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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YUNG-SHEN STEVEN LEE, Plaintiff and Appellant, v. FIORE, RACOBS & POWERS et al., Defendants and Respondents.	G055587 (Super. Ct. No. 30-2017-00921587) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Janet H. Christoffersen, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Sterling Scott Winchell for Plaintiff and Appellant.

Parker Mills, David B. Parker, Brandon P. Brousseau and Justin D. Denlinger for Defendants and Respondents.

* * *

INTRODUCTION

Plaintiff Yung-Shen Steven Lee appeals from an order granting a special motion to strike his complaint under the California anti-SLAPP statute, Code of Civil Procedure section 425.16 (section 425.16).[1] Defendants, the law firm of Fiore Racobs & Powers and two of its attorneys, Sarah Reed and Erin A. Maloney, had represented Spyglass Hill Community Association (the HOA) in litigation against Lee arising out of unpaid assessments. Lee alleged in his complaint that Defendants, in representing the HOA, had engaged in negligent or deliberate conduct resulting in a default judgment against him and causing his home to be levied upon and sold at an execution sale without his knowledge.

We affirm the order granting Defendants' anti-SLAPP motion. The claims in Lee's complaint arose out of allegations of conduct in furtherance of the right of petition or free speech under the federal and state constitutions within the meaning of section 425.16. Lee failed to meet his burden of producing evidence to demonstrate the merit of his claims.

BACKGROUND FACTS

In *Lee v. Rich* (2016) 6 Cal.App.5th 270, a majority of a panel of this court reversed an order granting Lee's motion for restitution and cancellation of the sheriff's deed of sale and thereby upheld the sale of Lee's home to a third party purchaser. In *Lee v. Rich, supra,* at pages 273-276 we recited the background facts:

"In 1991, Lee purchased a single-family home in Corona del Mar (the property). The property is part of a common interest development formed pursuant to the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.). The

[1] SLAPP is an acronym for "strategic lawsuit against public participation." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1 (*Baral*).)

common interest development is managed by the HOA, which was established pursuant to a declaration of covenants, conditions, and restrictions.

"In April 2007, Lee ceased paying the HOA assessments. Over the next two years, the HOA sent Lee notices of delinquency, intent to record a lien, and lien recordation. There is no dispute that Lee received those notices. As of May 2009, the amount that Lee owed to the HOA for delinquent assessments, late charges, collection costs, and attorney fees was $7,955.50.

"In May 2009, the HOA filed a lawsuit against Lee for, among other things, foreclosure of the assessment lien. Thereafter, attempts were made to serve process on Lee by notice and acknowledgment, and some 24 attempts at personal service were made from June 2 through October 26, 2009. In some instances, Lee refused to acknowledge he was at home and refused to open or answer the door. In November 2009, the HOA filed an ex parte application for publication of summons, which included a declaration from a registered process server.

"In June 2010, the HOA obtained, by default, a judgment of foreclosure of the assessment lien against Lee. The notice of entry of judgment was served on Lee by mail.

"Lee had a history of avoiding service of process. In an earlier lawsuit brought by Lee's neighbors, Powell Thurston and Karen Thurston (the Thurstons), Lee avoided service and failed to appear in court. In 2005, the Thurstons tried to contact Lee about a home construction project. The Thurstons attempted to deliver plans to Lee by hand delivery and certified mail, but were unsuccessful. The Thurstons attempted to deliver the plans to Lee by certified mail to his post office box, but they were always returned as refused and unopened. Once the HOA approved the construction project and work started, Lee notified the HOA that he objected. Lee refused to accept the plans if sent by certified mail and said he would arrange to go to the HOA's office to view them. He never did so.

"Based on the default judgment the HOA had obtained against Lee, a writ of sale issued in October 2010. In June 2011, a sheriff's deputy posted a notice of sheriff's sale under foreclosure on the front door of the property and outside the Orange County Sheriff's Office. The notice advised that the property would be sold at auction to the highest bidder on July 14, 2011.

"Rich learned of the sale about three weeks before the scheduled sale date by obtaining a copy of the notice of sale posted outside of the Orange County Sheriff's Office. He and four other bidders attended the sale on July 14. The bidding opened at the amount of the judgment ($19,578.32) and overbids increased in $5,000 increments. Bidding continued until Rich made a bid of $210,000. Nobody outbid him, and the property was sold to him for that amount. Rich immediately paid the required 10 percent deposit by cashier's check and paid the balance at the end of the three-month redemption period. The property was subject to tax liens and other encumbrances totaling $233,500.

"In November 2011, after the statutory redemption period elapsed with no action by Lee, Rich received a sheriff's deed to the property. Rich filed an unlawful detainer action, but Lee did not respond to attempts at service and the trial court authorized service by posting on the premises. Lee never objected to service of the unlawful detainer complaint and never responded to it. Rich obtained an unlawful detainer judgment by default against Lee, who had vacated the property after destroying portions of it.

"In February 2012, Lee filed a motion to set aside and vacate the default judgment obtained by the HOA. Lee argued, in essence, that he did not receive actual notice of the HOA's lawsuit because summons was never mailed to his post office box address.[2] The HOA opposed the motion. Lee and the HOA submitted declarations and evidence to support their respective positions. Rich was not served with the motion.

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[2] "Lee submitted several documents reflecting his post office box address. These documents were dated and/or mailed between November 2007 and November 2008, and

"On March 8, 2012, the trial court granted Lee's motion to set aside and vacate the judgment, ordered the judgment against Lee vacated, and granted him leave to answer. Lee filed his answer and a cross-complaint against the HOA the next day.

"On March 23, 2012, Lee filed an amended cross-complaint against the HOA, Rich, and the Orange County Sheriff. The only recovery sought by Lee was restitution of the amount of the judgment ($19,578.32).

"On March 27, 2012, Lee filed his motion for restitution and to cancel the sheriff's deed. The motion sought restitution of $19,578.32 from the HOA and cancellation of the sheriff's deed issued to Rich. Rich made his first formal appearance in the action by opposing Lee's motion. The HOA also filed opposition to Lee's motion.

"On April 17, 2012, Rich filed a motion for reconsideration of the order granting Lee's motion to set aside and vacate the default judgment. Two days later, the trial court granted Lee's motion for restitution and cancellation of the sheriff's deed of sale. The court ordered that the sheriff's deed issued to Rich be cancelled as "void *ab initio*" and that restitution be made to Rich. On May 3, 2012, the trial court denied Rich's motion for reconsideration as untimely."

The majority opinion in *Lee v. Rich, supra*, 6 Cal.App.5th at page 273, reversed the order granting Lee's motion for restitution and cancellation of the sheriff's deed of sale.

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in 2011. Service on Lee was attempted from June through October 2009, during a gap in the date of those documents. Service on Lee by mail was attempted in July 2009, and service addressed to his street address was returned with the stamp 'Unable to Forward [¶] No Forward Order on File.'"

PROCEDURAL HISTORY

I.

The Allegations of Lee's Complaint

In May 2017, after the opinion in *Lee v. Rich* became final, Lee filed a complaint against the HOA and Defendants asserting causes of action for negligence, negligent infliction of emotional distress, and abuse of process.

The complaint alleged that in July 2009, Defendants drafted a summons and complaint seeking $7,955.50 for delinquent assessments, late charges, collection costs and attorney's fees, and mailed that complaint, along with a Notice of Acknowledgement of Receipt and cover letter, to 10 Morro Bay Drive, Corona del Mar, Ca 92625. The complaint alleged that at the time of this mailing, Defendants knew Lee's official mailing address was a post office box in Newport Beach, Defendants had successfully mailed past correspondence to Lee at his official mailing address, and Lee's official mailing address was on file with the HOA.

The complaint alleged that "on this occasion, for reasons unknown to anyone other than [D]efendants," Defendants chose "to mail all official correspondence" to the street address instead of the official address, and "[t]he mail came back . . . as 'undeliverable.'" As a consequence, following service by publication, entry of default and a default judgment were entered against Lee, who did not receive notice because it was sent to his street address. The property was sold at a sheriff's sale in July 2011 for the high bid of $210,000 although the fair market value was $1.8 million. The trial court granted Lee's motion to cancel the sheriff's deed; however, this court reversed that decision and the sheriff's deed was ultimately reinstated, "thereby divesting Steven Lee of ownership of the Property."

Under the negligence cause of action, the complaint alleged Defendants breached their duty of care "by failing to do proper investigation of their own files or otherwise to determine and discover that there was a better or more likely address,

namely [Lee's] official address, for giving legal notice to Mr. Lee of the fact that he was being served with a summons and complaint, that he was being served with a request for service by publication, that he was being served with a notice of entry of default and an entry of judgment. Instead, [D]efendants employed methods which [D]efendants knew or should have known were not likely to give Steven Lee notice of any of these important legal documents, particularly given the fact that [D]efendants knew that all notices sent to the address they repeatedly chose to use would be returned as undeliverable." The complaint also alleged Defendants were negligent by failing to provide the sheriff with Lee's official address, which caused the sheriff to serve the notice of levy and notice of sale "to an address from where all mail would be returned [as] undeliverable."

Under the negligent infliction of emotional distress cause of action, the complaint alleged that same negligent conduct caused Lee to suffer severe emotional distress.

Under the abuse of process cause of action, the complaint alleged that Defendants breached a duty to use reasonable care to provide service of process in three ways:

1. Defendants deliberately chose not to serve Lee at his official address thereby "ensuring that Mr. Lee would not become aware of a summons and complaint, a request for service by publication, a notice of entry of default and an entry of judgment."

2. Defendants brought an ex parte request for an order of service by publication of the HOA complaint "without showing of urgency or irreparable harm." The ex parte request was, according to the complaint, supported by a declaration from Reed in which she "deliberately misrepresented" that Defendants "did not know of a better address" at which to serve Lee than his street address.

3. Defendants intentionally failed to provide the sheriff with Lee's official mailing address, which caused the sheriff to serve the notice of levy and notice of sale at the street address.

II.

The anti-SLAPP Motion

Defendants filed an anti-SLAPP motion to strike all three causes of action of the complaint (Defendants did not move alternatively to strike specific allegations). Lee filed opposition which included his declaration signed over five years earlier.

The trial court granted the anti-SLAPP motion. In a minute order, the court found that Defendants had represented the HOA in its litigation with Lee, which was an act in furtherance of free speech or petition, and that Lee had not sustained his burden of establishing a probability of success. On the latter point, the court found: "[Lee]'s complaint is not verified and he failed to timely file opposition to this motion with admissible evidence to establish his claims are sufficient to constitute a probability of prevailing." Lee timely appealed.

DISCUSSION

I.

Background Law and Standard of Review

"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 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." (§ 425.16, subd. (b)(1).)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.'

[Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.'" (*Baral, supra*, 1 Cal.5th at pp. 384-385, fn. omitted.)

"We review an order granting or denying an anti-SLAPP motion under the de novo standard and, in so doing, conduct the same two-step process to determine whether as a matter of law the defendant met its burden of showing the challenged claim arose out of protected activity and, if so, whether the plaintiff met its burden of showing probability of success." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42.)

II.

First Step: Lee's Claims Arise out of Allegations of Protected Activity.

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral, supra*, 1 Cal.5th at p. 396.) A claim arises from protected activity within the meaning of section 425.16, subdivision (b)(1), if the activity "underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (*Park, supra*, 2 Cal.5th at p. 1063.) "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*; see *Navellier v. Sletten* (2002) 29

Cal.4th 82, 89 ["In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity"].)

In their anti-SLAPP motion, Defendants identified the following allegations of protected activity: (1) Service of summons, request for entry of default, and notice of levy and notice of sale at Lee's unofficial street address; (2) service of a request for service by publication, notice of entry of default, and notice of entry of default judgment at the same unofficial address; (3) ex parte application for an order for service of summons by publication without a showing of urgency or irreparable harm and supported by a declaration containing intentional misrepresentations; and (4) failure to provide the sheriff with Lee's official address.

Lee's claims for negligence, negligent infliction of emotional distress, and abuse of process arise out of those allegations. Defendants argue that all of Lee's causes of action against them amount to a claim that Defendants "used the power of the judicial process to foreclose on his home without adequate notice or due process." It must be pointed out that neither Lee nor Defendants address in their appellate briefs the fourth allegation of allegedly protected activity—the failure to provide the sheriff with Lee's official address. We do not decide whether that allegation was protected activity because it did not form the basis of a claim. In the appellant's opening brief, Lee describes the "gravamen of the complaint" as "defendants purported to mail notice to [Lee] with process at a different address than the one he ordinarily received mail, and to an address where mail could not be successfully delivered." Likewise in the reply brief he states "[t]he gravamen of the complaint was Plaintiff's damage due to Defendants failure to mail notice to Steven Lee at an address where mail could not be successfully delivered."

Service of process, mailing notices, obtaining an order for service by publication, and submitting declarations are acts in furtherance of a person's right of petition or free speech. Under section 425.16, "'[a]ny act' includes communicative conduct such as the filing, funding, and prosecution of a civil action. [Citation.] This

includes qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) Such conduct includes, for example, service of notices necessary to institute an unlawful detainer action. (*Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1275; *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1247.) Service of process, obtaining court orders, and filing declarations are part and parcel of the constitutional right to petition courts for redress. (Cf. *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 770 ["Pleadings and process in a case are generally viewed as privileged communications".])

Our conclusion that Defendants satisfied the first prong of the anti-SLAPP statute is supported by *Rusheen, supra*, 37 Cal.4th 1048, an opinion discussed at length in the appellate briefs. In *Rusheen*, the California Supreme Court, in reviewing a judgment arising from an order granting an anti-SLAPP motion, addressed two issues:
"(1) whether action taken to collect a judgment, such as obtaining a writ of execution and levying on the judgment debtor's property, are protected by the litigation privilege as communications in the course of a judicial proceeding; and (2) whether a claim for abuse of process based on the filing of an allegedly false declaration of service is barred by the litigation privilege on the ground the claim is necessarily founded on a communicative act." (*Id.* at p. 1055, fn. omitted.)

The Supreme Court explained that the litigation privilege of Civil Code section 47, subdivision (b) (section 47(b))[3] protects only acts that are communicative, and, therefore, the threshold issue in determining whether the litigation privilege applies is whether the defendant's alleged conduct is communicative or noncommunicative.

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[3] The litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings (2) by litigants or other participants authorized by law (3) for the purpose of achieving the objects of the litigation and (4) having some connection or logical relation to the proceedings. (*Rusheen, supra*, 37 Cal.4th at p. 1057.) "Thus, 'communications with "some relation" to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege." (*Ibid.*)

(*Rusheen, supra*, 37 Cal.4th at p. 1058.) Pleadings and process, as well as filing false or perjurious testimony or declarations, are considered privileged. (*Ibid.*) There were conflicting Court of Appeal opinions on the issue whether postjudgment collection activity was communicative or noncommunicative. (*Id.* at pp. 1059-1060.)

The Supreme Court explained that even if the challenged conduct was a noncommunicative physical act, a court must look to whether the gravamen of the abuse of process cause of action was communicative or noncommunicative conduct. (*Rusheen, supra*, 37 Cal.4th at p. 1061.) The court concluded that "if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct." (*Id.* at p. 1065.) "The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen, supra*, 37 Cal.4th at p. 1058.)

The gravamen of the abuse of process cause of action in *Rusheen* was not the act of levying on the judgment, "but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Rusheen, supra*, 37 Cal.4th at p. 1062.) The noncommunicative act of levying on the judgment was necessarily related to the communicative act serving as the gravamen of the complaint and therefore was subject to the litigation privilege. "[B]ecause the execution of the judgment did not provide an independent basis for liability separate and apart from the filing of the false declarations of service, the gravamen of the action was the procurement of the judgment, not its enforcement. Thus, the enforcement of the judgment in reliance on the filing of privileged declarations of service was itself privileged." (*Id.* at p. 1065.)

In this case too, it was the procurement of the judgment, allegedly through perjured declarations of service, that was the gravamen of Lee's claims. Because the

judgment was procured through communicative acts, enforcement of the judgment also was privileged.

Rusheen was decided on the second prong of the anti-SLAPP analysis; that is, the probability the party opposing the motion would prevail. (*Rusheen*, *supra*, 37 Cal.4th at p. 1065.) The opinion does not address the first prong; that is, whether the noncommunicative act of levying on a judgment is an act in furtherance of the person's right of petition or free speech. Although the anti-SLAPP statute and the litigation privilege are not substantively the same, courts may "look[] to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2)." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) Thus, communicative acts identified in *Rusheen* as protected by the litigation privilege, such as filing a declaration of service, also constitute protected activity under the first prong of the anti-SLAPP statute.

III.

Second Step: Lee Failed to Meet His Burden of Demonstrating His Claims Are Factually Substantiated and Legally Sufficient.

At the second step of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral*, *supra*, 1 Cal.5th at p. 396.) "At this step, the plaintiff must establish the claims based on allegations of protected activity are legally sufficient and supported by a prima facie showing of facts which, if proved at trial, would support a judgment in the plaintiff's

favor. [Citation.] To meet this burden, a plaintiff cannot rely on its own pleading, even if verified [citation], but must present admissible evidence [citation]." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism, supra*, 23 Cal.App.5th at p. 49.)

The only evidence Lee submitted in opposition to the anti-SLAPP motion was a copy of a declaration he signed in February 2012, over five years before he filed his complaint in this action and the anti-SLAPP motion was filed. The declaration, which must have been filed in connection with an earlier case (he identifies himself as the defendant in the action), was not accompanied by a request for judicial notice or another form of authentication. The trial court found that Lee "failed to timely file opposition to [the anti-SLAPP] motion with admissible evidence to establish that his claims are sufficient to constitute a probability of prevailing." Because Lee did not submit any admissible evidence in opposition to the anti-SLAPP motion, he did not meet his burden at the second step of the anti-SLAPP analysis.

Even if we considered Lee's declaration, Lee's claims are barred by the litigation privilege of section 47(b). We explained above that Lee's claims arise out allegations of communicative acts undertaken in the course of a legal proceeding. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1058.)

In addition, Lee's claims are time-barred on their face. Negligence and negligent infliction of emotional distress causes of action have a two-year statute of limitations. (Code Civ. Proc., § 335.1) Abuse of process is considered an injury to the person (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 886-887) and therefore is subject to the two-year limitations periods of Code of Civil Procedure section 335.1. "The limitations period begins to run when the abuse of process occurs. [Citation.] If the injury to the plaintiff does not occur at the time the abuse of process occurs, then the limitations period begins to run when the injury occurs." (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 887.)

According to Lee's complaint, the alleged acts of negligence and abuse of process started in July 2009 and culminated in the sheriff's sale conducted in July 2011. Lee suffered injury in July 2011 at which time, he alleged, "his house [was] sold out from under him at [the] sheriff's sale pursuant to that levy." Lee argues he did not suffer injury until November 2016 when the opinion in *Lee v. Rich, supra*, 6 Cal.App.5th 270 reversed the order cancelling the sheriff's sale. Lee alleged, however, that upon learning of the sheriff's sale, he hired counsel and brought the motion to set aside the default and the default judgment, and the motion to cancel the sheriff's deed. The complaint alleged the motion to cancel the sheriff's deed was granted in April 2012. Thus, by April 2012, Lee had suffered damage caused by the alleged acts of negligence and abuse of process in that he had to incur costs, including attorney fees, to set aside the default judgment and unwind the sheriff's sale. Lee's complaint was filed over five years later, in May 2017, and therefore on its face is time-barred.

At oral argument, Lee argued for the first time that his claims for negligence and abuse of process were subject to tolling of the statute of limitations. "Equitable tolling 'halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct.'" (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460.) To establish equitable tolling, a plaintiff must prove (1) fraudulent conduct by the defendant resulting in concealment of the operative facts, (2) the plaintiff's failure to discover, within the limitations period, the operative facts that are the basis of the cause of action, and (3) the plaintiff acted with due diligence until those facts were discovered. (*Id.* at pp. 460-461.)

Lee's complaint had no allegations of equitable tolling, and Lee presented no evidence of equitable tolling in opposition to the anti-SLAPP motion. Lee signed the declaration submitted in opposition to the anti-SLAPP motion on February 10, 2012. In the declaration, he claimed he had never received actual notice of the summons of the

HOA complaint, had never evaded service, and had no knowledge of the HOA collection action or the default judgment. Thus, if we were to accept Lee's declaration as both admissible and true, it would show that as of February 2012 he was on notice of his claims against Defendants.

DISPOSITION

The order granting the anti-SLAPP motion is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.