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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RALPH DANIEL SALAS,

Plaintiff and Respondent,

v.

MICHAEL THOMPSON,

Defendant and Appellant.

G046149

(Super. Ct. No. 30-2011-00498152)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Jamoia A. Moberly, Judge. Affirmed.

Carothers DiSante & Freudenberger, Todd R. Wulffson and Mark H. Van
Brussel for Defendant and Appellant.

Sands Lerner, Neil S. Lerner and Arun Dayalan for Plaintiff and
Respondent.

* * *

INTRODUCTION

Defendant Michael Thompson appeals from an order denying his special motion to strike plaintiff Ralph Daniel Salas's complaint for defamation under Code of Civil Procedure section 425.16, commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute.¹ Thompson contends the trial court erroneously concluded he failed to show Salas's complaint arose out of protected activity. He argues the complaint was based on oral statements made in connection with an issue under consideration or review by a judicial body, within the meaning of section 425.16, subdivision (e)(2).

We affirm. Salas's complaint was based on allegations Thompson falsely stated to Thompson's business colleague and friend, Michael Hansen, that Salas was a convicted rapist, Salas's rape conviction record was under seal, and Hansen should keep his sister away from Salas. For the reasons we will explain, Thompson's alleged oral statements were not made in connection with an issue under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2), and therefore did not constitute protected activity. The trial court, therefore, did not err by denying Thompson's anti-SLAPP motion.

BACKGROUND

I.

THE DEFAMATION COMPLAINT

Salas filed a verified complaint against Thompson, containing claims for defamation per se and defamation per quod (the defamation complaint). The defamation complaint alleged the following in support of Salas's claims. Salas is the principal owner and officer of Harbor Breeze Corporation (HBC), which is a "vessel common carrier

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

operating harbor cruises, harbor tours, whale watching excursions and charters to Santa Catalina island out of the Port of Long Beach.” Thompson is a principal of HBC’s competitors, Newport Landing Sportfishing and Davey’s Locker Sportfishing (the Thompson entities), which offer whale watching and sport fishing excursions out of Newport Beach.

In April 2011, HBC filed a lawsuit in Los Angeles County Superior Court, alleging the Thompson entities had competed unfairly and unlawfully with HBC (the unfair competition action). The unfair competition action was “currently active and ongoing” at the time the defamation complaint was filed.

According to the defamation complaint filed in Orange County Superior Court, in June 2011, Thompson made several false statements about Salas to their mutual colleague in the commercial maritime industry, Michael Hansen. Hansen was the president of Dana Wharf Sportfishing, an entity that operates boat tours, whale watching excursions, and fishing trips in the same geographic areas as HBC and the Thompson entities. Specifically, the defamation complaint alleged Thompson stated to Hansen that Salas had a rape conviction, and that Thompson was trying to unseal Salas’s rape conviction record, thereby implying that the rape conviction “involved something more sinister such as the rape of a minor.” Thompson further stated that Hansen “should keep his sister, Donna, an adult, who also works for Dana Wharf Sportfishing, away from [Salas] because of [Salas]’s rape conviction.” The defamation complaint alleged Thompson’s statements to Hansen were false because Salas had never been charged, accused, indicted, arrested, or convicted of rape and there was no rape conviction record to unseal.

II.

THE ANTI-SLAPP MOTION AND SALAS’S OPPOSITION

Thompson filed an anti-SLAPP motion challenging the defamation complaint on the ground it arose out of statements made in connection with an issue

under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2). We summarize the evidence offered in support of and in opposition to the anti-SLAPP motion as follows.

A.

Thompson's Evidence in Support of the Anti-SLAPP Motion

In support of the anti-SLAPP motion, Thompson filed the declaration of his attorney, Todd R. Wulffson, in which Wulffson authenticated a copy of HBC's complaint in the unfair competition action. The complaint in the unfair competition action contained claims for unfair competition and false advertising in violation of Business and Professions Code sections 17200 and 17500, common law unfair competition, intentional interference with prospective economic relations, negligent interference with prospective economic relations, commercial defamation, and trade libel.

The complaint in the unfair competition action was based on allegations that the Thompson entities deceived the general public by falsely advertising the geographic regions they served, intentionally misrepresented to the public that whale watching and sports fishing in Southern California outside of Newport Beach are generally poor, and controlled a Web site that purported to be a neutral consumer guide to whale watching providers in which the Thompson entities "offer[ed] false and biased reviews under the guise of consumer neutrality." The complaint alleged the Thompson entities manipulated Internet search engines to direct Internet traffic to themselves.

The commercial defamation and trade libel causes of action in the unfair competition action's complaint were based on allegations that a Web site controlled by the Thompson entities stated (1) "it takes HBC's vessels 30 to 40 minutes to get out of the Long Beach harbor in order to enter the whale watching portion of the ocean, while it is common knowledge in the industry that it only takes 10 to 15 minutes"; (2) "Newport Beach Harbor is less polluted tha[n] Long Beach Harbor, which is scientifically false"; (3) "it takes only 20 minutes to travel by car from Long Beach, California to [the

Thompson entities'] business addresses in Newport Beach, California, when it takes, on average, at least 45 minutes to an hour"; (4) "HBC is mostly a harbor cruise company as opposed to a whale watching company when the far majority of HBC's business and revenue is derived from its whale watching services"; and (5) "Newport Beach, California is a natural harbor, when it in fact is a man-made harbor."

Wulffson's declaration also authenticated a letter written to Google Inc. on behalf of Whale Watching Owners Group, which was signed by Salas, among others, and which complained about the Thompson entities. Wulffson further authenticated excerpts from Salas's deposition that was taken in the unfair competition action and which Thompson had attended. During his deposition, Salas testified that he had been sued by a former employee for sexual harassment based on allegations he made sexually charged comments to her. The former employee did not claim Salas attempted to rape her. He testified no woman had ever claimed that he attempted to rape her. Salas also testified he had previously been convicted of driving under the influence, disturbing the peace, for getting into a fight in a bar, and breaking the antenna off a person's car. He had never been charged with or convicted for crimes involving violence against women.

Thompson also filed Hansen's declaration in support of the anti-SLAPP motion, in which Hansen stated Thompson never told him that Salas had a rape conviction. Hansen declared that during a telephone conversation, he told Thompson Hansen's sister was considering possible "shared business ventures" with Salas. Hansen declared Thompson responded by saying, "Donna may not want to do business with Mr. Salas, because, in Mr. Thompson's opinion, Mr. Salas was not a reputable person, with a history of violent behavior toward women and others, some of which resulted in criminal convictions." Hansen further stated: "I believe [Thompson] also told me that Mr. Salas had a history of claims of sexual harassment by women he worked with. My interpretation of Mr. Thompson's statements was that he was genuinely concerned for my sister's welfare, and wanted her to know his opinion of Mr. Salas." Hansen denied

Thompson ever used the word “rape” in connection with any description of Salas and denied, inter alia, telling Salas otherwise.

B.

Salas’s Evidence in Opposition to the Anti-SLAPP Motion

In opposition to the anti-SLAPP motion, Salas submitted the declaration of Douglas Lambert, in which Lambert stated that both HBC and Dana Wharf Sportfishing were his clients and that Salas and Hansen were his friends. Lambert stated that in July 2011, he called Hansen’s sister and, during that conversation, she “stated that she had been told by Mike Hansen that he was told that Dan Salas was a convicted rapist.” Lambert asked Hansen’s sister where the information about Salas had been obtained. She replied that Hansen “had said to her that Michael Thompson had told him that in a recent phone call. She also stated that Mike Hansen had said to her that Mr. Thompson told him that [she] might not be safe around Mr. Salas and that [she] should stay away from him.”

Lambert further stated that he spoke on the telephone with Hansen, who confirmed his sister’s report. Lambert then called Salas and informed him of what had been said about him. Salas became extremely upset, told Lambert, “it was absolutely untrue,” and said that he was going to drive to Dana Point and meet with Hansen “to make sure there was no misunderstanding as to what he had been told and to assure him that the statements made about him by Mr. Thompson were untrue.”

Salas filed his own declaration in opposition to the anti-SLAPP motion, in which he stated, inter alia, that after speaking with Lambert, Salas met with Hansen who confirmed (1) Thompson had told Hansen that Salas was a convicted rapist; (2) Thompson was attempting to unseal Salas’s rape conviction record; and (3) Thompson warned Hansen that his sister should stay away from Salas because of the rape conviction. Salas also stated in his declaration he had reviewed Hansen’s declaration that was filed in support of the anti-SLAPP motion, in which Hansen denied Thompson had made such statements. Salas stated he thereafter contacted Hansen to

discuss “why he had changed his story.” Hansen told Salas Hansen’s 77-year-old father is “best friends with Mr. Thompson,” Hansen did not think his father knew about the defamation complaint or the unfair competition action, and Hansen was “concerned it would kill his father to learn about it.”

III.

THE TRIAL COURT DENIES THE ANTI-SLAPP MOTION ON THE GROUND THOMPSON FAILED TO ESTABLISH THE DEFAMATION COMPLAINT AROSE OUT OF PROTECTED CONDUCT; THOMPSON APPEALS.

The trial court denied the anti-SLAPP motion. The court’s minute order stated in pertinent part: “[T]he statements or writings in question must occur in connection with an ‘issue under consideration or review’ in the proceeding. [Citation.] [¶] Defendant fails to demonstrate, firstly, that the alleged defamatory statements concern information testified to in Plaintiff’s deposition, as the Declaration of Defendant’s Counsel does not indicate Plaintiff testified to a rape conviction. [¶] Secondly, as the underlying lawsuit involves claims for unlawful business practices, Defendant fails to demonstrate the alleged defamatory statement concerned an ‘issue under consideration by a judicial body.’ Defendant has not established that Plaintiff’s alleged rape conviction was an issue under consideration by the Los Angeles Superior Court or related to the claims of unfair competition. [¶] Thus, as Defendant has failed to demonstrate he engaged in protected activity, Defendant’s motion fails the first step of analysis under C.C.P. §425.16 and is denied.”²

Thompson appealed from the order denying the anti-SLAPP motion.

² Thompson argues the trial court erred by overruling some of the evidentiary objections Thompson had raised challenging portions of Lambert’s and Salas’s declarations that were filed in opposition to the anti-SLAPP motion. We do not need to address those evidentiary challenges because whether the trial court erred in ruling on some of Thompson’s evidentiary objections is only relevant to the second prong of an anti-SLAPP analysis, which, for the reasons discussed *post*, we do not reach.

DISCUSSION

I.

SECTION 425.16 AND STANDARD OF REVIEW

“Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.’” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.)

We independently review the trial court’s order granting the anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) “‘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.]’ [Citation.]” (*Id.* at p. 326.)

II.

THOMPSON DID NOT SHOW THAT THE STATEMENTS UNDERLYING THE DEFAMATION COMPLAINT AROSE FROM PROTECTED ACTIVITY WITHIN THE MEANING OF SECTION 425.16, SUBDIVISION (b)(1).

As to the defendant's initial burden in bringing an anti-SLAPP motion, "[t]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech." (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 61.) In bringing the anti-SLAPP motion, Thompson argued the defamation complaint arose from activity protected under section 425.16, subdivision (e)(2), which provides that an act "in furtherance of a person's right of petition or free speech" includes a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

Citing *Supple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 238, Thompson argues, "Thompson's statements to Hansen, in which Thompson merely recounted matters about Salas that Salas himself had testified to in deposition, fall[] squarely within section 425.16(e)(2) in that they were oral statements made in connection with an issue 'under consideration or review by a . . . judicial body, or other official proceeding authorized by law.'" But Thompson's alleged statements to Hansen, upon which the defamation complaint is entirely based, do not "merely recount[] matters" that Salas testified to in his deposition, as Thompson contends. The record does not show Salas ever testified he had been convicted of rape, much less that he had suffered a rape conviction which had been placed under seal. To the contrary, the record shows Salas testified he had never been convicted of rape. Thus, the record does not show the alleged defamatory statements' connection to Salas's deposition, in particular, or the unfair competition action, in general.

Hansen explained in his declaration that although Thompson never stated Salas suffered a rape conviction, Thompson had expressed his opinion that Salas was not a reputable person and had a history of violent behavior toward women and others. Hansen further explained Thompson's statements were made in response to Hansen's news that his sister was considering going into business with Salas. No evidence was presented showing that Thompson ever mentioned Salas's deposition or the unfair competition action or whether Hansen was even aware of the unfair competition action at the time. (Cf. *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [section 425.16, subdivision (e)(2) protected e-mail litigation update describing parties' contentions and court rulings that was "directed to individuals who had some involvement in the parties' litigation"]; *Healy v. Tuscan Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 ["Because one purpose of the letter was to inform members of the association of pending litigation involving the association, the letter is unquestionably 'in connection with' judicial proceedings [citation] and bears "some relation" to judicial proceedings".])

Furthermore, whether Salas had suffered a rape conviction was not an issue before the trial court in the unfair competition action. Although Thompson argues HBC's and, "by extension, Salas's reputations" were issues under consideration by the trial court in the unfair competition action, the complaint in the unfair competition action shows HBC alone sued the Thompson entities for business torts. Salas is not a party to the unfair competition action and is not mentioned in the complaint filed in that case. The mere existence of the unfair competition action at the time the alleged defamatory statements were made does not establish that the alleged defamatory statements were made in connection with an issue under consideration or review in the unfair competition action.

In *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 172 (*McConnell*), two employees separately sued their employer

on the ground their employment agreements contained illegal provisions; they sought a declaration that they had the right to terminate their employment at will. The day after the lawsuits were filed, the employees were escorted from the workplace and were provided letters informing them that their job duties had been “temporarily” modified. (*Ibid.*) In the letters, they were instructed not to come into the office, use the company’s e-mail, attend any client or industry functions, or communicate with clients or other employees. (*Ibid.*) The employees amended their lawsuits to add causes of action for retaliation and wrongful termination based on the employer’s conduct. (*Ibid.*) The employer filed anti-SLAPP motions as to the two added causes of action arguing those causes of action were based on the employer’s letters to the employees, which, it argued, were written in connection with an issue under consideration or review in the employees’ lawsuits. (*Ibid.*) The trial court denied the anti-SLAPP motions, finding the added claims did not arise from protected activity. (*Id.* at p. 173.)

Affirming the trial court’s denial of the anti-SLAPP motions, the appellate court stated: “[A]s case law confirms, a cause of action does not necessarily arise from protected activity merely because it was filed after the defendant engaged in that activity.” (*McConnell, supra*, 175 Cal.App.4th at p. 176.) The court explained: “[T]he existence of the [employees’] lawsuits does not mean that any writing [the employer] might send thereafter is a ‘writing made in connection with an issue under consideration or review’ in the lawsuits. [Citation.] Thus, even if one could conclude that [one employee’s] retaliation and wrongful termination claims arose from [the] letter, and not from [the] action eliminating virtually all of their job duties, the letter, on its face, was not written in connection with ‘an issue under consideration or review by a . . . judicial body.’” (*Id.* at p. 177.)

Quoting *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 867, the court in *McConnell, supra*, 175 Cal.App.4th at page 177, further explained, “it is insufficient to assert that the acts alleged were ‘in connection with’ an official proceeding. There must

be a connection with an issue under review in that proceeding.” The court noted that “[w]hile the lawsuits undoubtedly precipitated [the employer]’s conduct the following day, that conduct, including the letter ‘temporarily modify[ing]’ the employees’ job duties, was directed at preventing that employee from taking clients away and not at establishing that the employee was legally required to remain employed. (*McConnell, supra*, at pp. 177-178.) The court observed the employer’s letter said “nothing at all” about the lawsuits or any claims the employer might make. (*Id.* at p. 178.) The court concluded, “[c]onsequently, it is difficult to find any basis to conclude that [the employer]’s letter was written ‘in connection with an issue under consideration’ in those lawsuits, of which no mention at all was made.” (*Ibid.*)

In *Paul v. Friedman, supra*, 95 Cal.App.4th at pages 856-858, a securities broker sued, inter alia, an attorney for conducting an intrusive investigation into the broker’s life and thereafter disclosing personal details to clients and others, which had no bearing on the securities fraud at issue in an arbitration proceeding. The attorney filed an anti-SLAPP motion, contending his conduct was protected because it was in connection with the arbitration proceeding, within the meaning of section 425.16, subdivision (e)(2). (*Paul v. Friedman, supra*, at p. 858.) The appellate court affirmed the trial court’s order denying the anti-SLAPP motion, stating that section 425.16 “does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with ‘an issue under consideration or review’ in the proceeding.” (*Paul v. Friedman, supra*, at p. 866.) The appellate court stated that “the intrusive prehearing investigation of and disclosures concerning [the securities broker]’s personal life—the subject of the lawsuit—were unrelated to any issue under consideration in the arbitration. In short, it is insufficient to assert that the acts alleged were ‘in connection with’ an official proceeding. There must be a connection with an issue under review in that proceeding.” (*Id.* at p. 867.)

As in *McConnell, supra*, 175 Cal.App.4th 169 and *Paul v. Friedman, supra*, 95 Cal.App.4th 853, the record here does not show the alleged defamatory statements were made in connection with an issue under consideration or review by the trial court in the unfair competition action or by any other judicial body.

Thompson argues, “[t]he sole purpose of Salas’s lawsuit was to intimidate Newport Landing and its owners from discussing HBC’s legal action with other members of the industry.” Thompson also argues: “Intimidating litigants and witnesses from discussing matters pending in a court proceeding is a primary reason the SLAPP law was enacted. Thompson therefore respectfully asks this Court to reverse the trial court’s ruling” Even if the alleged defamatory statements could be characterized as statements “discussing HBC’s legal action” or “matters pending in a court proceeding,” which for the reasons discussed *ante*, they cannot, “[t]he subjective intent of a party in filing a complaint is irrelevant in determining whether it falls within the ambit of section 425.16. ‘There simply is “nothing in the statute requiring the court to engage in an inquiry as to the plaintiff’s subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable.” [Citation.]’” (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1521.)

Thompson also argues that the California Supreme Court’s decision in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 “establishes that Thompson’s statements qualify for section 425.16 protection.” (Boldface and some capitalization omitted.) In *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at page 1109, the California Supreme Court held that in moving to strike a cause of action arising from a statement made before or in connection with an issue under consideration by a legally authorized official proceeding, a defendant need not “demonstrate separately that the statement concerned an issue of public significance.” Here, the anti-SLAPP motion was properly denied because Thompson was unable to show the defamation complaint arose from statements made in connection with an issue

under consideration in the unfair competition action, not because Thompson failed to show the statements concerned an issue of public significance. *Briggs v. Eden Council for Hope & Opportunity*, therefore, does not support Thompson's contention of error.

Because the trial court correctly concluded Thompson failed to demonstrate that the defamation complaint arose out of protected activity under section 425.16, subdivision (e)(2), we do not address whether Salas demonstrated a probability of prevailing on his claims.

DISPOSITION

The order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.