LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, APRIL 5, 2011

LITIGATION

Anthony Pellicano Strikes Again and Lawyers Are the Losers

By Timothy D. Reuben

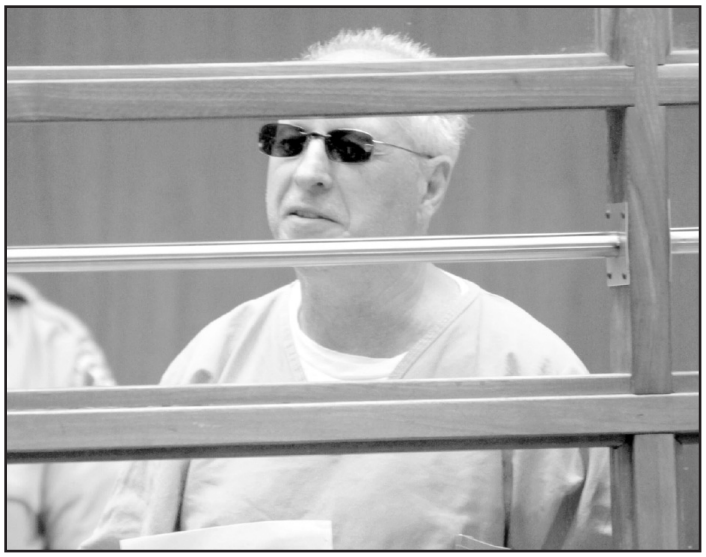
In yet another case created by the antics of Anthony Pellicano, this one involving an anti-SLAPP appeal, the 2nd District Court of Appeal has found that "[t]he bottom line is this: [Civil Code of Procedure Section] 425.16 was not enacted to protect an attorney who allegedly hired an 'investigator' like Anthony Pellicano to wiretap telephones so as to get an unfair advantage in a client's legal matters." *Gerbosi v. Gaims, Weil, West & Epstein*, 2011 DJDAR 3619 (2011). Sadly, this ruling is perhaps another example of the old adage — bad facts make bad law.

This matter began with a nasty dispute between Robert Pfeifer, a video game developer and former Sony executive, and his ex-girlfriend, Erin Finn. Finn allegedly opened an Internet prostitution service causing Pfeifer to end their relationship. At about the same time, Pfeifer was fired by his employer for purportedly using illegal drugs. He sued for wrongful termination, and at deposition, the employer produced Finn as a witness, who testified that she had seen Pfeiffer use illegal drugs. Gaims, Weil, West & Epstein represented Pfeiffer and introduced into this love fest Pellicano, who tapped Finn's phone. Pellicano also recorded Finn's neighbor, Michael Gerbosi, in allegedly confidential conversations with Finn.

More litigation ensued between Finn and Pfeifer, including a domestic harassment injunction proceeding against Pfeifer and a collection case against Finn. The two ultimately settled in 2001. But all was not over — Pfeifer was indicted in 2006 along with Pellicano for wiretapping. He pleaded guilty and testified against Pellicano at his criminal trial. Thereafter, in 2008, Finn and Gerbosi each filed a lawsuit against Gaims, Weil, West & Epstein (among others) for Pellicano's wrongful conduct, alleging numerous versions of invasion of privacy (including unlawful wiretapping) and related claims.

Gaims, Weil, West & Epstein filed anti-SLAPP motions to strike each complaint, arguing that the claims arose from the firm's petitioning rights in representing Pfeifer in litigation and thus its activities were protected as a matter of law. Lots of discovery was allowed at the request of the plaintiffs and one year after the motion was filed the trial court, Judge Peter Lichtman, denied both motions. He further found the motions were not in good faith and awarded over $220,000 in attorney fees against the law firm. Needless to say, Gaims, Weil, West & Epstein appealed.

Timothy D. Reuben specializes in business, real estate, professional liability and intellectual property litigation and is founder and managing principal of Reuben Raucher & Blum in Westwood.



AP PHOTO

Former Hollywood private eye Anthony Pellicano is shown in court.

The court made short work of the Gerbosi appeal — in an almost chiding tone, Justice Tricia A. Bigelow wrote that "Gaims's status as a lawyer" does not provide any "protective umbrella"; rather, the court held — with remarkably little factual discussion or analysis — that the "alleged criminal conduct" simply cannot be a "protected activity" supporting an anti-SLAPP motion, affirming the trial court's denial and award of fees. The court noted that the law firm "may well have valid defenses" like the statute of limitations, but the anti-SLAPP statute was not the "proper procedural tool" for winning the case — which in effect, was an acknowledgment that although the justices were not addressing the merits, there were strong factual reasons to support a dismissal.

What is not clear is whether the court is holding that a complaint is automatically excluded from the anti-SLAPP statute if criminal conduct is simply alleged. Here, although Pfeifer and Pellicano had been found guilty, it is nowhere suggested that Gaims, Weil, West & Epstein was criminally charged, much less convicted. And there is no debate that the firm's connection to the whole affair was due to representing a client in a civil case. One must presume that if the prosecution could have proceeded against the firm, it would have, yet no such facts are present.

So if a lawyer is not in fact guilty of criminal conduct and all the complaint has is a mere allegation of criminal conduct while the lawyer is clearly engaged in a protected activity, why not allow satisfaction of the first prong of an anti-SLAPP motion and move to the merits, recognizing that if the criminal conduct can be shown by the plaintiff on the facts, only then would it defeat the motion?

The above issue was more directly addressed in the eval-

uation of Finn's complaint. Interestingly, the court found that Finn's claim "stands in a different light because Gaims represented Pfeifer" against Finn. Gaims, Weil, West & Epstein did put in evidence that "it did not do the acts that Finn [and presumably Gerbosi] alleges it did," in effect disproving the allegation of illegal conduct that would take the firm outside the "protective umbrella." And the firm relied on the state Supreme Court's decision in *Flatley v. Mauro* (2006) 39 Cal. 4th 299, arguing that Finn had failed to show that it had admitted illegal conduct or that evidence "conclusively" proved any illegal conduct by the attorneys. (In Flatley, the Supreme Court held that a letter by a lawyer seeking to blackmail a party into paying a settlement, and which was clearly illegal, was not protected activity.)

But here the court interpreted Flatley quite differently, stating: "[W]hen a defendant's assertedly protected activity may or may not be criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law." But isn't that what Gaims, Weil, West & Epstein did? After all, the firm acted as attorneys representing a client — clearly protected activity as a matter of law. It was not prosecuted or in any manner found guilty of anything and it introduced evidence that it did not commit any illegal conduct — whereas the evidence of the illegal letter in Flatley was squarely before the court.

Here, Finn apparently did not prove criminal conduct by the lawyers — in fact, the court's focus appears to be that the law firm hired the unsavory Pellicano — but that act by itself certainly was not criminal. So why exactly does this not come squarely within Flatley? Oddly, the court rules that since wiretapping is illegal and there is an allegation of wiretapping by the lawyers, the mere allegation without proof takes the matter outside of the "protective umbrella." And notably, this analysis only applied to Finn's claims alleging wiretapping. The court found that "Finn's litigation causes of action" were not only subject to the first prong of the anti-SLAPP statute, but also that Gaims, Weil, West & Epstein had indisputable defenses to them on the merits — so it won on those claims. The court thus reversed the trial court's ruling with respect to these "litigation causes of action" and the fee award as it applied to Finn.

Needless to say, the implications of this case are not particularly good for attorneys and not limited to its peculiar facts — apparently this appellate panel believes that if criminal conduct is alleged (presumably accomplished simply by citing a criminal statute), no further proof may be needed to take the matter out of the anti-SLAPP protection. Certainly lawyers should not be committing criminal conduct, but they also should not be presumed guilty just because their client or investigator commits violations. Perhaps the problem is simply that the lore of Pellicano is so overpowering that the courts are not forgiving of those who hired him and brought the resulting blight upon the legal system.