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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL CHOBANIAN,

Plaintiff and Appellant,

v.

SCOTT KOHN et al.,

Defendants and Respondents.

B257020

(Los Angeles County
Super. Ct. No. BC497911)

APPEAL from an order of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Affirmed.

Law Offices of Vip Bhola, Vip Bhola for Plaintiff and Appellant.

The Yarnell Firm, Delores A. Yarnall, Law Office of Paul P. Young, Paul P. Young, Joseph Chora, Bryan K. Theis and Duane L. Bartsch for Defendants and Respondents.

Plaintiff and appellant Michael Chobanian appeals the trial court's order striking his complaint against defendants Scott Kohn (Kohn) and Kohn's attorneys, Paul Young, Eric Gassman and Brian Condon, pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute. In plaintiff's briefs on appeal, plaintiff does not dispute the merits of defendants' anti-SLAPP motion, but reargues an earlier ruling concerning an amendment to his complaint. We conclude that the trial court properly granted the motion to strike, and so affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND¹

In May 2000, a judgment in favor of Kohn's predecessor-in-interest was entered against Susan Chobanian in the principal amount of \$266,865.71. An order granting Kohn's motion for summary judgment to renew the original judgment was entered on March 21, 2011. (*Kohn v. Medical Clinic & Surgical Specialties of Glendale, Inc.* (Super. Ct. L.A. County, 2011, No. BC441260).) The amount of the principal and interest on the judgment had grown to over \$550,000. A writ of execution was issued on October 17, 2012.

Kohn, as Susan's judgment creditor, sought to levy against a checking account maintained at a Glendale branch of Bank of America (the Bank Account) under the name of Mary Chobanian, plaintiff's wife and Susan's mother,² in partial satisfaction of the judgment. In the collection action, Kohn presented evidence that Mary had died in April 2004, and that Susan had used the Bank Account to hold her own funds and to hide the funds from Kohn. The trial court determined that Kohn had established that the Bank

¹ We take judicial notice of the documents listed in defendants' request for judicial notice, consisting of documents filed in Los Angeles Superior Court Case Nos. EC017568 and BC441260. (Evid. Code, § 452.)

² For the sake of clarity, we refer to Mary and Susan Chobanian by their given names. No disrespect is intended.

Account contained Susan's funds, and issued an order of levy against the Bank Account. Bank of America paid the account balance of approximately \$440,000 to Kohn.

In December 2012, plaintiff filed the instant action against Kohn for conversion and injunctive and declaratory relief. Plaintiff's claim was based on the allegation that the funds in the Bank Account belonged to him as Mary's surviving spouse, and that the order of levy was based on false representations contained in Kohn's declaration.

Trial was initially set for January 27, 2014. On January 7, 2014, plaintiff filed an ex parte application for an order shortening time for plaintiff to secure leave to amend his complaint. Plaintiff's proposed first amended complaint, attached as an exhibit to the ex parte application, added Kohn's attorneys as defendants and added causes of action against all defendants for abuse of process and unfair business practices, based upon the allegation that Kohn and his attorneys obtained the writ of execution used to levy on the Bank Account by misrepresenting the existence of a valid judgment. At the hearing on the application, the court continued the trial date to June 16, 2014, and set the ex parte application for hearing on February 27, 2014. On that date, the trial court entered the following minute order: "The Court GRANTS the filing of a first amended complaint which is to be served and filed within 20 days as a separate pleading." The attorney defendants accepted service of the amended complaint at the hearing.

The attorney defendants, on behalf of Kohn and themselves, filed motions to strike the amended complaint pursuant to Code of Civil Procedure section 425.16. The motions asserted that the claims of the first amended complaint were based solely on defendants' litigation-related conduct, that is, their use of judicial procedures to collect on a judgment. As such, they were protected by the litigation privilege. (Civ. Code, § 47.) In addition, defendants contended that plaintiff had failed to establish a prima facie case of his ownership of the Bank Account. The attorney defendants therefore sought the striking of the complaint, and an award of attorney fees.

Plaintiff did not oppose the anti-SLAPP motion on the merits, but rather argued that the first amended complaint was not "operative," that the attorney defendants had not

been added as defendants, and that the original complaint against Kohn, based on his alleged conversion of plaintiff's funds, was not subject to an anti-SLAPP motion.³ Instead, plaintiff sought to re-litigate the issue of whether the first amended complaint was the operative complaint in the action. At the April 11, 2014, hearing on the anti-SLAPP motions, the trial court declined to consider that argument, but with defendants' concurrence, continued the hearing to permit plaintiff to oppose the motion on the merits.

On April 25, 2014, plaintiff filed an opposition to defendants' anti-SLAPP motions. Plaintiff reiterated his arguments that the original complaint had not been amended and the anti-SLAPP motion was therefore not properly before the court. Citing *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1397, plaintiff also contended that he had made a prima facie showing that his claim had at least the "minimal merit" required to defeat an anti-SLAPP motion. At the continued hearing on May 22, 2014, the trial court granted the anti-SLAPP motions and awarded defendants their attorney's fees.

Plaintiff timely appealed the trial court's order striking his complaint.

DISCUSSION

As we explained in *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255 (*Neville*), "A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional

³ The basis for this argument is convoluted and unnecessary to our resolution of this appeal. Suffice it to say that when, in response to plaintiff's request, the trial court granted the filing of his amended complaint, it became the operative complaint in the action, a conclusion confirmed by Presiding Judge Buckley on April 1. Consequently, in order to avoid the striking of his complaint, plaintiff was obliged to respond to the anti-SLAPP motions on the merits.

rights. [Citation.]’ (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) Pursuant to section 425.16, subdivision (b)(1), a litigant may move to strike “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue. . . .’ Such acts include ‘any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body. . . .’ (§ 425.16, subd. (e)(2).) ‘Thus, statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]’ (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35 (*Rohde*); see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*).)’ (*Neville, supra*, 160 Cal.App.4th at p. 1261.)

“To apply the anti-SLAPP statute, courts engage in a two-step process. “First, the court decides whether the [moving party] 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 [complaining party] has demonstrated a probability of prevailing on the claim.” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 703, quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) In analyzing whether the moving party has met its burden of showing that the suit arises from protected activity, the court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).)’ (*Neville, supra*, 160 Cal.App.4th at pp. 1261-1262.)

“An order granting a special motion to strike under section 425.16 is appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) We review the trial court’s order de novo. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79.) We do not weigh the evidence; rather, we accept as true evidence favorable to plaintiff, and evaluate evidence favorable to defendant to determine whether it defeats plaintiff’s claim as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3;

accord, *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.)” (*Neville*, *supra*, at p. 1262.)

Section 425.16, subdivision (e)(2) protects “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body. . . .” (§ 425.16, subd. (e)(2).) Thus, statements made in litigation, or in connection with litigation, are expressly protected by the anti-SLAPP statute.

Here, the specific acts of wrongdoing alleged in the operative complaint in support of plaintiff’s conversion claim constituted protected activity under the anti-SLAPP statute. For example, the complaint alleges that “Defendant through his counsel filed an Ex Parte Application for approval of affidavit of identity”; “Defendants knew of or should have known that the account levied against belonged to [Plaintiff]”; after “Plaintiff’s counsel contacted Defendant’s counsel to inform him that the funds taken via the levy [] did not belong to Susan Chobanian but belonged to Plaintiff[,] Defendant took no action to stop the transfer of funds and they were transferred to Defendant’s possession and control on December 12, 2012.” Thus, the wrongful conduct alleged in support of the conversion claim consisted of the filing an application to designate “Mary Chobanian” as Susan’s alias and levying on Susan’s asset, the Bank Account.

Similarly, the cause of action for declaratory relief alleged the controversy requiring declaratory relief as follows: “An actual controversy now exists between Plaintiff, Defendants and Does 1-20, inclusive, concerning their respective rights and duties. Specifically, Plaintiff contends that Defendants and each of them presented false information to the Court when they filed their Ex Parte Application for Approval of Affidavit of Identity in order to attach[] Plaintiff’s bank account 01626-12905 and the wrongful taking of his \$440,636.62.” This alleged wrongful conduct consists entirely of oral or written statements made in connection with a judicial proceeding, which conduct is expressly protected by the anti-SLAPP statute.

In the amended complaint's additional allegations against Kohn and the attorney defendants, plaintiff added the following factual allegations in support of his cause of action for abuse of process: Kohn purchased an assignment of a judgment, filed an action to renew the judgment, obtained an order for summary judgment and, based on that order, obtained "an order to levy upon the Bank of America account. . . ." The abuse of process claim further alleged that the attorney defendants "controlled all the legal filings and made all the decisions as to levy against the account," and that "[a]t the time Defendant's counsel represented to the Court that the Bank of America account, which was still in the name of Plaintiff's deceased spouse Mary Chobanian, belonged to Dr. Susan Chobanian, they knew that they did not have an actual judgment. . . ." The fifth cause of action for unfair business practices alleged that the foregoing conduct "constitutes unlawful, unfair and/or fraudulent business practices" in violation of Business and Professions Code section 17200. Again, the wrongful conduct alleged in support of the abuse of process and unfair business practices claims consisted solely of defendants' litigation-related activities, which conduct falls within the protection of the anti-SLAPP statute.

Having determined that defendants made their threshold showing that the challenged causes of action arose from protected activity, we must next determine whether plaintiff demonstrated a probability of prevailing on his claims, for the anti-SLAPP motion must be denied "if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff. [Citation.]" (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 356.) Whether the plaintiff established a prima facie case is a question of law. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

Conversion is the "wrongful exercise of dominion over the property of another." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) "The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3)

damages.” (*Ibid.*) The first amended complaint alleges that plaintiff is the owner of the Bank Account. However, the complaint describes the account as standing in the name of plaintiff’s wife Mary, and subject to a power of attorney given to his daughter Susan. Plaintiff then alleges that his wife died intestate, resulting in his ownership of the account. In order to establish a prima facie case of conversion, plaintiff was required to present “competent and admissible evidence.” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236.) Plaintiff failed to do so, instead relying on his unsupported allegations of ownership.

Moreover, defendants submitted evidence to show that Susan maintained exclusive control over the Bank Account, and used the account to hide assets from her creditors. This evidence included the following: Susan’s concealment, during a debtor’s exam, that her mother was deceased by referring to Mary in the present tense; Susan’s claim that the account checks made payable to her were gifts from her mother, although they were issued long after Mary’s death; and deposits into and out of the account were traced to Susan’s medical practice.

In short, plaintiff produced no evidence to establish a prima facie case for conversion.

Plaintiff’s showing in opposition to the motions to strike was similarly deficient with respect to the abuse of process and unfair business practices claims brought against Kohn and the attorney defendants in the amended complaint. “Abuse of process” arises when one uses the court’s process “for a purpose other than that for which the process was designed.” (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1522.) Thus, in order to establish a prima facie case for abuse of process, plaintiff was required to provide evidence that defendants had “an ulterior motive in using the process,” and committed a “willful act in the use of the process,” one that was “not proper in the regular conduct of the proceedings.” (*Ibid.*) This plaintiff failed to do. To the contrary, the first amended complaint expressly alleges that defendants used the process of the courts to obtain an order to levy on the Bank Account. Using judicial

procedures to satisfy a judgment can hardly be deemed “not proper in the regular conduct of the proceedings,” and involves no ulterior motive. Again, plaintiff failed to meet his burden of producing evidence to establish a prima facie case for abuse of process. Because the unfair business practices claim was based on the same conduct of defendants, it too was properly stricken under Code of Civil Procedure section 425.16.⁴

DISPOSITION

The order striking plaintiff’s first amended complaint is affirmed. Plaintiff is to bear costs on appeal.

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KIRSCHNER, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

⁴ Given our disposition of this appeal, we deny defendants’ motion to dismiss and request for sanctions.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.