails to show that the statements regarding his use of public funds is not substantially true. Karbassi acknowledges in his declaration that public records indicate that he was responsible for the expenditure. Karbassi maintains that Soria somehow falsified or manipulated the transaction report to include the \$500 DJ payment (Karbassi Decl., ¶ 7), but he offers no explanation for how this could have been accomplished. The contention is nothing more than a bare accusation.

Moreover, Karbassi submits no evidence that he has been damaged by this false statement of fact. In his declaration, Karbassi addresses how he was damaged by the mailer, but it appears that the negative feedback he received pertained to the assault and battery references. (See Karbassi Decl., ¶¶ 10, 11.) This does not establish the element of damages with regards to this one apparently false statement of fact in the mailer.

The "what's he been hiding" statements fall in the realm of unactionable opinion. Soria relies on *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, where a campaign mailer stated in an election for United States Congress that Richard Sybert "ripped off" taxpayers because he worked less than full-time while on the State's payroll, while maintaining a private law practice on the side. Sybert filed a complaint for libel and injunctive relief against his opponent who published the campaign mailer, Anthony Beilenson. (*Id.* at pp. 946-947.) Beilenson filed an anti-SLAPP motion, which was denied. After holding that Code of Civil Procedure section 425.16 applies to political campaigns, the court turned to the second prong of the analysis. The court analyzed the issue under the principle that, "[a]s a public figure, Sybert had the burden of showing, by clear and convincing evidence, that the objectionable statements had been made with actual malice." (*Id.* at p. 950.)

The mailer here proclaimed it to be wrong for a state official to have an outside job, the implication being that all of the official's time, attention, and energies ought to be devoted to his public post. This conduct, in the opinion of Beilenson, was a "rip-off." This colorful epithet, when taken in context with the other information contained in the mailer, was rhetorical hyperbole that is common in political debate. (*Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14 ... ; *Rizzuto v. Nexxus Products Co.* (S.D.N.Y. 1986) 641 F.Supp. 473, 481.) As such, the term "rip-off" was not defamatory.

[¶] ... [¶]

Even if the statements are deemed to be untruthful and not statements of opinion, Sybert was required to establish by clear and convincing evidence that Beilenson was aware of the probable falsity of the statements and willfully directed the publication of the libel. (*Garrison v. Louisiana* (1964) 379 U.S. 64, 79) Sybert charges that had Beilenson contacted the FPPC he would have discovered that Sybert was in compliance with the law. "Failure to investigate does not in itself establish bad faith." (*St. Amant v. Thompson* [(1968)] 390 U.S. 727, 733 ... ; *Evans v. Unkow* [(1995)] 38 Cal.App.4th [1490,] 1498-1499.) The record here lacks evidence upon which a reasonable fact finder could find that Beilenson acted with the requisite malice.

[¶] ... [¶]

... Moreover, under the precept of *New York Times* and its progeny, Sybert was required to show a likelihood that he could produce clear and convincing evidence of Beilenson's purported malice.

(*Beilenson, supra*, 44 Cal.App.4th at pp. 951-953, emphasis added.)

Similarly, in this case, the "what's he hiding" epithet is rhetorical hyperbole, which can mean any number of things to different readers. It was published in response to Karbassi criticizing Soria for the same kind of spending. This type of rhetoric is common in political campaigns.

Where the plaintiff is a public figure, he or she must prove by clear and convincing evidence that the allegedly defamatory statements were made with actual malice—"that is, with knowledge that that statement was false or with reckless disregard of whether it was false or not." (*New York Times Co.*, *supra*, 376 U.S. at pp. 279-280; see also *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256-257.)

"Although at trial a public figure plaintiff must establish actual malice by clear and convincing evidence, in the context of an anti-SLAPP motion the plaintiff must instead establish only a 'probability' that he or she can produce clear and convincing evidence of actual malice." (*Edward*, *supra*, 72 Cal.App.5th at p. 793.)

Karbassi concedes that this standard is applicable here, due to his public figure status. The court finds, however, that he makes no showing of actual malice. Karbassi's evidence and argument regarding malice primarily addresses the sexual assault statements. As noted above, the only potentially false statement of fact pertains to the \$500 payment for a DJ. Karbassi summarizes the argument regarding actual malice as follows:

When they published the Mailer, Soria and her campaign knew, and disregarded, that the assertions and implications that Karbassi is a criminally violent sexual predator concerned someone else. (Pulliam Decl. ¶¶ 9, 11-13.) They published the mailer in response to prior quarrels. (Karbassi ¶¶ 12-13; Pulliam Decl. ¶ 6.) Indeed, in response to this lawsuit, Soria's campaign told the media that their motive was to give Karbassi a "taste of his own medicine" -- in other words, to punish Karbassi for perceived slights earlier in the campaign. (Karbassi Decl. ¶13.)

(Oppo. 4:3-8.)

The simple fact of publishing the mailer is not evidence of malice. The article referenced in paragraph 13 of Karbassi's declaration is hearsay, and, even if it were admissible, it is merely evidence of a reciprocal response to Karbassi's criticisms of Soria, common in political campaigns. Karbassi offers no evidence of malice with regards to the statement of payment for a DJ, implying without evidence that Soria manipulated the public record. Karbassi fails to show probability of success on his defamation claim.

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: KAG  on 8/30/2022.

(Judge's initials)

(Date)

<p style="text-align: center;">SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000</p>	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p>
<p>TITLE OF CASE: Mike Karbassi vs. Esmeralda Soria</p>	
<p style="text-align: center;">CLERK'S CERTIFICATE OF MAILING</p>	<p>CASE NUMBER: 22CECG01710</p>


I certify that I am not a party to this cause and that a true copy of the:

Minute Order from Chambers and Tentative Ruling

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 09/14/2022

Clerk, by , Deputy
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