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Arbitration proceedings not a protected activity under anti-SLAPP

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Most lawyers familiar with arbitration understand that it is not a judicial proceeding, but instead one mutually agreed to by the parties through contract. However, it might come as a surprise to litigators that arbitration proceedings are not "protected activity" under the anti-SLAPP statute (Code of Civil Procedure Section 425.16), which potentially leaves arbitration participants exposed to new and additional litigation based on evidence raised during an arbitration proceeding. Such a case occurred in *Zhang v. Jenevein*, 2019 DJDAR 604, decided on Jan. 23.

In *Zhang*, the 2nd District Court of Appeal held that even though arbitration awards are subject to judicial confirmation, contractual arbitration is not an "official proceeding" and therefore, it "does not fit any of the four anti-SLAPP categories."

The *Zhang* matter concerned business conversations secretly recorded by Jenevein, the president of Tang Energy Group, Ltd., who later introduced those recordings as evidence in contractual arbitration. As a result of the recorded evidence, which was an important and material factor in the arbitration panel's decision, Tang Energy prevailed in the arbitration against Zhang. After the arbitration award was issued, Zhang filed a new lawsuit against Jenevein personally for invasion of privacy and recording confidential communications in violation of Penal Code Sections 632 and 637.2

In response, and in hopes of quickly dispatching the reactive lawsuit, Jenevein filed a special motion to strike under CCP Section 425.16.

The trial court denied the anti-SLAPP motion, ruling that neither the making of recordings nor using them as evidence in an arbitration was protected activity. Jenevein immediately appealed.

The appellate court in *Zhang* affirmed the trial court's decision, explaining that the use of the recordings in arbitration was not made in connection with a judicial or official proceeding, and thus, not a protected activity. In addition, the *Zhang* court clarified that any reliance on the litigation privilege under Civil Code Section 47 was misplaced: "Statements in arbitration may be protected by litigation privilege. But statements protected by the litigation privilege are not necessarily protected by the anti-SLAPP statute ... The litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes."

As a brief refresher, the principle purpose of litigation privilege under Civil Code Section 47, "is to afford litigants and witnesses the utmost freedom to access the courts without fear of being harassed subsequently by derivative tort actions." The privilege promotes effective judicial proceedings by encouraging open channels of communication and the presentation of evidence without the external threat of liability. The privilege immunizes participants from liability for torts arising from publications, statements and communications made during judicial proceedings and thereby enhances the finality of judgments in order to avoid the unending roundelay of litigation. *Seltzer v. Barnes*, 182 Cal. App. 4th 953 (2010).

But the litigation privilege is only an affirmative defense, not a complete bar to litigation, and it is not bulletproof. Several courts have recognized exceptions to the litigation privilege under statutes that are more specific than the privilege and which would be significantly or wholly inoperable if the privilege applied, such as the Rosenthal Fair Debt Collection Protection Act. *Komarova v. Nat'l Credit Acceptance, Inc.*, 175 Cal. App. 4th 324 (2009).

More importantly, our Supreme Court held in *Rusheen v. Cohen et al.*, 37 Cal. 4th 1048 (2006), that certain acts are noncommunicative and thus unprivileged: prelitigation illegal recording of confidential telephone conversations (*Kimmel v. Goland*, 51 Cal. 3d 202, 211 (1990)); eavesdropping on a telephone conversation (*Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985)); and physician's negligent examination of patient causing physical injury (*Mero v. Sadoff*, 31 Cal. App. 4th 1466, 1479-80 (1995)).

Based on the holding in *Kimmel*, Zhang's retaliatory lawsuit against Jenevein will be allowed to proceed in earnest through the court because, despite the discussion in the *Zhang* case, Jenevein is not entitled to the affirmative defense of litigation privilege.

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Given the extent of arbitration provisions in most business and employment agreements now, the *Zhang* decision, while appearing facially sound, should greatly concern litigators and their clients. It effectively opens the flood gates for retaliatory lawsuits by parties forced to contractually arbitrate and unhappy with the process, procedure and/or outcome of the arbitration proceeding.

The *Zhang* decision provides losing parties in arbitration the opportunity to use noncommunicative and unprivileged information learned in the arbitration proceeding to bring subsequent avenging litigation.

After *Zhang*, parties in arbitration may feel hamstrung to present what might be considered noncommunicative evidence for fear that that they may be sued later in court where they will not be able to swiftly extricate themselves with an anti-SLAPP motion or assert the affirmative bar of litigation privilege. Moreover, from a strategic point of view, sharp lawyers could use the arbitration process to obtain evidence which would support litigation where the stakes could be much more substantial. It is entirely possible that the *Zhang* decision could lead to a myriad of abuses.

When the Legislature enacted the anti-SLAPP statute in 1971 to curb the "disturbing increase" in lawsuits brought primarily to chill the valid exercise of constitutional rights and free speech, it surely did not contemplate the possibility that the arbitration process could actually be used to tee up retaliatory civil lawsuits. Call it the law of unintended consequences, but the *Zhang* decision could easily create additional litigation contrary to the express purpose of the arbitration act.

The decision in *Zhang* , though legally correct, serves to injure both the goals of arbitration and the anti-SLAPP statute. The obvious solution is for the Judicial Committee to draft an amendment to CCP Section 425.16(e) which clarifies that arbitration proceedings are "official proceedings" covered by the statute. Until the Legislature enacts such an amendment, participants in an arbitration will be faced with the problematic decision of not producing noncommunicative evidence for fear of possible legal retribution. To put parties and their lawyers in such a dilemma is wholly unfair and defeats the purpose of arbitration.

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