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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BADRIA ELNAGGAR et al.,

Plaintiffs and Appellants,

v.

THE IRVINE COMPANY LLC et al.,

Defendants and Respondents.

G051262

(Super. Ct. No. 30-2014-00726400)

O P I N I O N

Appeal from judgments and an order of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Affirmed in part and reversed in part.

Badria Elnaggar, in pro. per.; Eman Elamin, in pro. per. for Plaintiffs and Appellants.

Kimball, Tirey & St. John, Karl P. Schlecht and Michaelene H. Cody for Defendants and Respondents The Irvine Company LLC, Lorraine Seward, The Irvine Company Apartment Communities, Inc., and Michelle Beaudoin.

Ruzicka, Wallace & Coughlin and Richard Sontag for Defendants and Respondents Ruzicka & Wallace, LLP, Earl L. Wallace and Rahta Kea.

INTRODUCTION

Badria Elnaggar and Eman Elamin (appellants) appeal from two judgments of dismissal – one following a motion to dismiss under Code of Civil Procedure section 425.16, the anti-SLAPP statute,¹ and the other following a demurrer. The parties moving for dismissal by means of the anti-SLAPP motion included respondents The Irvine Company, LLC, and The Irvine Company Apartment Communities, Inc. (collectively Irvine Company.) The parties dismissed after the demurrer included the law firm of Ruzicka and Wallace, LLP (Law Firm).

The basis of appellants' dismissed first amended complaint was an unlawful detainer action against them filed by The Irvine Company, LLC, in 2010. Law Firm represented The Irvine Company, LLC, in this action. Appellants' lawsuit alleged numerous false statements made by both Irvine Company and Law Firm in the course of the unlawful detainer action.

Irvine Company and Law Firm separately moved for dismissal under the anti-SLAPP statute, and both filed demurrers. Appellants did not oppose the motions, and they did not attend the hearing. The trial court entered separate judgments. The court dismissed appellants' lawsuit against Irvine Company after granting the anti-SLAPP motion and dismissed the suit against Law Firm pursuant to Law Firm's demurrer.

We affirm the judgment in favor of Law Firm and related respondents. Appellants did not question or challenge this judgment in their appeal. Any disagreement they may have had with the trial court about this judgment has thus been abandoned.

¹ "SLAPP" is an acronym for "strategic lawsuit against public participation," and refers to a lawsuit which both arises out of defendants' constitutionally protected expressive or petitioning activity, and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377.)

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

With respect to Irvine Company and related respondents, the situation is somewhat different. The lawsuit as to them was dismissed after the court granted their anti-SLAPP motion. While we agree with the trial court that the vast bulk of appellants' first amended complaint alleges acts in furtherance of these respondents' right of petition, and is thus subject to dismissal, this is not true of the entire complaint. The eighth cause of action contains a few allegations relating to unprotected conduct.

A recently decided California Supreme Court case has defined an anti-SLAPP motion as a kind of motion to strike; it can and should differentiate between claims within a cause of action upon which the plaintiff has shown a probability of prevailing and claims for which this showing has not been made. The new case deals with the second step of the anti-SLAPP analysis – the plaintiff's probability of prevailing – but it makes sense to apply the same principle to the first step – the existence of protected activity.

Although the allegations of unprotected activity in the first amended complaint represent what Shakespeare called one halfpennyworth of bread in an intolerable deal of sack, nevertheless a motion to strike would remove only the sack. The bread would stay. We therefore reverse the judgment dismissing the case as to Irvine Company and related respondents. We reverse the order granting the anti-SLAPP motion, but *only* as to the allegations in the eighth cause of action that do not refer to protected activity. In all other respects we affirm the order.

FACTS

Appellants were tenants in an apartment complex in Irvine owned by The Irvine Company, LLC. In September 2010, The Irvine Company, LLC, obtained a judgment in an unlawful detainer suit against appellants from the Orange County Superior Court. The judgment included past due rent of \$1,950.67.

On November 8, 2013, appellants, representing themselves, filed an action in Los Angeles County Superior Court, Santa Monica branch, against Irvine Company,

two of its managing agents (collectively, the Irvine Company Defendants), Law Firm, and one of the lawyers who had represented The Irvine Company, LLC, in the Orange County unlawful detainer action. Appellants filed an amended complaint on November 27, 2013. This pleading added a new defendant – another lawyer from the unlawful detainer action.² The first amended complaint contained causes of action for fraud, willful misrepresentation of material facts, intentionally making false statements in court documents, willfully providing false statement to law enforcement, intentional concealment of known facts, fraud and false statements, perjury, and intentional infliction of emotional distress.

On February 3, 2014, the Irvine Company Defendants moved to transfer the Santa Monica case to Orange County. The Law Firm Defendants filed a similar motion on February 19. On May 8, 2014, appellants filed a summary judgment motion in the Santa Monica case, with a hearing date of January 22, 2015.

The Santa Monica court granted the two change of venue motions, with \$1,500 in sanctions against appellants, on May 22, 2014. The hearing date on appellants' summary judgment motion was advanced and vacated at the same time. The case was transferred to Orange County Superior Court on June 4, 2014. The case was assigned to the Honorable Frederick Aguirre.

On July 1, 2014, the Irvine Company Defendants and the Law Firm Defendants filed separate anti-SLAPP motions. They also filed separate demurrers to the first amended complaint. Appellants did not oppose these motions. They also did not attend the hearing.

The trial court ruled on all four motions on September 29, 2014. The tentative ruling and the subsequent minute order granted both anti-SLAPP motions and

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Law Firm and the two lawyers will be referred to as the Law Firm Defendants.

awarded attorney fees. The ruling and the minute order mentioned the demurrers only to state they were moot. The record on appeal does not include a reporter's transcript.

Judge Aguirre proceeded to enter judgments of dismissal following the September 29 hearing. The judgment entered in the Irvine Company Defendants' favor dismissed these defendants pursuant to their successful anti-SLAPP motion. The Law Firm Defendants' judgment of dismissal, however, was pursuant to the sustaining of its demurrer. The Law Firm Defendants' judgment did not mention an anti-SLAPP attorney fee award, but stated these defendants would recover their costs of suit through a memorandum of costs. A notice of entry of the Law Firm Defendants' judgment, with a copy of the signed judgment, was served on appellants on October 29, 2014. They filed their notice of appeal on December 29, 2014, appealing from both the judgment following the demurrer and the judgment following the granting of the anti-SLAPP motion.

On June 17, 2015, appellants filed a motion to set aside or vacate the two judgments for clerical error. The error, they claimed, was that their May 2014 summary judgment motion had been lost during the transfer from Santa Monica to Orange County in June 2014 and that the clerk's office had found it nearly a year later. The anti-SLAPP motions and the demurrers had been heard without their summary judgment motion's being in the Orange County court file. Judge Aguirre denied the motion on August 31, 2015, on the grounds that (1) he had no jurisdiction to hear it while an appeal was pending³ and (2) if the appeal was no longer pending, the motion had no merit. The entry of the judgments of dismissal had nothing to do with appellants' summary judgment motion.⁴

³ The appeal was ordered dismissed for failure to file an opening brief on August 12. The order became final 30 days later. (See Cal. Rules of Court, rule 8.264(b)(1).) This court still had jurisdiction over the appeal on August 31.

⁴ Appellants' motion to augment the record with documents relating to the June 2015 motion to vacate the judgment is granted.

DISCUSSION

What appellants want us to review is uncertain. The “issues raised on appeal” in their opening brief are (1) can defendants file anti-SLAPP motions and demurrers instead of responding to a summary judgment motion and (2) can defendants willfully misrepresent the amount of an unlawful detainer judgment. The argument section of the opening brief, however, discusses (1) the trial court’s refusal to vacate the judgment and (2) the court’s holding of protected activity under the anti-SLAPP statute.

California Rules of Court, rule 8.204(1)(B) requires each party’s brief to “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority,” and a rule of appellate practice is that an issue unsupported by argument and authority is deemed waived. (See, e.g., *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1503.) We will therefore address the issues raised in the argument section, as appellants have not presented any argument or authority to support the “issues raised on appeal.”⁵ This seems fair since those are the issues respondents have addressed.

I. Vacating the Judgments

Section 473, subdivision (d) provides: “The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.” This code section was the basis upon which appellants moved to vacate the judgment.

⁵ Appellants’ failure to file an opposition and to attend the hearing on the motions in the trial court actually forfeits any claim of error on appeal. (See *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830; *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.) In view of appellants’ litigation history against these respondents, however, and because our review of an order granting an anti-SLAPP motion is de novo (see *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 776), we will address the issues raised for the first time in appellants’ opening brief, in hopes that that doing so will forestall further meritless litigation.

“That a court of general jurisdiction has the power to correct clerical error in its judgment so that the judgment will conform to and speak the truth, regardless of the lapse of time and whether made by the clerk, counsel or the court itself, is a principle so established as to be beyond argument. [Citations.]” (*Bowden v. Green* (1982) 128 Cal.App.3d 65, 71.) “The distinction between a clerical error and a judicial error does not depend so much on the person making it as on whether it was the deliberate result of judicial reasoning and determination.’ [Citation.] . . . ‘The term “clerical error” covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence.’” (*Makovsky v. Makovsky* (1958) 158 Cal.App.2d 738, 742-743, quoting *George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 480-481.) “It is also settled that ‘[in] determining whether an error is clerical or judicial, great weight should be placed on the declaration of the judge as to his intention in signing the [judgment].’ [Citation.]” (*Bowden v. Green, supra*, 128 Cal.App.3d at p. 71.)

It is clear from Judge Aguirre’s minute order denying appellants’ motion to vacate the judgments that no clerical error caused their entry. Judge Aguirre stated, “[T]his error [i.e., the misplacement of the summary judgment motion] is not part of and did not lead to entry of Judgment.” Thus, if there was an error, it was a judicial one, and the appellants’ only remedy is an appeal. (*Stevens v. Superior Court* (1936) 7 Cal.2d 110, 114.) In fact, they did appeal both judgments.

Appellants appear to be laboring under the misapprehension that it was the Orange County Superior Court’s job to reschedule their summary judgment motion after the case was transferred from Santa Monica. It was, in fact, their job to renotice the motion; the court in Santa Monica had vacated the hearing date prior to transfer. The motion thus had no hearing date at all. Mislaying the motion paperwork could not have

interfered with this task. Presumably appellants had copies of what they had filed in Santa Monica.

Appellants knew the documents were missing from the court file when it arrived in Orange County. The declaration they filed to support their motion to vacate the judgment stated that they looked for the documents in Santa Monica and in downtown Los Angeles and phoned the Orange County court clerk's office regarding them. Why they did not simply refile the motion and get a new hearing date is unexplained.

Appellants did not renote their summary judgment motion after the Santa Monica hearing date was vacated and the case transferred. Respondents promptly filed their motions after transfer. But even if appellants had immediately renoted their summary judgment motion, judicial efficiency would have mandated hearing respondents' motions first. Both demurrers and anti-SLAPP motions are designed to be heard early in a lawsuit, and they address issues different from those addressed in a summary judgment motion.⁶ As Judge Aguirre stated, the existence or absence of appellants' motion in the Orange County court file before the hearing on respondents' motions could not have affected the outcome of the Irvine Company Defendants' anti-SLAPP motion or the Law Firm Defendants' demurrer. Assuming Judge Aguirre could hear it, appellants' motion to vacate the judgments for clerical error was correctly denied.

II. Anti-SLAPP Motion – First Step

“A SLAPP suit is ‘a meritless suit filed primarily to chill the defendant’s exercise of First Amendment rights.’ [Citations.] In response, the Legislature adopted the anti-SLAPP statute, which states: ‘A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public

⁶ We should also point out that the original hearing date for appellants' summary judgment motion was January 22, 2015. Thus, even if their motion had gone on calendar without a change of date when it came to the Orange County Superior Court, it would still have been heard *after* respondents' anti-SLAPP motions and demurrers.

issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’ [Citation.]” (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 208 (*Finton*).)

“The purpose of the statute is to dismiss meritless lawsuits designed to chill the defendant’s free speech rights *at the earliest stage of the case*. [Citation.] . . . [¶] Trial courts evaluate motions brought under the statute using 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. (§ 425.16, subd. (b)(1).)” [Citation.] If that requirement is met, the court then proceeds to the second step to determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.] ‘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.]” (*Finton, supra*, 238 Cal.App.4th at p. 209 (first italics added).)

Inspecting the first amended complaint leads to the ineluctable conclusion the bulk of appellants’ lawsuit is based on acts “in furtherance of” the Irvine Company Defendants’ right of petition. The statute defines “‘act in furtherance of a person’s right of petition’ ‘in connection with a public issue’” as, inter alia, “any written or oral statement or writing made before a . . . judicial proceeding” and “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).) The first amended complaint consists almost entirely of allegations regarding both kinds of oral statements and writings.

The first cause of action alleged false statements made in the unlawful detainer complaint and in a three-day notice to quit. The second cause of action alleged false statements in the unlawful detainer complaint regarding the existence of a lease and the amount of rent owing. The third cause of action alleged false statements made in court documents generally. The fourth cause of action alleged false statements in an application for a writ of possession and false statements on the writ given to the sheriff. The complaint also alleged false statements on an unsatisfied writ of possession filed with the court. The fifth cause of action alleged intentional concealment of facts in the unlawful detainer complaint. The sixth cause of action, again for false and fraudulent statements, is based on documents that were or were not provided to the court in connection with the unlawful detainer action (demands for past due rent and legal fees). The seventh cause of action alleged a false declaration and false verifications submitted to the court and lying under oath.

Only the eighth cause of action – for intentional infliction of emotional distress – did not focus entirely on events connected with the unlawful detainer action. In addition to alleging distress occasioned by the eviction, appellants also alleged events that took place before the filing of the unlawful detainer action and were, at least on the surface, unconnected with it. Specifically, appellants alleged that the Irvine Company Defendants caused emotional distress by canceling their lease and raising their rent in retaliation for their filing a lawsuit against the landlord complaining about parking problems at the apartment complex. Canceling a lease and raising the rent do not implicate rights of petition or free speech. (Cf. *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286-1288 [terminating tenancy and removing rental unit from market not protected activity].)

In a recently issued opinion, *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*), the California Supreme Court held that section 425.16 allows a court to strike separate claims contained within a pleaded “cause of action” in cases where a plaintiff has

mingled claims of protected activity and unprotected activity within a single cause of action and has not shown a probability of prevailing on the protected claims. (*Baral, supra*, at p. 392.) “[C]ourts may rule on plaintiffs’ specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity.” (*Id.* at p. 394.) The analysis mirrors the one that would be performed for a motion to strike, which can attack individual allegations. (*Id.* at pp. 394, 396.) (See *County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 1001; *People v. Thomas* (1952) 108 Cal.App.2d 832, 836; § 436.) Although the *Baral* opinion focused on the second step of the anti-SLAPP analysis – the plaintiff’s probability of prevailing (*Baral, supra*, at p. 385), we believe the same analysis applies to the first step – determining whether or not the acts alleged are protected.⁷

The eighth cause of action of the first amended complaint represents just such a mixed bag of protected and unprotected activity. Appellants allege emotional distress as a result of losing the unlawful detainer action and being evicted. This is another name for suing the Irvine Company Defendants for exercising their right of petition. (See *Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 133 [label of cause of action not determinative].) But the eighth cause of action also alleges acts that took place *before* the unlawful detainer suit and were unconnected with it. Appellants alleged they suffered emotional distress when their lease was canceled and their rent was raised in retaliation for filing an earlier lawsuit against their landlord. Canceling a lease or raising the rent is not protected activity.

We wish to be very clear about the scope of this decision. We have *not* held that appellants have stated a cause of action for emotional distress or for anything

⁷ With respect to the first-step analysis, the court stated, “When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage.” (*Baral, supra*, at p. 396.)

else. We have not addressed any defense the Irvine Company Defendants may have against the remaining claims. We have held only that acts alleged in the eighth cause of action that *preceded* the filing of the unlawful detainer action *and* were unrelated to it – which would *not* include serving a three-day notice to quit (see *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 282) – are not protected acts under the anti-SLAPP statute. Their ultimate fate is not before us.

III. Remaining Issues

Appellants have not contested the trial court’s ruling on the second step of the anti-SLAPP analysis – their probability of prevailing – with anything other than general statements, without citation to authority. Any argument they may have had on this issue is forfeited. (See *DP Pham LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 674.)

The litigation privilege of Civil Code section 47, subdivision (b)(2), covers nearly all of the alleged conduct.⁸ To put it as plainly as possible, a person, a business entity, and an attorney cannot be sued for anything they say in court or put in a paper filed with the court, no matter how false or badly intentioned, except in an action for malicious prosecution. This is the meaning of an “absolute” privilege. (See *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361 (*Hagberg*); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216.) The privilege also applies to oral statements or writings made in anticipation of a lawsuit or reasonably connected with it. (*Hagberg, supra*, 32 Cal.4th at p. 361.) Thus the privilege covers the three-day notice to quit and whatever was in the writ of possession delivered to the sheriff.

The facts alleged in causes of action one through seven and in most of the eighth cause of action, when disentangled from appellants’ opinions about the facts, all refer to statements or filings in the unlawful detainer action or in connection with it. For example, the first and second causes of action alleged false statements to the court

⁸ Civil Code section 47 provides, “A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding, . . .”

regarding the existence of a lease and the amount of the rent. The fourth cause of action alleged a false writ of possession filed with the court. The seventh cause of action is based entirely on allegedly false declarations filed with the court and on false testimony under oath. Regardless of whether the statements or filings were true or false, they are absolutely privileged and cannot form the basis of a lawsuit other than one for malicious prosecution.

Before appellants begin to entertain thoughts of suing for malicious prosecution, we should point out that such an action requires a favorable termination of the underlying lawsuit.⁹ (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 739.) Appellants lost the unlawful detainer action, so they cannot base a suit for malicious prosecution on it.

Moreover, appellants cannot prevail on any claim based on fraud because they were not defrauded. All the fraud allegations refer to false statements made to the court or the sheriff. Appellants themselves were not deceived. (See *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 [elements of cause of action for fraud].) Even if the court or the sheriff was deceived, appellants cannot sue on either one's behalf. (See *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 640.)

Appellants' notice of appeal included the Law Firm Defendants' judgment of dismissal after an order sustaining a demurrer as one of the judgments from which they appealed, but they did not ask for review of either the demurrer or the subsequent judgment. Because appellants have not raised any issue or supplied any argument or authority regarding the Law Firm Defendants' demurrer to the first amended complaint,

⁹ Appellants' present case is but one of several suits and proceedings they have instituted against the Irvine Company. In addition to the case they filed in Santa Monica, they filed a small claims case in 2007, an Orange County Superior Court case in 2008, and a federal district court case in 2013. The Orange County Superior Court case was dismissed with prejudice for "repeated violations of the Court's orders," and appellants dismissed their federal lawsuit.

Appellants appealed the Santa Monica transfer order on May 23, 2014, and abandoned their appeal a month later. They also took a writ, which was denied on July 11.

we deem this issue abandoned and affirm the judgment. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1615.)

DISPOSITION

The judgment in favor of the Law Firm Defendants is affirmed. The judgment in favor of the Irvine Company Defendants is reversed. The order granting the anti-SLAPP motion to the Irvine Company Defendants is reversed only as to allegations in the eighth cause of action of acts that preceded the filing of the unlawful detainer lawsuit and are unrelated to it. In all other respects, the order is affirmed, and the first through seventh causes of action of the first amended complaint and those portions of the eighth cause of action referring to the 2010 unlawful detainer action and acts related to or resulting from it are stricken. Appellants' motion to augment the record is granted. Respondents' motion to augment the record is denied. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.