

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MANUEL ALCARAZ,

Plaintiff and Respondent,

v.

ROXANA OTERO DE KINKAID,

Defendant and Appellant.

G046288

(Super. Ct. No. 30-2011-00501385)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Anthony E. Bordighi and Anthony E. Bordighi for Defendant and Appellant.

Law Offices of Paul H. Sweeney and Paul H. Sweeney for Plaintiff and Respondent.

*

*

*

Defendant Roxana Otero De Kinkaid appeals from the denial of her special motion to strike (anti-SLAPP motion; Code Civ. Proc., § 425.16; § 425.16) the complaint of plaintiff Manuel Alcaraz. She argues the trial court erred in finding the claims did not arise from protected activity. She also asserts plaintiff cannot demonstrate a probability of prevailing on the merits of his claim. Because defendant did not adequately show the complaint was based on protected activity, we must affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant got into a dispute about a parking space in a mall parking lot. Thereafter, defendant reported the incident to the police department and to the Transportation Security Administration (TSA), which employed plaintiff as a police officer, claiming plaintiff had improperly touched her arm, thereby committing battery. Subsequently plaintiff sued defendant for defamation and intentional and negligent infliction of emotional distress based on her reports to the police and the TSA.

The court granted defendant's anti-SLAPP motion, finding her statements to the police and the TSA were protected speech. However, the court also found the complaint was "too vague" as to whether it was "based upon matters not related" to defendant's statements to the police or the TSA. In light of this finding the court ostensibly dismissed the complaint "without prejudice."

Three months later plaintiff filed a new action containing the same three causes of action but omitting all references to statements to the police and the TSA. Instead, the second complaint alleged defendant lied to "non-governmental people" during the same time alleged in the first complaint and in the "year from the date of the filing of [the second] complaint." This time the court denied the anti-SLAPP motion, ruling defendant had failed to show the second complaint was based on protected speech.

DISCUSSION

1. Request for Judicial Notice

Concurrently with filing her opening brief defendant filed a request for judicial notice of certain documents filed in the first action including: the first complaint; the first anti-SLAPP motion, opposition, and reply; and the motion for attorney fees and opposition. We granted that request.

Plaintiff maintains we should nevertheless disregard these documents, primarily the first complaint, because defendant failed to ask the trial court to take judicial notice of them in connection with the anti-SLAPP motion in this case. Plaintiff also asserts these documents are irrelevant.

We consider the first complaint for the purposes of providing background and context, but we agree with plaintiff that it is not proper for us to rely on any of these documents in deciding this appeal. Even though we granted the request for judicial notice, because the documents were not in front of the trial court, we decline to consider them in support of defendant's substantive argument. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [although reviewing court takes judicial notice it may choose not to rely on documents].) Defendant has not presented "any good or sufficient reason" for her failure to request judicial notice of these documents in the trial court. (*Ibid.*; see also *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326 [appellate court need not consider documents not in trial court record].)

2. Overview of Applicable Law

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 California Constitution in connection with a public issue’ includes: . . . any . . . conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(4).)

The court must engage in a two-step analysis under this section. First it has to determine whether the defendant has met her 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 demonstrate 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.) We review an order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

3. Protected Speech

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: . . . any written or oral statement or writing made before a[n] . . . executive[] . . . body or . . . any other official proceeding authorized by law” (§ 425.16, subd. (e)(1).) “A defendant meets [her initial] burden by demonstrating that the act underlying the plaintiff’s cause fits one of the[se] categories” [citation]. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

Defendant has failed to show the statements alleged in the second complaint are protected speech. Plaintiff alleges that, beginning on the date of the

parking lot dispute and “thereafter,” defendant made the offending statements to “non-governmental” persons. There is no reference to statements made to the police or TSA, nor is there any allegation that the statements refer to “a public matter under review by a legislative, judicial, or executive body” as defendant claims.

The fact the first complaint contained allegations of statements to governmental authorities is of no consequence. We have only the second complaint before us and it does not fall within section 425.16.

We certainly understand defendant’s position in this case. In ruling on the anti-SLAPP motion in the first case, the court had only two options: (1) grant and dismiss the first complaint with prejudice; or (2) deny it. Dismissal without prejudice, which is tantamount to granting the motion with leave to amend, was not an option.

When an anti-SLAPP motion is granted the plaintiff has no right to amend the complaint to show the speech is not protected in an attempt to avoid dismissal under section 425.16. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073; but see *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 870-871 [where speech is protected court may grant leave to amend to show probability of success].)

“Because the trial court concluded on the merits that [the] claim against the . . . defendants arose from their exercise of constitutional rights, [the plaintiff] cannot amend its pleading or *file a new pleading based on the same act* by the . . . defendants in an attempt to avoid the estoppel effect of the court’s ruling.” (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 667, italics added.)

Unfortunately, but perhaps understandably, defendant did not appeal from the ruling in the first case. That ruling is now final and we cannot review it. As noted above, we are confined to reviewing the second complaint in determining the outcome of this case, and, as pleaded, it withstands a motion under section 425.16. Because defendant did not show the second complaint was based on protected speech, the burden

never shifted to plaintiff to demonstrate a probability of success on the merits of the action, and we need not discuss that element.

DISPOSITION

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

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.