Filed 1/19/17 Peltekci v. Roshan CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAIT PELTEKCI and ALBERT PELTEKCI, Plaintiffs and Appellants, v. FEREIDOON ROSHAN, ROSHAN, LLC, ROSHAN PROPERTIES, INC., ROBERT CHANDLER, and ROBERT C. CHANDLER, A LAW CORPORATION, Defendants and Respondents.	B270068 (Los Angeles County Super. Ct. No. BC593641)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern. Affirmed.

Law Offices of Richard Pech, Richard Pech for Plaintiffs and Appellants.

Chandler Law Firm, Robert C. Chandler and Carla R. Kralovic, for Defendants and Respondents.

INTRODUCTION

In response to an unlawful detainer action brought against them, plaintiffs and appellants Sait Peltekci and Albert Peltekci brought a claim for malicious prosecution against defendants and respondents Fereidoon Roshan, Roshan, LLC, and Roshan Properties, Inc. (Roshan defendants), and Robert Chandler and Robert C. Chandler, A Law Corporation (Chandler defendants). Defendants moved to dismiss by filing an anti-SLAPP[1] motion (Code Civ. Proc. § 425.16).[2] For the reasons that follow, we affirm the order granting defendants' motion and dismissing the case.

FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 2005, plaintiffs, individually and doing business as Ontario Jewelry Plaza, entered into a commercial lease with Roshan Properties, LLC[3], subsequently amended,

---

[1] "SLAPP is an acronym for strategic lawsuit against public participation. [Citation.]" (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 957, fn. 3.) An order granting or denying a special motion to strike under Code of Civil Procedure section 425.16 is appealable. (Code Civ. Proc., § 904.1, subd. (a)(13).)

[2] All statutory citations are to the Code of Civil Procedure.

[3] The entity "Roshan Properties, LLC" did not actually exist at the time and is not a party in the instant case. Rather, defendant Roshan, LLC was at all relevant times the owner and title holder of the property. Defendants explain that "Roshan Properties, LLC" was erroneously listed on the lease. Approximately ten years later, on April 29, 2015, the entity

pursuant to which plaintiffs leased commercial property located in Ontario, California, for a term from October 1, 2005, through September 30, 2015. In late 2010 and early 2011, plaintiffs became delinquent in their rent payments and continued to remain so.

On July 19, 2014, plaintiffs were served with a three-day notice to pay rent or quit, which sought rent and other related charges in the amount of $336,432, for the period February 28, 2011, through August 15, 2014. Thereafter, Roshan, LLC, through its counsel, Gateway Legal Group, P.C., brought an unlawful detainer action against plaintiffs (hereinafter "UD1"). At the UD1 trial, a jury found plaintiffs did not "fail to make [] rental payment[s] to Roshan LLC as required by the lease." On March 17, 2015, judgment was entered in favor of plaintiffs.

On April 10, 2015, plaintiffs were served with another three-day notice to pay rent or quit, which sought "estimated rent now due and owing" for the property "in the estimated amount of $122,768.00, representing the past due rent for the period of April 1, 2014, to March 31, 2015." (Bold and underscore omitted.) This three-day notice noted that "ROSHAN PROPERTIES, LLC" had been "erroneously listed on the lease agreement" and instead directed plaintiffs to make payment either to Roshan Properties, Inc. or to Fereidoon Roshan. The Chandler defendants prepared and executed this three-day notice.

On about April 21, 2015, a board of directors meeting was held for Roshan, LLC and Roshan Properties, Inc. Fereidoon Roshan, as "managing member of Roshan, LLC" and as "chairman of the board of Roshan Properties, Inc.," was the only

---

"Roshan Properties, LLC" was created and registered with the California Secretary of State.

one present. At the meeting, the board passed a resolution that recognized the lease with plaintiffs "lists Roshan Properties, LLC in error" and consequently corrected the name of the lessor by stating as follows: "The correct entity is the recorded owner of the property of Roshan, LLC." The Board passed the additional resolution that: "Roshan, LLC, as the record owner of the property hereby assigns the limited legal rights to prosecute and enforce the unlawful detainer action against [plaintiffs]." There was no explicit indication to whom Roshan, LLC made the assignment. All parties, however, accept that the assignment, if valid, was made to Roshan Properties, Inc.

On May 15, 2015, on behalf of Roshan Properties, Inc., the Chandler defendants filed an unlawful detainer action against plaintiffs (hereinafter "UD2"). On June 29, 2015, Roshan Properties, Inc. voluntarily dismissed UD2 without prejudice.

In response to the UD2 action, in September 2015, plaintiffs filed a complaint for malicious prosecution against defendants. Defendants then filed an anti-SLAPP motion to dismiss the matter. On December 8, 2015, in connection with the hearing on defendants' anti-SLAPP motion, the trial court issued a tentative ruling granting the motion on the grounds that plaintiffs' evidence of probable cause and malice was inadequate. Following the hearing, the trial court adopted its tentative ruling as its final ruling, granted defendants' anti-SLAPP motion, and dismissed the case. Plaintiffs timely appealed.

DISCUSSION

I. Anti-SLAPP Motion

A. Applicable Law

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]"[4] (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) "The goal [of section 425.16] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806.)

"In ruling on a special motion to strike under section 425.16, the trial court employs a two-prong analysis. Initially, under the first prong, the trial court determines "'whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity . . . If the court finds such a showing has been made, it then determines

---

[4] Section 425.16, provides: "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).)

[under the second prong] whether the plaintiff has demonstrated a probability of prevailing on the claim." [Citation.]' [Citation.]" (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 468-469.) The defendant bears the burden on the threshold issue regarding protected activity, while the plaintiff bears the burden as to the second. (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34-35.)

With respect to the second prong, in order to establish probability of prevailing on the merits, a plaintiff "'"must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited"' [Citations]." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) To make out a cause of action for malicious prosecution, a plaintiff must show that the prior action: (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

We review de novo the trial court's decision to grant or deny an anti-SLAPP motion. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79.)

B. Probable Cause to Bring UD2

Plaintiffs concede that, because their malicious prosecution claim arises from defendants having brought the UD2 action, defendants met their burden of establishing the first prong of the anti-SLAPP statute, i.e., the cause of action arose from protected speech or petitioning. (See *Chavez v. Mendoza* (2001) 94

Cal.App.4th 1083, 1087 ["It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition"].) With respect to the second prong, however, plaintiffs contend the trial court erred in concluding that they failed to meet their burden of establishing a reasonable probability of prevailing on the merits. We disagree, because we find that plaintiffs failed to establish a prima facie case that defendants lacked probable cause to bring the UD2 action.[5]

"The question of probable cause is 'whether as an objective matter, the prior action was legally tenable or not.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) Because counsel and their clients "have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win [citations], . . . there is probable cause if, at the time the claim was filed, 'any reasonable attorney would have thought the claim tenable.' [Citation]." (*Jarrow Formulas Inc. v. LaMarche* (2003) 31 Cal.4th 728, 742.) Indeed, "every case litigated to a conclusion has a losing party, but that does not mean the losing position was not arguably meritorious when it was pled." (*Id.* at p. 743.) Thus, "[a] litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery

---

[5] Because we conclude plaintiffs did not meet their burden to show defendants lacked probable cause, we do not address whether plaintiffs showed that defendants had malice in bringing UD2. Further, we do not address plaintiffs' contention that the trial court erred by declining to rule on their objections to the Chandler and Roshan declarations submitted in connection with the anti-SLAPP motion. We do not rely on that evidence in finding that plaintiffs failed to carry their burden to show lack of probable cause.

upon a legal theory which is untenable under the facts known to him. [Citation.]" (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292.)

Here, there is no genuine dispute that plaintiffs owed past rent under the lease. Defendants therefore had a tenable basis for bringing UD2 to evict plaintiffs from the property and to seek rents due and owing. In arguing that defendants lacked probable cause to bring UD2, plaintiffs conspicuously avoid this salient fact and instead contend that probable cause was lacking (1) because the three-day notice was purportedly defective and (2) because Roshan, LCC, as the property owner, could not legally assign to Roshan Properties Inc. its right to bring the UD2 action. While reasonable minds may differ on whether plaintiffs ultimately might have prevailed on one or both contentions in the UD2 action, neither contention renders defendants' decision at the time it filed the UD2 action untenable in law or fact.

1. Validity of the Three-Day Notice

With respect to providing three-day notice prior to bringing an unlawful detainer action, such notice is only valid if the landlord complies with the provisions of section 1161, subdivision 2, which, among other things, requires notice of the amount of rent due. (§ 1161, subd. (2); *Levitz Furniture Co. v. Wingtip Communications, Inc.* (2001) 86 Cal.App.4th 1035, 1038 (*Levitz*).) A notice that seeks rent in excess of the amount due is invalid and will not support an unlawful detainer action. (*Levitz*, *supra,* 86 Cal.App.4th at p. 1038.) Plaintiffs thus contend that UD2 was brought without probable cause because defendants' three-day notice purportedly overstated plaintiffs' past due rent by demanding $122,768 for the one-year period of April 1, 2014,

through March 31, 2015.[6] More specifically, plaintiffs claim the three-day notice overstated rents due (1) because the jury in UD1 supposedly found that no rents were due under the lease through March 17, 2015 and (2) because defendants did not credit plaintiffs for $46,500 defendants received from plaintiffs' subtenants during that one-year period.

As an initial matter, it should be noted that, aside from reductions to account for the UD1 jury verdict and for subtenant payments, plaintiffs do not dispute that defendants otherwise correctly calculated and demanded past due rent of $122,768 for the period at issue. Moreover, although a three-day notice seeking rent in excess of the actual amount due is generally invalid, a three-day notice in connection with a commercial lease need only reasonably estimate the amount of rent due in order to

---

[6] Plaintiffs also state in their opening brief that the three-day notice "was false in its preparation, service, and basis for the UD2" because the assignment of rights to file UD2 from Roshan, LLC to Roshan, Properties, Inc. was made after the three-day notice was served. Plaintiffs' intended meaning for this statement is unclear. Plaintiffs provide no further argument or legal authority to suggest that the purported after-the-fact assignment rendered the three-day notice invalid. Therefore, insofar as plaintiffs intended to argue that the assignment of rights after service of the three-day notice undermined probable cause due to invalidity of the three-day notice, we deem that argument waived. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215 ["'Contentions are waived when a party fails to support them with reasoned argument and citations to authority'"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [same].)

be valid. (See § 1161.1[7]; *Levitz*, *supra*, 86 Cal.App.4th at p. 1039.) There is no dispute here that the lease was for a commercial property and that the three-day notice clearly states that the "*estimated* amount due of $122,768.00" was an "*estimated* rent now due and owing." (Italics added). Therefore, in evaluating plaintiffs' contention that the three-day notice was so clearly invalid that defendants lacked probable cause to bring UD2, we examine whether plaintiffs have established that defendants possessed no tenable basis to reasonably exclude from its rent calculations reductions due to the UD1 jury finding or subtenant rent payments.

With respect to the jury's finding in UD1, on its verdict form the jury answered "No" to the following question: "Did Sait Peltekci, Albert Peltekci, and Ontario Jewelry Plaza fail to make at least one rental payment to Roshan LLC as required by the lease?" Because judgment in UD1 was entered on March 17, 2015, and because defendants sought in their UD1 complaint damages consisting of back rent plus rental payments through the date of the judgment, plaintiffs contend the jury necessarily found plaintiffs owed no rent under the lease through March 17, 2015. In light of that purported finding, plaintiffs contend the

---

[7] Section 1161.1 provides in relevant part: "With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent: [¶] (a) If the amount stated in the notice provided to the tenant pursuant to [section 1161(2)] is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due."

three-day notice (which sought rent for the period April 1, 2014, through March 31, 2015) should have excluded any rents due up to and including March 17, 2015.

Plaintiffs advance one interpretation of the jury's verdict—that plaintiffs did not fail to pay *any* rent due under the lease. But they ignore another reasonable interpretation of the UD1 verdict—that plaintiffs did not fail to pay any rent *to Roshan LLC* as required by the lease, because the lease was between plaintiffs and a different entity, "Roshan Properties, LLC." The UD1 jury verdict is certainly susceptible to defendants' other—if not more—reasonable interpretation. Defendants therefore had a tenable basis not to reduce their rent demand in the three-day notice to account for plaintiffs' interpretation of that verdict. Accordingly, we do not find that on this basis plaintiffs have demonstrated defendants lacked probable cause to bring UD2.

As for the effect of subtenant payments on the validity of the three-day notice, there is no dispute that plaintiffs' subtenants made rent payments to defendants totaling $46,500 during the one-year period of April 1, 2014, through March 31, 2015. Plaintiffs thus contend those payments should have been credited toward the $122,768 rent owed by plaintiffs for that time period. Defendants, however, possessed a legally tenable basis to reasonably exclude those subtenant payments from the $122,768 demand in the three-day notice. With respect to a debtor with multiple obligations to a creditor, section 1479 provides that, in the absence of an express intention by the debtor or creditor as to which debt obligation shall be deemed satisfied as the debtor makes a payment to the creditor, such payment should be applied to "the obligation earliest in date of maturity." (§ 1479, subd. (3); *Bank of America Etc. Assn. v. Kelsey* (1935) 6 Cal.App.2d 346,

352.) Here, plaintiffs are the landlord's debtor. There is no genuine dispute that plaintiffs owed rent under the lease prior to the period at issue in UD2, and plaintiffs did not explicitly indicate to which rent obligation any subtenant payment should be applied.[8] Defendants therefore had a reasonable basis to apply any subtenant payments toward plaintiffs' earlier rent obligations and exclude them from the three-day notice calculation of estimated rent for the period April 1, 2014, to March 31, 2015. Because defendants had a legally tenable basis for so doing, we conclude that on this basis plaintiffs have not carried their burden to show a lack of probable cause either.

2. Lawfulness of the Assignment of Rights

With respect to the assignment by Roshan, LLC (as property owner) to Roshan Properties, Inc., of its rights to bring the unlawful detainer action, plaintiff contends such rights cannot be assigned, which therefore rendered UD2 untenable from the outset. There does not appear to be any case law or legal authority—and plaintiff does not cite to any—holding that a property owner's assignment of authority to pursue an unlawful detainer is necessarily invalid. Rather, plaintiffs rely on two cases presenting factually dissimilar circumstances (*Chao Fu,*

---

[8] Plaintiffs argue that, on some of the rent payment checks, plaintiffs' subtenants indicated "in substance and effect" the month for which rent was to be applied. Plaintiffs, however, provide no support for the proposition that a third-party can manifest the debtor's intent to satisfy a debtor's particular obligation under section 1479 or that the mere notation of a month on a third-party's check could so qualify. Moreover, of the $46,500 in subtenant payments, plaintiffs can only make such claim as to checks totaling $18,700.

Inc. v. Wen Ching Chen (2012) 206 Cal.App.4th 48 (*Chao Fu*) and *Martin v. Bridgeport Community Assn. Inc.* (2009) 173 Cal.App.4th 1024 (*Martin*)), as well as a generally accepted treatise concerning landlord-tenant law, Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2015).

In *Chao Fu*, *supra,* 206 Cal.App.4th at pages 59-60, the court held that in an action to quiet title and to obtain damages for a cloud on title, the plaintiff must have an interest in the property in order to have standing to sue and cannot bring suit based on an "assignment of claims" from the property owner. In *Martin, supra*, 173 Cal.App.4th at pages 1029, 1032-1033, the court held that the property owners could not confer standing on plaintiffs via an assignment of rights to maintain an action to enforce an agreement "to transfer title" to certain disputed property. While both *Chao Fu* and *Martin* stand for the proposition that a property owner may not assign the right to bring certain causes of action relating to validity of title and scope of property interests, they do not clearly foreclose the ability of a property owner to assign rights to its agent to bring an action to collect back rents and evict a tenant in unlawful possession of the property.

More instructive is the landlord-tenant law treatise relied upon by plaintiffs. Contrary to plaintiffs' reading of it, that treatise recognizes that an assignee might be able to bring an unlawful detainer action. Noting that a landlord owner's agent does not have inherent authority to sue in the agent's own name as a real party interest, the treatise explains: "Standing as assignee: Of course, the result would be otherwise if the landlord assigned its interest to the agent. As assignee, the agent would be the real party in interest (party owning the claim of right to

possession) and thus entitled to maintain the UD in his or her own name. [See *National Reserve Co. of America v. Metropolitan Trust Co. of Calif.* (1941) 17 C[a]l.2d 827, 831, 112 P[.]2d 598, 601]."[9] (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2015) ¶ 8:29.1).) The treatise goes on to say that there is "no case on point" holding that a landlord can assign his interest in an unlawful detainer action and thus advises that a landlord who does not maintain the UD in his name and instead assigns his interest to an agent is likely to draw a general demurrer.[10] But such cautionary advice from a landlord-tenant law treatise does not render a decision to assign rights to bring an unlawful detainer action untenable, particularly where the treatise suggests in connection with that cautionary advice that there is a legal basis for that approach.

Accordingly, while it may be that a property owner cannot assign its rights to bring an unlawful detainer action, we cannot say that defendants lacked a tenable legal basis to bring UD2 with Roshan Properties, Inc. as the plaintiff via an assignment of

---

[9] In *National Reserve*, our Supreme Court stated: "It is well established that an assignment of a chose in action for collection vests the legal title in the assignee . . . . In such case the assignee may maintain a suit thereon in his own name, even though the assignor retains an equitable interest in the thing assigned." (*National Reserve Co. of America, supra*, 17 Cal.2d 827 at p. 831.) *National Reserve*, however, was not a landlord-tenant case.

[10] The inapplicability here of both *Chao Fu, supra*, 206 Cal.App.4th at page 48, and *Martin*, *supra*, 173 Cal.App.4th at page 1024, is underscored by the treatise's failure to cite or discuss either case relating to the assignment of rights to bring an unlawful detainer action.

rights from Roshan, LLC.[11] As such, we conclude that on this asserted basis plaintiffs also failed to meet their burden to show that defendants lacked probable cause to initiate UD2.

II. Plaintiffs' Motion to Strike

Plaintiffs have filed a motion to strike defendants' appendix on appeal on the ground that the documents contained therein were not before the trial court regarding the anti-SLAPP motion. The documents at issue relate to a separate malicious prosecution action plaintiffs brought against defendants for bringing the UD1 action. That malicious prosecution action was also dismissed pursuant to an anti-SLAPP motion by defendants. Plaintiffs have further requested we strike from defendants' brief any references to the documents in question.

Because the documents in defendants' appendix do not appear to be part of the record before the trial court in this case, we grant plaintiffs' motion to strike the appendix, along with any references thereto in defendants' brief. (See Cal. Rules of Court, rule 8.124(g); see e.g., *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404 [striking noncompliant exhibits because "[a]n appellant's appendix may only include copies of documents that are contained in the superior court file"]; *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 673

---

[11] Plaintiffs also suggest in passing that the assignment was "null and void" because it took place after service of the three-day notice. Plaintiffs, however, provide no further argument or support for this proposition. We deem that argument waived. (*Moulton Niguel Water Dist. v. Colombo*, *supra*, 111 Cal.App.4th at p. 1215; *Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785.)

[granting motion to strike portions of brief that referred to evidence that was not part of the record].)

We deny plaintiffs' request for sanctions.

DISPOSITION

The order granting defendants' anti-SLAPP motion is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIN J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.