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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BRUCE D. LINDSEY et al.,

Plaintiffs and Appellants,

v.

MICHAEL DAVIS et al.,

Defendants and Respondents.

E056571

(Super.Ct.No. CIVRS1107119)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Combs & Schaertel and Arthur T. Schaertel for Plaintiffs and Appellants.

Blomberg, Benson & Garrett, Inc. and David K. Garrett for Defendants and Respondents.

I

INTRODUCTION

Plaintiffs Bruce B. Lindsey and Linda F. Barbee—an unmarried couple who live

together—sued defendants—John L. Benson, Michael Davis, and the law firm of Blomberg, Benson, and Garrett, Inc.—asserting that defendants and the Fontana police department had falsely implicated Lindsey in a plot to hire a hit man to murder Barbee. Defendants filed an anti-SLAPP motion (Code Civ. Proc., § 425.16)¹ directed at the first amended complaint (FAC). The trial court granted the motion to strike and dismissed the complaint as to these defendants.²

Based on our independent review of the record, we have determined that plaintiffs' claims are based on alleged activity by defendants that is protected under section 425.16. Additionally, we hold that plaintiffs cannot establish a probability of prevailing on their claims. Therefore, we affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

Our appellate review is hindered by plaintiffs' failure to follow the rules and conventions of appellate procedure. Nevertheless, based on our own review and with help from respondents' brief, we endeavor to summarize the record.

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

² Other defendants are not parties to this appeal.

*A. The First Amended Complaint.*³

The FAC employs an unconventional style.⁴ Instead of the usual form of allegations, plaintiffs offer a meandering narrative based on a series of declarations by Barbee, Lindsey, Esther Stamps, and Ralph Garcia. Ultimately, the FAC attempts to allege violations of plaintiffs' civil rights. (42 U.S.C. § 1983.)

The substance of Barbee's declaration is that, after Barbee had dinner with friends on October 27, 2010, she was detained at approximately 7:30 p.m. by Fontana undercover police who warned her that Lindsey had hired a hit man to kill her. After the police questioned her for several hours, they eventually released her at the home of her friend, Esther Stamps. Finally, at approximately 2:10 a.m., the police said it was safe to return to her own home. The police told Barbee they had arrested Lindsey for gun possession. She was also advised not to worry because the hit man had "gone away." Afterwards, Barbee was fearful and suffered from insomnia and anxiety attacks.

Lindsey's declaration stated that he was contacted at approximately 12:00 p.m. on October 27, 2010 by "Mike," a courier for defendant Benson, about delivering a cashier's check for a \$25,000 settlement and to obtain a signed release. Lindsey and his lawyer, Arthur T. Schaertel, met Mike at a bar and had a round of drinks. Lindsey and Schaertel

³ The operative complaint for the motion to strike is the FAC, not the third amended complaint which plaintiffs incorrectly cite for 25 pages of their opening brief. The corrected version of the FAC is located at pages 153-195 of the clerk's transcript.

⁴ The record suggests that Lindsey probably drafted the complaint and wrote the appellants' brief because his lawyer was "too busy."

took the release to have it notarized and Lindsey and Mike exchanged the check and the release at a bank.

After Lindsey went home, he retired to bed at approximately 9:00 p.m. while Barbee was still gone from the house. At approximately 11:15 p.m., police came and pounded on his front door. They broke through the door, handcuffed him, and searched the house. Lindsey was shown a photograph of Mike, the courier, who was described as the hit man hired to kill Barbee. The police had observed their meeting at the bar and had recorded Mike calling someone to say, "They don't want me to do the job and they hired someone else." The police arrested Lindsey for possession of an unregistered assault rifle. Lindsey accused the police of manufacturing a false CLETS (California Law Enforcement Telecommunications System) order. Thereafter Lindsey suffered from ongoing trauma. He and Barbee were seeing a psychiatrist.

The FAC also incorporates the declarations of Barbee's friend, Stamps, and Ralph Garcia, Barbee and Lindsey's tenant, confirming the information supplied by Barbee and Lindsey. Garcia also stated he discovered on October 28, 2010, that a gun had been taken from the room he rented from Barbee and Lindsey.

After the declarations are concluded, the FAC alleges that defendants Benson and Davis had a troubled business relationship with Lindsey and that they agreed to settle a legal dispute for \$25,000. Plaintiffs then allege Benson and the Fontana police fabricated a scheme about Lindsey hiring a hit man to kill Barbee and arranged for Lindsey to meet with Mike, the courier. The FAC incorporates the subject release.

The first (and only) cause of action is set forth at pages 23 to 43 of the FAC. It generally alleges that defendants, together with the Fontana police—specifically Officer David Janusz—sought revenge against plaintiffs by having Lindsey arrested for possession of an illegal assault rifle. The police allegedly obtained an illegal emergency protective order to search plaintiffs’ home and to steal or damage property. All of plaintiffs’ claims against defendants involve purported criminal activity by Lindsey.

B. Defendants’ Motion to Strike

In October 2011, defendants filed their anti-SLAPP motion, arguing that a lawsuit arising from defendants’ alleged involvement concerning Lindsey’s suspected crime is protected activity subject to a special motion to strike. In addition, all three individual defendants submitted declarations stating that they had never accused Lindsey of planning to kill Barbee.

Plaintiffs opposed the motion,⁵ based on their declarations and a copy of the police report. The police report, prepared by Janusz describes how, in October 2010, he had learned from an unnamed source that Lindsey was trying to hire someone to kill Barbee. Lindsey owned a massage parlor, advertised as “erotic” or “exotic.” The police and the Department of Justice conducted a surveillance of the business and of Lindsey. When the potential hit man met Lindsey in the bar, Lindsey reportedly told him, “I’m gonna have two Mongols [motorcycle gang members] take that bitch kicking and screaming into a ditch.” The police detained Barbee for her protection. Barbee told Janusz that she had

⁵ In their reply, defendants filed multiple objections to plaintiffs’ declarations.

spent over \$1 million on Lindsey and she believed he was involved in prostitution. Because Barbee said there were weapons in the house she shared with Lindsey, Janusz obtained an emergency protective order and various law enforcement officers searched the house where Lindsey denied having contact with a potential hit man. The Upland Fire Department opened a safe found to contain five weapons. Lindsey was arrested for illegal possession of an assault rifle. (Pen. Code, § 12280, subd. (c).)

The hearing on the motion to strike was continued from November 2011 until February 2012. The court asked for supplemental briefing on the issue of “whether Defendants’ denials of the allegations in Plaintiffs’ complaint, set forth in their declarations in support of their SLAPP motion, prevents them from meeting the first threshold burden of a Plaintiff in a SLAPP motion or whether the allegations against them in the complaint are sufficient to establish that the conduct complained of by Plaintiffs is in furtherance of Defendants’ free speech rights.” Both plaintiffs and defendants filed supplemental memoranda although defendants’ submission is not in the clerk’s transcript.

The trial court filed a written ruling on the anti-SLAPP motion: “Here, Plaintiffs have alleged a cause of action for violations of 42 U.S.C. §1983. The Defendants allegedly concocted a scheme to exact revenge upon plaintiff Bruce Lindsey involving the making of false and malicious reports to the defendant police agencies. Defendants are private citizens and a law firm, not state actors. To act ‘under color of’ state law for 42 U.S.C. §1983 does not require that the defendant be an officer of the state, but the

private person must be a willful participant in joint action with the state or its agents.

Dennis v. Sparks (1980) 449 U.S. 24.

“Based upon the complaint, Defendants’ liability appears to have ‘arisen’ from their alleged communications with the various police departments. Defendants’ denials do not change the allegations in the complaint that Defendants communicated with the police. Plaintiffs argue that because the communications were malicious and involved accusations of serious criminal behavior, i.e. the alleged murder for hire of Linda Barbee, the communications are not protected and therefore the anti-SLAPP statute does not apply.”

The trial court observed that all three defendants denied knowing Linda Barbee or communicating with the police about her. The court held that, if defendants had talked to the police, their communications would have been privileged. Furthermore, “Plaintiffs have accused Defendants of extortion and slander . . . there is no evidence, other than Plaintiffs’ allegations, of illegal conduct by Defendants. [¶] The court finds that Defendants have met their burden of proof and Plaintiffs have failed to show a reasonable probability of prevailing on their claims.”

III

SECTION 425.16

“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Section 425.16, the anti-SLAPP statute, allows a party to bring a special motion

to strike a meritless SLAPP suit at an early stage of the litigation. (*Rusheen*, at pp. 1055-1056; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 708-709.)

The court follows a two-step process in determining whether a cause of action constitutes a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; § 425.16, subd. (b)(1).) The court first determines whether the defendant has made a threshold showing that the challenged cause of action “aris[es] from” protected speech or petition activity. (*Navellier*, at p. 88.) This showing is made if the “act” underlying the challenged cause of action fits one of the four categories of protected activities described in section 425.16, subdivision (e). (*Navellier v. Sletten, supra*, at p. 88.)

If the court finds the defendant has met this threshold burden, it then determines whether the plaintiff has demonstrated a probability of prevailing on the merits of the plaintiff’s claim. (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.) To meet this burden, the plaintiff must demonstrate ““that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”” [Citations.] [¶] 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.” (*Id.* at p. 89.)

“We review an order granting or denying a special motion to strike de novo. (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 657.) That is, we independently determine whether the challenged cause or causes of action arise from protected activities, and if so whether the plaintiff has demonstrated a probability of

prevailing on the claims. (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1084.)” (*Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at p. 710.)

IV

SECTION 1983 CLAIMS

Plaintiffs contend defendants did not meet their burden of demonstrating that the section 1983 claims against them are based on protected activities. We disagree. A cause of action “aris[es] from” protected activities if the act underlying the claim is “itself” an act in furtherance of the right of free speech or petition. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; § 425.16, subd. (b)(1).) In determining whether a claim is based on protected activity, we disregard the labeling of the claim and examine its “principal thrust or gravamen,” or “[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.” [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) We consider the pleadings together with the supporting and opposing affidavits, “stating the facts upon which the liability . . . is based.” (§ 425.16, subd. (b)(2); *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.)

The protected activities described in subdivision (e)(2) of section 425.16 include statements or writings made “in connection with an issue under consideration or review by a . . . judicial body, or *any other official proceeding authorized by law. . . .*” (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198.) These protected activities include acts “preparatory to or in anticipation of” the bringing of an

action or other official proceeding. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

The conduct underlying plaintiffs' section 1983 claims against defendants is their alleged connivance with the Fontana police to implicate Lindsey in a crime and to have him arrested. As such, the section 1983 claims are based on acts preparatory to or in anticipation of official proceedings, namely criminal charges and proceedings against Lindsey. (§ 425.16, subd. (e)(2); see *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115; *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941-942.)

Plaintiffs argue that defendants' alleged conspiracy activities are not protected because they were unlawful as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 324-328; *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 703-704.) This argument fails because, as the trial court found, "there is no evidence, other than Plaintiffs' allegations, of illegal conduct by Defendants." Not only did defendants deny in their declarations that they engaged in any unlawful activities, there is no uncontroverted evidence that their activities were unlawful as a matter of law.

Unlawful or criminal activities do not qualify as protected speech or petition activities under the anti-SLAPP statute. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 317; *Lefebvre v. Lefebvre*, *supra*, 199 Cal.App.4th at p. 704.) "But when the defendant's assertedly protected activity *may or may not be* unlawful, the defendant may invoke the anti-SLAPP statute *unless* the activity is unlawful as a matter of law. [Citation.] An activity may be deemed unlawful as a matter of law when the defendant does not dispute that the activity was unlawful, or uncontroverted evidence conclusively shows the

activity was unlawful.” (*Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at pp. 711-712, citing *Flatley*, at p. 317; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 383-384.)

In contrast to plaintiffs’ section 1983 claims, *Flatley* and *Lefebvre* involved claims based on activities that were indisputably unlawful as a matter of law and therefore were unprotected under the anti-SLAPP statute. The plaintiff in *Flatley* sued an attorney for extortion and related causes of action based on the attorney’s alleged attempt to extort money from the plaintiff by threatening to publicize the plaintiff’s alleged rape of the attorney’s client—unless the plaintiff paid the attorney and his client a seven figure settlement. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 305-311.) Based on the uncontroverted evidence that the attorney had attempted to extort money from the plaintiff, the court in *Flatley* concluded that the attorney’s extortion attempt was “illegal as a matter of law,” and therefore not a protected form of speech under section 425.16. (*Flatley*, at pp. 317-320.)

Lefebvre also involved undisputed unlawful activity—the filing of a false police report—which uncontroverted evidence showed was in fact false. The plaintiff sued his former wife and another defendant for malicious prosecution and related claims, alleging that they conspired to accuse the plaintiff of threatening to kill his former wife and their children. (*Lefebvre v. Lefebvre*, *supra*, 199 Cal.App.4th at p. 700.) The former wife admitted she filed “an illegal, false criminal report.” (*Id.* at p. 705.) Thus, as a matter of law, the former wife could not show that her former husband’s claims were based on protected activities.

“Additional cases further illustrate the critical distinction between a plaintiff’s bare allegations of unlawful activities and uncontroverted evidence of unlawful activities. In *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, the defendant’s *allegedly* false report to school officials that the plaintiff abused the defendant’s children was protected activity, notwithstanding the plaintiff’s allegation that the report was merely “an attempt to manufacture corroboration” for the defendant’s false accusations of abuse. (*Id.* at pp. 1569-1570.) In *Siam*, as here, there was no uncontroverted evidentiary showing that the defendant’s report was false. Similarly, in *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, the defendant’s allegedly false report to police that the plaintiff inappropriately touched her was deemed protected activity because there was no uncontroverted evidentiary showing that the report was false.” (*Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at p. 713.) By contrast, the section 1983 claims against defendants here are not based on indisputably unlawful, unprotected activities.

Given that the section 1983 claims against defendants are based on protected activities, we turn to the second prong of the anti-SLAPP inquiry and consider whether plaintiffs met their burden of establishing a probability of prevailing. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 95) Plaintiffs were required to state a legally sufficient claim and produce competent, admissible evidence that could sustain a favorable judgment. (*Chabak v. Monroy*, *supra*, 154 Cal.App.4th at pp. 1512-1513.) In determining whether the plaintiff has made a prima facie evidentiary showing on the second prong of the anti-SLAPP inquiry, we consider the pleadings and the evidence presented on the motion. We do not weigh the credibility or compare the probative

strength of competing evidence. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) We disregard declarations lacking in foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26).

Section 1983 applies to persons acting “under color of” state law, and normally does not apply to private actors, such as defendants. To support their conspiracy allegations, plaintiffs needed to offer admissible evidence of an agreement, a meeting of the minds, or joint action between defendants and a state actor to deprive plaintiffs of their federal constitutional rights. (*Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at p. 714.) No evidence supported a reasonable inference that defendants engaged in such a conspiracy or joint action. Instead, plaintiffs resort to unsubstantiated speculation about why defendants arranged to deliver the settlement check and release by courier, the courier’s role, and how the police knew about the meeting in the bar. But plaintiffs’ speculations are insufficient to show a conspiracy or joint action. Even if the police communicated with Mike the courier about Lindsey’s suspected crime, nothing in the showing made by plaintiffs in their FAC or the opposition to the motion to strike constituted evidence that defendants had connived with the Fontana police to implicate Lindsey in a murder scheme. Plaintiffs therefore failed to make a prima facie evidentiary showing to support the state actor component of their section 1983 claims.

V

DISPOSITION

In summary, we hold that plaintiffs' claims against defendants are based on protected alleged activity by defendants, making plaintiffs' lawsuit subject to the anti-SLAPP statute. Plaintiffs presented no evidence to support the probability of prevailing on their claims. We affirm the judgment and order defendants to recover their costs on appeal.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.