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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ENTREPRENEUR MEDIA, INC.,

Plaintiff and Respondent,

v.

SCOTT SMITH,

Defendant and Appellant.

A140303

(San Francisco County
Super. Ct. No. CGC13530730)

Defendant Scott Smith appeals from the trial court's order denying his motion under Code of Civil Procedure section 425.16 (section 425.16) to strike the complaint filed by plaintiff Entrepreneur Media, Inc. as a strategic lawsuit against public participation (SLAPP). We conclude the gravamen of the complaint—which targets defendant's alleged fraudulent conveyance of certain website domain names in order to evade collection on plaintiff's judgment—does not arise from protected activity even though the conveyance occurred against the backdrop of arguably protected expressive conduct. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2003, plaintiff obtained a judgment and permanent injunction in a trademark infringement action brought in the United States District Court for the Central District of California, entitled *Entrepreneur Media, Inc. v. Scott Smith* (2004) Civ. No. 98-3607, 2004 U.S. Dist. Lexis 24078 (Infringement Action). The district court found defendant had intentionally and willfully infringed upon plaintiff's trademark. Defendant was

permanently enjoined from using various marks containing the word “Entrepreneur.” Plaintiff was awarded damages, attorney fees, and costs.

During the course of the Infringement Action, defendant filed for bankruptcy. Plaintiff later prevailed in a nondischargeability action brought under the Bankruptcy Code (11 U.S.C. § 523(a)(6)), as to the debt arising from the willful trademark infringement. (See *Smith v. Entrepreneur Media, Inc.* (Bankr. 9th Cir. 2009) 2009 Bankr. Lexis 4582; *affd.* in *Smith v. Entrepreneur Media, Inc.* (9th Cir. 2012) 465 Fed.Appx. 707.)

On February 1, 2012, plaintiff obtained a renewal of the Infringement Action’s default judgment.

On April 18, 2013, plaintiff filed the underlying action here, alleging it had obtained a money judgment against defendant in federal district court totaling over \$1.6 million. The complaint further alleges that after defendant filed for bankruptcy, the indebtedness due plaintiff was declared nondischargeable. Among his assets are two domain names entitled “brandlarceny.com” and “bizstarz.com,” both of which he owns and actively promotes.

According to the complaint, defendant transferred the two domain names to Domains By Proxy, LLC, which is allegedly a subsidiary of, or affiliated with, GoDaddy.com, LLC, for the purpose of hindering, delaying, and defrauding plaintiff in providing for enforcement against the domain names by way of a receivership. Plaintiff sought an order declaring the transfers to be null and void, commanding the transferees to impound the domain names, and precluding defendant “from beneficial use or access thereto” pending further order of the court. Plaintiff further sought authorization for appointment of a receiver and authority for the receiver to sell the domain names with the net proceeds from the sale to be turned over to plaintiff.

On May 23, 2013, defendant filed a general denial to the complaint.

On July 19, 2013, defendant filed his anti-SLAPP motion to strike the complaint pursuant to section 425.16.

On September 16, 2013, the trial court filed its order denying the motion to strike. The court found defendant failed to show the complaint is based on petitioning or other First Amendment activities, concluding the gravamen of the lawsuit was to “unwind an allegedly fraudulent transfer.” Certain allegations in the complaint concerning defendant’s malice and his access and use of the two domain names in question were deemed incidental and not a basis for liability.

DISCUSSION

I. Standard of Review

An order granting or denying a special motion to strike is expressly made appealable by section 425.16, subdivision (i). “Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ [Citation.] However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. The Anti-SLAPP Statute

“A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party’s constitutional right of petition or free speech. [Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be ‘construed broadly’ to that end. [Citation.] [¶] A cause of action is subject to a special motion to strike if the defendant shows that the cause of action arises from an act in furtherance of the defendant’s constitutional right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on the claim. [Citations.]” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 882-883.)

The term “ ‘act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue’ ” is defined to include: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

Consideration of an anti-SLAPP motion requires 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.’ ” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the moving defendant meets this burden, the court must determine whether the plaintiff has shown a probability of prevailing on the claim. (*Ibid.*) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

III. The Gravamen of the Complaint Does Not Arise from Protected Activity

A defendant meets its burden of showing that the challenged cause of action arises from protected activity “ ‘by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [citation].” (*Navellier, supra*, 29 Cal.4th at p. 88.) In this context, “arises from” means “based upon.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114.) “[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.]

Moreover, that 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.” (*Navellier, supra*, at p. 89.) “If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step.” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271.)

The gravamen or principal thrust of the action determines whether the challenged cause of action arises from protected activity. (*Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384, 387, 396.) The gravamen is the acts on which liability is based; it is “ ‘the allegedly wrongful and injury-producing conduct that provides the foundation for the claims.’ ” (*Id.* at p. 396, italics omitted.) “ ‘In deciding whether the “arising from” requirement is met, a court considers “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” [Citation.]’ [Citation.]” (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962.) The “focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” (*Navellier, supra*, 29 Cal.4th at p. 92.) The anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the transaction or occurrence underlying the complaint. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 794.)

1. Fraudulent Transfer Allegations

Code of Civil Procedure section 708.210 establishes the basis for plaintiff’s creditor’s suit: “If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment.” Here, plaintiff alleges Domains By Proxy and GoDaddy are in possession or control of defendant’s property, in the form of the two

Internet domain names. Plaintiff further alleges that it has an interest in that property due to the outstanding judgment against defendant in the Infringement Action.

With respect to the fraudulent conveyance allegations, “[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, § 3439.04, subd. (a).) For purposes of the statute, a “debtor” is “a person who is liable on a claim.” (*Id.* § 3439.01, subd. (e).) A “creditor” is “a person who has a claim . . . of a debtor.” (*Id.* § 3439.01, subd. (c).) Here, the complaint alleges defendant transferred his ownership of the two domain names with the intent to preclude or prevent plaintiff from reaching these assets.

The allegation that plaintiff transferred his ownership interest in the two websites to a third party, in order to maintain control of the assets while escaping his creditor’s reach, serves as the foundation for the operative complaint. Although it is common knowledge that websites are used to communicate information, what defendant might or might not communicate through the use of the two domain names is not relevant to the cause of action itself. Further, the act of conveying property is not a protected activity nor an exercise of free speech, in and of itself. (See, e.g., *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477-478 [“This dispute [involving ownership of property] and not any protected activity, is ‘the gravamen or principal thrust’ of the action. [Citation.] The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit.”].)

The instant lawsuit is not aimed at precluding defendant’s First Amendment rights. Instead, it seeks to recover items of value that plaintiff may then liquidate to recover some degree of compensation for its damages in the Infringement Action. We thus concur with the trial court that the challenged cause of action does not arise out of

protected activity. Accordingly, we need not address whether plaintiff has demonstrated a probability of prevailing on its complaint.¹

2. The Complaint's Expressive Conduct Allegations Are Incidental

Defendant asserts the trial court erred in concluding two allegations in the complaint referencing his expressive activities are merely incidental to the cause of action. We are not persuaded.

The complaint alleges: “As a result of the underlying facts in the [Infringement] Action and the prosecution of the [Infringement] Action, bankruptcy proceedings, and enforcement proceedings, [defendant] has developed and continues to display spite, malice, ill-will, anger, and a desire for revenge to and against Plaintiff and Plaintiff’s lawyers. [Defendant] has made it clear, directly and indirectly, that he will never voluntarily pay this Judgment, or any part thereof. [Defendant] has engaged in campaigns of spite, malice, ill-will, anger, and a desire for revenge to and against Plaintiff and Plaintiff’s lawyers, the principals of Plaintiff, and other parties. [Defendant] has made it his life’s ambition to injure, harm, and terrorize everybody and anybody associated with the filing and prosecution of this action, including the filing of frivolous actions before the United States Patent & Trademark Office . . . and proceedings before the [federal district court].” The complaint also alleges: “[Plaintiff] caused the re-registration for the purpose of concealing his ownership, while on the other hand, having beneficial access to, use of, exploitation of, and beneficial interest in, these two domain names, which includes access through emails, promotional activities, and a continuing association with the domain names.”

In *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, the appellate court summarized the law to be applied in analyzing a claim that contains allegations pertaining to acts that are protected under the anti-SLAPP statute, as well as nonprotected acts: “When a [complaint] presents a mixed cause of action that involves protected and

¹ Defendant asserts plaintiff cannot establish the element of injury in fact because there is no evidence the two domain names have any value.

nonprotected activities, . . . the question presented is ‘whether the gravamen of the cause of action targets protected activity. [Citation.] If liability is not based on protected activity, the cause of action does not target the protected activity and is therefore not subject to the SLAPP statute. [Citations.]’ [Citation.] Stated differently, the question is whether the protected activity is merely an incidental part of the cause of action. [Citation.]” (*Id.* at p. 767.)

“[A]n alleged act is incidental to a claim, and incidental to any unprotected activity on which the claim is based, only if the act is not alleged to be the basis for liability.” (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1183.) However, allegations concerning acts that “could each be the sole and adequate basis for liability under the cause of action” are *not* incidental to the cause of action. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) In determining whether allegations pertaining to protected activity are incidental to a cause of action, courts have often considered whether such allegations constitute a *substantial* and/or *significant* part of the factual allegations underlying a claim. (See, e.g., *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125 [a “cause of action is vulnerable to a special motion to strike under the anti-SLAPP statute only if the protected conduct forms a *substantial part* of the factual basis for the claim” (italics added)]; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1288 [“allegations of protected conduct in the original intentional interference claim were not merely incidental to the allegations of unprotected conduct. They represent the *bulk* of the allegations underlying the cause of action” (italics added)].)

As we have already discussed, the complaint itself seeks to unwind the fraudulent transfer of ownership as to the two domain names. Defendant concedes the allegations quoted above do not form the majority of the allegations in the complaint. Noticeably absent are any specific references to the content that defendant has posted on his two websites. To the extent they address defendant’s expressive conduct at all, the allegations go to the element of intent, which plaintiff must set forth in order to state its fraudulent conveyance claim. (See Civ. Code, § 3439.04, subd. (a)(1).) They also

address one of the factors relevant to determining intent, specifically, whether the debtor retained possession or control of the property transferred after the transfer. (Civ. Code, § 3439.04, subd. (b)(2).) Thus, the challenged conduct at issue in the complaint, the allegedly fraudulent transfer of the domain names to avoid collection, only incidentally implicates defendant's right of expression.

DISPOSITION

The order is affirmed.

Dondero, J.

We concur:

Humes, P.J.

Banke, J.