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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVID GIANULIAS,

Plaintiff and Respondent,

v.

SOMMAI PATAMAKANTHIN et al.,

Defendants and Appellants.

E060357

(Super.Ct.No. CIVRS1300970)

OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Fink & Steinberg, Keith A. Fink and Olaf J. Muller for Defendants and Appellants.

Younesi & Yoss, John D. Younesi and Jan A. Yoss for Plaintiff and Respondent.

I

INTRODUCTION

Plaintiff and respondent David Gianulias and defendants and respondents Sommai Patamakanthin, Pat Patamakanthin, Rosalyn Patamakanthin and Shawn Patamakanthin

(collectively, defendants) have accused one another of fraud in the purchase and sale of an import business. The parties have been involved in litigation since October 2009, when a company affiliated with Gianulias sued defendants in the Orange County Superior Court (the Orange County case). In 2012, Sommai¹ obtained a default judgment of almost \$3 million on his cross-complaint in the Orange County case. In 2013, Gianulias, as an individual, sued defendants and others in the San Bernardino Superior Court. On appeal, defendants challenge the trial court's denial of their anti-SLAPP motion. (Code Civ. Proc., § 425.16.)²

We agree with the trial court's finding that the San Bernardino case does not constitute protected speech subject to the anti-SLAPP statute. We affirm the ruling.

II

FACTUAL AND PROCEDURAL BACKGROUND³

A. The Orange County and San Bernardino County Complaints

On February 3, 2009, Gianulias formed TTSDG, Inc. with three other people, Nelson Ortas, Ronnie Nadel, and Ross Sheldon. Defendants owned an import business called Trend Setting Designs, Inc. (TSD). In February 2009, TSD sold its assets to

¹ We use defendant's first name for ease of reference.

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

³ We derive the relevant facts from the complaint, the anti-SLAPP motion and opposition, and the attached exhibits. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

TTSDG, for one million dollars, payable in two successive \$500,000 installments. As part of the transaction, TTSDG and Sommai also executed a two-year consulting agreement for two million dollars, payable in equal payments of \$500,000 at six-month intervals. In other words, a total of \$3 million would be paid for the business over a three-year period. As part of the negotiations, Gianulias disclosed having liquid assets of \$6 million in a Wells Fargo bank account.

After the first \$500,000 was paid, problems with the transaction developed in March 2009. The second \$500,000 for the purchase was not paid. Ginaulias loaned \$300,000 to TTSDG. In May 2009, TSD assigned its name to TTSDG. Defendants formed another company, Chic Home Trends, Inc. (Chic Home).

In October 2009, TSD filed the Orange County case against defendants and others for fraud, breach of fiduciary duty, breach of contract, unjust enrichment, and four other related causes of action, seeking the \$800,000 paid or loaned by TSD and Ginaulias, and additional damages of more than \$4 million. In April 2010, Sommai and Chic Home filed a cross-complaint against Gianulias, TTSDG, and other defendants seeking the remaining \$2.5 million owed on the purchase and consulting agreements and an additional \$92,404.

On July 15, 2011, TSD dismissed the Orange County case without prejudice. According to Gianulias's declaration, the dismissal was prompted by a good faith desire to settle the case and "mounting attorney fees as well as the stress of the litigation." The cross-complaint was not dismissed and, after a discovery dispute, the court ordered the answers of TTSDG and Gianulias to the cross-complaint stricken and their defaults were

entered. On March 21, 2012, the court entered a default judgment against TTSDG and Gianulias, as an alter ego, in the total amount of \$2,931,065.62.⁴

On February 8, 2013, Gianulias filed his complaint in San Bernardino County for fraud, breach of fiduciary duty, and unjust enrichment (the San Bernardino complaint). Gianulias alleged the existence of an elaborate investment scheme concocted by defendants to cheat him and cause him to suffer damages of \$3 million—\$800,000 invested in the import business and an additional \$2.2 million for the Orange County case default judgment.

A comparison of the Orange and San Bernardino County complaints demonstrates they share many of the same allegations and causes of action. Both complaints have similar causes of action for fraud, breach of fiduciary duty, and unjust enrichment. Additionally, many paragraphs are almost identical in the two complaints. In the Orange County complaint: paragraphs 10-14, 16-20, 22-24, 31-35, 45, 46, 48, 55-75, and 99-102. In the San Bernardino County complaint: paragraphs 13-17, 20-27, 29-33, 35-37, and 39-54.

One difference between the two complaints is that the Orange County case plaintiff is TSD, formerly known as TTSDG, and the plaintiff in the San Bernardino complaint is Gianulias, as an individual. In the San Bernardino complaint, Gianulias added allegations that he did not discover the full extent of defendants' scheme to cheat

⁴ The default judgment was affirmed on appeal. (*Patamakanthin v. Gianulias* (Feb. 25, 2014, G047860) [nonpub. opn.] [Fourth Dist., Div. Three].)

him until some date in 2011, during the course of depositions in the Orange County case. Essentially, however, the San Bernardino complaint, like the Orange County case, seeks to recover the \$800,000 invested in the import business, plus the amount defendants were awarded for the default judgment.

B. The Anti-SLAPP Motion

On April 18, 2013, defendants filed a special motion to strike the San Bernardino complaint. (Code Civ. Proc., § 425.16.) They argued that the two complaints were almost identical; the San Bernardino complaint was based on protected litigation activity in the Orange County case (Civ. Code, § 47, subd. (b)); and the San Bernardino complaint was subject to Code of Civil Procedure section 425.16, as it applies to any direct attack on a judgment a prior action. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 648-649.) Defendants also argued Gianulias could not show the probability of prevailing because of the bar of res judicata, collateral estoppel and other reasons.

In opposition to the anti-SLAPP motion, Gianulias submitted a declaration in which he asserted that he did not discover the scope of defendants' fraud until their depositions were taken in early 2011 but "all of the facts in the complaint I have filed relate to [defendants'] pre-litigation scheme to set me up." He also explained that, after payment of the initial \$500,000 for the value of the company's assets, each subsequent \$500,000 payment was intended to come from sales and would only be paid if sufficient income was generated. Gianulias contends he was damaged by prelitigation fraud, based on multiple misrepresentations, and that the terms of the purchase transaction were

changed without Gianulias's knowledge.⁵

Gianulias summed up his San Bernardino complaint as follows: “[Defendants] saw that I had \$3 million in a Wells Fargo Checking Account. They were determined to receive the full benefit of this money and structured a transaction where they would either receive the money from [TSD], or somehow extract it from me. That is the basis of the claim in this case.” He elaborated: “Even the most cursory review of the allegations of the Complaint reveals that the causes of action all arise out of [the] actions by [defendants] before any litigation was ever initiated and when the parties were engaging in a business transaction. The anti-SLAPP statute relates to very specific types of protected speech and conduct. Not all conduct and speech falls within its protection. Here, because the claim by Defendants is that the protected activity was their actions in the litigation, but the Complaint does not arise out of Defendants’ litigation activity, there is no protected activity and the motion must be denied.”

At the hearing, the trial court observed, “the gravamen in this action . . . is all prelitigation conduct. It has to do with the formation of the business. It has to do with them entering into a contract. It has to do with [Gianulias’s] allegations of breach of fiduciary duty. . . . [¶] . . . It’s not about the Orange County case.” The trial court denied

⁵ He also explained that he did not believe the Orange County Superior Court had jurisdiction to order a default judgment against him because he had been misadvised that he had become “a member of the Kibbutz Degania . . . a sovereign government with its own laws . . . [and] that any action by a State Court in California had no effect over [him].” Degania Alef is a kibbutz in northern Israel. Degania was Israel's first kibbutz. It was established in 1909 in Ottoman Palestine.

the anti-SLAPP motion, ruling that defendants had failed to make a threshold showing that Gianulias’s causes of action ““arise out of”” the exercise of rights of free speech or petition in connection with a public issue.

III

DISCUSSION

A. *Legal Principles*

“Section 425.16 permits a court to strike any cause of action that arises from the defendant’s exercise of his or her constitutionally protected free speech rights or petition for redress of grievances. [Citations.] In ruling on a special motion to strike brought under section 425.16, the trial court must engage in a two-step process. First, the court must determine whether defendant has made a threshold showing that the challenged cause of action ‘arises from’ a protected activity. Second, if the defendant makes this showing, the trial court must determine whether the plaintiff has established a probability of prevailing on the claim. [Citation.] The burden is on the defendant on the first prong to show the action is within the statute; if the defendant succeeds, the burden shifts to the plaintiff to establish a probability of prevailing. [Citation.] Normally, if a defendant satisfies the first portion of this test, the trial court next addresses whether it is reasonably probable the plaintiff will prevail on the merits at trial. [Citation.] [¶] . . . We review the trial court’s ruling on the motion to strike independently under a de novo standard. [Citation.] We do not weigh credibility, but accept as true the evidence favorable to plaintiff and evaluate the defendant’s evidence only to determine whether it defeats the plaintiff’s evidence as a matter of law. [Citation.]” (*Optional Capital, Inc. v. Das*

Corporation (2014) 222 Cal.App.4th 1388, 1398.)

“The ‘critical consideration’ under the first part of the anti-SLAPP analysis is ‘whether the cause of action is *based* on the defendant’s protected free speech or petitioning activity.’” (*Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1244, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Protected speech includes filing a complaint and other litigation-related conduct: “It is beyond dispute the filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16. [Citation.] Section 425.16 may also apply to conduct that relates to such litigation. [Citation.] Courts have adopted a ‘fairly expansive view’ of litigation-related conduct to which section 425.16 applies. [Citation.] Moreover, ‘clauses (1) and (2) of section 425.16, subdivision (e) . . . are coextensive with the litigation privilege of Civil Code section 47, subdivision (b).’ [Citation.]” (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125-1126; *Navellier v. Sletten, supra*, 29 Cal.4th at p. 92.) The litigation privilege applies to all communications made during litigation. (*Brown*, at p. 1126.)

B. Anti-SLAPP

Whether a cause of action arises from specified conduct for the purposes of the statute depends on the principal thrust or gravamen of the plaintiff’s cause of action. (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 867.) On appeal, defendants characterize the San Bernardino complaint as being based entirely on their conduct “for filing suit, litigating, and prevailing in the Orange County [case].” As such, defendants claim they are entitled to anti-SLAPP

protection because Gianulias “impermissibly targets [their] speech and petitioning conduct directly related to the prior Orange County [case].” Additionally, defendants assert Gianulias cannot prevail because their speech and conduct are privileged under Civil Code section 47, subdivision (b), and because his claims are barred by principles of res judicata and collateral estoppel, and for other reasons.

Whatever the ultimate merits of Gianulias’s San Bernardino complaint, our independent review concludes that the anti-SLAPP statute does not apply. To try putting it as simply as possible, the record reflects that, after the parties’ business dealings soured, TSD sued defendants, and Sommai and Chic Homes filed a cross-complaint. After Gianulias’s complaint was dismissed without prejudice, Sommai and Chic Homes obtained a default judgment against him and TSD. Gianulias then filed a second complaint, asserting similar claims as before against defendants. Although the San Bernardino complaint makes repeated references to the previous Orange County case, the essential dispute, which involves the failure of the 2009 transaction, does not constitute protected speech. As such, defendants cannot claim protection under the anti-SLAPP statute. For a similar reason, the litigation privilege does not apply because the San Bernardino complaint is not based on conduct in the Orange County case.

The case upon which defendants primarily rely is not pertinent authority for their position. In *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, the appellate court reversed the trial court’s order denying an anti-SLAPP motion. The *Rodhe* complaint was a suit for defamation based on voice mail messages left by a lawyer threatening litigation. (*Id.* at pp. 33-34.) The San Bernardino complaint is not based on litigation conduct.

Instead, many courts have determined in various contexts that, in cases where there is successive litigation between the parties and subsequent litigation is not based on the previous litigation, the later litigation is not protected under the anti-SLAPP statute: “[C]onduct is not automatically protected merely because it is related to pending litigation; the conduct must arise from the litigation.” (*Optional Capital, Inc. v. Das Corporation, supra*, 222 Cal.App.4th at p. 1400; *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286-1287; *Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1161-1162.)

In *Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 133-140, the appellate court affirmed the trial court’s denial of the defendant’s anti-SLAPP motion. *Moriarty* involved somewhat similar facts because the current litigation potentially related to an earlier unlawful detainer case but the court found that the defendant could not sufficiently establish that the current litigation was based on prior litigation. (*Id.* at pp.133-136.) The appellate court reasoned that, even though the previous legal action triggered the plaintiff’s current complaint, it did not cause the complaint to be filed. (*Id.* at p. 136.) In *Old Republic Construction Program Group v. The Boccardo Law Firm, Inc., supra*, 230 Cal.App.4th at pages 862-870, the appellate court held it was the allegedly fraudulent acts, not the previous lawsuit, that was the gravamen of the causes of action in the current lawsuit.

The San Bernardino complaint is related to but not based upon the Orange County case; it is not a SLAPP suit. Because we conclude that defendants have not met their burden under the first step of the SLAPP analysis, we do not reach step two, concerning

the likelihood of prevailing. (*Moriarty v. Laramar Management Corp.*, *supra*, 224 Cal.App.4th at p. 140; *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) We do, however, observe that for the doctrine of res judicata to apply, the same parties must actually adjudicate the same causes of action. (*Lyons v. Security Pacific National Bank* (1995) 40 Cal.App.4th 1001, 1015.) There are different parties, causes of action, and adjudications in the Orange County and San Bernardino County proceedings. Similar difficulties present an obstacle to the application of the principles of collateral estoppel. (*Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 914, 820, citing *Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 847; *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156.) Defendants’ other arguments need not be considered in view of our holding that the San Bernardino complaint does not qualify for anti-SLAPP protection.

IV

DISPOSITION

We affirm the trial court’s denial of defendants’ motion under section 425.16. The parties are to bear their own costs on appeal.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.