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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENNETH A. JOWDY,

Plaintiff and Appellant,

v.

SERGEI GONCHAR,

Defendant and Respondent.

B231242

(Los Angeles County
Super. Ct. No. BC436632)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Jr., Judge. Reversed and remanded.

Caldwell Leslie & Proctor, Robyn C. Crowther, Michael D. Roth and Arwen R. Johnson for Plaintiff and Appellant.

Jacobson Russell Saltz & Fingerman, Michael J. Saltz, Sunny S. Nassim and Colby A. Petersen for Defendant and Respondent.

Plaintiff Kenneth Jowdy appeals from an order granting a special motion to strike brought under Code of Civil Procedure section 425.16, referred to as the anti-SLAPP (strategic lawsuit against public participation) statute. Jowdy sued Sergei Gonchar for malicious prosecution arising from a lawsuit Gonchar and several other investors filed against Jowdy concerning their investment in Jowdy's real estate development projects. Gonchar filed a joinder to the special motion to strike filed by his attorney Ronald Richards. Gonchar concedes his joinder was improper because he did not seek affirmative relief. Although the parties address the merits of the trial court's order granting Richards' special motion to strike, we do not because, for better or for worse, Gonchar is not bound by that ruling. We therefore reverse and remand to the trial court for further proceedings.¹

BACKGROUND

1. *Allegations in Malicious Prosecution Complaint*²

Gonchar is a professional hockey player. Gonchar, through his financial adviser, Philip Kenner, invested in two real estate projects in Mexico that Jowdy intended to develop and manage. When Jowdy's relationship with Kenner soured, Kenner allegedly encouraged Gonchar and Kenner's other hockey player clients to hire Richards to sue Jowdy.

Richards filed two lawsuits on behalf of the hockey player investors, *de Vries, et al. v. Jowdy*, and *Nash, et al. v. Jowdy*. Gonchar was a plaintiff in both lawsuits, which were later consolidated. After Jowdy successfully filed a demurrer to the consolidated complaint (first amended consolidated complaint), Richards prepared an amended

¹ Gonchar moved this court for a summary reversal, but we deferred ruling on the motion. We deny the motion, but we limit our opinion to the procedural grounds addressed on appeal.

² Both parties' briefs cite to evidence presented by Gonchar's codefendants and Jowdy to support and oppose the special motions to strike. Since we conclude Gonchar did not properly join Richards' motion, we limit our factual recitation to the allegations in the malicious prosecution complaint.

complaint (second amended consolidated complaint), which generated another round of demurrers. Richards, however, filed a voluntary dismissal without prejudice of the entire action before the demurrer hearing.

2. *Special Motions to Strike*

Richards and two hockey players filed special motions to strike Jowdy's malicious prosecution complaint.³ Gonchar, in propria persona, filed a notice of joinder to Richards' motion. The joinder states: "Comes now Defendant Sergei Gonchar, pro per, and hereby files his joinder in co-defendant Richard's [*sic*] Special Motion to Strike Complaint Pursuant to Code of Civil Procedure Section 425.16"

The trial court granted Richards' motion, along with the two hockey players' motions, concluding the evidence Jowdy presented to defeat the motions did not show with a reasonably probability that he could prevail on his malicious prosecution complaint. The trial court reasoned that Jowdy could not establish the first element of a malicious prosecution claim, that is, a favorable termination of the hockey players' lawsuit. The court stated: "It's still a viable case. So I don't see how it's been established. And it is of course the plaintiff's burden to establish that there was this favorable termination, and all we have is really a voluntary dismissal, a declaration by counsel explaining the tactical reasons that he selected [*sic*] to dismiss at that time without prejudice. These tactical reasons are articulated and buttressed by other evidence for the court, and there is nothing really to rebut that other than asking the court to speculate. It's not a matter of weighing evidence. There is no evidence on the other side."

Thereafter, the trial court granted Gonchar's joinder. Jowdy timely appealed, challenging the trial court's order granting Gonchar's motion by "joinder."

³ Hockey players Jason Woolley and Glen Murray each filed a special motion to strike.

DISCUSSION

1. *Anti-SLAPP Motion*

We review de novo the legal question of whether the anti-SLAPP motion was properly granted. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) There is a two-step process for evaluating a special motion to strike. “ ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . 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.’ [Citation.]” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

The parties agree that Jowdy’s malicious prosecution action arises from protected activity. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) The dispositive issue presented in the anti-SLAPP motions was whether Jowdy demonstrated that his malicious prosecution complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence Jowdy submitted is credited. (*Id.* at p. 741.) Thus, to defeat the special motions to strike, Jowdy was required to present evidence of the three necessary elements of a malicious prosecution of a civil proceeding: The underlying action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in Jowdy’s favor; (2) was brought or continued without probable cause; and (3) was initiated with malice. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965-966.)

Jowdy contends that Gonchar’s joinder to the anti-SLAPP motion was a “nullity,” and the trial court should not have granted the joinder or the motion Gonchar joined because Jowdy established the hockey players’ lawsuit was terminated in his favor, and the trial court found Jowdy presented evidence to establish the probability of prevailing on the other two elements of his claim for malicious prosecution. We discuss each argument in turn.

2. *The Trial Court Improperly Granted Gonchar's Joinder*

Relying principally on *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382 (*Decker*), superseded by statute on other grounds as noted in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348-1349, Jowdy contends that Gonchar's joinder was procedurally defective because Gonchar did not seek affirmative relief. We agree.

Decker states that a joinder in an anti-SLAPP motion is not sufficient to place that party before the court in connection with the affirmative relief sought in a special motion to strike. (*Decker, supra*, 105 Cal.App.4th at pp. 1390-1391.) In *Decker*, the court held that a defendant lacked standing to appeal from an order denying a codefendant's anti-SLAPP motion because the defendant had not filed his own motion and had only joined in the codefendant's motion. (*Id.* at pp. 1390-1391.) The court explained: "The joinder is not in the form of a motion and does not present any evidence or argument. In the analogous situation of a motion for summary judgment, we concluded a notice of joinder does not alone constitute a motion. [Citation.] We hold the same is true for a special motion to strike under section 425.16." (*Id.* at p. 1391.) The court recognized that " 'standard practice' permits parties to join in each other's arguments" but noted that "joining in an argument is different from joining in a motion." (*Ibid.*) The court concluded that because the defendant did not file his own motion for relief, he was not bound, "for better or for worse," by the court's order, and thus had no standing to appeal. (*Ibid.*)

Barak v. The Quisenberry Law Firm (2006) 135 Cal.App.4th 654, 660-661, rejected the *Decker* court's summary judgment comparison. Unlike a moving party on a motion for summary judgment, which requires the presentation of evidence, no evidence is necessary to shift the burden to the plaintiff when opposing the special motion to strike. (*Id.* at p. 661.) According to the *Barak* court, joinder to a special motion to strike is proper if the joining party seeks affirmative relief. (*Ibid.*; see also *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 31, fn. 3.)

As Gonchar concedes, his joinder did not seek affirmative relief. The joinder is not sufficient to place Gonchar before the court. Like the improperly joined party in

Decker, Gonchar is not bound by the order granting Richards’ anti-SLAPP motion. We therefore reverse the trial court’s order granting Gonchar’s joinder to the special motion to strike.

3. *The Order Granting Gonchar’s Codefendants’ Anti-SLAPP Motion*

Although the parties recognize that Gonchar did not seek affirmative relief, both Jowdy and Gonchar present arguments as if they are bound – for better or for worse – by the order granting Gonchar’s codefendants’ special motions to strike. As we shall explain, we do not reach the merits of the trial court’s order.

a. *Jowdy Seeks a Reversal and Remand to Deny Gonchar’s Motion*

Although Jowdy refers to “Gonchar’s motion” throughout his briefs, Jowdy’s claims of error relate to his evidentiary showing to defeat the special motions to strike brought by Gonchar’s codefendants. Jowdy claims the trial court erred by applying a higher legal standard than is required under the anti-SLAPP statute, and in his opposition to the special motions to strike, he made a prima facie showing of facts, that if proved at trial, would establish all the elements of his malicious prosecution cause of action. As Jowdy notes, upon a prima facie showing of facts, the court cannot weigh the evidence, but must determine as a matter of law whether the evidence is sufficient to support a judgment in his favor. (*Taus v. Loftus, supra*, 40 Cal.4th at pp. 713-714.) A defendant, however, can defeat the plaintiff’s evidentiary showing by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, abrogated by statute on another point of law as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 545-550.)

Because Gonchar presented no evidence, the evidence upon which the trial court reached its conclusion was presented by other codefendants to show as a matter of law that Jowdy could not prevail.⁴ Jowdy, however, did not appeal from the order granting

⁴ Jowdy argues, for example, “[t]he evidence submitted by Gonchar’s codefendants to demonstrate the voluntary dismissal was ‘tactical’ did not defeat Jowdy’s showing as a matter of law and, at most, created an issue of fact that a jury should determine.” (Bold omitted.) Specifically, he states: “As set forth above, Gonchar did not introduce *any*

the codefendants' motions. Jowdy limited his appeal to the "Order Granting Special Motion to Strike brought by Defendant Sergei Gonchar by Joinder under Code of Civil Procedure Section 425.16." We cannot reach the merits of, in Jowdy's words, the "entire order," when Jowdy did not appeal from the order granting the motions properly before the court.

In crafting his arguments seeking a reversal and denial of "Gonchar's motion" on remand, Jowdy repeatedly refers to a motion that does not exist. Jowdy contends the trial court's only error in ruling on "Gonchar's motion" was its conclusion that the hockey players' lawsuit was not terminated in his favor, and if it had not erred, the court would have denied "Gonchar's motion" based upon its findings that he had established a *prima facie* showing of facts to support the other elements of his malicious prosecution claim. Jowdy's citation to the record does not support his understanding of the trial court's ruling. The court stated: "Now as to Gonchar, I'm also inclined to grant as to him. We don't have sufficient evidence really before the court dealing with the other issues in terms of probable cause or lack of malice. We don't have a declaration from Mr. Gonchar, but I think because the court has determined that there is insufficient evidence to establish on that first prong of the malicious prosecution . . . the court can also grant the special motion to strike as to Mr. Gonchar as to that first cause of action." We read the trial court's comments to show the absence of Gonchar's evidence, not the sufficiency of Jowdy's *prima facie* evidence. This *prima facie* evidence was offered in opposition to the codefendants' motions, which the trial court concluded as a matter of law did not establish the probability of prevailing on the merits.

Finally, Jowdy contends that this court must consider the merits because the trial court stated it intended to rule the same way in subsequent anti-SLAPP motions in this action. Jowdy, however, neglected to note that the trial court stated any ruling on a

affirmative evidence to defeat Jowdy's *prima facie* showing of favorable termination. . . . Nonetheless, the *post hoc* rationale of Gonchar's codefendants was belied by Jowdy's contemporaneous evidence to the contrary and, in any event, could not defeat Jowdy's showing as a matter of law. . . ."

subsequent anti-SLAPP motion not before it would be an impermissible “advisory opinion[.]” In any event, we do not rely on a trial court’s comments made from the bench during the course of a hearing addressing a motion that is not before it. (See *City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 54.)

In sum, because Gonchar concedes his joinder was not a proper motion to strike the malicious prosecution complaint, even upon our de novo review, we have no authority to deny Gonchar’s nonexistent motion.

b. *Gonchar Seeks a Reversal and an Order Granting the Motion*

Although Gonchar is not bound, for better or for worse, by the order granting his codefendants’ anti-SLAPP motions, Gonchar seeks to reap the benefits of the trial court’s order. We decline to reach his merits-based arguments presented on appeal.

DISPOSITION

The order granting Gonchar's special motion to strike under Code of Civil Procedure section 425.16 is reversed on the ground that the joinder was insufficient to place that party before the court in connection with the affirmative relief sought. The matter is remanded to the trial court for further proceedings consistent with the views expressed herein. No costs are awarded on appeal.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.