LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

MONDAY, APRIL 15, 2024

GUEST COLUMN

A bad opinion for lawyers

By Timothy D. Reuben

Shutterstock

Sometimes the appellate court just gets it plain wrong, as it did in *Medallion Film, et al. LLC v. Loeb & Loeb*, 2024 DJDAR 2825, where the Second Appellate District, Division Eight, reversed the order of Los Angeles Superior Court Judge Randolph Hammock granting Loeb & Loeb's anti-SLAPP motion striking a fraud complaint based on a lawyer's pre-litigation correspondence. Presiding Justice Maria E. Stratton, joined by Justices John Shepard Wiley and Victor Viramontes, directed the trial court to deny Loeb's motion because in its de novo review of the correspondence, the appellate court was "not persuaded [Loeb's] letter is protected by the litigation privilege." The court so ruled despite the fact that the attorney letter clearly threatened litigation, stating in part that if the plaintiffs persisted in their claimed intention "to litigate," "this matter will be considered … to constitute tortious interference." Unfortunately, based on this ruling, attorney letters must be even more adversarial and contentious, and threaten more aggressively, for the litigation privilege to protect them. The opinion encourages the wrong type of legal practice—that is, to make sure they are protected, lawyers must become more contentious.

In 2014, Loeb's client William Sadleir (Sadleir) was manager of the Clarius Capital Group (Clarius), and he hired Medallion Film and Pelican Point (Medallion) to assist "in obtaining funding for film projects," for which Medallion would be entitled to a fee. Medallion introduced Clarius to BlackRock as a potential source of financing and provided BlackRock relevant information about Clarius. According to Medallion, Sadleir then dissolved Clarius and hired Loeb to form a new entity called Aviron "in order to continue marketing Clarius's film properties." In 2015, Aviron obtained a loan from BlackRock for film projects, but Medallion only learned of this fact in 2017. Medallion contacted Sadleir "who denied any affiliation between Aviron and Clarius and said he was solely an employee of Aviron." Thereafter, in 2018, plaintiffs sent a letter to BlackRock, stating in part: "We have a fee agreement with Bill Sadle[i]r based upon monies raised from Blackrock thru my introduction to you. What can you do to assist us here in collecting what is due to us. … Let us know so we don[']t have to litigate and can resolve the matter in an amicable fashion." Loeb apparently was not the direct recipient of this correspondence but learned of it, presumably either from BlackRock or directly from Medallion, and clearly this threat of litigation by Medallion to pursue its finder's fee was directed at Loeb's clients as well as BlackRock, and just as obviously Medallion hoped and expected BlackRock to share this email with Sadleir and Aviron.

Loeb on behalf of its clients Aviron and Sadleir responded by sending Medallion a letter dis-

puting its entitlement to any fee, denying any "legal connection," "common ownership," or "successor in interest" status between Aviron and Clarius, and stating: "Any further communication by you to … BlackRock regarding this matter will be considered by Aviron to constitute tortious interference." These dueling letters over a disputed finder's fee were clearly a prelude to litigation, which indeed followed. Ironically, first there was litigation between BlackRock and Aviron. Documents from that lawsuit came into Medallion's hands, and these documents purportedly proved that contrary to what Loeb had contended, there was in fact a legal connection, common ownership, and/or successor in interest status between Aviron and Clarius. But rather than suing Aviron for its finder's fee (possibly because of statute of limitations issues), Medallion sued the law firm, Loeb, contending that Loeb had by its letter defrauded it.

Loeb filed a special motion to strike Medallion's fraud complaint under Code of Civil Procedure Section 425.16, the anti-SLAPP statute, contending among other things that its letter was protected activity (first prong) and that California's litigation privilege under Civil Code Section 47 prohibited any claims based on pre-litigation communications (second prong). Judge Hammock, while expressing concerns about the conduct of Loeb, concluded that the complaint was in fact subject to the anti-SLAPP statute because such communications by attorneys constitute "protected activity" and there was no conclusive proof that Loeb had acted "illegally" by taking what appeared to be a false position in its letter to Medallion when it denied the connection between Aviron and Clarius. Moving to the second prong, the trial court found the fraud claims arose from the Loeb letter and therefore were barred by the litigation privilege. The trial court did encourage the plaintiffs to appeal "because if [Loeb] knowingly and maliciously lied, plaintiffs 'should be able to sue them for that.'" How the appellate court could possibly have determined based on a cold record on appeal that Loeb had knowingly and maliciously lied (since the trial court had not done so) is not explained.

In any event, the appellate court in its de novo review inexplicably concluded that Loeb's "representations were not communications made in preparation for or in anticipation of litigation." Justice Stratton's opinion goes on: "The [Medallion] email demonstrates the plaintiffs just wanted to be paid, and they were appealing to whomever they thought would be influential in persuading Sadleir to pay them without having to resort to litigation. This is the exact opposite of a threat of litigation." Simply put, this is just wrong, since almost all senders of demand letters for payment are potential plaintiffs who "just want to be paid," and would obviously prefer not to resort to litigation if they could just get paid. A clue to the fact that this was pre-litigation correspondence is that litigation ensued. Yet, oddly, the appellate court concludes, without explanation or evidence, that "eventual litigation was a remote possibility." It was this unfounded finding that supported the appellate court's questionable holding both that Loeb's letter did not constitute privileged conduct and also that the litigation privilege failed to attach as a result of the language of the Medallion email. But how could the court then go on and also ignore the direct threat of litigation in the Loeb letter? The opinion merely concludes that Loeb's direct threat that any further communication about its fee from Medallion would constitute tortious interference was "not a communication made in good faith and serious contemplation of litigation but an attempt to dissuade the plaintiffs from making further inquiries." The appellate court based this conclusion on the fact that "the parties could well have negotiated a settlement and obviated any need' for litigation." Of course, that is always possible—many pre-litigation disputes are in fact settled and there is no need for litigation, but that does not make the pre-litigation correspondence threatening litigation unprotected by the litigation privilege. Other times, settlements are not negotiated and instead lawsuits are filed, so the fact that there could be a settlement is simply no justification to decide that the litigation privilege does not apply. The logic of the appellate court is simply faulty. Moreover, how could the appellate court possibly conclude that Loeb's threat was not serious? How could the court know what Loeb had been told by its client or to what extent its client was in fact prepared to litigate? Lawsuits have certainly been filed with much less at stake.

Weakening the litigation privilege is unwise from a public policy perspective, and it also makes the practice of law more challenging. This opinion unnecessarily muddies the waters, and lawyers should not have to guess whether some court could view their letters one way (i.e., protected activity), while another court could view them differently (creating potential liability) because maybe there could have been a settlement. The litigation privilege is absolute and must protect attorneys who take legal and factual positions in pre-litigation disputes, even when those positions are highly questionable. Unreasonable or frivolous positions may under certain circumstances give rise to sanctions or a lawsuit or even bar complaints, but opposing parties should not be allowed to sue lawyers personally for fraud based on allegations in a letter which take an adversarial position and are often based on privileged communications. The litigation privilege exists to prevent such unnecessary litigation and to protect lawyers who zealously represent clients, as is their duty. Here the trial court recognized that fact, and while the court had concerns about the attorney's conduct, Judge Hammock held that these pre-litigation communications had to be subject to the privilege. Moreover, lawyers should not be discouraged in pre-litigation communications from attempting to avoid litigation through settlement or by persuading a party not to litigate. But that is what the appellate court did here by its misguided analysis. One can only hope this opinion is an outlier, *sui generis*, that it is generally not followed by other appellate courts, or even better de-published or subjected to California Supreme Court review.

Timothy D. Reuben *is the founder and managing principal of Reuben Raucher & Blum. He specializes in complex civil cases and handles matters in arbitration and at trial and appellate levels in both state and federal courts. He also serves pro bono as a fee arbitrator, a settlement officer, and a temporary judge.*

Reprinted with permission from the *Daily Journal*. ©2024 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.

RRB
REUBEN RAUCHER & BLUM PC
ATTORNEYS AT LAW