

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK ANTOINE FOSTER,

Plaintiff and Appellant,

v.

S.C. SOUTHERN CROSS, LLC et al.,

Defendants and Respondents.

D063741

(Super. Ct. No. 37-2011-00099901-
CU-WT-CTL)

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

Ronald S. Prager, Judge. Affirmed.

Mark Antoine Foster, in pro. per., for Plaintiff and Appellant.

Duckor Spradling Metzger & Wynne, John C. Wynne and Robert M. Shaughnessy
for Defendants and Respondents.

Mark Antoine Foster, appearing in propria persona, appeals from a judgment entered in favor of defendants S.C. Southern Cross, LLC (Southern Cross), Craig Becky and John Welsh (collectively Defendants) after the trial court declared him a vexatious litigant, required him to furnish security, and dismissed his operative complaint when he

failed to do so. Foster contends the trial court exhibited bias against him and erred in striking his opposition to the vexatious litigant motion. He also contends substantial evidence did not support the vexatious litigant finding and that the trial court erred in determining he could not prevail in this action. We reject his assertions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts as alleged by Foster in his operative second amended complaint. In August 2011, Foster was hired by the Tavern restaurant to work as a line cook, an at-will position. Southern Cross operated the Tavern restaurant. David and Margaret Halpin (the Halpins) and defendants Becky and Welsh were members of Southern Cross. About two weeks later, Foster accepted a promotion to the position of executive chef, believing he could not be terminated without good cause. In early October 2011, his employment was terminated without good cause.

Foster filed this action against Defendants. The trial court sustained Defendants' demurrer to the complaint with leave to amend. Thereafter, Defendants demurred to Foster's first amended complaint, but the demurrer was taken off calendar when the trial court granted Foster leave to file a second amended complaint.

Defendants later moved for an order finding Foster to be a vexatious litigant and requiring him to furnish security. Foster untimely filed a 54-page memorandum of points and authorities in opposition to the motion. The trial court tentatively granted the motion finding Defendants had presented sufficient evidence that Foster was a vexatious litigant and there was no reasonable probability he would succeed in his action. The trial court

noted that it refused to consider Foster's opposition brief beyond the first 15 pages, on the ground it exceeded the 15-page limit.

At oral argument, Foster asked the trial court to consider his entire opposition brief. The trial court declined, noting that even if it had considered the entire brief, it would not have changed its evaluation of the merits of Foster's case. After hearing lengthy argument from Foster, including his theory that an implied-in-fact unilateral contract existed that he would not be terminated for a reasonable time without good cause, the trial court confirmed its tentative ruling. Foster timely appealed.

DISCUSSION

I. *General Legal Principles*

The vexatious litigant statutes were created to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempts to relitigate issues previously determined against them. (Code Civ. Proc., §§ 391-391.7; *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169-1170.) (Undesignated statutory references are to the Code of Civil Procedure.) These statutes allow a defendant in pending litigation to move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant. (*Shalant v. Girardi, supra*, at p. 1170.) If, after a hearing, the court finds for the defendant on these points, it must order the plaintiff to furnish security. (*Ibid.*) If the plaintiff does not do so, the action will be dismissed. (*Ibid.*)

When considering a motion to declare a litigant vexatious, the court must weigh the evidence to decide whether the litigant is vexatious based on the statutory criteria and

whether the litigant has a reasonable probability of prevailing. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635.) To be declared a vexatious litigant, the plaintiff must come within one of the definitions in section 391, subdivision (b). (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 969.)

We review the trial court's order declaring a party to be a vexatious litigant for substantial evidence. (*Morton v. Wagner, supra*, 156 Cal.App.4th at p. 969.) We are required to presume the order declaring a litigant vexatious is correct and imply findings necessary to support that designation. (*Ibid.*) A reversal is required only where there is no substantial evidence to imply findings in support of the vexatious litigant designation. (*Ibid.*)

II. Trial Court Correctly Determined Foster to be a Vexatious Litigant

The trial court found Foster to be a vexatious litigant under section 391, subdivision (b)(1), which applies if the plaintiff "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." A case is finally determined adversely to a plaintiff if the plaintiff does not win the action or the action is dismissed. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779 (*Tokerud*)). The term "litigation" means "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).)

Here, Defendants presented evidence showing that within the last seven years, Foster filed at least five actions that resulted in the entry of a judgment against him and three actions that were dismissed, namely:

1. *Foster v. Morgan, Lewis & Bockius LLP*, San Francisco Superior Court (SFSC), Case No. CGC-08-471937. Judgment was entered on October 1, 2008, after the court sustained a demurrer to Foster's complaint without leave to amend.

2. *Foster v. Aramark Sports, LLC*, SFSC, Case No. CGC-08-471936. Judgment was entered on October 1, 2008, after the court sustained a demurrer to Foster's complaint without leave to amend.

3. *Foster v. Specialty Risk Services*, SFSC, Case No. CGC-08-471939. Judgment on the pleadings was entered on September 12, 2008.

4. *Foster v. Law Offices of Gray & Prouty et al.*, SFSC, Case No. CGC-08-471938. A dismissal was entered on October 31, 2008 after the court sustained a demurrer to Foster's second amended complaint without leave to amend.

5. *Foster v. Operation Dignity, Inc., et al.*, Alameda County Superior Court, Case No. RG06302322. On September 16, 2008, a judgment was entered against Foster.

6. *Foster v. Operation Dignity, Inc., et al.*, Alameda Superior Court, Case No. RG08403410. On January 15, 2009, the case was dismissed with prejudice.

7. *Foster v. Operation Dignity, Inc., et al.*, United States District Court, Northern District of California, Case No. C-07-5029 SBA. On March 19, 2008, the matter was dismissed, without prejudice.

8. *Foster v. Operation Dignity, Inc., et al.*, United States District Court, Northern District of California, Case No. C-07-5030 MMC. On or about January 15, 2009, the parties stipulated to dismiss the action, with prejudice.

Foster's contention that the three prior actions that were terminated by way of dismissal cannot be counted against him is meritless. As the *Tokerud* court explained, "[a]n action which is ultimately dismissed by the plaintiff, with or without prejudice, is nevertheless a burden on the target of the litigation and the judicial system, albeit less of a burden than if the matter had proceeded to trial. A party who repeatedly files baseless actions only to dismiss them is no less vexatious than the party who follows the actions through to completion. The difference is one of degree, not kind." (*Tokerud, supra*, 38 Cal.App.4th at p. 779.) Even if the argument had merit, Defendants presented evidence that the requisite five actions were concluded against Foster by adverse judgment.

Relying on *Lackner v. LaCroix* (1979) 25 Cal.3d 747 (*Lackner*), Foster argues that his actions against Operation Dignity, Gray & Prouty and Specialty Risk cannot be counted against him because the courts had no jurisdiction over the complaints. Foster's reliance on *Lackner* is misplaced as this case pertains to a malicious prosecution action and does not address the vexatious litigant statutes. (*Id.* at p. 749.) Foster cited no authority to support his implied contention that a dismissal based on lack of jurisdiction is not an adverse determination under the vexatious litigant statutes. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived."].)

We also reject Foster's contention that the trial court should not have considered any of the underlying cases cited by Defendants because they were "not frivolous." The trial court granted the motion under subdivision (b)(1) of section 391. This subdivision does not require a finding of frivolity. Finally, Foster asserts the litigation privilege

precludes counting four of his prior actions as being adversely determined against him. (See generally Civ. Code § 47, subd. (b).) We reject this claim as Foster provided no authority showing how the litigation privilege applies in this context. (*In re Marriage of Falcone & Fyke, supra*, 164 Cal.App.4th at p. 830.)

Accordingly, we conclude the trial court correctly determined that Foster is a vexatious litigant.

III. *Trial Court Did Not Abuse its Discretion by Requiring Security*

A court may require a vexatious litigant to furnish security as a condition of prosecuting a pending lawsuit if it determines, after hearing the evidence upon the motion, that "there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant." (§ 391.3, subd. (a).) A court's decision that a vexatious litigant does not have a reasonable probability of success is based on an evaluative judgment in which the court may weigh evidence. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785-786.) If there is any substantial evidence to support a trial court's conclusion that a vexatious litigant had no reasonable probability of prevailing in the action, it will be upheld. (*Golin v. Allenby, supra*, 190 Cal.App.4th at p. 636.)

Here, Foster's operative complaint alleged causes of action for breach of an implied contract of employment, breach of the implied covenant of good faith and fair dealing, promissory estoppel, fraud and deceit, intentional misrepresentation, negligent misrepresentation, intentional interference with a contractual relationship, intentional interference with a prospective economic advantage, intentional and negligent infliction

of emotional distress and violation of the Unfair Competition Law (UCL) set forth at California Business and Professions Code § 17200 et seq. We examine each claim to determine if substantial evidence supported the trial court's conclusion that Foster had no reasonable probability of prevailing.

A. Contract Causes of Action

Foster's first cause of action alleged breach of an implied contract not to terminate except for good cause. Specifically, Foster alleged that Defendants created a unilateral contract with him, which modified his original at-will contract as a line cook, that included an implied-in-fact agreement to terminate him only for good cause after a reasonable period of time.

In California, a presumption exists that employment is at will, absent an "express oral or written agreement specifying the length of employment or the grounds for termination." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677; Lab. Code, § 2922 ["An employment, having no specified term, may be terminated at the will of either party on notice to the other."].) "[T]he totality of the circumstances' must be examined to determine whether the parties' conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer's termination rights." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 (*Guz*)). Thus, the employer's rights regarding either termination or demotion, as an adverse employment action, may be limited by such a contractual agreement. (*Id.* at p. 355.) In examining such a claim, courts consider the entire relationship of the parties, which includes factors such as personnel policies and practices, longevity of service, any

employer-sanctioned assurances of continued employment, and communications from or conduct of the employer approving of the employee's work, such as promotions, raises, bonuses, or positive performance reviews. (*Foley v. Interactive Data Corp.*, *supra*, 47Cal.3d at p. 680; *Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488.)

Here, the members of Southern Cross presented evidence showing that they made no express promises to employ Foster for a specified term or only terminate his employment for good cause. Foster's declaration does not show the existence of any express promise and he admitted during oral argument that no express promise existed. Similarly, the evidence does not support the existence of any implied agreement. Foster's employment lasted a little over two months during which time he received the promotion and salary increase based on his favorable performance. This evidence, however, is insufficient to constitute a contractual guarantee of future employment security. (*Guz*, *supra*, 24 Cal.4th at p. 342 ["[R]aises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security."].)

Instead, Foster claimed he had a unilateral contract with Defendants that included an implied-in-fact agreement to terminate him only for good cause after a reasonable period of time. This argument does not advance Foster's position. "An implied-in-fact agreement to terminate only for good cause is regarded as an offer of a unilateral contract." (*Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 740.) Thus, assuming Foster had a unilateral contract with Defendants, as addressed above, he failed to establish an implied-in-fact agreement to terminate him only for good cause.

Foster's second cause of action alleges breach of the implied covenant of good faith and fair dealing. This claim necessarily fails with Foster's claim for breach of contract because "the implied covenant of good faith and fair dealing cannot supply limitations on termination rights to which the parties have not actually agreed." (*Guz, supra*, 24 Cal.4th at p. 342.) Stated differently, "[a]n at-will employee cannot use the implied covenant to create a for cause employment contract where none exists." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1391.)

Foster's third cause of action alleges Defendants should be estopped from terminating his employment as executive chef because he relied on Defendants' implied promise to not terminate him except for good cause. The doctrine of promissory estoppel "employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672.) The elements of promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance and damages. (*Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, 513.) This claim fails because Foster has not shown that Defendants made a clear and unambiguous promise to him regarding the nature of his employment when he accepted the executive chef position.

B. Fraud Causes of Action

Foster's fourth and fifth causes of action for promissory fraud and intentional misrepresentation against Becky and Welsh alleged that these defendants promised to retain him as executive chef for a reasonable period of time. Similarly, the sixth cause of action for negligent misrepresentation alleged that these defendants promised him

continued employment as executive chef if he resigned his line cook position.

Promissory fraud, intentional misrepresentation and negligent misrepresentation all require, among other things, a false representation. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243; *Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.) As discussed above, Becky and Welsh presented evidence showing they made no express promises to Foster regarding his employment and Foster admitted during oral argument that no express promise existed. (*Ante*, Part III.A.)

Thus, the trial court correctly concluded that Foster had no reasonable probability of prevailing on his fraud claims.

C. Interference Causes of Action

Foster's seventh cause of action alleged the Becky and Welsh intentionally interfered with his executive chef and line cook contracts with Southern Cross. He also alleged that Becky and Welsh were parties to the contracts and were aware of the contracts as owners of Southern Cross.

To recover for intentional interference with a contractual relationship, a plaintiff must prove, among other things, that a valid contract or ongoing contractual relationship existed between the plaintiff and another party. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d. 1118, 1126.) It is well established that a contracting party cannot interfere with its own contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 ["the tort cause of action for interference with contract does not lie against a party to the contract"].) This principle extends to the

contracting party's employees and agents. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24.)

Assuming, for the sake of argument only, that Foster had executive chef and line cook contracts with Southern Cross, Becky and Welsh, as members of Southern Cross, they cannot be held liable for their alleged interference with these contracts.

Foster's eighth cause of action alleged intentional interference with prospective economic advantage against Becky and Welsh. Although similar to a claim for intentional interference with contract, a claim for interference with prospective advantage may be pleaded where there is no existing enforceable contract. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601.) The tort of intentional interference with prospective advantage imposes liability for wrongful conduct that disrupts the business relationship of another. (*Id.* at p. 595.) This claim, however, does not lie against a party to the relationship from which the anticipated benefit will derive. (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262.)

Thus, the trial court correctly concluded that Foster had no reasonable probability of prevailing on his interference claims.

D. Emotional Distress Claims

Foster's ninth and tenth causes of action for intentional and negligent infliction of emotional distress alleged that the actions and fraudulent misrepresentations of Becky and Welsh induced him into an employment contract for an executive chef position and then terminated his employment without cause. Accordingly, Foster's claims for intentional and negligent infliction of emotional distress are premised on his contract and

fraud claims. Because Foster failed to establish a probability of prevailing on these claims, his derivative claims of emotional distress also fail.

E. UCL Claim

Foster's eleventh cause of action alleged a violation of the UCL, Business and Professions Code section 17200, et seq. Foster claimed that Becky and Welsh violated the UCL by their wrongful conduct as alleged in his other causes of action. To state a claim for a violation of the UCL, Foster must allege that the Defendants committed a business act or practice that is "fraudulent, unlawful, or unfair." (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1136.) Here, Foster's UCL claim is based upon the underlying claims asserted in the balance of his complaint. "Because the underlying causes of action fail, the derivative UCL . . . claim[] also fail[s]." (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147.)

In summary, we conclude the trial court correctly ruled that Foster did not have a reasonable probability of prevailing in the litigation. The order requiring him to furnish security was supported by substantial evidence and was not an abuse of discretion.

IV. *Remaining Issues*

Foster asserts the trial court was biased against him because he was acting in *propria persona*. He also claims the trial court tolerated perjury, failed to address the issues, applied different standards, acted contrary to law, ignored records and issued an inconsistent and arbitrary decision.

If a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality, disqualification is mandated. The

existence of actual bias is not required. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) On the other hand, a judge has a duty to consider the evidence, resolve evidentiary conflicts and form an opinion. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1220.) "The opinion thus formed, being the result of a judicial hearing, does not amount to [improper] bias and prejudice."

(*Ibid.*)

We have reviewed Foster's allegations of bias and the entire record, which includes the reporter's transcripts for two hearings. We conclude that a reasonable person would not have interpreted any of the trial court's comments or decisions as arising out of a bias or prejudice against Foster. Similarly, the record does not support Foster's other allegations of impropriety. Rather, the record reflects that the trial court considered the briefs and evidence properly submitted by both sides and decided the matter against Foster. The trial court expressly noted that it disagreed with Foster and also complimented him on his "professional demeanor." The record shows that the trial court considered the issues and treated both parties fairly. Moreover, as our decision reflects, it decided the issues correctly.

Finally, the trial court's decision to not consider Foster's entire oversized brief filed in opposition to Defendants' motion does not further his claims. As noted by the trial court, Foster's arguments would not change the number of unsuccessful actions filed by Foster or its evaluation of the evidence in deciding the merits of Foster's case.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.