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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LOUIS CHASE,

Plaintiff and Appellant,

v.

G. TEPLANSKY et al.,

Defendants and Appellants.

E052083

(Super.Ct.No. CIVVS801912)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed in part; reversed in part and remanded.

Jean-Rene Basle, County Counsel, and James H. Thebeau, Deputy County Counsel, for Defendants and Appellants.

The Beck Law Firm and Thomas E. Beck for Plaintiff and Appellant.

INTRODUCTION¹

Plaintiff Louis Chase (Chase) filed a civil rights action against defendants, the County of San Bernardino and three sheriff's deputies, Gregory Teplansky (Teplansky), Fernando Hernandez (Hernandez), and Ed Ripley (Ripley). The basis of Chase's single cause of action is the alleged use of excessive force by Teplansky and Hernandez when arresting Chase and a purported conspiracy by all three defendants to thwart a proper investigation of the incident.

Defendants filed a special anti-SLAPP motion to strike. (§ 425.16.) The trial court granted the motion to strike as to Ripley, who was involved only in the investigation, but denied the motion as to Teplansky and Hernandez because of their direct involvement in the alleged use of excessive force and subsequent conspiracy. Defendants Teplansky and Hernandez appeal and Chase has filed a cross-appeal.

We agree with the trial court that section 425.16, subdivision (e), of the anti-SLAPP statute applies to Chase's single cause of action as pled against all defendants for engaging in constitutionally protected activity. Because the statute applies, the burden shifted to Chase to make a prima facie evidentiary showing to sustain a judgment in his favor. (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 670-673.) Chase submitted no evidence at all, relying solely on the allegations of his complaint and argument.

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

In the absence of any evidence that Chase could demonstrate a probability of prevailing on the merits of the first amended complaint, we affirm the trial court's rulings as to Ripley and reverse the trial court's ruling as to Teplansky and Hernandez. We remand with directions to the trial court to enter a new order granting the special motion to strike as to Teplansky and Hernandez and to enter judgment in their favor.

II

FACTUAL AND PROCEDURAL BACKGROUND

Because Chase did not submit any evidence in opposition to the motion to strike, we derive the statement of the facts from the allegations of the unverified first amended complaint (FAC) and from the arguments submitted in support of and against defendants' anti-SLAPP motion.

A. The FAC

In the FAC, Chase sued for damages for civil rights violations (42 U.S.C. § 1983) against two deputy sheriffs, Teplansky and Hernandez, and deputy chief Ripley. Chase alleges that, on May 7, 2006, Teplansky was in a vehicle pursuing Chase, who was on foot. Teplansky intentionally struck Chase with the vehicle. Together Teplansky and Hernandez continued to injure Chase, pulling him out from under the vehicle, handcuffing him, wrenching his arms with unnecessary force, and tearing his rotator cuff. Chase required surgery and a month of hospitalization. When Chase was discharged, he was still using a wheelchair and required additional medical and therapeutic care.

Chase alleges that Teplansky falsified the crime report, misrepresenting that Chase had caused the collision and that Teplansky alone had handcuffed Chase. After Chase

made a citizen's complaint against Teplansky and Hernandez, they conspired with Ripley, the internal affairs investigator, to cover up their crimes against Chase. Ripley and the sheriff's department did not fully investigate the alleged civil rights violations and participated in covering up defendants' criminal misconduct, thereby ratifying the deprivation of Chase's rights.

B. The Anti-SLAPP Motion

Defendants filed an anti-SLAPP motion. As to Ripley, defendants argued that the actions and statements of Ripley involved a matter "under consideration or review" by an executive agency. (§ 425.16, subd. (e)(1), (2).) Therefore, defendants urged the conduct and speech of Ripley is protected activity under the anti-SLAPP statute.

Additionally, defendants argued Chase could not establish the probability of prevailing on his claims against Ripley or the other defendants because there were insufficient allegations of a conspiracy. Particularly, Ripley, as a supervisor, could not be liable for a coverup of excessive force unless he participated in the force personally or directed its use. Defendants relied on *Humphries v. County of Los Angeles* (2009) 554 F.3d 1170, 1201-1202, holding that "[u]nder § 1983, a supervisor is only liable for his own acts. Where the constitutional violations were largely committed by subordinates the supervisor is liable only if he participated in or directed the violations," and citing *Taylor v. List* (9th Cir. 1989) 880 F.2d 1040, 1045 ["[L]iability under § 1983 arises only upon a showing of personal participation by the defendant.""]

Furthermore, defendants maintained a claim of excessive force is not actionable under the Fourteenth Amendment and all defendants were entitled to qualified immunity as to the conspiracy and Fourteenth Amendment allegations.

In opposition, Chase argued that California's anti-SLAPP statute cannot insulate defendants from federal section 1983 tort liability: "The anti-SLAPP statutes are powerless to shield state officials from recognized section 1983 liability." Furthermore, Chase contended that all three defendants could be liable under federal law for conspiracy and a coverup and for violating the Fourteenth Amendment. Chase disagreed that defendants were entitled to qualified immunity. Notably, Chase offered no evidence whatsoever to demonstrate a reasonable probability of prevailing on the merits of his cause of action. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 22, 26; § 425.16, subd. (b)(1).)

C. The Trial Court's Ruling

The trial court granted the anti-SLAPP motion as to Ripley "on the grounds that plaintiff has not identified a constitutional or statutory right in favor of Plaintiff, which Ripley violated, and on the grounds that the complaint fails to state sufficient facts to constitute an action under 42 U.S.C. [section] 1983 as to defendant[] Ripley. Ripley's alleged 'cover-up' of Teplansky and Hernandez'[s] use of excessive force was not a cause of any constitutional injury to plaintiff. [¶] Lastly, defendant Ripley has made a threshold showing that the challenged cause of action is one arising from protected activity. Ripley has demonstrated that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the

United States or California Constitution in connection with a public issue,” as defined in the statute, namely, statements made by Defendants regarding the post-incident investigation of the events surrounding the detention of Plaintiff. [¶] Additionally, Plaintiff cannot establish the probability of prevailing on the merits of the FAC with respect to Defendant Ripley, or, that Ripley is a policy-making supervisor.”

The trial court made a distinction as to Teplansky and Hernandez and denied the anti-SLAPP motion “for their direct participation in the alleged excessive force and any possible conspiracy to cover up between themselves.”

III

DISCUSSION

A. *Anti-SLAPP Principles*

The Legislature enacted section 425.16 “to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 865.)” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312.) 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*, at pp. 312-313.)

The anti-SLAPP statute establishes a two-step procedure whereby the trial court evaluates the merits of a plaintiff’s cause of action, using a summary-judgment-like procedure, at an early stage of the litigation. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 312.) First, the defendant is required to show that the cause of action arises from

protected activity, i.e., activity by the defendant in furtherance of his constitutional right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.)

If the trial court determines that the defendant has met his initial burden, the burden shifts to the plaintiff to demonstrate a reasonable probability of prevailing on the merits of his cause of action. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67; *Gilbert v. Sykes*, *supra*, 147 Cal.App.4th at pp. 22, 26; § 425.16, subd. (b)(1).) “Put another way, the plaintiff ‘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.’ [Citations.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

In attempting to establish a factual dispute, the opposing party may not rely upon the mere allegations or denials of his pleadings but must tender evidence of specific facts in the form of affidavits, or admissible discovery material, in support of his contention that the dispute exists: “The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence. [Citation.] In reviewing the plaintiff’s evidence, the court does not weigh it; rather, it simply determines whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial. [Citation.]” (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672-673; *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017; see *South Sutter, LLC v. LI Sutter Partners, L.P.*, *supra*, 193 Cal.App.4th at p. 670.) Where the anti-SLAPP statute applies and the plaintiff fails to establish that he has

a probability of prevailing, a cause of action subject to the anti-SLAPP statute “shall be stricken.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

We independently review orders granting or denying a motion to strike under section 425.16. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 325; *Gilbert v. Sykes, supra*, 147 Cal.App.4th at p. 22.) Only causes of action that satisfy both prongs of the anti-SLAPP statute, i.e., that arise from protected speech or petitioning activity and that lack even minimal merit are subject to being stricken under the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

B. Protected Speech or Activity

Chase alleges that, in violation of section 1983, defendants Teplansky and Hernandez used excessive force and then conspired with Ripley to avoid fully investigating the subject incident as required by Penal Code section 832.5. Chase argues the anti-SLAPP statute should not apply to his federal claim because police misconduct should not be shielded by the operation of California law. Defendants contend that the anti-SLAPP statute applies to a federal claim asserted in state court. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1117-1118.)

As set forth in the statute, protected speech or activity includes “any act . . . 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” (§ 425.16, subd.(b)(1).) Section 425.16, subdivision (e), provides: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any

written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, . . .”

Defendants maintain that Chase’s complaint against them arises out of the protected activity of an official proceeding authorized by law. In *Bradbury*, for example, a deputy sheriff sued for civil rights violations and other causes of action based on allegations that the district attorney had misrepresented plaintiff’s involvement in a warrant search and a shooting. (*Bradbury v. Superior Court, supra*, 49 Cal.App.4th at p. 1111.) The trial court denied an anti-SLAPP motion. The appellate court reversed: “[S]ection 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties. . . . [¶] . . . [¶] ‘. . . Otherwise, if government is compelled to guarantee the truth of its factual assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed. . . .’ (*Nadel v. Regents of University of California* [(1994)] 28 Cal.App.4th [1251,] 1266-1267.)” (*Bradbury*, at p. 1115.)

Defendants also rely on *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 999, holding that an action for violation of state civil rights based upon written communications between police officers and the district attorney was subject to an anti-SLAPP motion because the claims arose from “statements in writing in official proceedings.”

In *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, an attorney denied that he had hired a private investigator to conduct surveillance of the city manager. The attorney filed a section 1983 action against the City of Morgan Hill, asserting the city had retaliated against him by adopting a resolution condemning him. The appellate court held the activity by the city qualified for protection under the anti-SLAPP statute because the attorney's claims were based on investigative reports by the city council's surveillance subcommittee, the council's hearing, and a subsequent resolution adopted by council. (*Id.* at p. 1061.)

These three cases—*Bradbury*, *Schaffer*, and *Tichinin*—lead us to agree with defendants that statements made in a crime report and as part of an official investigation of a citizen's complaint must necessarily be considered part of an official proceeding authorized by law. Teplansky's crime report and Ripley's investigation form a significant part of Chase's civil rights claim. Therefore, we conclude Chase's cause of action arises from protected activity. Even if Chase's cause of action includes unprotected activity based on his claims of excessive force, it is still subject to a motion to strike. Where a single cause of action contains mixed allegations of protected and unprotected conduct, the entire cause of action is subject to an anti-SLAPP motion. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.)

C. *Probability of Success*

Once it is determined that Chase's claim is based on protected speech or activity, the burden shifts to Chase to submit evidence of a prima facie case supporting his cause of action. On this point, defendants assert that their police statements and reports

concerning Chase's claim for excessive force are privileged under Civil Code section 47, subdivisions (a) and (b). (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 616-617.)

Notwithstanding defendants' claim of privilege, Chase neglected to establish he was likely to prevail on his claim because he presented no admissible evidence of specific facts in the form of declarations or admissible discovery material. Rather than treating defendants' anti-SLAPP motion like a summary judgment proceeding, Chase treated it like a demurrer. Chase submitted no evidence at all, relying instead solely on legal argument and the allegations of his pleadings. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) Chase made no showing of probability of success as required by the statute. On appeal, he continues in the same error, apparently not recognizing the lack of evidence is the critical issue.

In spite of Chase's allegations of excessive force and conspiracy against defendants, he offered no actual evidence of misconduct by them. For this reason, the trial court correctly granted defendants' anti-SLAPP motion as to Ripley and the trial court should have granted the motion as to defendants Teplansky and Hernandez.

IV

DISPOSITION

Chase's cause of action against defendants involved protected speech and activity under section 425.16, subdivision (e). Chase submitted no evidence to establish any probability of prevailing against defendants.

We affirm the trial court's rulings as to Ripley and reverse the trial court's ruling as to Teplansky and Hernandez. We remand and direct the trial court to enter a new order granting the special motion to strike as to Teplansky and Hernandez and to enter judgment in their favor. The prevailing parties shall recover their costs on appeal.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.