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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PATRICIA A. PINTO,

Plaintiff and Appellant,

v.

KRYSTAL MANNING et al.,

Defendants and Respondents;

LAURIE MANNING,

Defendant and Appellant.

G045172

(Super. Ct. No. 30-2010-00406769)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed in part and reversed in part.

Long & Marquis, David M. Long and William A. Marquis for Plaintiff and Appellant.

Law Offices of Edward A. Dzwonkowski, Edward A. Dzwonkowski and Russ E. Boltz for Defendants, Appellant and Respondent.

Defendants Krystal Manning, Marndena Manning, Danielle Manning (collectively the Mannings), and Laurie Manning (Laurie; all four defendants collectively defendants) demurred to the complaint of plaintiff Patricia A. Pinto for slander of title and conspiracy to slander title and also filed a special motion to strike it. (Anti-SLAPP motion; Code Civ. Proc., § 425.16; all further references are to this code unless otherwise stated.) The court overruled the demurred, granted the motion as to the Mannings but denied it as to Laurie.

Plaintiff appeals the grant of the Mannings' motion. Laurie appeals the denial of her motion and the overruling of her demurrer. We reverse the grant of the Mannings' motion and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Patricia Manning (decedent) had three children, including plaintiff; her two sons predeceased her. Laurie was married to one of the sons and had two daughters, defendants Marndena and Danielle. Defendant Krystal is the daughter of the other son.

Before the decedent died she transferred one piece of real property and personal property to plaintiff and herself in joint tenancy and made plaintiff the beneficiary of her bank accounts and insurance policies. When decedent died the Mannings sued plaintiff for partition of real property, quiet title, fraud, an accounting, declaratory relief, and conspiracy, essentially seeking an interest in the property decedent had transferred to plaintiff. The Mannings then recorded a lis pendens on the real property. Plaintiff successfully demurred to the original and first amended complaint, after which the Mannings filed a second amended complaint seeking a constructive trust on the real and personal property and for constructive fraud and breach of fiduciary duty. After plaintiff's motion to expunge the lis pendens was granted, apparently based on lack of proper service, the Mannings recorded a second one.

Plaintiff then demurred to the second amended complaint and moved to expunge the second lis pendens. The court sustained the demurrer without leave to amend and expunged the lis pendens on the grounds the constructive trust cause of action is not a real property claim and the Mannings were unable to show the likely validity of a real property claim by a preponderance of the evidence. According to the complaint in this action, the Mannings appealed the judgment but not the expungement. The judgment was affirmed.

Plaintiff then filed the instant action against all defendants for slander of title and conspiracy to slander title based on recording the lis pendens. She alleged she was injured because she could not sell the real property while the lis pendens was of record, during which its value decreased.

As to Laurie, plaintiff alleged she filed the original action and lis pendens “without original authorization from” the Mannings, who later ratified her actions. She further pleaded Laurie conspired with the Mannings to take those actions, by retaining a lawyer, and signing the verification on behalf of the Mannings, and more specifically Marndena.

Defendants filed the demurrer and anti-SLAPP motion. The court overruled the demurrer and denied the motion as to Laurie but granted it as to the Mannings.

DISCUSSION

1. Anti-SLAPP Motion

a. Introduction

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any “cause of action against [that party] arising from any act [the party commits] in furtherance of the . . . right of petition or free speech under the United States

Constitution or the California Constitution in connection with a public issue” An “act in furtherance of a person’s right of . . . free speech under the United States or the California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a . . . judicial proceeding[or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body” (§ 425.16, subd. (e).)

We review an order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) In doing so we must engage in a two-step analysis. First we need to determine whether the defendants have met their burden to show “that the challenged cause of action is one arising from protected activity.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If so, the burden shifts to the plaintiff to show the likelihood of prevailing on the claim. (*Ibid.*) “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.]’ [Citations.]” (*Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.) The intent of the statute is to prevent “chill[ing] the valid exercise of . . . freedom of speech and petition . . . through abuse of the judicial process” and to that “end, th[e] section [is to] be construed broadly.” (§ 425.16, subd. (a).)

b. Protected Activity

It is well established that the recording of a lis pendens is protected activity under section 425.16 (e.g., *Park 100 Inv. Group II v. Ryan* (2009) 180 Cal.App.4th 795, 805-806) and the parties do not dispute this. But plaintiff argues defendants engaged in

illegal conduct not encompassed within the statute. Specifically, she relies on her allegation Laurie forged the signature of Marndena on the original complaint.

Section 425.16 “does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights. [Citation.]” (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 704-705.) Where “the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff’s action.” (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 320.) Here plaintiff has not shown the alleged wrongful signature is illegal as a matter of law.

Plaintiff points to section 446, subdivision (a), which provides that “where a pleading is verified, it shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his or her office, or from some cause unable to verify it, or the facts are within the knowledge of his or her attorney or other person verifying the same. When the pleading is verified by . . . any other person except one of the parties, he or she shall set forth in the affidavit the reasons why it is not made by one of the parties.” Here, according to the complaint, Laurie did not make such an explanation.

But that does not render the verification illegal as a matter of law. In *California State University v. Superior Court* (2001) 90 Cal.App.4th 810 real party in interest argued that a plaintiff’s petition for writ of mandate, verified by its lawyer, should be denied because the verification did not state why the plaintiff had not signed it. The court rejected that argument, explaining that under those circumstances ““the court may permit the pleading to stand. [Citations.]” [Citation.]’ [¶] . . . [¶] ‘The object of a verification is to assure good faith in the averments or statements of a party. [Citations.] The absence of any complaint by real part[y] concerning verifying counsel’s good faith renders this contention meritless.’” (*Id.* at p. 822, fn. 4.)

Here, plaintiff's only challenge is to the signature by Laurie, i.e., the failure to comply with section 446, subdivision (a). Moreover, in her complaint she acknowledges Marndena ratified the filing of the action.

Further, defendants do not concede illegality. Rather, they point to the allegation the Mannings ratified Laurie's actions. They also argue plaintiff failed to set out any evidence showing they had an intent to defraud. Both of these facts are required elements of forgery as set out in Penal Code section 470, subdivision (a), which defines forgery as the "sign[ing of] the name of another person" "with the intent of defraud, knowing that . . . [there] is not authority to do so"

Thus, the recording of the lis pendens was protected activity under the anti-SLAPP statute and the first prong of the two-part test has been satisfied.

c. Probability of Success on the Merits

As for the second factor, to show a probability of success on the merits of the action, 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." [Citation.] . . . [P]laintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. [Citation.]' [Citation.]" (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 866-867.)

Plaintiff sued defendants on two theories. First, she alleged defendants slandered her title by recording the lis pendens. "The elements of a cause of action for slander of title are '(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.' [Citations.]" (*Alpha and Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664, italics omitted.) Plaintiff made out a prima facie case supporting this claim.

There is no question a lis pendens is a publication. Defendants argue recording a lis pendens is absolutely privileged under the litigation privilege set out in Civil Code section 47. Not so. A lis pendens is only privileged if “it identifies an action previously filed . . . which affects the title or right of possession of real property, as authorized or required by law.” (Civ. Code, § 47, subd. (b)(4).)

Although the Supreme Court has not weighed in on whether a claim for a constructive trust will support a lis pendens (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 650, fn. 7 [“we do not address the question of whether a claim that seeks to impose a constructive trust . . . may be a basis for a lis pendens”]), the overwhelming authority deems it insufficient. (E.g., *Urez Corp. v. Superior Court* (1987) 190 Cal.App.3d 1141, 1149 and its progeny.) A lis pendens is proper in “an action in which a real property claim is alleged.” (§ 405.2.) In the circumstances of this case, and consistent with the language in Civil Code section 47, subdivision (b)(4), such an action requires a pleading affecting “title to, or the right to possession of, specific real property” (§ 405.4.)

“A constructive trust is ‘not an independent cause of action but merely a type of remedy’ [citation]” (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82) and must be based on a cause of action pleading a plaintiff’s entitlement to real property. In the underlying complaint, although defendants prayed for an order compelling plaintiff to transfer to them their respective interests in the subject real property, no real property causes of action were alleged. In addition to the constructive trust cause of action, defendants set out only claims based on constructive fraud and breach of fiduciary duty. “[A] plaintiff may not file a lis pendens on the basis of a complaint that seeks the imposition of a constructive trust on the defendant’s property where the plaintiff has failed to adequately plead facts in the underlying complaint that would entitle the plaintiff to such a remedy. [Citations.]” (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 921.)

Defendants argue the quiet title cause of action in the original complaint sufficiently supported the lis pendens. Without commenting on the substance of the argument, even if that were true, defendants did not withdraw the lis pendens at the time they filed the operative second amended complaint. At that point there was no cause of action affecting title or the right to possess real property.

As to the third factor, the lis pendens notice was false because in it defendants stated the action could affect title or possession of the property but that was not true. (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1381.)

Finally, plaintiff submitted evidence she was damaged. The realtor who listed and sold the property filed a declaration stating that the house was originally listed in July 2006 for \$640,000. The lis pendens was recorded in November 2006 and when potential purchasers learned of it they lost interest. The house was ultimately sold in November 2008 for about \$400,000. The realtor stated that during this period the housing market declined.

Plaintiff purported to allege a second count for civil conspiracy, but there is no such cause of action. (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 954.) Rather, conspiracy is “a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.’ . . . ‘A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve.’ [Citation.]” (*Id.* at pp. 954-955)

The gist of plaintiff’s claim for civil conspiracy is Laurie’s agreement with the Mannings to file the underlying complaint and record the lis pendens to prevent sale of the property. It is based on essentially the same conduct as the underlying slander of title claim and thus survives as well.

Defendants raise the statute of limitations in support of their demurrer and not in the context of probability of success on the merits, but plaintiff would not be able to establish that element if the statute had run when they filed their complaint. The three-

year statute of limitations for slander of title (§ 338, subd. (g)) begins to run “when plaintiff could reasonably be expected to discover the existence of the claim,” i.e., when a plaintiff learns of a false and unprivileged statement that disparages title to her property (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230).

The parties dispute when the statute began to run. If it accrued at the time the original lis pendens was recorded on November 2, 2006, plaintiff’s complaint, filed on September 9, 2010, was too late. If, however, it began to run at the time plaintiff sold the property and suffered monetary damages, in December 2008, the complaint was timely filed.

The law is not entirely settled on this issue. Some cases hold that, because damages are one of the elements of the tort, an action does not accrue until a plaintiff incurs a monetary loss. (See *Truck Ins. Exchange v. Bennett* (1997) 53 Cal.App.4th 75, 84; *Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 929.) But at least one case suggests that if a plaintiff knows of the false, unprivileged statement, she cannot wait to bring the action until she wants to sell the property because she would not be acting with reasonable diligence in protecting her rights. This would be an unfair extension of the statute of limitations. (*Arthur v. Davis* (1981) 126 Cal.App.3d 684, 691, fn. 5.)

Our facts are different. Here, plaintiff had already sought to sell the property at the time the lis pendens was recorded and the alleged slanderous statement was made. At that point, according to the declaration of plaintiff’s realtor, potential purchasers were no longer interested in the property. There is some evidence plaintiff knew she would suffer pecuniary damages after the lis pendens was recorded. The realtor’s declaration states that after the recordation the housing market “dropped significantly.” But she sets out no specific dates as to when the drop began.

This requires a factual resolution. We believe plaintiff has provided sufficient evidence to show a prima facie case and thus has satisfied the second prong of the analysis.

2. *Demurrer*

Defendants demurred on the ground the action was barred by the statute of limitations. Laurie appeals, arguing the court erred in overruling it. But an appeal does not lie from an order overruling a demurrer; it may be reviewed only upon appeal from a final judgment. (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 125.) Therefore, Laurie's appeal based on the order overruling her appeal is not well taken.

The Mannings raise this argument in their respondents' brief in opposition to plaintiff's appeal from the grant of the anti-SLAPP motion in their favor. But they did not appeal from that ruling, arguing it only in their respondents' brief, and if they had, it also would be barred because it is an interlocutory order.

Even if the issue was properly before us, however, as discussed above, the complaint does not establish on its face that it is barred. In determining the sufficiency of a complaint we must look only to the facts it alleges. (*Sui v. Price* (2011) 196 Cal.App.4th 933, 938.)

Here, the complaint does not state a date as to when plaintiff discovered she would suffer a pecuniary loss, i.e., specifically when the market "dropped precipitously." The complaint alleges only that it occurred during the period the lis pendens in effect. The lis pendens were recorded on November 2, 2006 and May 17, 2007 and expunged on September 18, 2007; the complaint was filed on September 9, 2010. Although it is likely real estate prices declined prior to the filing of the complaint, we will not make assumption as to when this specifically occurred for purposes of considering a demurrer. "If the dates establishing the running of the statute of limitations do not clearly appear in

the complaint, there is no ground for a general demurrer.” (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.)

DISPOSITION

That portion of the order granting the special motion to strike is reversed. The order is affirmed in all other respects. Plaintiff is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.