SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
North Justice Center
1275 N. Berkeley Ave
Fullerton , CA 92838

SHORT TITLE: Rumshiskaya vs. Nafal

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2020-01159914-CU-DF-NJC**

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Clerk of the Court, by: Lamora Silva , Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
NORTH JUSTICE CENTER

MINUTE ORDER

DATE: 03/01/2021 TIME: 11:14:00 AM DEPT: N17

JUDICIAL OFFICER PRESIDING: Craig Griffin
CLERK: Lenora Silva
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2020-01159914-CU-DF-NJC** CASE INIT.DATE: 09/11/2020
CASE TITLE: **Rumshiskaya vs. Nafal**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Defamation

EVENT ID/DOCUMENT ID: 73482084

EVENT TYPE: Chambers Work - Submitted Matter

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 02/08/21 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

PLAINTIFF'S MOTION TO APPLY FOREIGN LAW

"California has applied the so-called governmental interest analysis in resolving choice-of-law issues. In brief outline, the governmental interest approach generally involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state" and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied."
Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal.4th 95, 107–108; *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 87–88.

Published California cases have expressed that there is no conflict of laws when the issue is whether to apply the forum state's statute of limitations to claims brought against the forum-resident defendant. As stated in *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793-794:
"Statutes of limitation are designed to protect the enacting state's residents and courts from the burdens associated with the prosecution of stale cases in which memories have faded and evidence has been lost … Here California courts and a California resident would be protected by applying California's statute of limitations because California is the forum and the defendant is a California resident. Applying California's statute of limitations would thus advance its underlying policy. In choice of law terms,

California has an "interest" in applying its law. In contrast, Kentucky has no interest in having its statute of limitations applied because here there are no Kentucky defendants and Kentucky is not the forum. This case, like *Reich v. Purcell, supra,* is 'the very paradigm of the false conflict.' The court properly applied California law." (*Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793–794.)
The key consideration is that the statutes of limitations is a defense, largely established to create a limit to the time to bring claims. As stated in *Ashland,* "We note the situation would be markedly different if the defendant were from Kentucky and Kentucky's limitation period were shorter than California's. Then Kentucky would have an interest in having its law applied, its relationship to the case would be "substantial," California's public policy would not be offended by applying Kentucky's statute of limitations, and the parties' choice of Kentucky law arguably would be supportable." (*Ashland,* at n.2.)

Ashland has been followed by later appellate courts in this state, e.g., *American Bank of Commerce v. Corondoni* (1985) 169 Cal.App.3d 368, 373. Such precedents are binding upon this Court.

Although California State courts are not bound by federal precedents, it should be noted that the federal authorities applying the California "governmental interest" test to conflict of laws recognize that in all but the "rare exceptions," California statutes of limitation will be applied where California is the forum, especially where the California statutes provide a shorter time to bring suit.

This principle was applied by the Ninth Circuit in *Deutsch v. Turner Corp*. (9th Cir. 2003) 324 F.3d 692. In that case, survivors of forced labor camps during World War II brought claims in California state courts and district courts in California for lost wages and personal injuries suffered. Although the plaintiffs included both residents and nonresidents of California, and all of the injuries took place outside of California, the court concluded that the California statues of limitations should apply. In doing so, the Court observed:
"California applies the "governmental interest" approach to conflict of law issues. Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law, and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations.
Id. at pp. 716–17; *see also Nelson v. International Paint Co*. (9th Cir. 1983) 716 F.2d 640, 645 ["Only California has an interest in having its statute of limitations applied" because 'the forum is in California, and the only defendant is a California resident.'"]

Plaintiff relies upon *Aalmuhammed v. Lee* (9th Cir. 2000) 202 F.3d 1227, in which the Ninth Circuit applied New York law to a case filed in a California district court. In *Aalmuhammed*, the plaintiff sought quantum meruit recovery for services performed in New York and Egypt. Although the defendants were California residents and the plaintiff was a resident of Florida, the court concluded that the six-year New York statute of limitations should apply instead of the two year limitation under California law. The court observed:
"California's interest in protecting its residents from stale claims arising from work done outside the state is a weak one: "[t]he residence of the parties is not the determining factor in a choice of law analysis."[fn] New York's interest in governing the remedies available to parties working in New York is far more significant. [fn] New York's connection with Aalmuhammed's claim is considerably more substantial, immediate and concrete than California's. We conclude that New York would suffer more damage to its interest if California law were applied than would California if New York law were applied."
Aalmuhammed, at p. 1237. Although declaring "California's interest in protecting its residents from stale claims arising from work done outside the state is a weak one.," the Ninth Circuit provides no citations in support of that statement. Indeed, this declaration seems at odds with the Ninth Circuit's reasoning just three years later in *Deutsch,* where despite no tortious acts having occurred in California, and noting that

many of the plaintiffs did not reside in California, the Court declared: “California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a ‘state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be ‘stale.’” Because California’s statute of limitations is shorter that that of Israel, California has a strong interest in applying its own law.

Plaintiff argues that Israel has a strong interest in providing its tort victims a greater time to bring claims, relying on its Israel law expert, Dr. Boaz Shnoor, who declares that Israel has a “strong interest in giving victims [of defamation] sufficient time to understand the implications of the tort in their lives before filing suit.” Shnoor Decl. ¶ 15. Of course, Dr. Shnoor notes that the statute of limitations for defamation is set forth only in a general statute applicable to all causes of action, save a narrow few. Thus, as to statute of limitations under Israel law, a defamation claim does not appear to present an unusually strong interest vis a vis other claims.

Moreover, Dr. Shnoor goes on to note other interests protected under Israel’s statute of limitations:
“The State of Israel also wants potential defendants to know there are definite time limitations in litigation and for them to know that they are no longer under the threat of a lawsuit. Is has an interest in a potential defendant knowing they are not required to retain evidence any longer, as well as ensure that lawsuits are decided in a timely manner and there is no spoliation of evidence. Additionally, Israel, *like California,* has an interest in ensuring that the courts are not overburdened with stale claims that the court’s time to used to solve current problems, and not historical issues.”
Shnoor Decl. at ¶ 16 (Emphasis added.). As Dr. Shnoor acknowledges, Israel and California’s statutes of limitation share an interest in avoiding stale claims for the mutual benefit of defendants and the court. As both Israel and California are seeking to balance the rights of the plaintiffs in bringing suit, and the rights of the defendant and the courts to avoid stale claims, the fact that each has struck a different balance does not create a true conflict or suggest a “rare exception” requiring application of Israel law.

More importantly, however, California law of defamation is shaped in large part by this country’s strong First Amendment right to free speech.
“The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.... [T]he First Amendment ‘ordinarily’ denies a State ‘the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.’ ...”
D.C. v. R.R. (2010) 182 Cal. App. 4th 1190, 1211. Thus, the laws of both California and the United States reflect a careful balancing between the “First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation.” *Milkovich v. Lorain Journal Co*. (1990) 497 U.S. 1, 2.; *Franklin v. Dynamic Details, Inc*. (2004) 116 Cal.App.4th 375, 390.

California substantive law tips the balance in favor of tree speech more than Israel, for number of reasons; first, California, unlike Israel, does not provide criminal penalties for defamation. (Israel Defamation Law, 1965 (IDL), Chapter B., para. 6: “Those who publish defamation, with harmful intent, to two persons or more except the victim, will be sentenced to one year of jail.”) Also, under California law, truth is an absolute defense to defamation. *Campanelli v. Regents of Univ. of Cal*. (1996) 44 Cal.App.4th 572, 581-582. Under Israel law, truth is a defense only if its publication was in the public interest. (IDL, Chap. C, ¶ 14.)

California’s vital interest in free speech is reflected in its procedural laws as well. For example, the state’s Anti-SLAPP statue begins with the following declaration:
“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled

through abuse of the judicial process. To this end, this section shall be construed broadly.
Cal. Civ. Proc. Code § 425.16 (West). Accordingly, unlike other tort claims, those relating to speech falling under the protection of the Anti-SLAPP can be summarily adjudicated before any discovery is taken. Moreover, despite the American Rule of each side bearing their own attorney fees applicable to other tort claims, the successful defendant in an Anti SLAPP motion is entitled to attorney fees expended in bringing the motion.

The importance of freedom of speech is also reflected in the fact that California, unlike Israel, has adopted the "single publication rule." Shnoor Decl. p. 5, ¶ 15. In California, like most U.S. states, "[a] cause of action for defamation accrues immediately upon the occurrence of the tortious act and thus, is not appropriate for the continuing violation exception." *Flowers v. Carville* (9th Cir. 2002). 310 F.3d 1118, 1126. California's adoption of the single publication rule was designed "to reduce the potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." *Traditional Cat Assn., Inc. v. Gilbreath (2004)* 118 Cal.App.4th 392, 404. (internal citations and quotations omitted).

Finally, California's strong interest in protecting free speech is reflected in the fact that its statute of limitations for defamation is a relatively brief one year. Unlike Israel's seven year statutes of limitations generally applicable to virtually all causes of action, California's one year limitation period in defamation cases is half of that provided for in personal injury and breach of oral contract actions, one third of that provided in fraud and medical malpractice actions, and one-fourth of that provided for a claim for breach of a written contract.

It should be noted that Illinois, the state where Defendant was residing when she published the allegedly defamatory material, similarly employs a one-year statute of limitations on defamation actions. 735 Ill. Comp. Stat. Ann. 5/13-201 (West). Moreover, Illinois generally applies the "single publication rule" to defamation and violation of privacy cases. *Moore v. People for the Ethical Treatment of Animals, Inc*. (Ill. App. Ct. 2010) 402 Ill.App.3d 62, 73. These facts dispel any concern that Defendant engaged in forum shopping by moving to California to take advantage of laws more favorable to her.p

In conclusion, the Court holds that California's interests would be the more seriously impaired that those of Israel if California's statute of limitations were not applied here.

For the foregoing reasons, the Court **DENIES** the Plaintiff's request to apply the law of Israel.

DEFENDANT'S ANTI-SLAPP MOTION:

Defendant's special motion to strike the Complaint is **GRANTED.**

Step One:

Defendant meets the initial burden to show that Plaintiff's defamation and (derivative) false light claims are based upon Defendant's acts in furtherance of free speech. The Motion invokes (e)(3) which is interpreted similar to the (e)(4) prong - both employ the concept of an "issue of public interest". (See *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 140, 143-4; see *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.)

Posting material on Facebook satisfies the element that the speech occurs in a public forum. (See Opp. Brf. at 11:19; see *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252 ("Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute"); *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199 ("It cannot be disputed that Facebook's website and the Facebook pages at issue are 'public forums,' as they are accessible to anyone who consents to Facebook's Terms"); *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735–1736, 1737) ("[T]oday the answer is clear.

[It] is cyberspace—the 'vast democratic forums of the Internet' in general…, and social media in particular…. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.").

The dispute centers on whether the Defendant's communication was made in connection with an issue of public interest. Plaintiff asks the Court to consider the fact that she herself was a private person. But this narrow matter does not constitute the totality of the evaluation. It is the totality of the communication and context that are to be considered, including the content, the topics, the public issues connected to the speech, as well as the audience, speaker, and purpose. (See *FilmOn.com Inc.,* 7 Cal.5th 133, 148-51.) If a statement is made in participation in public discussion on an issue of public interest, it will receive protection. (*Id.* at 150, 151.)

Here, the post was inextricably connected to issues of public interest. One was the apparent shooting a Palestinian nurse that had taken place during a protest. The Complaint concedes that the incident was quickly publicized and received widespread attention. (See Complaint ¶ 6 ("Her death, blamed on Israel, was widely reported internationally, and condemned"); ¶ 43 to 47).

The public issue could be defined more broadly to be what the Complaint describes as the "radically escalat[ing]" "tensions between Israel and the Hamas-controlled Gaza strip", "resulting in violent incidents along the border" and resulting in the "Great March of Return." As noted in the Complaint, the Great March included "a minimum of ten thousand people and sometimes up to thirty thousand people." (Complaint ¶¶ 2, 3, 6. 3.) It could be defined even more broadly as the "ideological" differences of people about "current events in the Middle East" (see the Complaint ¶ 1).

Moreover, the Complaint concedes that the Defendant is an "influencer", an "activist", engaged in a social media role for an organization advocating for groups within the region, on social media (Complaint ¶22-24). "The Defendant's sole objective was to lash out in her ideological frustration over current events in the Middle East." (Complaint ¶ 1). This supports the conclusion that the speech was political expression.

The Complaint also concedes that the Defendant's Facebook page identified her as an activist and it was used to further the "activism", with 15,900 followers and 4,937 friends. The Defendant's offending post is said to have generated a tremendous response (went "viral") being shared and re-shared thousands of times, and viewed around the world millions of times, according to the Complaint. (Complaint ¶ 8, 9, 22-24, 45).

The content and the context compel the conclusion that the Defendant was exercising First Amendment rights.

The fact that the Defendant used the identity and image of Plaintiff – who was a private person with no involvement with the June 1st incident - does not take away from the conclusion that the post was expressing political views and was political speech. Indeed, the challenged post included Plaintiff solely because her image had been published by the Israel Defense Forces as an apparent recruitment tool. Moreover, any inappropriate use which the Defendant made of Plaintiff's name and image and any inappropriate interjection of Plaintiff into the dialogue about the incident are best evaluated, in Step Two.

Step Two:

The evaluation of the merits includes considering whether a defendant is able to defeat the plaintiff's claim by way of an affirmative defense, such as a privilege or statute of limitations. "[T]he statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it". (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398-99.)

The Complaint recognizes the problem of the statute of limitations. Plaintiff seeks to apply another body of law, Israeli law based on choice of law principles (see Complaint ¶ 31-32). For the reasons explained in connection with the Court's ruling on the Plaintiff's concurrent Motion, the Court is unable to conclude that Israeli law must be applied. Therefore, the law of this State will apply. *(See Mireskandari v. Gallagher* (2020) 59 Cal.App.5th 346, 384-6; Evid. Code § 311; *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1469.)

The statute of limitations for defamation in this state is one year (CCP § 340(c).) When a false-light claim is based on a defamatory publication, the courts will apply the same rules to the false light claim as govern the defamation cause of action. (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 245-46; see also Complaint ¶ 32).

The Complaint was filed in September of 2020, which is more than 2 years after the Facebook matter was posted, in June of 2018 (see Complaint ¶ 35 and 48). Therefore, the action is time-barred. And for this reason, the Defendant's anti-SLAPP motion is GRANTED. (*See Traditional Cat Assn.,* 118 Cal.App.4th 392, 405*; see also Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1245-7.)

DEMURRER TO COMPLAINT:

Defendant's demurrer to the Complaint is **MOOT** in light of the ruling on the anti- SLAP motion.

The Defendant's additional effort to seek imposition of unspecified sanctions was defective and was also unnecessary. The premise that the Israeli counsel signed the Complaint is incorrect. (See Dmrr. Brf. at 21:7, see Compl. filed herein, p. 29; cf. CRC 2.111).

Further, there is no authority cited to support seeking sanctions in a demurrer brief. (See CCP 430.10(a)-(i).) Nor is any proper sanctions power invoked here. (See *Civ Proc. Before Trial ¶ 9:1001, Rutter Group 2020.*) Courts do not consider extrinsic materials in connection with a hearing of a demurrer. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.)

Court orders Clerk to give notice and Defendant to prepare the order with proof of service attached.