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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MICHAEL MEAD,

Plaintiff and Appellant,

v.

SHOWPLACE SQUARE LOFTS
OWNERS ASSOCIATION et al.,

Defendants and Appellants.

A132104

(City & County of San Francisco
Super. Ct. No. CGC10504671)

Before the court are cross-appeals from an order granting in part and denying in part defendants' special motion to strike, pursuant to Code of Civil Procedure¹ section 425.16, the so-called anti-SLAPP statute, and overruling defendants' demurrer to the complaint. We shall affirm the order concerning the anti-SLAPP motion and modify the ruling on the demurrer.

Background

The underlying controversy has a long history. Quoting from the opinion of Division Two of this court on the appeal from the trial court's award of attorney fees following a prior judgment adverse to respondent Showplace Square Lofts Owners Association (the HOA), the HOA "sued the unit owners, three owners of units in Showplace Square, concerning some parking and storage spaces. The unit owners

¹ All statutory references are to the Code of Civil Procedure unless otherwise noted.

contended that Showplace Square Loft Company, LLC (LLC), the original owner and developer of the project, sold them the rights to some 30 parking and storage spaces in the project. This contention was supported by the LLC. The HOA contended that the LLC did not have the right to sell the spaces to the unit owners, and sought (a) cancellation of the deed purporting to make the transfer; (b) a declaration that the unit owners violated the governing covenants, conditions, and restrictions ('CC&Rs'); and (c) damages." (*Showplace Square Lofts Owners' Assn. v. Mead* (Jan. 19, 2010, A122575) [nonpub. opn.].) Following a court trial, the court entered judgment in favor of the three unit owners, finding that they "validly, and consistently with the CC&Rs, acquired ownership to the multiple parking spaces at issue." The HOA noticed but ultimately withdrew an appeal from the judgment.

Michael Mead, one of the three prevailing unit owners, then brought this action against the HOA, nine individuals who allegedly "are and/or were members of the HOA board of directors," and the property management company of the project and its employee "with account responsibility for the HOA" (collectively, defendants). The complaint alleges that subsequent to the unit owners' purchase of a unit in the project and of the 30 parking spaces in 2003, confirmed by a deed executed in 2004, the defendants "discussed the fact that they could lower everyone's monthly HOA membership dues if they could take control of the spaces away from Mead," the HOA refused to give the unit owners its necessary consent to rent the parking spaces to persons not owning a unit in the project or to convert any of the spaces into storage spaces, that "[f]rom August 2004 through January 2006, the defendants published a fusillade of insults and accusations to the members of the association, accusing Mead [and the other two unit owners] of stealing \$900,000 worth of HOA assets in collusion with the bankrupt developer in a scheme to help the developer defraud . . . his creditors, the HOA and the bankruptcy court" and that, at a meeting of the HOA, two board members "explained that it was their intent to stop all future sales of spaces by Mead and to take control of Mead's spaces in order to provide the association with a source of income that would lower monthly dues for all. As intended, the conduct of the HOA board had the effect of dramatically

depressing demand for the rental and sale of spaces to residents of the project and by withholding approval on any terms, completely eliminating the rental market to non-residents.” The complaint continues by alleging that “the slander campaign culminated in the HOA board of directors instituting a civil action against [the three-unit owners] seeking the cancellation of the instrument by which the spaces were conveyed by the developer” and recording an “unnecessary lis pendens [that] had the intended punitive effect of preventing Mead from selling or refinancing his unit and increasing the pressure to capitulate.” The HOA made no similar claims against other unit owners who had purchased or rented additional parking and storage spaces from the original developer.

Further, according to the complaint, “During trial, the HOA abandoned all the theories upon which the action had been filed and prior to the pronouncement of judgment, conceded that the developer did have the right to sell multiple spaces with any unit.” Nonetheless, the “HOA board” allegedly “continued to throw up roadblocks,” “announced they would never allow Mead to rent parking or storage to any non-resident under any circumstances and the slander campaign resumed in earnest. The HOA continued the litigation by appealing the trial court’s decision even though they had conceded all points of contention before the court announced its decision. Just as Mead was about to file his opposition and with no prior notice, the HOA abruptly dismissed the appeal.” There followed a period during which the HOA board considered the amendment of the “house rules,” which the complaint characterizes as “a delaying tactic,” but “[f]inally, in 2010, the HOA approved the rental of spaces to non-residents but declined to authorize the conversion of spaces from parking to storage.”

The present complaint contains nine causes of action, labeled as follows: (1) declaratory relief; (2) intentional interference with contract; (3) intentional interference with prospective advantage; (4) negligent interference with prospective advantage; (5) publication of injurious falsehood; (6) slander of title; (7) breach of fiduciary duty; (8) breach of CC&Rs; and (9) malicious prosecution. The trial court granted defendants’ special motions to strike causes of action 2 through 7 “because they arise from protected activity and plaintiff has presented insufficient evidence of non-

privileged conduct that occurred during the time period permitted by the statute of limitations to show a likelihood of success,” and struck the ninth cause of action for malicious prosecution “because it arises from protected activity and the plaintiff has presented insufficient evidence to show a likelihood that he will be able to prove that the underlying complaint was prosecuted without probable cause and with malice.” The court denied the motions as to causes of action 1 and 8, for declaratory relief and breach of the CC&Rs, because they “do not arise from protected activity,” and it overruled the demurrers to those two causes of action. The parties have timely cross-appealed from the portions of the ruling with which they disagree.

Discussion

“Section 425.6, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant’s] right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review the trial court rulings on the special motion to strike de novo. (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 624.)

1. *The trial court properly granted the motion to strike causes of action 2 through 7.*

In neither the trial court nor in its appellate briefs does Mead seriously dispute that his complaint comes within the first step of the anti-SLAPP analysis.² Although these causes of action are based in part on alleged conduct both before and after the prosecution of the prior action by the HOA, that action seeking to invalidate the sale of the 30 parking and storage spaces is central to each of those causes of action. A claim based on the pursuit of litigation unquestionably comes within the scope of the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90.) And “[t]he apparently unanimous conclusion of published appellate cases is that ‘where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 426.16 unless the protected conduct is “merely incidental” to the unprotected conduct.’ ” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) The prosecution of the prior action unquestionably is not “incidental” to causes of action 2 through 7.

Mead contends the trial court erred in failing to find that he satisfied the second prong of the anti-SLAPP analysis by stating and substantiating a legally sufficient claim. (See *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 63.) However, Mead failed to present evidence sufficient to substantiate these claims. In opposition to the special motion to strike, he submitted only the trial court’s decision in the previous action; his own declaration which essentially repeats the conclusory allegations of the complaint without any of the foundational facts necessary to support those allegations; and snippets from the prior trial testimony of one board member. The board member’s testimony was to the effect that the board challenged only the acquisition of the 30 spaces

² In the trial court, Mead obliquely suggested that his complaint is exempt from the anti-SLAPP statute as an action arising from commercial speech, citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12. He makes no such suggestion on appeal, which is patently untenable. (See *id.* at p. 26.) In his reply brief, Mead includes a lengthy discussion of cases concerning proper application of the first prong of the anti-SLAPP analysis, but he makes no suggestion that the prosecution of a lawsuit is not protected activity to which the statute applies.

by Mead and his two associates because the board members believed the developer had transferred the 30 units to a “good friend” at “nominal value” as “a scheme to get money out of the bankruptcy court” and they did not challenge the purchase of additional spaces by others who paid substantial sums for their spaces. Mead’s conclusory declaration is insufficient to sustain his burden of presenting a prima facie case to defeat the anti-SLAPP motion (*Martin v. Inland Empire Utilities Agency*, *supra*, 198 Cal.App.4th at p. 625; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 616), and the single board member’s testimony hardly provides the evidence necessary to establish any of the six causes of action in question.

Moreover, Mead offered no evidence to overcome the defenses that all of the defendants’ conduct was protected by either the litigation privilege (Civ. Code, § 47, subd. (b)(2); see, e.g., *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485-1486) or the privilege for communications made without malice to others who share the same interest (Civ. Code, § 47, subd. (c); see, e.g., *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 739-741; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 344). The complaint alleges that the allegedly slanderous statements about him and his motives were made only to other members of the board or of the homeowners’ association. Hence, the trial court properly granted the special motion to strike the causes of action for interference with contract and advantageous relationships, defamation, slander of title and breach of fiduciary relationship.

2. *The trial court properly granted the special motion to strike cause of action 9 for malicious prosecution.*

As indicated above, the trial court granted the special motion to strike the malicious prosecution cause of action on the ground that Mead failed to present sufficient evidence to establish that the HOA’s action was prosecuted without probable cause or with malice. Mead asserts that both can be inferred from what he argues is the obvious merit of his position in the HOA suit, as supported by the court’s decision in that case. However, the issues involved in the underlying action were hardly as simple and clear-cut as Mead suggests. Although the three-unit owners asserted that when purchasing their

unit they had an agreement with the developer that the 30 spaces were included, the 2003 deed included only a single space—assertedly because the title company would not issue a title policy covering 30 undifferentiated spaces. The 30 spaces were included in a second deed to the three-unit owners in January 2004. The doctrine of merger was argued to compel the conclusion that the terms of the 2003 deed controlled, and the 2004 deed was ineffective. That there was probable cause to support defendants’ position is strongly suggested by the tentative decision of the trial court, which was to agree with the HOA.³ Although in further argument Mead succeeded in convincing the trial court to reverse its tentative decision, Mead has provided no basis to find that the HOA lacked probable cause for its position, much less that the suit was motivated by malice—that is, by hatred or ill will or by any purpose other than to secure to the HOA the rights to the 30 spaces in question. The special motion to strike was properly granted as to this cause of action.

3. *The trial court properly denied the motion to strike causes of action 1 and 8.*

The trial court denied the special motion to strike the first cause of action for declaratory relief and the eighth cause action for breach of the CCRs, the latter of which was asserted against the HOA and the members of its board of directors. Defendants contend that the court erred in finding that these causes of action do not arise from protected activity because these claims “incorporate by reference and are based upon the mixed-up general allegations contained in the first 18 paragraphs of the complaint.” However, although these claims are factually related to the others, the legal theories on which they rest are not in any sense *based on* the protected activity that underlies the

³ The tentative decision read in part as follows: “Judgment for plaintiff [HOA]: [¶] • By September 17 2003 LLC lost its right to sell spaces. January 30, 2004 deed is therefore ineffective. Issue therefore devolves to defenses, specifically *bona fide* purchaser. [¶] • The February 18 2003 deed is not ambiguous, is not the result of fraud and expressly does not transfer the spaces. Defendants were fully aware of this at the time. The prior contract of sale merges into and is superceded by this deed. [¶] • The January 30, 2004 deed is not supported by consideration, and defendants knew by this time (a) that all units had been transferred from the LLC (constructive notice via deeds), and (b) the contents of the CC&Rs.”

other claims. The first cause of action alleges there is a continuing disagreement concerning the duty of the HOA to establish reasonable rules for the conversion of parking spaces into storage spaces. The ninth cause of action alleges the HOA and its directors “violated the provisions of the CC&Rs as described above including but not limited to their refusal to allow the rental of parking/storage spaces to non-residents as is their duty under Article 2 section 2.2(D) of the declarations of restrictions for Showplace Square Lofts.” Neither of these claims is based on filing the prior judicial proceedings or on other conduct that is constitutionally protected. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89 [“[T]hat a cause of action arguably may have been ‘triggered’ by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity.]; see also, e.g., *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 [“it is the *principal thrust* or *gravamen* of plaintiff’s cause of action that determines whether the anti-SLAPP statute applies”].) Hence, the court properly denied the special motion to strike these two causes of action.

4. *The trial court properly overruled the demurrer to cause of action 1.*

Defendants contend that the first cause of action does not properly plead a cause of action for declaratory relief because the pleading is uncertain and fails to allege a specific, concrete controversy. Their argument is supported by the prayer to the complaint, which seeks “a declaration of rights, duties, and obligations of the parties pursuant to the provisions of the CC&Rs, and specifically for a declaration by this court that the above-described actions by defendants violate the covenants and restrictions of the CC&Rs.” The prayer undoubtedly is subject to defendants’ criticism, but the body of the first cause of action provides greater specificity. While the pleading could be improved, it fairly appears that despite the adoption of house rules in 2010 permitting the rental of spaces to non-residents, a controversy remains as to whether the HOA may fail “to establish reasonable rules for the conversion of parking spaces into storage spaces by

owners of parking spaces in the [Showplace Square Lofts].” So far as appears, this is a continuing specific disagreement which the parties are entitled to have judicially resolved.⁴

5. *The trial court erroneously overruled the demurrer to cause of action 8.*

Although we have concluded above that the eighth cause of action was not subject to the anti-SLAPP motion, the demurrer to this cause of action should have been sustained. This cause of action seeks damages for the refusal of the HOA to permit Mead to rent any of the disputed 30 spaces to non-residents, in violation of the terms of the CC&Rs, contending that Mead did not own the 30 spaces. The damages that Mead seeks to recover—loss of income, diminished value of the spaces, and costs and attorney fees—are the direct consequence of the dispute over ownership of the 30 spaces, the subject of the prior HOA action. Hence, this claim was a compulsory cross-complaint that should have been filed in the prior action and cannot be asserted against the HOA in this separate action.

Section 426.30, subdivision (a) provides: “Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.” And a “related cause of action” is defined in section 426.10, subdivision (c) as “a cause of action which arises out of the same transaction, occurrence, or series of occurrences as the cause of action which the plaintiff alleges in his complaint.”

“[B]ecause ‘[t]he law abhors a multiplicity of actions . . . the obvious intent of the Legislature . . . was to provide for the settlement, in a single action, of all conflicting claims between the parties arising out of the same transaction. [Citation.] Thus, a party

⁴ Defendants assert that the cause of action is also defective because the owners of other units who will be affected by resolution of the dispute have not been joined. It does not appear that this issue was considered in the trial court. Our decision does not preclude the trial court from doing so on remand.

cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demand or defenses; he may not submit his case in piecemeal fashion. [Citation.]’ [Citations.] In furtherance of this intent of avoiding a multiplicity of action, numerous cases have held that the compulsory cross-complaint statute . . . must be liberally construed to effectuate its purpose” of preventing piecemeal litigation. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 959.) “Because of the liberal construction given to the statute to accomplish its purpose of avoiding a multiplicity of actions, ‘transaction’ is construed broadly; it is ‘not confined to a single, isolated act or occurrence . . . but may embrace a series of acts or occurrences logically interrelated.’ ” (*Id.* at p. 960; see also, e.g., *Currie Medical Specialties, Inc. v. Bowen* (1982) 136 Cal.App.3d 774, 777.)

Although the present record does not disclose the date on which Mead’s answer was filed, the HOA complaint in the prior action was filed on January 23, 2006. Mead’s complaint in the present action alleges that he purchased the 30 spaces in February 2003, that in “early 2004” the HOA board discussed the financial advantages to HOA members “if they could take control of the spaces away from Mead” and the board “secretly discussed” the matter in August 2004. When Mead requested permission to convert two parking spaces into storage spaces, the board “demanded that Mead produce proof of ownership of the spaces and rejected his request for conversion claiming that the spaces in question were the property of the members of the HOA.” In addition, “the board demanded mediation of the ownership issue in June of 2005 and thereafter sued. The matter they proposed to mediate was Mead’s refusal to acknowledge the right of the association to manage and control his parking and storage spaces on behalf of the rightful owners and Mead’s refusal to acknowledge that he had no ownership or other rights in the parking and storage spaces.” “From August 2004 through January 2006” defendants allegedly published their “fusillade of insults and accusations” against Mead, the matter was discussed at a board meeting on November 21, 2005, where board members “explained that it was their intent to stop all future sales of spaces by Mead and to take control of Mead’s spaces in order to provide the association with a source of income that

would lower monthly dues for all,” and the “slander campaign culminated” when the HOA filed suit on January 23, 2006. Thus, the complaint makes clear that Mead’s cause of action for breach of the terms of the CC&Rs accrued well before he filed his answer in the prior litigation, even if damages continued to accrue subsequent to that date.⁵ If the HOA breached the terms of the CC&Rs in failing to acknowledge Mead’s rights as an owner of the 30 spaces, it did so no later than January 2006. His present claim unquestionably is logically related to the claim he defended in the prior action. He was required to assert his cause of action as a cross-complaint in the prior action or not at all. (*Align Technology, Inc. v. Tran, supra*, 179 Cal.App.4th 949; *Currie Medical Specialties, Inc. v. Bowen, supra*, 179 Cal.App.4th 774.)

⁵ At oral argument, counsel for Mead argued that the alleged breach by the HOA occurring before the pendency of the HOA action did not include the refusal to permit him to rent his parking spaces to non-residents. Not so. The complaint in this action alleges, in paragraph 8, that “In early 2004, a new board of directors was elected and the members began discussing the cash flow generated by Mead’s *rental* and sale of spaces;” in paragraph 9, that in June 2005 the board proposed to mediate “Mead’s refusal to acknowledge the right of the association to manage and control his parking and storage spaces on behalf of the rightful owners and Mead’s refusal to acknowledge that he had *no ownership or other rights* in the parking and storage spaces”; in paragraph 10, that at a board meeting on November 21, 2005, board members “explained that it was their intent to stop all future sales of spaces by Mead and to *take control of Mead’s spaces* in order to provide the association with a source of income that would lower monthly dues for all” and that “[a]s intended, the conduct of the HOA board had the effect of dramatically depressing demand for the *rental* and sale of spaces to residents of the project and *by withholding approval on any terms, completely eliminating the rental market to non-residents*”; in paragraph 16, that “From August of 2004 through the date the ‘house rules’ were amended in July of 2010, the HOA board actively discouraged its members from *renting* or purchasing spaces from Mead and *refused to approve any renting of spaces to non-residents under any conditions*; and in paragraph 17, that “The board’s *refusal to approve any outside rental*, refusal to allow conversion of parking to storage and unrelenting attacks from the defendants caused seven years of losses,” a period that necessarily began long before the filing of the complaint. (Italics added.) Thus, while the alleged breach in refusing to permit rentals to non-residents may have continued beyond the filing and resolution of the HOA action, the cause of action for that breach unquestionably arose before that point and the claim was required to have been asserted in the pending action.

The prior HOA action was brought against Mead by only the HOA; the individual board members were not plaintiffs in that action. The eighth cause of action here is alleged against the board members in addition to the HOA, so that section 426.30 literally does not require related claims to have been included in a cross-complaint against them. Nonetheless, it appears that these individuals are named in the eighth cause of action based solely on their acts as members of the HOA board. Whether there is any basis to assert claims against them in their individual capacity for breach of the CC&Rs, though doubtful, was not explored in the proceedings below. We do not foreclose consideration of this question on remand, should Mead file an amended complaint, which he should be given leave to do.

Because we conclude that defendants' demurrers to the eighth cause of action should have been sustained based on Mead's failure to have filed a compulsory cross-complaint in the prior action, we need not consider the other grounds on which defendants based their demurrer.

Disposition

The order appealed from is affirmed in all respects except insofar as it overrules the demurrer to the eighth cause of action, as to which the demurrer should be sustained with leave to amend. Defendants and respondents shall recover their costs on appeal.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.