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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MICHAEL HOVSEPIAN,

Plaintiff and Respondent,

v.

JOHN TOMAINO,

Defendant and Appellant.

F062881

(Super. Ct. No. 11CECG00400)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. M. Bruce Smith, Judge.

Law Offices of Murray M. Aron and Murray M. Aron for Defendant and Appellant.

Fike & Watson and David A. Fike for Plaintiff and Respondent.

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Defendant appeals from the denial of his special motion to strike plaintiff's complaint, filed pursuant to Code of Civil Procedure section 425.16¹ (anti-SLAPP motion).² He contends plaintiff failed to demonstrate a probability of prevailing on his claims. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff leased a hangar at Chandler Airport from the City of Fresno (city) for the operation of his business, Aloha Aircraft Sales. Defendant leased space at Chandler Airport from the city for the operation of his business, American Helicopters. Defendant's lease included a provision requiring him to be present and open for business not less than 40 hours per week. Plaintiff filed a complaint against defendant alleging two causes of action: defamation and intentional infliction of emotional distress. Plaintiff alleged defendant made false and unprivileged written and oral publications accusing plaintiff of bribing a city official, which injured plaintiff in his reputation and occupation. In response, defendant filed a special motion to strike the complaint pursuant to section 425.16. Defendant's motion assumed plaintiff's complaint was based on a letter defendant wrote to the city attorney in which he suggested plaintiff had a secret lease with the city excusing plaintiff from the requirement of keeping his business premises open at least 40 hours per week; the letter requested an investigation. Defendant contended his communication with the city was absolutely privileged pursuant to Civil Code section 47, subdivision (b).

Plaintiff filed opposition to the anti-SLAPP motion, asserting that the complaint was not based on the letter, of which plaintiff was not aware until he received defendant's

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

² "SLAPP is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.) Section 425.16 was enacted as a remedy to such lawsuits. (*Ibid.*)

motion. Instead, it was based on several false accusations. While plaintiff was leasing his hangar, the electric bills were excessive; he complained to the city and it eventually bought out his lease and paid him for improvements he had made. Defendant told city officials that plaintiff had made a \$5,000 bribe to Director of Aviation, Russell Widmar; that plaintiff's electric bills were high because he let a Laotian family live in his hangar; and plaintiff did not invest in improvements to his hangar. Plaintiff presented emails obtained from the city reflecting that a constituent had called on October 26, 2010, "to report alleged fraud ... in our Airports Dept."; the caller stated "Russ" received \$5,000 from the individual surrendering the hangar lease of Aloha Aircraft Sales. The caller said he would be contacting Channel 24. Plaintiff declared he received phone calls from news reporters at Channels 24 and 47 in October 2010, around the time defendant made the accusation of bribery to the city; the reporters asked him about defendant's bribery allegations. James Akers, a pilot, declared that, in approximately summer of 2010, while Akers was at a restaurant at the airport, he overheard defendant, who was sitting at a nearby table with a group of people, tell the group that plaintiff was a child molester and that defendant was going to report that plaintiff was bribing or paying off the director. Plaintiff's opposition also asserted defendant had harassed plaintiff in various ways.

The trial court found that defendant had met his burden of showing that the acts or statements alleged in the complaint were protected activities under section 425.16. After overruling the objections defendant made to plaintiff's evidence, the trial court concluded plaintiff had demonstrated a probability of prevailing on his claims. Accordingly, it denied defendant's motion. Defendant appeals.

DISCUSSION

I. Review of Anti-SLAPP Motions

Section 425.16 was enacted to deter SLAPP suits. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 16, fn. 1; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1414 (*Dowling*)). "A SLAPP lawsuit is generally defined as a 'meritless suit filed

primarily to chill the defendant’s exercise of First Amendment rights.’ [Citation.]” (*Dowling, supra*, at p. 1414.) Section 425.16, the anti-SLAPP statute, “‘is California’s response to the problems created by meritless lawsuits brought to harass those who have exercised these rights.’ [Citation.]” (*Dowling, supra*, at p. 1414.) “‘Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.’ [Citations.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278.) It involves a two-step process: “‘[t]he moving party bears the initial burden of establishing a prima facie showing the plaintiff’s cause of action arises from the defendant’s free speech or petition activity.’ [Citation.]” (*Dowling, supra*, 85 Cal.App.4th at p. 1417.) “‘If the defendant establishes a prima facie case, then the burden shifts to the plaintiff to establish “‘a probability that the plaintiff will prevail on the claim,”’ i.e., “make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff’s favor.” [Citation.]’” (*Ibid.*) “‘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.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

“Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based.’ [Citation.] However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3, first & second bracketed insertions added.) “If the trial court’s decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the

correctness of the grounds on which the lower court reached its conclusion. [Citation.]” (*City of Alhambra v. D’Ausilio* (2011) 193 Cal.App.4th 1301, 1307.)

Plaintiff does not contend the trial court erred in concluding defendant met his burden of demonstrating that the activities alleged in the complaint constituted protected activities under section 425.16. Consequently, we discuss only the second step of the process: whether plaintiff established a probability he will prevail on his claims.

II. Probability of Prevailing on Claims

“Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. [Citations.]” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645; see also, Civ. Code, §§ 44-46.) “Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the ‘public’ at large; communication to a single individual is sufficient. [Citations.]” (*Smith v. Maldonado, supra*, 72 Cal.App.4th at p. 645.) ““The elements of the tort of intentional infliction of emotional distress are: ““(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.””” (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

Defendant contends plaintiff failed to demonstrate a probability of prevailing on the claim because his statements to the group in the airport restaurant fell within the absolute litigation privilege of Civil Code section 47, subdivision (b). “A privileged publication or broadcast is one made: ... [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law” As it applies to publications made in a judicial proceeding, the privilege is not limited to

statements made in the courtroom, but includes “statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.” (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) The privilege also applies to “complaints to governmental agencies requesting that the agency investigate or remedy wrongdoing.” (*Id.* at p. 363.)

In *Lee v. Fick* (2005) 135 Cal.App.4th 89, 91 (*Fick*), the parents of several members of a high school baseball team complained to school officials about the treatment of their sons by the team coach. After the coach was fired by the school, he sued the parents for libel and other causes of action arising out of their complaints to the school and comments they made to one another. The Ficks filed an anti-SLAPP motion. The court held the motion should have been granted as to all challenged causes of action. The libel cause of action was based on a letter that Mrs. Fick wrote to the school district. The plaintiff’s evidence did not dispute that the letter was written pursuant to the principal’s instruction to the parents to put their complaints in writing, it was delivered to the school district, it was an attempt to have the defendant removed as baseball coach, Mrs. Fick did not provide the letter to anyone else, and school authorities investigated and eventually decided to remove the defendant as coach. (*Fick, supra*, 135 Cal.App.4th at p. 96.) Regarding the slander cause of action, Mrs. Fick declared she made statements to school officials and she may have made some comments to parents of other baseball players in discussing concerns about the plaintiff’s conduct. (*Id.* at p. 98.) The court stated: “In order to be effective in pressing their complaints to school authorities, parents must be free to communicate with each other without fear of liability. [Citation.] Such communications between interested parties are protected by the privilege. [Citation.]” (*Id.* at p. 97.)

Akers’ declaration states he overheard defendant say “he was going to report that Michael was bribing or paying off the director.” Akers knew defendant was discussing plaintiff because defendant also referred to Aloha. Widmar’s declaration states that he

was never offered, nor did he ever accept, a bribe from plaintiff. Defendant contends his comment to the group was a preliminary to contemplated litigation as discussed in *Hagberg*, or a discussion among interested parties as in *Fick*. Nothing in the evidence, however, indicates that there was any litigation contemplated or that the group to whom defendant was speaking included any interested parties. There was no evidence defendant discussed any litigation or potential litigation with the group. The evidence indicates defendant simply announced to the group his intention of reporting the alleged bribery. There is no evidence defendant discussed whether he should report it, sought the group's opinions, asked for their support, or asked them to join in making the report.

There is no evidence any member of the group joined defendant in reporting the alleged bribery to the city or any other public official, or made a separate report of that alleged conduct. The members of the group are not identified. Defendant does not argue that they were interested parties; he argues only that both plaintiff and defendant owned businesses at Chandler Airport and “[t]he meeting was a discussion at Chandler Airport by one lessee about reporting another lessee for allegedly bribing the director.” In *Fick*, the parents were interested persons because all had sons on the baseball team who were affected by the conduct of the coach and they all complained to the school about the coach. There is no similar evidence about a relationship between defendant and the group at the restaurant or a relationship between the group and plaintiff to show that the group had any legitimate interest in the communication.

“[T]he court should grant the [anti-SLAPP] motion if, as a matter of law, the defendants' evidence in support of the motion defeats the plaintiff's evidentiary support for the claim. [Citation.]” (*Fick, supra*, 135 Cal.App.4th at p. 95.) Defendant presented

no evidence contradicting plaintiff's or supporting his claim of privilege. His arguments did not defeat plaintiff's evidentiary support for the claims alleged in the complaint.³

III. Matters Outside the Scope of the Complaint

Defendant contends the trial court improperly considered evidence of matters beyond the scope of the complaint in ruling on the motion. The complaint alleged only that defendant made false and unprivileged publications accusing plaintiff of bribing a city official. Defendant points to evidence presented by plaintiff that defendant stated plaintiff is a child molester, plaintiff allowed a Laotian family to live in the hangar, and plaintiff did not invest in hangar improvements; he also cites evidence that defendant engaged in a pattern of harassing plaintiff for years. In its ruling, the trial court concluded reports to the city of bribery and other activities (including allowing a Laotian family to live in the hangar and not investing in hangar improvements for which he was to be paid) were absolutely privileged under Civil Code section 47, subdivision (b), because defendant was asking for an investigation. It concluded plaintiff could not prevail on those claims.

The trial court expressly stated that the accusation that plaintiff was a child molester was not alleged in the complaint, and it therefore did not consider that conduct in ruling on the motion. For the same reason, the court stated it was not considering the harassing acts. Although, as defendant points out, the trial court made one passing reference to plaintiff alleging defendant made a false accusation that he was a child molester, we do not believe the decision was based on that accusation or the result of the motion would have been different without that reference. Defendant has not demonstrated prejudicial error.

³ In light of our conclusion that the motion was properly denied based on allegations of false statements made at the restaurant, it is unnecessary for us to address defendant's arguments about the allegations that defendant published false statements to news reporters.

DISPOSITION

The order is affirmed. Plaintiff is entitled to costs on appeal.

HILL, P. J.

WE CONCUR:

WISEMAN, J.

KANE, J.