

**JAN 21 2005**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No.	CC-03-1636-MoPB
	)		
ABDOULAYE BAH,	)	Bk. No.	LA 02-42222-SB
Debtor.	)	Adv. No.	LA 03-01438-SB
_____	)		
	)		
PHILIP RESTAINO;	)		
GEORGETTE RESTAINO,	)		
Appellants,	)		
v.	)	<b><u>O P I N I O N</u></b>	
	)		
ABDOULAYE BAH,	)		
Appellee.	)		
_____	)		

Argued and Submitted on October 20, 2004  
at Pasadena, California

Filed - January 21, 2005

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: MONTALI, PERRIS and BRANDT, Bankruptcy Judges.

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1 MONTALI, Bankruptcy Judge:

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3 Defendants moved for dismissal of an adversary proceeding  
4 under Federal Rule of Bankruptcy Procedure 7012 (incorporating  
5 Federal Rule of Civil Procedure 12(b)(6) ("FRCP 12(b)(6)")<sup>1</sup>,  
6 arguing that the plaintiff's claims were barred by California's  
7 statutory litigation privilege and by the doctrine of collateral  
8 estoppel (issue preclusion) and res judicata (claim preclusion).  
9 In the same motion, the defendants also moved the bankruptcy  
10 court to strike the claims against them under California Code of  
11 Civil Procedure section 425.16,<sup>2</sup> California's statute against  
12 "Strategic Lawsuits Against Public Participation," commonly known  
13 and referred to herein as the "anti-SLAPP statute." The  
14 bankruptcy court denied the request to dismiss the adversary  
15 proceeding under FRCP 12(b)(6) and also denied the request to  
16 strike the action under the anti-SLAPP statute. By a memorandum  
17 (not for publication) issued concurrently with this opinion, we  
18 affirm the bankruptcy court's decision on the issues of  
19 litigation privilege, issue preclusion and claim preclusion. In  
20 this opinion, we reverse the bankruptcy court's conclusion that  
21 the anti-SLAPP statute is inapplicable in bankruptcy court and we  
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23 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

25 <sup>2</sup> We are not publishing the memorandum dealing with those  
26 issues because, unlike the anti-SLAPP issue, they are not issues  
27 of first impression and because the factual background is very  
28 detailed, complicated, unique to this case, and not necessary for  
resolution of the legal issue addressed in this opinion.

1 publish because the anti-SLAPP issue is one of first impression  
2 in bankruptcy courts.<sup>3</sup>

3 I.

4 **FACTS**

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6 Appellants Philip and Georgette Raistano ("Appellants") sued  
7 Appellee Abdoulaye Bah ("Debtor") in state court in 2001. After  
8 participating in a court-ordered mediation, Debtor and Appellants  
9 (and other parties) reached a settlement. Appellants, alleging  
10 that Debtor breached the settlement agreement, thereafter  
11 requested the state court to enter a judgment against Debtor.  
12 Debtor opposed Appellants' request for entry of judgment. Before  
13 any judgment was entered, Debtor filed a chapter 11 case. He  
14 then commenced an adversary proceeding against Appellants and  
15 others for intentional misrepresentation, to determine the  
16 nature, extent and validity of liens, for turnover of property of  
17 the estate, for turnover of property of the estate held by a  
18 custodian, for declaratory relief, for breach of fiduciary duty  
19 and for conspiracy to defraud.

20 Appellants filed a motion to dismiss the claims against them  
21 (the "AP Motion"). Appellants argued that Debtor had failed to  
22 state a claim upon which relief could be granted under Rule 7012  
23 and FRCP 12(b)(6), because the claims against them were barred by  
24 issue and claim preclusion and by the statutory litigation

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26 <sup>3</sup> We have been able to locate only one bankruptcy case that  
27 even mentions an anti-SLAPP statute: In re 110 Beaver St.  
28 P'ship, 244 B.R. 185, 189 (Bankr. D. Mass. 2000). In that case,  
the court refused to approve a compromise of claims arising  
under, inter alia, the Massachusetts anti-SLAPP statute.

1 privilege set forth in California Civil Code section 47(b).  
2 Alternatively, Appellants moved the bankruptcy court to strike  
3 the claims against them under California's anti-SLAPP statute.

4 At a hearing, the bankruptcy court announced that it was  
5 denying the AP Motion. The court denied the request to strike  
6 the adversary proceeding under the anti-SLAPP statute because the  
7 adversary proceeding involved federal bankruptcy questions; the  
8 court held that the anti-SLAPP statute is inapplicable in  
9 bankruptcy cases, even with respect to pendent state law claims.

10 Appellants filed a premature notice of appeal which became  
11 effective under Rule 8002(a) when the bankruptcy court entered  
12 its order denying the AP Motion on March 8, 2004. We  
13 subsequently issued an "Order re Finality" noting that the denial  
14 of the portion of the AP Motion requesting that the adversary  
15 proceeding be stricken as a SLAPP suit is immediately reviewable  
16 under the collateral order doctrine, citing Batzel v. Smith, 333  
17 F.3d 1018 (9th Cir. 2003).

## 18 II.

### 19 ISSUE

20  
21 Is California's anti-SLAPP statute applicable in bankruptcy  
22 cases involving both federal questions and pendent state law  
23 claims?

## 24 III.

### 25 STANDARD OF REVIEW

26  
27 A decision to grant or deny an anti-SLAPP motion is  
28 reviewed de novo. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1102

1 (9th Cir. 2003) ("We review the granting of defendants' motion to  
2 strike under the anti-SLAPP statute de novo."); Lam v. Ngo, 111  
3 Cal.Rptr.2d 582, 592 (2001) ("[D]enials of anti-SLAPP suit  
4 motions are reviewed de novo by appellate courts.").

5 **IV.**

6 **DISCUSSION**

7  
8 California and a number of other states have enacted  
9 anti-SLAPP statutes.<sup>4</sup> California's anti-SLAPP statute,  
10 California Code of Civil Procedure section 425.16, "was enacted  
11 in order to provide for the early dismissal of meritless suits  
12 aimed at chilling the valid exercise of the constitutional rights  
13 of freedom of speech and petition for the redress of grievances."  
14 Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63  
15 F.Supp.2d 1127, 1128 (N.D. Cal. 1999); see also Batzel, 333 F.3d  
16 at 1023-24 ("California law provides for pre-trial dismissal of  
17 'SLAPPs' . . . [which are] lawsuits that 'masquerade as ordinary  
18 lawsuits' but are brought to deter common citizens from  
19 exercising their political or legal rights or to punish them for  
20 doing so.") (citations omitted). The statute provides that a  
21 "cause of action against a person arising from any act of that  
22 person in furtherance of the person's right of petition or free  
23 speech under the United States or California Constitution in

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25 <sup>4</sup> For a list of states that have enacted anti-SLAPP  
26 statutes, see Paul D. Wilson, Of Sexy Phone Calls and Well-Aimed  
27 Golf Balls: Anti-SLAPP Statutes in Recent Land-Use Damages  
28 Litigation, 36 Urban Lawyer 375 n.1 (2004); see also Michael Eric  
Johnston, A Better SLAPP Trap: Washington State's Enhanced  
Statutory Protection for Targets of "Strategic Lawsuits Against  
Public Participation", 38 Gonz. L. Rev. 263, 276 (2002-2003).

1 connection with a public issue shall be subject to a special  
2 motion to strike, unless the court determines that the plaintiff  
3 has established that there is a probability that the plaintiff  
4 will prevail on the claim." Cal. Code Civ. Pro. § 425.16(b)(1).<sup>5</sup>

5 Appellants contend that Debtor filed the adversary  
6 proceeding in retaliation for Appellants' exercise of free speech  
7 or petition (i.e., filing the state court lawsuit and filing the  
8 motion for entry of judgment). Therefore, according to  
9 Appellants, California's anti-SLAPP statute requires dismissal of  
10 the claims against Appellants and imposition of sanctions against  
11 Debtor.

12 The bankruptcy court disagreed, holding that the anti-SLAPP  
13 statute does not apply to bankruptcy actions involving federal  
14 questions, even when such lawsuits include pendent state law  
15 claims. We agree that the anti-SLAPP statute does not apply with  
16 respect to causes of action arising under the Bankruptcy Code,  
17 but disagree that pendent state claims are likewise immune from  
18 application of the statute.

19 In United States v. Lockheed Missiles & Space Co., 190 F.3d  
20 963 (9th Cir. 1999), the Ninth Circuit held that California's  
21 anti-SLAPP remedy applies to diversity actions in federal court,  
22 inasmuch as the parties had not identified "any federal interests  
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25 <sup>5</sup> The California Legislature enacted the anti-SLAPP statute  
26 in response to a "disturbing increase" in lawsuits being used to  
27 harass individuals for exercising their constitutional right of  
28 freedom of speech (see Cal. Civ. Proc. Code § 425.16(a)), even  
though the plaintiff is not attempting to vindicate a legally  
cognizable right. For an excellent discussion of the statute's  
history, the policies underlying it, and its operation, see  
Rogers v. Home Shopping Network, Inc., 57 F.Supp.2d 973, 974-77  
(C.D. Cal. 1999).

1 that would be undermined by application of the anti-SLAPP  
2 provisions." *Id.* at 973; see also Batzel, 333 F.3d at 1025-26  
3 ("Because California law recognizes the protection of the  
4 anti-SLAPP statute as a substantive immunity from suit, this  
5 Court, sitting in diversity, will do so as well."), citing  
6 generally Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).<sup>6</sup>

7 While the Ninth Circuit has held that the anti-SLAPP statute  
8 applies in diversity actions (with the limitations noted *supra* in  
9 footnote 6), it has not decided whether it applies in cases  
10 involving federal question jurisdiction. It did indicate in  
11 Lockheed, however, that the statute may not be applicable where  
12 federal interests would be "undermined." Lockheed, 190 F.3d at  
13 973.

14 We have located only one case in which a court has addressed  
15 the issue of whether the anti-SLAPP statute applies in federal  
16 question cases with pendent state law claims. In Globetrotter,

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18 <sup>6</sup> Even though the Ninth Circuit has held that the anti-  
19 SLAPP statute can be invoked in diversity cases, it and other  
20 California federal courts have procedurally limited its  
21 application. Specifically, if a defendant makes a motion to  
22 strike under the anti-SLAPP statute based on a failure of proof  
23 or evidence, the motion must be treated as though it is a motion  
24 for summary judgment and discovery must be "developed  
25 sufficiently to permit summary judgment under Rule 56." Rogers,  
26 57 F.Supp.2d at 982. The Ninth Circuit agreed with the reasoning  
27 of Rogers and adopted this rule in Metabolife Int'l, Inc. v.  
28 Wornick, 264 F.3d 832, 846 (9th Cir. 2001). Similarly, if an  
anti-SLAPP motion to strike is based on the legal deficiencies of  
the complaint, a federal court "must decide the motion in a  
manner that complies with the standards set by Federal Rules 8  
and 12." Rogers, 57 F.Supp.2d at 982. In other words, the court  
must read the complaint broadly, take all well-pleaded  
allegations as true, and dismiss with leave to amend. *Id.*  
"Standards that put a more onerous burden on the nonmoving party  
would conflict with Rules 8 and 12. Therefore, they cannot apply  
in federal court." *Id.* at 982-83.

1 63 F.Supp.2d at 1129-30, the court held that the anti-SLAPP  
2 statute was not applicable to federal questions, but could be  
3 applicable to pendent state law claims. We agree with this  
4 holding.

5 Like the Globetrotter court, we do not believe that the  
6 anti-SLAPP statute may be applied to federal causes of action.  
7 As noted by the Ninth Circuit in MSR Exploration, Ltd. v.  
8 Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996): "It is  
9 very unlikely that Congress intended to permit the  
10 superimposition of state remedies [such as claims for malicious  
11 prosecution] on the many activities that might be undertaken in  
12 the management of the bankruptcy process." Id. The MSR  
13 Exploration court therefore held that a chapter 11 debtor's  
14 action for malicious prosecution based on a creditor's actions in  
15 bankruptcy court was preempted entirely by the Bankruptcy Code.  
16 "In short, the highly complex laws needed to constitute the  
17 bankruptcy courts and regulate the rights of debtors and  
18 creditors also underscore the need to jealously guard the  
19 bankruptcy process from even slight incursions and disruptions  
20 brought about by state malicious prosecution actions." MSR  
21 Exploration, 74 F.3d at 914.

22 In other words, the Ninth Circuit has decided that  
23 application of state laws that grant relief for procedural abuses  
24 can undermine application of the Bankruptcy Code.  
25 Superimposition of the anti-SLAPP statute, which is not  
26 dissimilar to the state law claim of malicious prosecution, on  
27 traditional bankruptcy causes of action could "gravely affect the  
28 already complicated processes of the bankruptcy court." Id. We



1 therefore agree with the Globetrotter court that the anti-SLAPP  
2 statute may not be applied to matters involving federal  
3 questions, particularly those involving federal questions of  
4 bankruptcy law.

5 That said, we also agree with the Globetrotter court that  
6 application of the anti-SLAPP statute to pendent state law claims  
7 is appropriate. Globetrotter, 63 F.Supp.2d at 1129-30.

8 Important substantive state interests -- the protection of  
9 citizens' constitutional rights of freedom of speech and  
10 petition for the redress of grievances -- are furthered by the  
11 anti-SLAPP statute and application of the statute to state law  
12 claims would not undermine federal interests. Id. Debtor  
13 invoked state law remedies in bankruptcy court which he could  
14 have (but did not) raised in state court. No reason exists to  
15 deny Appellants a state law remedy which they could have asserted  
16 against Debtor's state law claims in state court. Under  
17 Lockheed, therefore, application of the anti-SLAPP statute to  
18 pendent state law claims is appropriate. Id. Thus the  
19 bankruptcy court's statement to the effect that anti-SLAPP  
20 remedies are not available in federal court was erroneous.

21 In light of this holding, we are remanding this matter to  
22 bankruptcy court for a determination of which claims of Debtor  
23 are pendent<sup>7</sup> state law claims and whether such pendent state law  
24 claims are subject to dismissal under the anti-SLAPP statute. If  
25 necessary, the court should first afford an opportunity for

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27 <sup>7</sup> Based on our examination of the first amended complaint,  
28 it appears that the claims area mixture of pendent state law  
claims and claims under the Bankruptcy Code. It is the province  
of the bankruptcy court, in the first instance, to sort out which  
claims are pendent state law claims.

1 discovery to proceed as required by Metabolife and Rogers (as  
2 discussed in footnote 6, supra). In other words, the bankruptcy  
3 court must determine whether the pendent state law claims satisfy  
4 both prongs of the anti-SLAPP statute: (1) that the claims arise  
5 from protected speech or petitioning<sup>8</sup> and (2) that the claims  
6 lack minimal merit.<sup>9</sup> Navellier v. Sletten, 124 Cal.Rptr.2d 530,  
7 536 (2002).<sup>10</sup>

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9 <sup>8</sup> As noted by the Ninth Circuit in Batzel, a defendant  
10 making an anti-SLAPP motion "is required to make a prima facie  
11 showing that the plaintiff's suit arises from an act the  
12 defendant made in connection with a public issue in furtherance  
13 of the defendant's right to free speech under the United States  
14 or California Constitution." Batzel, 333 F.3d at 1024.

15 <sup>9</sup> If Appellants are able to demonstrate that Debtor's  
16 adversary proceeding was filed in retaliation to their exercise  
17 of free speech on a public issue, the burden will shift to Debtor  
18 "to establish a reasonable probability that [he] will prevail" on  
19 his claims against Appellants in the adversary proceeding.  
20 Batzel, 333 F.3d at 1024. "To do this, the plaintiff must  
21 demonstrate that 'the complaint is legally sufficient and  
22 supported by a prima facie showing of facts to sustain a  
23 favorable judgment if the evidence submitted by the plaintiff is  
24 credited.'" Metabolife, 264 F.3d at 840 (citations omitted).  
25 "This burden is 'much like that used in determining a motion for  
26 nonsuit or directed verdict,' which mandates dismissal when 'no  
27 reasonable jury' could find for the plaintiff." Id. (citations  
28 omitted). To the extent the motion to strike under the anti-  
SLAPP statute is based on legal (as opposed to evidentiary)  
deficiencies, a federal court should heed the admonishments in  
Rogers not to disturb the allocation of burdens on plaintiffs set  
forth in Federal Rules of Civil Procedures 8 and 12. See  
discussion in footnote 6, supra.

<sup>10</sup> Debtor argues on appeal that Appellants have not  
demonstrated that the first prong has been satisfied. Based on  
the first amended complaint as currently drafted, we cannot reach  
this conclusion. The first amended complaint is so lengthy,  
verbose, and filled with extraneous details that we cannot  
ascertain whether or not the pendent state law causes of action  
are based on the Appellants' protected free speech. See  
Navellier, 124 Cal.Rptr.2d at 536 (the mere fact that an action  
was filed after protected activity occurred does not mean the

(continued...)

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V.

CONCLUSION

While we agree with the bankruptcy court that the anti-SLAPP statute is inapplicable to federal claims, we disagree that it is inapplicable to pendent state law claims. We therefore REVERSE that aspect of the court's order and REMAND for a determination of which claims constitute pendent state law claims and, of those, which claims satisfy both prongs of the anti-SLAPP statute.

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<sup>10</sup>(...continued)  
action arose from that activity for the purposes of the anti-SLAPP statute; a cause of action triggered by protected activity "does not [mean] it is one arising from such"; the "critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity") (emphasis in original). In Navellier, the California Supreme Court held that an action against a party who filed a counterclaim on claims he had released by an earlier settlement could be attacked as a SLAPP because it was based on the defendant's act in filing the counterclaim. This holding appears contrary to Debtor's claim that the first element of the anti-SLAPP statute has not been satisfied here.