Filed 11/7/19 710 and 712 Ardmore, LLC v. Roth CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

710 AND 712 ARDMORE, LLC, Plaintiff and Respondent, v. MARK ROTH, Defendant and Appellant.	B293766 (Los Angeles County Super. Ct. No. YC072628)

APPEAL from orders of the Superior Court of Los Angeles County, Robert Broadbelt, III, Judge. Affirmed in part, reversed in part, and remanded with directions.

The Law Office of Alda J. Shelton and Alda J. Shelton for Defendant and Appellant.

Spierer, Woodward, Corbalis & Goldberg, Stephen B. Goldberg and Meighan E. Leon for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

710 and 712 Ardmore, LLC (Ardmore) is the owner and developer of a two-unit townhouse (Property) located at 710-712 Ardmore Avenue in Hermosa Beach, California. Appellant Mark Roth (Roth) is the owner of real property located next door. Ardmore constructed an "exterior stairway to the second floor" on the north side of the Property, right next to Roth's property. Roth asserts the stairway violated the Hermosa Beach Municipal Code and is thus illegal; he hired an architect who confirmed his hypothesis.

On November 30, 2017, Ardmore entered into a purchase agreement with a potential buyer of one unit of the Property and escrow was opened for $2,600,000. On December 18, 2017, the potential buyer cancelled the transaction.[1]

While the sale was still pending, in early December 2017, Roth hired an attorney "to sue either the City of Hermosa Beach or [Ardmore]" regarding the stairway and its removal for "violating zoning ordinances." He ultimately filed a claim with the City of Hermosa Beach on December 26, 2017.[2]

A week later, on January 2, 2018, Roth placed a sign "viewable by a person standing on the landing of the Ardmore [Property] stairs," which stated: "I have filed a complaint with

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[1] It is important to note, for purposes of our review, that this cancelled transaction took place before the property was placed on the Multiple Listing Service and before Roth posted any of the challenged signs at issue in this litigation.

[2] On January 9 and 23, 2018, Roth attended two city council meetings about his claim.

the city to demolish the stairs at 712 Ardmore as an illegal intrusion into the required rear yard. If the city does not order them removed, I will sue the city and the property owner."

On an unknown date in January 2018, a unit of the Property was listed for sale in the Multiple Listing Service and over 125 potential buyers viewed the Property.

On January 17, 2018, Roth contacted Ardmore's real estate agent Lauren Forbes (Forbes) under the guise of being an interested buyer and asked Forbes why she "was steering people away from the front stairs during showings and open houses." Roth later admitted to Forbes that he is "the neighbor" and forwarded an email that he had previously sent to her coworker, that said: "[I]f you do not advise any potential buyer of this alleged violation and potential lawsuit[,] you could be liable for [f]raudulent concealment and could be reported to the bureau of [real estate]. You could also get sued by the buyer if he gets substituted into the lawsuit should property be sold."

Ardmore filed a civil complaint against Roth and served him on February 18, 2018. A few days later, on February 22, 2018, Roth replaced the first sign with a second sign which stated: "The owner of 712 Ardmore has sued me in Torrance Superior Court Case number YC072628, to have the court rule whether the exterior stairs to 2nd floor of 712 Ardmore are illegal. If the owner loses the case, the stairs will have to be torn down and the door sealed off. Have you been informed of the lawsuit and any consequences to you including becoming part of this lawsuit?"

Ardmore did not receive any purchase offers and, on March 6, 2018, it reduced the selling price by $60,000.

On April 2, 2018, Ardmore filed its First Amended Complaint (FAC)—the operative complaint in the underlying civil matter—against Roth; Ardmore alleged three causes of actions: 1) intentional interference with prospective economic relations/advantage; 2) preliminary and permanent injunction and damages; and 3) nuisance.

On May 17, 2018, Roth filed a special motion to strike portions of Ardmore's FAC as a strategic lawsuit against public participation under the anti-SLAPP statute, citing Code of Civil Procedure[3] section 425.16. Roth moved to strike the first and second causes of action of the FAC (for intentional interference with prospective economic relations and preliminary and permanent injunction and damages, respectively) and the first and second sentences of paragraph 31 in the third cause of action (for nuisance), which states: "[Roth] has placed an illegal sign on his property, in direct view of potential buyers of the project, for the purpose of interfering with [Ardmore]'s sale of the project. The sign violates the Hermosa Beach Municipal Code." (Some capitalization omitted.)

Roth argued that his two signs are "communicative acts in furtherance of his right of petition or free speech" and are thus protected speech pursuant to section 425.16, subdivisions (e)(1) and (e)(2). Roth also argued that Ardmore cannot show a probability of prevailing on its three claims because (1) the FAC

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[3] All further undesignated statutory references are to the Code of Civil Procedure, unless otherwise indicated.

is legally insufficient; (2) Ardmore failed to provide admissible evidence in support of its claims; and (3) Ardmore could not satisfy its burden to demonstrate that all elements for the alleged causes of action were met. And finally, Roth argued that the statements on the signs are privileged pursuant to Civil Code section 47 (i.e., the litigation privilege), because they pertain to a claim made in an official proceeding before the Hermosa Beach City Council and about the claims in Ardmore's FAC itself, respectively.

In support of its opposition filed June 5, 2018, Ardmore filed the declarations of its real estate agent Forbes and Patti Nernberg (Nernberg), who previously lived at the unit listed for sale and now resided at the other unit of the Property. Roth filed objections to portions of the declarations of Forbes and Nernberg.

Meanwhile, after a few more price reductions, the Property unit ultimately sold for $2,203,000.

On June 18, 2018, the hearing on Roth's anti-SLAPP motion was held "and argued", but no court reporter was present and no settled statement is part of the record on appeal.[4] The court took the matter under submission.

On September 7, 2018, the court denied Roth's special motion to strike the first and second causes of action of the FAC and the first two sentences of paragraph 31 of the third cause of action. As to the first prong, the court ruled Roth met his burden to establish that the statements on the signs constituted " 'an act

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[4] On our own motion, we take judicial notice of the June 18, 2018 minute order, attached as an exhibit to the parties' stipulation filed with this Court on April 17, 2019. (Evid. Code, §§ 452, 453, 459.)

in furtherance of a person's right of petition or free speech . . . in connection with a public issue' " per section 425.16, subdivision (e)(2), as the signs "raise the issue of the legality of the subject stairway which was under . . . review by the City of Hermosa Beach in connection with the claim filed by [Roth] and . . . in connection with the lawsuit filed by [Ardmore]." As to the second prong, the court found Ardmore demonstrated a probability of prevailing on each of the three claims of the FAC. The court further found the litigation privilege does not protect Roth's statements on the signs.

And finally, the court ruled on Roth's evidentiary objections to the declarations of Forbes and Nernberg. It sustained 5 of 25 objections and overruled the rest.

Roth timely appealed.

DISCUSSION

A. Standard of Review

We review a trial court's ruling on a special motion to strike pursuant to section 425.16 under the de novo standard. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788; *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) "In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1652.) As always, "our job is to review the trial court's ruling, not its reasoning." (*People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 386.)

We review a trial court's rulings on evidentiary objections by applying an abuse of discretion standard. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.) As the party challenging the court's decision, it is Roth's burden to establish such abuse, which we will find only if the trial court's order "exceeds the bounds of reason." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

B. The Absence of a Reporter's Transcript Dooms Review of the Trial Court's Rulings on the Evidentiary Objections

Roth challenges orders made after a hearing at which no court reporter was present. The record on appeal does not include a settled statement or agreed statement as authorized by California Rules of Court, rules 8.163 and 8.137. The June 18, 2018 minute order does specify that Roth's anti-SLAPP motion was called for hearing "and argued" before the court took the matter under submission.

Affirmance of the order appealed from may be warranted in the absence of a reporter's transcript when such a transcript is necessary for meaningful review. (See, e.g., *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187 [appeal requiring consideration of testimony could not proceed in the absence of a reporter's transcript or a settled statement].) As a result, Roth cannot rely on errors at the June 18, 2018 hearing unless the claimed error appears on the face of the record before us. (Cal. Rules of Court, rule 8.163; see, e.g., *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [declining to review the adequacy of an award of damages absent a reporter's transcript or settled statement of the damages portion]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447–448 ["The absence of

a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion"].)

Because we review the denial of an anti-SLAPP motion de novo and must conduct an independent analysis of our own, we can resolve the appeal from the ruling on Roth's special motion to strike in the absence of a reporter's transcript. "While a record of the hearing would have been helpful to understand the trial court's reasoning, it is not necessary here where our review is de novo and the appellate record includes the trial court's written orders and all . . . materials germane to Appellant['s] motion." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933-934; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 696.) The absence of a reporter's transcript is not fatal to Roth's appeal of the court's denial of his anti-SLAPP motion.

The same, however, cannot be said for Roth's appeal of the trial court's order overruling his evidentiary objections, which, he contends, was "an abuse of discretion." The cardinal rule of appellate review is judgments and orders of the trial court are presumed correct and prejudicial error must be *affirmatively* shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of providing an adequate record, and the failure to provide an adequate record for meaningful review requires the issue to be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

We do not know what took place at the June 18, 2018 hearing where Roth's motions "were argued" before the court took the matter under submission. There is no indication whether certain exhibits were authenticated, or if either of the declarants (Forbes or Nernberg) were present and testified. For instance, Roth contends the court's order overruling his objection—on the

grounds of hearsay and no foundation—to Nernberg's statement in her declaration about the City's issuance of a Certificate of Occupancy for the Property unit on January 11, 2018, was an abuse of discretion. But without more, we cannot undertake a meaningful review of the basis of the trial court's decision. We do not know what took place during the June 18, 2018 hearing, i.e., whether Nernberg provided testimony that laid the requisite foundation as to how she had personal knowledge of the facts surrounding the issuance of the Certificate of Occupancy for the Property unit listed for sale, or whether she provided any testimony at all… and therein lies the problem. Roth has not met his burden of *affirmatively* showing error by the court based on the record before us. We see no abuse of discretion; the rulings on Roth's evidentiary objections are affirmed.

C. Applicable Law

Section 425.16 provides, inter alia, that "[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 establishes that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' " is defined in section 425.16 to include, in relevant part: "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any 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." (§ 425.16, subds. (e)(1) & (e)(2).) "[A] statement is 'in connection with' litigation under section 425.16, subdivision (e)(2), if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.) This includes statements made to "persons who are not parties or potential parties to litigation, provided such statements are made 'in connection with' pending or anticipated litigation." (*Id.* at p. 1270.)

The Legislature enacted section 425.16 to prevent and deter "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Thus, the purpose of the anti-SLAPP law is "not [to] insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

When a party moves to strike a cause of action (or portion thereof) under the anti-SLAPP law, a trial court evaluates the special motion to strike by implementing a two-prong test: (1) has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056); and if it has, (2) has the non-moving party demonstrated that the challenged cause(s) of action has "minimal merit" by making "a prima facie factual showing sufficient to sustain" a judgment in its favor? (*Baral*, *supra*, 1 Cal.5th at pp. 384–385; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93–94; see also § 425.16, subd. (b)(1)).

Thus, after the first prong is satisfied by the moving party, "the burden [then] shifts to the [non-moving party] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, at p. 396.)

D. Prong 1: *Arising from Protected Activity*

Roth's initial burden is to show that Ardmore's three causes of action arise from Roth's protected activity. (*Park*, *supra*, 2 Cal.5th at p. 1061.)

In Roth's statements communicated via the first sign (posted on January 2, 2018), he refers to his claim filed with the City of Hermosa Beach and warns of potential lawsuits against the City and the property owner. Thus, we find Roth's first sign contained a written statement made in connection with the issue of whether the stairway of the Property is in violation of the Hermosa Beach Municipal Code. This issue formed part of Roth's claim that was under review with the City of Hermosa Beach. Hermosa Beach's city government is an "executive body" in satisfaction of section 425.16, subdivision (e)(2). Posting the sign is thus protected activity for purposes of the anti-SLAPP statute. (See *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 373.)

Roth's statements in the second sign (posted in February 2018) specifically referred to the lawsuit initiated by Ardmore and warns future buyers that they may become a part of the lawsuit upon transfer of ownership. We find Roth's second sign contains communication in connection with an issue that is part of pending litigation and was directed at "persons who are not parties or potential parties to litigation," i.e., potential buyers who are likely to have an interest in the pending lawsuit if they considering purchasing the Property unit.

It was argued that because Roth's communications were made via the two signs placed on an "illegal fence", Roth's conduct was illegal as a matter of law (per *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*)), precluding him from using the anti-SLAPP statute to strike Ardmore's complaint. (*Id.* at p. 305.) We find this argument unavailing. Case authorities have found the *Flatley* rule applies "only to criminal conduct, not to conduct that is illegal because [it is] in violation of statute or common law." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804–806.) Here, even if Roth's fence was in violation of various sections of the Hermosa Beach Municipal Code,[5] his conduct does not amount to *criminal* conduct; a "violation of any of the provisions of this chapter" of the Hermosa Beach Municipal Code amounts to "an *infraction*" punishable with a fine of $50 for the first violation and $100 for the second violation of the same condition within one year.

Ardmore refers to the signs' placement on "the illegal fence" in the statement of facts section of respondent's brief by citing to paragraph 14 of Nernberg's declaration in support. We are astonished by this because the court sustained Roth's objection to paragraph 14 of Nernberg's declaration "as to the statement that

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[5] The trial court took judicial notice of the relevant code sections of the Hermosa Beach Municipal Code.

the fence is illegal." That part of Nernberg's declaration was not admitted into evidence, a fact Ardmore neglected to recite to us.[6]

Based on the foregoing, we find the first prong of the two-step anti-SLAPP analysis is satisfied.

E. Prong 2: Probability of Prevailing on the Causes of Action

We conduct an inquiry into whether Ardmore has stated "legally sufficient" claims and made a "prima facie factual showing" with competent/admissible evidence sufficient to sustain a favorable judgment on each of the challenged causes of actions. (*Baral*, *supra*, 1 Cal.5th at pp. 384–385; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)
In deciding the question of potential merit, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) In considering the pleadings and declarations, we do not make credibility determinations or compare the weight of the evidence; instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of

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[6] We are equally astonished by Ardmore's misstatement of the record in many parts of its brief. For example, in the statement of facts section, Ardmore states its attorney demanded that Roth immediately remove the sign and Roth refused; in support of this "fact," Ardmore cites to paragraph 14 of Nernberg's declaration and pages 167–171 of the clerk's transcript, but that information is not found on any of the cited pages, in contravention of California Rules of Court, rule 8.204, subdivision (a)(1)(C).

law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

1. First Cause of Action: Intentional Interference with Prospective Economic Advantage

Intentional interference with prospective economic advantage/relations has five elements: "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

We need not reach the question whether Ardmore has provided sufficient *factual* substantiation for the specific elements of this cause of action because, for the reasons discussed below, Ardmore failed to state a legally sufficient claim as to its cause of action for intentional interference of prospective economic advantage. (See *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31 ["If the pleadings are not adequate to support a cause of action, the plaintiff has failed to carry his burden in resisting the [anti-SLAPP] motion"].)

In the FAC, Ardmore alleged the following: Ardmore hired a real estate agent and "entered into a listing agreement in order to sell a unit"; Ardmore's "and its agent's efforts and intention to sell the [Property unit] constitutes an economic relationship that will result in economic benefit"; Roth was "aware of the probability of [Ardmore] entering into an agreement *with a potential buyer, which would result in future economic benefit*" to

Ardmore; Roth's conduct "has *interfered with [Ardmore]'s sale of the [Property unit] and future economic benefit*." (Italics added.) Thus, the only *economic benefit* alleged is one that would arise from the sale of the property to a potential buyer.

However, the law is clear in that "an *existing* relationship with an *identifiable* buyer" (as opposed to *potential* buyer) must be alleged or else Ardmore's expectation of a future sale was, at most, " 'a hope for an economic relationship and a desire for future benefit.' " (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 527 (*Safeway).*) The only identifiable buyer in the record before us was from the cancelled escrow of the unit, but that preceded Roth's posting of the signs. All other buyers were *potential* and thus, Ardmore was precluded from pleading an *existing* economic relationship with them. By identifying its real estate agent as the third party with whom Ardmore has an *existing* economic relationship, Ardmore essentially attempts an end-run around this major defect in its pleading.

This "tort protects the expectation of an advantageous business relation even in the absence of an existing, legally binding agreement." (*Safeway*, *supra*, 42 Cal.App.4th at pp. 520-521, italics omitted.) The only identifiable individual who stood to gain an *economic benefit* from the business relationship created by way of the listing agreement was actually the real estate agent (e.g., lost commission).

Additionally, in the FAC, Ardmore sought damages in an amount to be proven at trial. Section 425.10, subdivision (a)(2) states that "[i]f the recovery of money or damages is demanded, the amount demanded shall be stated." (§ 425.10, subd. (a)(2).) An allegation of having suffered "damages according to proof"

does not amount to a sufficient pleading of damages, especially because Ardmore did not allege or specify any damages arising from the alleged breakdown of its relationship with Forbes (but for the reduction of the listing price of the property, which—as already noted—would have been an economic benefit arising from Ardmore's relationship with an identifiable buyer, not the broker). (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 475.)

Accordingly, we find that Ardmore's first claim does not pass the second prong of the anti-SLAPP test.

2. Second Cause of Action: Preliminary and Permanent Injunction and Damages

In its FAC, Ardmore pled "preliminary and permanent injunction and damages" as its second cause of action. " 'Injunctive relief is a remedy, not a cause of action. [Citation.] A cause of action must exist before a court may grant a request for injunctive relief.' " (*Ivanoff v. Bank of America N.A.* (2017) 9 Cal.App.5th 719, 734.) " 'A permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established.' " (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293.) Because Ardmore incorporates by reference the allegations from the first cause of action into what it refers to as its "second cause of action," Ardmore's second claim operates as a request for injunctive relief and damages based on the allegations set forth in the intentional interference of prospective economic relations cause of action. As set forth above, Ardmore failed to establish a probability of prevailing on its first cause of action. Accordingly, the second cause of action fails as well.

As for damages, Ardmore contends that where "an action is brought seeking punitive damages and an injunction, the plaintiff is not required to plead the amount demanded" and cites to section 425.10 in support. Ardmore miscites the statute, which states the amount demanded need not be stated where an action is brought to recover punitive damages *for personal injury or wrongful death*. (§ 425.10, subd. (b).)

3. Third Cause of Action: Nuisance

Roth argues Ardmore cannot establish a probability of prevailing on the merits of the first and second sentences of paragraph 31 of the nuisance cause of action. Those sentences state: "[Roth] has placed an illegal sign on his property, in direct view of potential buyers of the [Property unit], for the purpose of interfering with [Ardmore's] sale of the [Property unit]. The sign violates the Hermosa Beach Municipal Code."

A nuisance is defined by statute as "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on [the] disturbance of rights in land. [Citation.] A nuisance may be both public and private, but to proceed on a private nuisance theory, the plaintiff must prove *an injury specifically referable to the use and enjoyment of his or her land*." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041, italics added (*Koll-Irvine*).)

Here, Ardmore alleged that Roth placed the sign in direct view of potential buyers "for the purpose of interfering with" the sale of the unit. Ardmore provided evidence the unit was in

escrow in December 2017 for $2.6 million and, after the posting of signs, Ardmore received minimal interest in the unit and the listing price was reduced multiple times. It was sold at a substantially reduced price of $2,203,000. We believe Ardmore has established a claim for nuisance.

Roth argues that a "diminution in value does not interfere with the present use of property and cannot alone constitute a nuisance," citing the court's holding in *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 533–534. However, the case before us is distinguishable from *Oliver,* where plaintiffs were not in the process of selling their property and a diminution in value did not interfere with their *present use* of the property. (*Id.* at pp. 529, 534.) Here, plaintiff Ardmore was in the process of selling the Property unit and so a diminution in value did interfere with its present use of the Property unit, i.e., having it listed for sale and profit.

Additionally, Ardmore's failure to specify a dollar amount of damages suffered in the FAC does not defeat its nuisance claim, as we are required to consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" in deciding whether Ardmore has demonstrated a probability of prevailing. (§ 425.16, subd. (b)(2).) Here, a review of Ardmore's FAC in conjunction with Roth's anti-SLAPP motion and the supporting/opposing papers, demonstrate that Ardmore made a prima facie showing that Roth's signs interfered with Ardmore's present use of the Property, i.e., the attempted sale of the Property unit, resulting in the substantial reduction of the selling price of the unit. While the court in *Koll-Irvine* held that a private nuisance action "cannot be maintained for an interference in the use and

enjoyment of land *caused solely by the fear of a future injury*" (*Koll-Irvine*, *supra*, 24 Cal.App.4th at pp. 1041–1042, italics added), here, Ardmore did not allege fear of a *future* injury. Rather, Ardmore alleged Roth's signs caused a diminution in the value of the Property (from $2.6 million to $2,203,000) as well as caused Ardmore to incur additional costs in connection with the sale of the Property (for e.g., additional staging fees, appraisal fees, etc.)—all of which are injuries already suffered by Ardmore.

Roth also argues that Ardmore's nuisance claim fails because it "alleged no physical invasion from the sign," quoting "a case" that was "cited [to] approvingly" by *Koll-Irvine*. However, the "case" *Koll-Irvine* relied on is no longer good law, a fact Roth neglects to tell us. (*Id*. at p. 1042.)

Finally Roth argues his signs are protected by the litigation privilege. Civil Code section 47, subdivision (b) provides an absolute privilege for communications made in any legislative, judicial or other official proceeding authorized by law, or in the initiation or course of any other proceeding authorized by law. (Civ. Code § 47, subd. (b).) The litigation privilege is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley*, *supra*, 39 Cal.4th at p. 323.) Thus, Ardmore cannot establish a probability of prevailing if the litigation privilege precludes a finding of liability on the nuisance cause of action.

The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of harassment in subsequent derivative actions. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) "The usual formulation is that the

privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege is "not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.) The connection or logical relation Roth's communication must bear to the litigation in order for the privilege to apply must be a functional one. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146.) "[T]he *communicative act*—be it a document filed with the court, a letter between counsel or an oral statement—must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation[.]" (*Ibid.*)

We find the public policy underpinning the litigation privilege does not support barring Ardmore's nuisance claim based on Roth's statements on the signs. There is no evidence in the record supporting the notion that Roth's communications via the sign were a "necessary or useful step in the litigation process." Neither Roth's first nor second sign were necessary or useful to his pending claim with the city or to the pending litigation initiated by Ardmore. There is no evidence in the record that Roth's signs improved his position with pending litigation or helped achieve the object of the litigation.

Based on the foregoing, we find Ardmore has met its burden of showing a probability of prevailing on the merits of its nuisance cause of action.

DISPOSITION

The trial court's order overruling Roth's evidentiary objections is affirmed. The order denying Roth's special motion to strike Ardmore's third cause of action for nuisance is affirmed. The order denying Roth's special motion to strike Ardmore's first two causes of the FAC is reversed; we remand the matter to the trial court with instructions to strike the first and second causes of action from the FAC. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.