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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DONALD PUTNAM,

Plaintiff and Respondent,

v.

SOUTH COAST EMERGENCY
VEHICLE SERVICE et al.,

Defendants and Appellants.

E051645

(Super.Ct.No. CIVRS1001649)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco,
Judge. Reversed.

Stradling Yocca Carlson & Rauth, Robert J. Kane, Peter L. Wucetich; Craig L.
Winterman for Defendants and Appellants.

Law Offices of Thomas Hoegh and Thomas Hoegh for Plaintiff and Respondent.

I. INTRODUCTION

Defendants South Coast Emergency Vehicle Service, South Coast Fire Equipment,
Inc., and Jeff Kahler (hereafter referred collectively to as South Coast) appeal from the

trial court's denial of their anti-SLAPP (strategic lawsuit against public participation) motion (Code Civ. Proc.,¹ § 425.16). Defendants contend that each of the causes of action in plaintiff Donald Putnam's complaint arose in whole or in substantial part from protected statements, and Putnam has not shown the likelihood of prevailing on the merits of his claims. We agree with defendants' contentions, and we reverse.

II. FACTS AND PROCEDURAL BACKGROUND

In February 2010, Putnam filed a complaint against South Coast alleging wrongful discharge in violation of public policy, defamation, and intentional infliction of emotional distress. Putnam alleged he had been employed as a mechanic for South Coast since April 2005. South Coast leased a portion of its premises to another company. In February 2009, the lessee offered to give Putnam some copper wire, and Putnam removed the copper wire from the premises and sold it. On February 26, 2009, South Coast accused him of stealing the wire and requested Putnam to resign in lieu of being terminated. Putnam refused to resign, and on March 2, 2009, his employment was formally terminated. When Putnam applied for unemployment benefits with the State Economic Development Department (EDD), South Coast opposed the application, asserting that Putnam had been discharged for misconduct. Putnam alleged the report of theft to the EDD was false. In his cause of action for wrongful discharge in violation of public policy, Putnam alleged the false accusation of theft and discharge was for the purpose of preventing him from receiving unemployment benefits. In his cause of action

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

for defamation, Putnam alleged that on February 26 and March 2, 2009, defendants accused him of theft. He alleged those statements were made “verbally in the presence of others and in writing and reported to the [EDD]” In his cause of action for intentional infliction of emotional distress, Putnam repeated his allegations that defendants made false accusations of theft and attempted to deny him his unemployment insurance benefits. South Coast filed an answer in May 2010 generally denying the allegations of the complaint and raising various affirmative defenses.

In June 2010, South Coast filed a special motion to strike Putnam’s complaint under section 425.16. South Coast asserted that Putnam’s claims arose from protected activity, or more specifically, from statements made to the EDD, and Putnam could not show a likelihood of prevailing on the merits because statements to the EDD are absolutely privileged.

In opposition to the anti-SLAPP motion, Putnam claimed that his wrongful termination action was based on an attempt by Kahler, South Coast’s manager, to extort him and defame him *before* the EDD proceedings. Putnam claimed that defendants had previously determined to terminate his employment and replace him with another mechanic before the wire incident, and in accusing him of theft, they were seeking to avoid liability for his unemployment insurance benefits. In his declaration filed in opposition to the anti-SLAPP motion, Putnam stated that Frontline Communications leased space in South Coast’s facility, and Putnam had occasionally assisted them in installing heavy equipment outside of his working hours for South Coast. Frontline was moving out of its space in February 2009 and needed to dispose of some scrap copper

wire. Frontline offered the wire to Putnam if he would remove it from the premises. Putnam agreed, and in front of other South Coast employees, he and his father-in-law loaded the wire and sold it to a scrap metal yard.

Putnam further declared that on March 2, 2009, Kahler called Putnam into the office and informed Putnam he was being terminated for stealing company property. Putnam denied the theft. Kahler gave Putnam the option of resigning and told Putnam that if he resigned, nothing further would be said about his stealing the wire. Putnam refused. Kahler told Putnam that he “better resign now or [Kahler would] have [him] arrested for stealing from the company.” In his declaration, Putnam stated his belief that South Coast had decided to terminate his employment to replace him, and South Coast was seeking to avoid liability for Putnam’s unemployment benefits.

Putnam declared that following his termination, South Coast drew up paper work stating, “Termination due to violation of company policy. Employee removed property from South Coast without knowledge or authorization of South Coast Management.” (Capitalization omitted.) Putnam was ordered to acknowledge receipt of his termination papers. Putnam provided declarations showing that the incident had been published to South Coast’s employees, including office manager Kristen Cenderelli and industry consultant Richard Loken.

Putnam stated in his declaration that he had 28 years of experience as a heavy truck and equipment mechanic and had worked for South Coast for more than four years. Because of his termination, he has been unable to find new employment.

The trial court held a hearing on the motion. The trial court took judicial notice of the decision of the California Unemployment Insurance Appeals Board in Putnam’s case, in which the Board affirmed the determination that Putnam had not committed misconduct and that he was entitled to unemployment benefits. Following the hearing, the trial court denied the motion as to all causes of action.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Overview of Section 425.16

The anti-SLAPP statute, section 425.16, authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant’s constitutional rights of free speech or petition for redress of grievances. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312 (*Flatley*)). The purpose of the statute is to prevent the chilling of the valid exercise of these rights through ““abuse of the judicial process,”” and, to this end, is to ““be construed broadly.”” (§ 425.16, subd. (a); *Flatley, supra*, at pp. 312-313.) While the statute was originally intended “to protect nonprofit corporations and common citizens ‘from large corporate entities and trade associations’ in petitioning government [citation] [N]ow it has been broadened to protect large corporations and trade associations [Citation.]” (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 66.

The anti-SLAPP statute establishes a two-step procedure under which the trial court evaluates the merits of a plaintiff’s cause of action at an early stage of the litigation. (*Flatley, supra*, 39 Cal.4th at p. 312.)

First, the defendant must show that the cause of action arose from protected activity, i.e., activity in furtherance of the defendant’s constitutional right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*)). A defendant meets its threshold burden of demonstrating that a cause of action arises from protected activity by showing that the act or acts underlying the claim fit one or more of the categories described in section 425.16, subdivision (e). (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Subdivision (e) of section 425.16 provides that an “act in furtherance of a person’s right of petition or free speech,” includes, among other things, “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” Communications made in preparation for or in anticipation of bringing an action or other official proceeding fall within the ambit of these subdivisions and are not required to pertain to an issue of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.)

Second, if the trial court determines the defendant has met its initial burden, the burden shifts to the plaintiff to demonstrate a reasonable probability of prevailing on the merits of his cause of action. (§ 425.16, subd. (b)(1); *Equilon, supra*, 29 Cal.4th at p. 67.)

We independently review orders granting or denying a motion to strike under section 425.16. (*Flatley, supra*, 39 Cal.4th at p. 325.)

B. Defamation Claim

1. Did the Cause of Action Arise from Protected Activity?

Putnam's complaint alleged a cause of action for defamation. Defamation is "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. [Citations.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) A statement that falsely accuses another of theft is per se defamatory. (See, e.g., *Allard v. Church of Scientology* (1976) 58 Cal.App.3d 439, 450.) Putnam alleged that South Coast defamed him by falsely accusing him of stealing copper wire.

Defendants contend that Putnam's defamation cause of action was based primarily on statements that were protected for purposes of the anti-SLAPP statute. In *Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843 (*Dible*), a psychiatric counselor sued her former employer for wrongful termination and defamation, among other causes of action, after the employer terminated her on the ground that her negligence had led to the suicide of a patient. (*Id.* at pp. 845-846.) The trial court granted the defendant's anti-SLAPP motion, and the plaintiff appealed. (*Dible, supra*, at p. 847.) On appeal, the court held that the allegedly defamatory statements the plaintiff's former employer made to the EDD in connection with the plaintiff's claim for unemployment benefits were part of an official proceeding and were therefore privileged under section 425.16, subdivision (e)(1) and (2). (*Dible, supra*, at pp. 848-851.)

Some of the statements on which Putnam relies were made *before* the EDD proceedings and were allegedly made to preclude such proceedings, in that if Putnam

voluntarily resigned, he could not file a claim for unemployment benefits. Thus, Putnam alleged a mixed cause of action. “A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity. [Citation.] “[A] plaintiff cannot frustrate the purposes of the [anti-]SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one “cause of action.” [Citation.]” (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288, fn. omitted.) Here, at least one of the underlying acts—the statements to the EDD—was protected (*Dible, supra*, 170 Cal.App.4th at pp. 848-851), and those statements were not merely incidental to unprotected activity but were inextricably connected to it. We therefore conclude defendants have met their burden of showing that the cause of action for defamation arose from protected activity.

2. *Did Putnam Establish a Likelihood of Success on the Merits?*

We next determine whether Putman established a likelihood of success on the merits. We conclude the statements on which Putnam relies were not only protected for purposes of the anti-SLAPP statute, but they were also privileged, and as such, cannot support a cause of action for defamation.

A privileged publication includes one made in any “official proceeding authorized by law” (Civ. Code, § 47, subd. (b).) Under that definition, statements to the EDD are privileged. (*Williams v. Taylor* (1982) 129 Cal.App.3d 745, 754 [an employer’s explanation to the EDD of reasons for an employee’s termination was privileged when made without malice].)

Putnam also contends that South Coast published defamatory statements not only to the EDD, but also to Cenderelli, South Coast's office manager, and Loken, Putnam's former supervisor and an industry consultant. In response, defendants argue that Putnam cannot show any likelihood of success on the merits of his defamation claim, because any statements to Cenderelli and Loken were conditionally privileged under Civil Code section 47, subdivision (c), and Putnam self-published the statements to Loken.

a. Publication to Cenderelli

Civil Code section 47 creates a conditional privilege for "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civ. Code, § 47, subd. (c).) In *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841 (*Deaile*), a former employee sued her former employer for defamation and other causes of action after she elected forced retirement in lieu of being discharged for lying about the causes of her absences. (*Id.* at p. 845.) The trial court entered judgment for the defendant on her complaint, and the appellate court affirmed, holding the employer's communications to former fellow employees and supervisors of a terminated employee about the reasons for her termination were privileged under Civil Code section 47, former subdivision (3). The court explained that the statements "were of a kind reasonably calculated to protect or further a common interest of both the communicator and the recipient. [Citations.]" (*Deaile, supra*, at p. 847.)

Putnam alleged that South Coast acted with malice, and the common interest privilege does not apply to a communication made with malice. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1557; *Begier v. Strom* (1996) 46 Cal.App.4th 877, 8820-883.) “The malice necessary to destroy a qualified privilege is ‘actual malice or malice in fact, that is, a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.’ [Citation.] Malice may also be established by a showing that the publisher of a defamatory statement lacked reasonable grounds to believe the statement true and therefore acted with reckless disregard for plaintiff’s rights. [Citations.]” (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997.) Once a defendant establishes the factual predicate for a privilege—as South Coast has done here—the burden shifts to the plaintiff to show that the statement was made with malice. (*Taus v. Loftus, supra*, 40 Cal.4th at p. 721.)

Here, South Coast represented to the EDD that under its lease with the tenant, any property the tenant left behind after the tenant vacated the property belonged to South Coast. South Coast therefore claimed the property the tenant left behind belonged to South Coast, and Putnam had taken it without permission. The EDD found that Putnam had not committed misconduct, because he was unaware of the terms of the lease under which South Coast claimed ownership of the property. Under these circumstances, indicating that South Coast had a good faith belief in its accusations against Putnam, we cannot say that South Coast’s conduct constituted malice as a matter of law.

b. Statements to Loken

South Coast contends Putnam cannot establish defamation with respect to statements made to Loken because Putnam himself published those allegedly defamatory statements. (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [Fourth Dist., Div. Two] [summary judgment was properly granted in a defamation action when the plaintiff had himself talked about the underlying incident with fellow employees in an attempt to garner their support].) In addition, Loken stated he was the acting supervisor for defendants when Putnam's transaction with defendant's lessee and the copper wire took place, and as such, had a common interest with defendants such that any statements they made to him were privileged. (Civ. Code, § 47, subd. (c); *Deaile, supra*, 40 Cal.App.3d at p. 847.)

We agree that Putnam has failed to establish the likelihood of success on the merits in an action based on any statements that were made to Cenderelli and Loken.

C. Wrongful Termination

1. *Did the Cause of Action Arise from Protected Activity?*

In his cause of action for wrongful termination, Putnam alleged that South Coast terminated his employment in violation of public policy as a result of "falsely accusing [him] of stealing property from Defendants . . . and then wrongfully discharging [him] for removing Defendants['] . . . property from its premises without authority or permission, said wrongful discharge[] was done for the purpose of preventing [him] from receiving unemployment benefits"

Putnam asserts his wrongful termination action was based on attempted extortion. Not all speech or petition activity is protected by the anti-SLAPP statute. The statute cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367, disapproved on another ground in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.) Thus, for example, the statute does not protect conduct that amounts to extortion. (*Flatley, supra*, 39 Cal.4th at p. 328; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 318.)

““Conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical.” [Citations.] An exception to the use of section 425.16 applies only if a “defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.” [Citation.]” (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 482.)

Here, for the same reasons that Putnam cannot establish malice, he cannot establish that South Coast’s conduct constituted extortion or was illegal as a matter of law.

D. Intentional Infliction of Emotional Distress

1. Did the Cause of Action Arise from Protected Activity?

In his third cause of action for intentional infliction of emotional distress, Putnam alleged that “[o]n February 26, March 2, 2009 and continuing,” South Coast accused him of stealing property from South Coast and “then terminated [him] for misconduct on

March 2, 2009, and thereafter, attempted to deny [him] his unemployment benefits on the grounds that [he] had stolen property” from South Coast.

Defendants argue they met their burden of establishing that the third cause of action arose primarily or in substantial part from protected activity. In that Putnam’s cause of action for intentional infliction of emotional distress was based on the same statements and actions as his causes of action for wrongful termination and defamation, the same analysis applies. We therefore conclude defendants met their burden.

2. *Did Putnam Establish a Likelihood of Success on the Merits?*

South Coast next argues that Putnam cannot show any likelihood of success on the merits as to his third cause of action for intentional infliction of emotional distress because workers’ compensation is the exclusive remedy for emotional distress in the employment context. In *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 367, the court explained: “An employer’s intentional misconduct in connection with actions that are a normal part of the employment relationship, such as demotions and criticism of work practices, resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as ‘manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.’ [Citation.] Workers’ compensation ordinarily provides the exclusive remedy for such an injury. [Citation.]” We therefore agree with defendants’ argument.

Moreover, in *Deaile*, the court held that the trial court had not erred in dismissing the plaintiff’s cause of action for emotional distress. (*Deaile, supra*, 40 Cal.App.3d at pp. 849-850.) The court explained that the privileges under Civil Code section 47 were not

limited to actions for defamation, and “[c]learly, an employer is privileged in pursuing its own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ so that (1) appropriate action may be taken against the employee; (2) the danger of such breaches occurring in the future may be minimized; and (3) present employees may not develop misconceptions that affect their employment with respect to certain conduct that was undertaken in the past. Where an employer seeks to protect his own self-interest and that of his employees in good faith and without abusing the privilege afforded him, the privilege obtains even though it is substantially certain that emotional distress will result from uttered statements. [Citations.]” (*Deaile, supra*, at pp. 849-850.) We therefore conclude that Putnam has failed to establish the likelihood of success on the merits.

IV. DISPOSITION

The order appealed from is reversed. Costs shall be awarded to defendants and appellants.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.