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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THOMAS M. HALL, Plaintiff and Appellant, v. YAHOO! INC., Defendant and Respondent.	B270056 (Los Angeles County Super. Ct. No. BC556269)

APPEAL from an order of the Superior Court of Los Angeles County. Robert Hess, Judge. Affirmed.

Law Office of Thomas M. Hall and Thomas M. Hall for Plaintiff and Appellant.

Kilpatrick Townsend & Stockton, Dennis L. Wilson and Emil W. Herich for Defendant and Respondent.

Plaintiff and appellant Thomas M. Hall (Hall) appeals from an order granting a special motion to strike, pursuant to Code of Civil Procedure section 425.16[1] (anti-SLAPP motion), to all but one cause of action asserted against defendant and respondent Yahoo! Inc. (Yahoo) and sustaining, without leave to amend, Yahoo's demurrer to the remaining cause of action in Hall's first amended complaint.[2] We affirm the trial court's order.

BACKGROUND

The prior harassment action

In a prior civil lawsuit (*Hall v. Lund,* Los Angeles County Super. Ct. No. BS147482), Hall sought a restraining order against Christopher Lund (Lund), a co-defendant in the instant action, for sending harassing and threatening emails and for posting defamatory statements about Hall on the internet. Hall filed a declaration in that action stating that he "write[s] articles on law, social issues and politics," that his writings have been published in the Los Angeles Daily Journal and in an online magazine, and that he "participate[s] in online discussions of social and political issues." Hall further declared that his writings "have been subject to substantial criticism, particularly from individuals who espouse white supremacist and anti-government views."

Hall identified Lund as a white supremacist who disagreed with Hall's published political views by sending him nearly 700 threatening and disparaging emails. Hall also identified two others who are also co-defendants in the instant action,

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[1] All further statutory references are to the Code of Civil Procedure, unless stated otherwise.

[2] Yahoo also filed a motion to dismiss this appeal. After consideration of the motion, Hall's opposition and Yahoo's reply, we deny the motion and proceed with the appeal.

glendahjessop@hotmail.com (Jessop) and paul_dunk@msn.com or (Dunk)[3], as white supremacists who were assisting Lund in an effort to harm him by providing Lund with Hall's home address and a photograph of Hall. Hall was granted a restraining order against Lund in that action.

The instant lawsuit

On August 29 2014, Hall filed the instant action against Lund, Jessop, and Dunk for intentional infliction of emotional distress, libel, false light invasion of privacy, and invasion of privacy. In addition to those named or identified in the previous harassment action, Hall named as a defendant derHoaxster@gmail.com (derHoaxster), and alleged that derHoaxster had "published multiple statements disparaging Plaintiff as dishonest in his law practice and in his personal life." Hall also named Yahoo as a defendant, based on allegations that Yahoo had published or republished threatening and defamatory statements made by Lund, Jessop, Dunk, and derHoaxster.

Yahoo demurred to the complaint on the grounds that section 230 of the Communications Decency Act (47 U.S.C. § 230, "the CDA") immunized interactive computer service providers such as Yahoo from liability arising out of the publication of content or information created by a third party. Hall argued in response that his complaint could be amended to allege that Yahoo was "the content provider, rather than merely a shielded republisher" of the objectionable statements.

The trial court sustained the demurrer with leave to amend, but made clear that Hall's amended complaint would have to include specific facts showing why Yahoo was not shielded by the CDA: "Title 47 [United States Code] Section 230 provides protection against this suit, and plaintiff must therefore

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[3] Dunk is also associated with the email address "pddunk@yahoo.com."

plead specific facts which show that what Yahoo itself did is not protected."

On July 17, 2015, Hall filed a first amended complaint (FAC) that included the same causes of action alleged in his initial complaint as well as a new fifth cause of action against Yahoo for intentional interference with contract. In the new cause of action, Hall alleged that Yahoo had flooded his America Online (AOL) email account with more than 2000 emails denigrating AOL's services. Hall's FAC also alleged that Yahoo was not shielded by the CDA because Yahoo had failed to identify the users of the screen names who had posted defamatory statements about him, and that Yahoo itself was the "content provider" of those statements.

On August 20, 2014, Yahoo filed an anti-SLAPP motion and a demurrer to the FAC. Yahoo argued that Hall's claims came within the ambit of the anti-SLAPP statute because they were based on statements that concerned a public issue and were made in a public forum, namely, Yahoo's internet forums and chat rooms. Yahoo further argued that Hall had no probability of prevailing on his claims because the CDA immunized Yahoo from liability for publication of content provided by third parties.

In its demurrer, Yahoo argued that Hall's newly added cause of action for intentional interference with contract should be dismissed because it exceeded the scope of the trial court's order granting Hall leave to amend and because it failed to state a claim for relief.

Yahoo submitted in support of its anti-SLAPP motion and demurrer the declaration of its Senior Supervisor of Legal Services, Michele Chan, who stated that Yahoo itself does not originate any of the content posted by users on Yahoo's electronic forums, bulletin boards, chat rooms, community calendars, and other interactive areas of service, nor does Yahoo authorize users

to post any content on any of these sites on Yahoo's behalf. Chan further stated in her declaration that Yahoo had never used the email addresses "pddunk@yahoo.com," "glendahjessop@hotmail.com," or "derhoaxter@gmail.com" to originate content or to post content on its electronic forums, bulletin boards, chat rooms, community calendars, and other areas of interactive service. Yahoo also submitted a request that the trial court take judicial notice of Hall's filings in his previous civil harassment action.

Hall opposed the demurrer and anti-SLAPP motion, arguing that Yahoo was not shielded from liability under the CDA because it had not provided, in response to Hall's discovery requests, telephone numbers for the users of the screen names "pddunk@yahoo.com" and "derHoaxster@yahoo.com." Hall further argued that a jury could reasonably understand Chan's declaration "to establish that the posts of 'Paul Dunk' and 'derHoaxster' were the creations of Defendant Yahoo! and not the product of any third party." Hall also claimed that he was not a public figure for the purpose of any of Yahoo's allegedly tortious actions and that he would prevail because the defamatory statements about him were all false.

At a November 25, 2015 hearing, the trial court granted the anti-SLAPP motion as to all causes of action in the FAC except the fifth cause of action for intentional interference of contract. As to that cause of action, the trial court sustained the demurrer without leave to amend on the grounds that Hall failed to obtain leave to add a new cause of action and failed to allege facts sufficient to state a claim for intentional interference with contract.

This appeal followed.

DISCUSSION

I. Anti-SLAPP motion

A. Applicable law and standard of review

Section 425.16 was enacted "to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]" (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315 (*Club Members*).) As relevant here, subdivision (b)(1) of section 425.16 provides: "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 Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Determining whether section 425.16 bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action "aris[es] from any act . . . in furtherance of the [moving party's] right of petition or free speech." (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.) The scope of the statute is broad. In authorizing the filing of a special motion to strike, the Legislature "expressly provided that section 425.16 should 'be construed broadly.' [Citations.]" (*Club Members, supra*, 45 Cal.4th at p. 315.)

If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a "probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) In order to demonstrate a probability of prevailing, a party

opposing a special motion to strike under section 425.16 "'"must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. omitted (*Jarrow*).) "'The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.]"' (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679 (*Stewart*).)

A trial court's order granting or denying a special motion to strike under section 425.16 is reviewed de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

B. Timeliness of motion

Hall argued in his reply brief on appeal that the trial court lacked jurisdiction to rule on Yahoo's anti-SLAPP motion because the motion was untimely filed, without permission to do so, more than 60 days after service of Hall's initial complaint. An argument raised for the first time in a reply brief is generally forfeited on appeal. (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 388-389.) Even absent such forfeiture, the argument is meritless.

Section 425.16, subdivision (f) provides that an anti-SLAPP motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Hall relies on *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, review granted March 22, 2107, S239777, in support of his argument that the anti-SLAPP motion was untimely because it was filed more than 60 days after service of his original complaint, rather than the amended complaint. That case, however, is no longer valid authority, in light of the Supreme

Court's grant of review. Pending a contrary determination by the Supreme Court, existing case authority holds that an anti-SLAPP motion may be timely filed within 60 days of an amended complaint. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840-841.) Yahoo's anti-SLAPP motion, filed on August 20, 2015, was directed to Hall's FAC, which Hall served by mail on July 16, 2015. The motion was timely filed. (§ 425.16, subd. (f); *Yu*, at p. 318; *Lam*, at pp. 840-841.)

C. Arising from protected activity

Hall does not dispute that his claims against Yahoo arise from activity that is protected under the anti-SLAPP statute.[4] We therefore turn to the second prong of the analysis under the statute -- whether Hall has met his burden of demonstrating a probability of prevailing on the merits. (*Navellier, supra,* 29 Cal.4th at p. 88.)

D. Probability of prevailing

Hall contends the trial court erred as a matter of law by concluding that the CDA (47 U.S.C. § 230), immunizes Yahoo from liability for all causes of action asserted against it except the intentional interference with contract claim. He maintains that Yahoo does not qualify for immunity under the CDA because it failed to identify the persons who made the allegedly defamatory statements about him.

Section 230(c)(1) of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher

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[4] Because Hall does not challenge the trial court's determination that Yahoo met its burden of establishing that the claims asserted against it arise from activity that is protected under the anti-SLAPP statute, we need not address his argument that the trial court erred by finding him to be a "public figure" for purposes of analyzing the claims in the FAC.

or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (§ 230(f)(3).) Section 230(e)(3) of the CDA provides: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).)

The CDA has "been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 (*Barrett*).) The statute "'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, [section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.' [Citation.]" (*Barrett*, at p. 43, quoting *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330.)

A defendant claiming immunity under the CDA must establish three elements: (1) it is a provider or user of an interactive computer service; (2) the cause of action treats the defendant as a publisher or speaker of information; and (3) the information at issue is provided by another information content provider. (*Gentry v. eBay, Inc*. (2002) 99 Cal.App.4th 816, 830.)

Hall does not dispute that Yahoo is a provider of an interactive computer service, or that his claims against Yahoo treat Yahoo as the publisher of the challenged emails and internet posts. The sole issue is whether the subject statements were provided by another person or entity.

Yahoo provided evidence that it was not responsible, in whole or in part, for the creation or development of the content of the emails and internet posts attributed to the users of the screen names "pddunk@yahoo.com," "glendahjessop@hotmail.com," and "derhoaxter@yahoo.com." Yahoo submitted in support of its anti-SLAPP motion the declaration of its Senior Supervisor of Legal Services, Chan, who stated that Yahoo itself does not originate any of the content posted by users on Yahoo's electronic forums, bulletin boards, chat rooms, community calendars, and other interactive areas of service, nor does Yahoo authorize users to post any content on any of these sites on Yahoo's behalf. Chan further stated in her declaration that Yahoo has never used the email addresses "pddunk@yahoo.com," "glendahjessop@hotmail.com," or "derhoaxter@yahoo.com" to originate content or to post content on Yahoo's electronic forums, bulletin boards, chat rooms, community calendars, or other interactive areas of service.

Hall did not object to Chan's declaration, nor did he submit any evidence to contradict the statements in her declaration. Instead, he argued that Yahoo had failed to establish immunity under the CDA because it had not provided the names, addresses, telephone numbers, or other identifying information about the users of the screen names "pddunk@yahoo.com" and "derHoaxster@yahoo.com."

In order to demonstrate a probability of prevailing, a party opposing an anti-SLAPP motion ""must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Jarrow, supra,* 31 Cal.4th at p. 741, fn. omitted.) "'The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.]'" (*Stewart, supra*, 181 Cal.App.4th

at p. 679.) Hall presented no evidence whatsoever to support his claims and therefore failed to meet his burden of demonstrating a probability of prevailing on those claims.

Hall's argument that Yahoo was required to identify the persons who posted the objectionable content by providing the names, addresses, telephone numbers, or other identifying information for such persons is legally unsupported. The CDA contains no such requirement, and Hall cites no authority that construes the statute to impose such a requirement. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790 (*Delfino*), a case on which Hall relies, undermines rather than supports his position. The court in *Delfino* concluded that because "there was no evidence that Agilent [the interactive computer service provider] played any role whatsoever in 'the creation or development' of" the objectionable content that was the subject of the action, it clearly satisfied the third element required for a finding of CDA immunity. (*Id.* at p. 807.) Here, there was undisputed evidence that Yahoo was not responsible, in whole or in part, for the content of the emails and posts that are the subject of Hall's claims. The trial court accordingly did not err by granting the anti-SLAPP motion.

II. Demurrer

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action

under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

"Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. [Citation.]" (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 (*Harris).*) Under these circumstances, "such granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained." (*People ex rel. Dept. of Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785-786.) A "plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. [Citation.]" (*Harris, supra*, at p. 1023.) An amended complaint that exceeds the scope of an order granting leave to amend may be stricken by a trial court in its own discretion or upon a motion to strike by the opposing party. (§§ 435, 436.)

To obtain leave of court to add new causes of action, a noticed motion is generally required. (§ 473, subd. (a)(1).) A motion for leave to amend must be supported by a declaration specifying the effect of the amendment, why the amendment is necessary and proper, when the facts giving rise to the amended allegations were discovered, and reasons why the request for

amendment was not made earlier. (Cal. Rules of Court, rule 3.1324.)

The trial court's order sustaining the demurrer to Hall's initial complaint accorded Hall leave to amend to "plead specific facts which show why what Yahoo itself did is not protected" under the CDA. Hall's FAC included an entirely new fifth cause of action for intentional interference with his AOL account based on the allegation that Yahoo had flooded that account with emails making false claims about AOL's email service. The fifth cause of action for intentional interference with contract exceeded the scope of the trial court's order granting Hall leave to amend. The trial court did not err by sustaining the demurrer to the fifth cause of action on that basis. (*Harris, supra,* 185 Cal.App.4th at p. 1023.)

Hall's opening appellate brief fails to adequately address the trial court's second basis for sustaining Yahoo's demurrer to the fifth cause of action -- failure to state a claim for relief for intentional interference with contract. In order to state a cause of action for intentional interference with contract, a "plaintiff must allege that (1) he had a valid and existing contract; (2) *the defendant had knowledge of the contract and intended to induce its breach*; (3) the contract was in fact breached by the contracting party; (4) *the breach was caused by the defendants' unjustified or wrongful conduct*; and (5) the plaintiff has suffered damage. [Citations.]" (*Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 995 (*Dryden*).)

Hall's fifth cause of action alleges that a flood of emails from Yahoo disrupted and interfered with his email communications and with his contract with AOL. It does not does not allege, however, that Yahoo acted with the intent to induce AOL to breach its contract with Hall, nor does it allege that the contract was in fact breached by AOL. The allegations

fail to state a claim for intentional interference with contract, and the trial court accordingly did not err by sustaining the demurrer to that claim. (*Dryden, supra*, 65 Cal.App.3d at p. 995.)

Hall has not explained how he can further amend the first amended complaint to state a claim for intentional interference with contract and accordingly has not demonstrated any error by the trial court in sustaining the demurrer without leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

DISPOSITION

The order granting the anti-SLAPP motion and sustaining the demurrer to the first amended complaint without leave to amend is affirmed. Yahoo is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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