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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD HAMP, SR., et al.,

Plaintiffs and Appellants,

v.

HARRISON PATTERSON O'CONNOR &
KINKEAD, LLP et al.,

Defendants and Respondents.

D061276

(Super. Ct. No. 37-2011-00054272-
CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,

Timothy B. Taylor, Judge. Reversed.

INTRODUCTION

Richard Hamp, Sr., (Hamp) sued Harrison Patterson O'Connor & Kinkead, LLP, its successor Harrison Patterson & O'Connor, LLP, and Harry W. Harrison (collectively Harrison) for alleged deficiencies in Harrison's representation of Hamp in an employment

action.¹ Harrison moved to strike Hamp's complaint under Code of Civil Procedure section 425.16,² commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn 1.) The trial court granted the motion, finding the anti-SLAPP statute applied because Hamp based his complaint on Harrison's protected petitioning activity and Hamp failed to establish a probability of prevailing.

Hamp appeals, contending the anti-SLAPP statute does not apply to his complaint because he based it on Harrison's incompetent representation of Hamp's interests in the employment action, not on Harrison's protected petitioning activity. Even if the anti-SLAPP statute does apply to his complaint, he contends he established a probability of prevailing on the merits. We need not decide Hamp's second contention because we agree with his first one and reverse the judgment.

BACKGROUND

Hamp worked as a ready mix concrete driver for Hanson Aggregates Pacific Southwest, Inc. (Hanson). In July 2004 Hamp fell at work and injured his back. He filed a workers' compensation claim and Hanson placed him on a leave of absence. In November 2006, Hanson's workers' compensation insurance company notified Hanson

¹ Hamp's wife also sued Harrison; however, the record does not show she has any distinct claims. Her only role in this case appears to be as "co-counsel." Where appropriate, our references to Hamp include both Hamp and his wife.

² Further statutory references are also to the Code of Civil Procedure unless otherwise stated.

that Hamp's condition was permanent and stationary and he had permanent work restrictions precluding him from performing heavy lifting or repeated bending or stooping. Hanson discharged Hamp two weeks later.

Hamp subsequently hired Harrison to represent him in an employment action against Hanson. The employment action asserted causes of action for wrongful termination, employment discrimination, failure to provide reasonable accommodation, harassment, and intentional infliction of emotional distress.

During the discovery phase of the employment action, Hanson produced three job descriptions purportedly for Hamp's position at Hanson. Hanson produced the first and second job descriptions in March 2009. The first job description stated it was for a ready mix driver position at Hanson's parent company, Hanson Aggregates West Region (ready mix driver 1 position). The second job description stated it was for a ready mix driver position at Hanson (ready mix driver 2 position). Both of these job descriptions were prepared by the same person. Neither indicates its preparation or effective dates.

Hanson produced the third job description in April 2009. The third job description was for a concrete mixer truck driver position at a company referred to as Hanson Aggregates Pacific Southwest Region (concrete mixer driver position). The job description does not identify its preparer; however, it states it was prepared in March 1993 and updated in April 1999, December 2001, and July 2005.

The two ready mix driver job descriptions are virtually identical. They indicate the physical demands of a ready mix driver include regular stooping, crouching, and lifting or moving up to 50 pounds. The concrete mixer job description is in a different

format and indicates the physical demands of a concrete mixer driver include zero to one hour of bending over, crawling, and crouching; one to two hours of lifting 51 to 75 pounds; zero to one hour of lifting 76 to 100 pounds; and zero to one hours of lifting over 100 pounds.

The same month it produced the concrete mixer driver job description, Hanson moved for summary judgment or, alternatively, summary adjudication of Hamp's claims. Hanson's separate statement of undisputed facts included the statement that Hamp's job duties "required regularly lifting and/or carrying approximately 50 pounds (and occasionally up to 100 pounds), bending, stooping, or crouching" The evidence Hanson submitted in support of this statement included the concrete mixer driver job description. Harrison submitted a response on Hamp's behalf indicating the statement was "undisputed."

Hanson's separate statement also included the statement that Hanson could not accommodate Hamp's work restrictions to allow him to perform his former job. The response Harrison submitted on Hamp's behalf indicated this point was "disputed." Nonetheless, it does not appear Harrison submitted any evidence indicating how Hanson might have reasonably accommodated Hamp's work restrictions. Rather, Harrison's basis for disputing this point was that "Hanson never attempted to accommodate [Hamp] prior to his termination."

The trial court granted summary adjudication of Hamp's claims for harassment, intentional infliction of emotional distress, and punitive damages, finding Hamp's allegations were insufficient to support claims for harassment and punitive damages, and

the facts did not show Hanson engaged in outrageous conduct or that Hamp suffered severe emotional distress. The trial court denied summary adjudication of Hamp's claims for employment discrimination, failure to reasonably accommodate, and wrongful termination. As to these claims, the trial court found that, although there was no dispute Hamp could not perform his former job and there were no reasonable accommodations Hanson could make to allow him to perform his former job, Hanson had not established Hamp could not perform any other available job.

After a failed settlement attempt, Harrison withdrew from representing Hamp in May 2010 and Hamp obtained new counsel. Hanson again moved for summary judgment on Hamp's remaining claims and its separate statement of undisputed facts again included the statement that Hamp's job duties "required regularly lifting and/or carrying approximately 50 pounds (and occasionally up to 100 pounds), bending, stooping or crouching" As part of Hanson's supporting evidence for this statement, Hanson referenced the response Harrison previously submitted on Hamp's behalf indicating this statement was undisputed. Notwithstanding this prior admission, Hamp's new counsel disputed the point and submitted evidence showing the lifting requirement for Hamp's former job could be reduced by using alternative, lighter equipment.

Hanson's separate statement also again included the statement that Hanson could not accommodate Hamp's work restrictions to allow him to perform his former job. Like Harrison, Hamp's new counsel disputed this point on Hamp's behalf. Unlike Harrison, it appears Hamp's new counsel supplied evidence Hanson failed to or refused to discuss a specific accommodation—the use of alternative, lighter equipment.

In August 2010 the trial court granted Hanson's motion, finding Hamp had not established he could perform any of the alternative jobs open at the time Hanson discharged him. The trial court's ruling did not address the dispute over whether Hamp could have performed his former job with a reasonable accommodation, suggesting the trial court may have regarded the matter resolved by its ruling on Hanson's first summary judgment motion.

In May 2011 Hamp filed the instant action with causes of action for breach of fiduciary duty, attorney malpractice, and intrinsic or extrinsic fraud upon the trial court. Although filled with dramatic and hyperbolic language, the complaint essentially alleges the concrete mixer driver job description was "fraudulent"³ and Harrison intentionally or negligently allowed Hanson to use the job description without challenge and to Hamp's detriment in the employment action, including during the deposition of Hamp's treating physician and in the first summary judgment motion.

Harrison moved to strike Hamp's complaint under the anti-SLAPP statute. The trial court granted the motion, finding Hamp's claims arose from petitioning activity and Hamp had not demonstrated a probability of prevailing on his claims.

³ In later papers filed with the court, Hamp clarified "fraudulent" meant the job description had not been approved by and was not on file with his union.

DISCUSSION

Hamp contends the trial court erred in granting the motion as the anti-SLAPP statute does not apply to his claims against Harrison because the claims are for attorney malpractice, not protected petitioning activity. We agree.⁴

"Section 425.16, subdivision (b)(1), 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.' The analysis of an anti-SLAPP motion thus involves two steps. First, the court decides whether the defendant has made a threshold showing that the

⁴ Harrison argues we should not decide this issue because Hamp did not raise it below. However, we are satisfied Hamp adequately preserved the issue for appeal. Hamp's opposition papers below specifically argued Harrison's motion to strike was improper because "Defendants are (or were) not engaged in 'protected free speech', but were, in point of *FACT*, obliged *under contract*, to protect and defend Plaintiff by professionally and effectively representing Plaintiff's interests. All speech under such representation and all work product becomes the property of Plaintiff. Plaintiff has the right to expect an effective and professional, non-negligent defense and representation in open court. This case is clearly a matter of private tort law wherein Plaintiff had the right to expect competent, professional representation; and, this case is specifically NOT about Defendant's so-called 'protected speech'; no public redress of grievances against a political activity or agency of any government was ever any part of this instant case. There is no attempt to 'silence' Defendant's right to free speech. This instant case attempts to hold Defendants accountable for negligence, negligence per se, and for fraud upon the court." While not artfully worded, we think it is reasonably clear from this passage that Hamp argued the anti-SLAPP statute did not apply to attorney malpractice claims. From our reading of the record, it appears Harrison was the party who avoided the issue below. (See fn. 5, *post*.)

challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] '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.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.)

"We review an order granting or denying a motion to strike under section 425.16 *de novo*." (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.) "In deciding whether the initial 'arising from' requirement is met, [we consider] 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Activities protected by the anti-SLAPP statute include written or oral statements made before a legislative, executive, or judicial proceeding and written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body. (§ 425.16, subd. (e)(1)-(2).) Whether a cause of action arises from protected activity depends upon its principal thrust or gravamen. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) "[T]he critical point is whether the plaintiff's cause of action [is] *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) In other words, "the defendant's

act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*Ibid.*) The anti-SLAPP statute does not apply where allegations of protected activity are only incidental to a cause of action based on unprotected activity. (*Martinez v. Metabolife Internat., Inc.*, *supra*, at p. 187.)

The California Supreme Court has not yet addressed the applicability of the anti-SLAPP statute to legal malpractice actions. (See *Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th 811 at p. 820 [court declines to decide whether legal malpractice action involves petitioning activity under the anti-SLAPP statute and instead resolves case based on plaintiff's demonstrated probability of prevailing on the merits].) However, appellate courts, including this one, have concluded in various contexts that the anti-SLAPP statute does not apply to an action by a client against a former attorney for legal malpractice, at least when the alleged malpractice is the attorney's negligent failure to protect the client's rights in a prior litigation. (*Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 627 (*Jespersen*); see also *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 576-579 ["section 425.16 does not shield statements made on behalf of a client who alleges negligence in the defendant's representation of the client"]; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1228 [the anti-SLAPP statute does not apply to "a client's causes of action against the client's own attorney arising from litigation-related activities undertaken for that client"]; *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272-1275 [a client's action against his or her attorney for malpractice, breach of fiduciary duty, or other related theory of recovery is not subject to the anti-SLAPP statute merely because some of the allegations refer to the attorney's

actions in court]; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1534 ["Legal malpractice is not an activity protected under the anti-SLAPP statute."]; but see *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1161-1162, 1170-1172 [anti-SLAPP statute applies to claims by client against attorney where the claims are based on the attorney's whistleblower statements to the insurance commissioner, not statements the attorney made while the attorney was representing the client in litigation].)⁵

The rationale for the appellate courts' conclusions is multifold. When a client sues an attorney for mishandling the client's litigation, the crux of the complaint is not that the attorney acted in furtherance of anyone's right of petition or free speech, but that the attorney negligently failed to so act on the client's behalf. (*Jespersen, supra*, 114 Cal.App.4th at p. 632.) A contrary view risks turning "garden-variety attorney malpractice into a constitutional right." (*Ibid.*)

In addition, "[a] malpractice claim focusing on an attorney's incompetent handling of a previous lawsuit does not have the chilling effect on advocacy found in malicious

⁵ Despite having the moving burden and the obvious applicability of these authorities, Harrison only cited *Jespersen, supra*, 114 Cal.App.4th 624 below. Even then, Harrison glossed over the less favorable parts of *Jespersen*. We remind Harrison's counsel, "[t]he obligation to disclose adverse legal authority is an aspect of the lawyer's role as "officer of the court." . . . [L]awyers *should* reveal cases and statutes of the controlling jurisdiction that the court needs to be aware of in order to intelligently rule on the matter. It is good ethics *and* good tactics to identify the adverse authorities, even though not directly adverse, and then argue why they are distinguishable or unsound. The court will appreciate the candor of the lawyer and will be more inclined to follow the lawyer's argument.'" (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82 fn. 9, citing Fortune et al., *Modern Litigation and Professional Responsibility Handbook* (2001) § 8.5.1 pp. 329–330.)

prosecution, libel, and other claims typically covered by the anti-SLAPP statute." (*Kolar v. Donahue, McIntosh & Hammerton, supra*, 145 Cal.App.4th at p. 1540.) Moreover, when a plaintiff's claims involve a petitioning right a defendant lawyer exercised on the plaintiff's behalf, it would be "manifestly unfair and surely beyond the contemplation of the Legislature even in its mandate to construe the statute broadly" to turn the right against the plaintiff when the plaintiff claims the defendant lawyer acted negligently or fraudulently in the exercise of the right. (*Robles v. Chalilpoyil, supra*, 181 Cal.App.4th at p. 580; see also *PrediWave Corp. v. Simpson Thacher & Bartlett LLP, supra*, 179 Cal.App.4th at p. 1228 [it is unreasonable to construe the anti-SLAPP statute "to include a client's causes of action against the client's own attorney arising from litigation-related activities undertaken for that client" as such a construction would lead "to absurd results"].)

Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658, upon which Harrison relies, is distinguishable. Unlike this case, *Peregrine* primarily involved claims by a former client against a law firm for the law firm's actions representing a third party, not the former client, in litigation. (*Id.* at pp. 673, 675.) Such claims are more akin to malicious prosecution claims and have the chilling effect the anti-SLAPP statute exists to prevent.

As Hamp's claims against Harrison involve legal malpractice occurring while Harrison represented Hamp in litigation and the gravamen of them is Harrison's failure to protect Hamp's interests rather than Harrison's petitioning activity, we conclude the anti-SLAPP statute does not apply. In view of our conclusion, we need not decide whether

Hamp established a probability of prevailing on his claims. (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, *supra*, 179 Cal.App.4th at p. 1228; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 [when defendant does not show "protected activity" underlies plaintiff's claims, it is irrelevant whether plaintiff has shown a "probability of prevailing"].)

DISPOSITION

The judgment is reversed. Appellants are awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.