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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

HOSSAIN SAHLOLBEI,

Plaintiff and Appellant,

v.

STEVEN MONTGOMERY,

Defendant and Respondent.

E053031

(Super.Ct.No. INC076108)

**OPINION**

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Affirmed.

Wendy Chase Arenson for Plaintiff and Appellant.

Stutz Artiano Shinoff & Holtz, Jeffery A. Morris, Paul V. Carelli IV, Casey C.

Shaw, and Alex J. Tramontano for Defendant and Respondent.

Plaintiff Hossain Sahlolbei claims that defendant Steven Montgomery breached a settlement agreement that included an arbitration clause. Sahlolbei asserted two causes of action: (1) for breach of contract and (2) to compel arbitration.

Montgomery filed a “SLAPP motion” — i.e., a special motion to strike pursuant to Code of Civil Procedure section 425.16. In a previous appeal, we held that the SLAPP motion had to be granted with respect to the breach of contract cause of action but denied with respect to the cause of action to compel arbitration.

On remand, the trial court refused to compel arbitration. It also awarded Montgomery his attorney fees in connection with the SLAPP motion. It then entered judgment. Sahlolbei appeals.

We will hold that any error in refusing to compel arbitration of the breach of contract cause of action was harmless. Once the trial court granted the SLAPP motion with respect to the breach of contract cause of action and entered judgment accordingly, any further litigation of Sahlolbei’s breach of contract claims was barred, as a matter of law, by res judicata. We will also hold that the trial court properly awarded Montgomery all of his fees in connection with the SLAPP motion.

## I

### PROCEDURAL BACKGROUND

In 2005, Sahlolbei, Montgomery and others entered into a settlement agreement. The settlement agreement included an arbitration provision.

In 2008, Sahlolbei commenced this action by filing a “Complaint for: 1. Breach of Contract; 2. Petition to Compel Arbitration” (the complaint). (Capitalization omitted.) According to the general allegations of the complaint, Montgomery had breached the

settlement agreement by making certain written and oral statements. Moreover, Montgomery had breached the settlement agreement by refusing to submit to arbitration.

The first cause of action was for breach of contract. It alleged that Montgomery had breached the settlement agreement “[b]y the underlying conduct described above and his refusal to submit to arbitration,” and it alleged damages. The second cause of action was to compel arbitration.

Montgomery filed a SLAPP motion. The trial court denied the motion.

Montgomery, however, appealed. In that appeal, we upheld the denial of the SLAPP motion with respect to the cause of action to compel arbitration; however, we held that the SLAPP motion should have been granted with respect to the cause of action for breach of contract.

On remand, Montgomery filed a motion for \$19,816.66 in attorney fees and costs, representing the fees and costs he incurred in bringing the SLAPP motion. In July 2010, the trial court granted the motion, awarding Montgomery the full amount sought.

In August 2010, Sahlolbei filed a motion to compel arbitration. Montgomery opposed the motion, arguing that (1) the arbitration provision did not apply to him, and (2) the arbitration provision limited the arbitrable issues to the amount of damages, as opposed to liability.

In November 2010, the trial court denied the motion to compel arbitration. Sahlolbei filed a motion for reconsideration. In January 2011, the trial court denied the motion for reconsideration.

The trial court then entered judgment against Sahlolbei and in favor of Montgomery on the entire complaint.

Sahlolbei filed a timely notice of appeal from (1) the order denying arbitration (see Code Civ. Proc., § 1294, subd. (a); Cal. Rules of Court, rule 8.108(e)) and (2) the judgment.

## II

### THE DENIAL OF THE MOTION TO COMPEL ARBITRATION

Sahlolbei contends that the trial court erred by refusing to compel arbitration. We conclude, however, that the judgment — entered as a result of the SLAPP motion — will bar the contract claims that Sahlolbei is seeking to arbitrate, as a matter of res judicata. Accordingly, the denial of the motion to compel arbitration is harmless error.

The parties did not raise res judicata or harmless error in their original briefs. At our request, however, both sides have filed supplemental briefing on these issues.

“Res judicata, or claim preclusion, precludes the relitigation of a cause of action that was litigated in a prior proceeding if three requirements are satisfied: (1) the present action is on the same cause of action as the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. [Citation.] Res judicata not only precludes the relitigation of issues that were actually litigated, but also precludes the litigation of issues that could have been litigated in the prior proceeding. [Citations.]” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557.)

The breach of contract cause of action that Sahlolbei seeks to have arbitrated is identical to the breach of contract cause of action that was dismissed as a result of the SLAPP motion. Moreover, the parties to the arbitration would be identical. Sahlolbei does not argue otherwise. The only requirement worth discussing, then, is whether the judgment on the breach of contract cause of action, entered as a result of the SLAPP motion, is a final judgment on the merits.

“The purpose of the [SLAPP Act] is ‘to provide a procedural remedy to *dispose of* lawsuits that are brought to chill the valid exercise of constitutional rights.’ [Citations.]” (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026, italics added.) “Because these meritless lawsuits seek to deplete ‘the defendant’s energy’ and drain ‘his or her resources’ [citation], the Legislature sought “‘to prevent SLAPPs by ending them early and without great cost to the SLAPP target’” [citation].” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Accordingly, “granting a motion to strike under [Code of Civil Procedure] section 425.16 results in the dismissal of a cause of action *on the merits* [citation] . . . .” (*Id.* at p. 193, italics added.)

Allowing a plaintiff to relitigate a cause of action that has been stricken under the SLAPP Act would gut the Act. This is true whether the relitigation took place in front of a judge or in front of an arbitrator. As Montgomery puts it, “[T]here [is] no controversy left to arbitrate.”

We recognize that, under California law, the trial court’s judgment is not *yet* final for purposes of res judicata, because this appeal is pending. (*Franklin & Franklin v. 7-*

*Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174.) Once we issue our remittitur, however, it will *become* final. At that point, it will bar, as a matter of law, Sahlolbei's breach of contract cause of action.

We therefore conclude that, even assuming the trial court erred in denying the petition to compel arbitration (an issue we do not decide), the error was harmless, because Sahlolbei cannot show a reasonable probability of prevailing in the arbitration.

Sahlolbei argues that he "only intended to file a petition to compel arbitration, not a combined complaint for breach of contract and . . . petition." In the previous appeal, we rejected a similar argument. (*Sahlolbei v. Montgomery* (Jan. 21, 2010, E047099) [nonpub. opn.].) As we noted then, the only reasonable reading of his complaint/petition, including its allegation of a separate cause of action for damages for breach of contract, was that he was initiating a lawsuit as well as seeking to compel arbitration. We also noted that he had never attempted to dismiss the breach of contract cause of action.

Indeed, Sahlolbei could have prevented the operation of res judicata by the simple expedient of voluntarily dismissing his breach of contract cause of action, without prejudice, at any time prior to the hearing on the SLAPP motion. Although he would still have been exposed to attorney fees (see *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107 [Fourth Dist., Div. Two]), this would have prevented the dismissal from having res judicata effect. (See generally *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 465.)

Sahlolbei also argues that he has not had an opportunity to litigate his breach of contract claim on the merits, in the sense of taking discovery, presenting evidence, obtaining findings of fact, etc. However, unlike collateral estoppel (also known as issue preclusion), res judicata (also known as claim preclusion) can bar claims that have not been actually litigated. (*Morris v. Blank* (2001) 94 Cal.App.4th 823, 830-831.) And once again, we note that the whole point of the SLAPP Act is to prevent a plaintiff from saddling a defendant with the effort and expense of litigating a meritless claim.

Next, Sahlolbei relies on footnote 8 of our previous opinion. He never fully explains its relevance. However, he seems to think that in it, we assured him that the ruling on the SLAPP motion would *not* be res judicata in an arbitration — in other words, that we are sandbagging him.

To respond to this argument, we must quote the footnote in full. It stated: “During oral argument, Sahlolbei’s attorney urged this court not to address the complaint for breach of contract, because the alleged breach of contract is an arbitrable issue, and our opinion could be binding on the arbitration proceedings via principles of law of the case and/or collateral estoppel. Contrary to Sahlolbei’s position, our determination regarding Sahlolbei’s ‘probability of prevailing’ does not equate with a finding on the merits of the breach of contract claim. [Citation.] Accordingly, we disagree that our opinion, which is confined to the anti-SLAPP motion, will have a preclusive effect on the arbitration proceedings.” (*Sahlolbei v. Montgomery, supra.*)

As footnote 8 indicates, at the time, Sahlolbei was only concerned about the portion of our opinion holding that he had not shown a probability of prevailing on the breach of contract claim. Moreover, he was only concerned about collateral estoppel or law of the case, not res judicata. Hence, in our previous opinion, we did not address, one way or the other, the potential application of res judicata. “[A]n appellate court’s opinion is not authority for propositions the court did not consider or on questions it never decided. [Citation.]” (*People v. Braxton* (2004) 34 Cal.4th 798, 819.)

Finally, Sahlolbei contends that Montgomery forfeited the benefit of res judicata by failing to raise this issue in the trial court. Res judicata, however, is relevant in this case because it leads to the conclusion that the trial court’s refusal to compel arbitration was harmless. And harmless error could not possibly have come up in the trial court; by definition, it must be raised for the first time on appeal. In any event, we have discretion to “permit[] a party to raise belatedly ‘a pure question of law which is presented on undisputed facts.’ [Citations.]” (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.) The application of res judicata in this case is such a question.

We emphasize the narrowness of our reasoning. We assume, without deciding, that the trial court could not have denied the petition to compel arbitration on the ground that the claims to be arbitrated were barred by res judicata; it would have had to grant the petition (if otherwise meritorious), leaving res judicata to be determined by the arbitrator. (See *Loscalzo v. Federal Mut. Ins. Co.* (1964) 228 Cal.App.2d 391, 398.) We also assume that an arbitrator would have the raw power to disregard the res judicata effect of

the judgment, even though this would be error. (See *Interinsurance Exch. v. Bailes* (1963) 219 Cal.App.2d 830, 836.) Even if so, the legal effect of the judgment is to bar Sahlolbei's breach of contract claim. Hence, the likelihood that Sahlolbei would prevail on that claim in an arbitration is negligible. We therefore conclude that the asserted error is not prejudicial.

### III

#### ATTORNEY FEES

Sahlolbei also contends that the trial court erred by awarding Montgomery attorney fees in connection with the SLAPP motion.

Subject to exceptions not applicable here, "a prevailing defendant on a [SLAPP] motion . . . shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c)(1).)

"The term 'prevailing party' must be 'interpreted broadly to favor an award of attorney fees to a partially successful defendant.' [Citation.]" (*Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 425-426.) "A defendant need not succeed in striking every challenged claim to be considered a prevailing defendant . . . . Instead, a defendant is entitled to recover fees and costs in connection with a partially successful motion, unless the results obtained are insignificant and of no practical benefit to the defendant. [Citation.]" (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 218.)

On the SLAPP motion, Montgomery prevailed with respect to the cause of action for breach of contract; Sahlolbei prevailed with respect to the cause of action to compel

arbitration. Sahlolbei now claims that the cause of action to compel arbitration “was the only relevant issue” in the action. Not so. As we have already held, the complaint asserted two separate and alternative causes of action. Indeed, one could view the cause of action for breach of contract as raising the only *substantive* issue, while the cause of action to compel arbitration raised a merely *procedural* issue — i.e., which tribunal was going to decide the substantive issue.

Even more important, as we have also held, the judgment on the breach of contract cause of action — entered as a result of the SLAPP motion — is *res judicata*; it bars further litigation of Sahlolbei’s breach of contract claims. By prevailing on the SLAPP motion with respect to the cause of action to compel arbitration, Sahlolbei may have won a battle, but he lost the war. His partial victory was “insignificant and of no practical benefit.” By contrast, Montgomery’s seemingly only partial victory on the SLAPP motion actually ended up entitling him to the termination of the entire dispute in his favor.

Sahlolbei also argues that, because Montgomery only prevailed on a (supposedly) trivial issue, the trial court erred by awarding him the full amount of fees he was seeking. For the reasons already stated, we disagree.

Finally, Sahlolbei argues that the SLAPP motion was frivolous. Yet again, this argument is made on the premise that Montgomery only prevailed on a trivial issue. Yet again, for the reasons already stated, we disagree.

We conclude that the trial court did not err by awarding Montgomery the full amount of attorney fees he was seeking.

IV

DISPOSITION

The judgment is affirmed. Montgomery is awarded costs on appeal against Sahlolbei.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.