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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN B. PELKOLA, Plaintiff and Appellant, v. STEVEN S. FEDER et al., Defendants and Respondents	2d Civil No. B261697 (Super. Ct. No. 56-2014-00454064-CU-PO-VTA) (Ventura County)

John P. Pelkola appeals from an order granting a special motion to strike in favor of respondents, attorney Steven S. Feder and the law firm of Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez (herein "Feder"), and attorney Samuel M. Huestis and the Law Offices of Samuel M. Huestis (herein "Huestis"). (Code Civ. Proc. § 415.16.)[1] The trial court struck five causes of action for malicious prosecution, abuse of process, fraud, intentional infliction of emotional distress, and defamation as a strategic lawsuit against public participation ("SLAPP"). We affirm on the ground that each cause of action arises from a protected speech activity (§ 425.16, subd. (e)(2); *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480).

Facts and Procedural History

From 1991 to 2007, Feder represented Pelkola's parents, Bruce and Edna Pelkola ("Bruce" and "Edna"), on various estate and Medi-Cal planning matters. Bruce and

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Edna suffered from dementia and advanced Parkinson's Disease. To qualify for long-term assisted care benefits, they quitclaimed their house to Pelkola and Pelkola signed an occupancy agreement granting them a lifetime right of occupancy. Feder prepared the quitclaim deed and occupancy agreement. On July 26, 2006, Pelkola signed a Declaration of Right to Return Home stating that Bruce and Edna may "return to the residence to live at any time."

After Bruce and Edna moved into an assisted living facility, Pelkola mortgaged their home for $380,000 and transferred their savings ($180,000) into his own account. When Bruce and Edna asked for money to pay for assisted living care, Pelkola claimed the money had been gifted to him. Lacking the funds for assisted living care, Bruce and Edna asked to move back home. Pelkola refused to let them move back unless they paid the mortgage as rent.

In 2009, Bruce and Edna retained Huestis to investigate and file a financial elder abuse complaint with the Ventura County District Attorney and Ventura Police Department. On December 18, 2009, Feder provided Huestis a declaration and copies of the quitclaim deed, occupancy agreement, and Pelkola's Declaration of Right to Return Home. Feder declared that Bruce and Edna never intended to gift the $180,000 and that Pelkola was to hold the money for their benefit.

In 2010, the Ventura County District Attorney charged Pelkola with financial elder abuse. Feder was subpoenaed and testified at the June 12, 2013, preliminary hearing. At the conclusion of the hearing, the magistrate dismissed the criminal charges.

Civil Complaint for Damages

On June 11, 2014, Pelkola sued for malicious prosecution, abuse of process, breach of agreement, legal malpractice, notary malpractice, breach of fiduciary duty, fraud, intentional infliction of emotional distress, defamation, and negligence. Pelkola claimed that respondents falsely reported the elder abuse to cover up a Medi-Cal fraud.

Feder and Heustis brought a special motion to dismiss on the ground that their representation of Bruce and Edna was a protected speech activity under the anti-SLAPP statute. (§ 425.16.) The trial court granted the motion. It found that the malicious

prosecution, abuse of process, fraud, intentional infliction of emotional distress, and defamation causes of action were based on "communications to a law enforcement agency concerning potential elder abuse. This is a protected activity. There is nothing in the opposition to the motion that convinces the court that there is a likelihood of success on any of these causes of action."

The Anti-SLAPP Statute

Section 425.16, also known as the anti-SLAPP statute, was enacted to screen out meritless cases at an early stage. (*Cottage Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 718.) Section 425.16 deters lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech and the petition for redress of grievances. (*Soukup v. Hafif* (2006) 39 Cal.4th 260, 278.) In analyzing a section 425.16 motion, the trial court engages in a two-step process. (*Soukup*, at p. 278.) First, the court decides whether defendant has made a threshold showing that the challenged cause of action arises from a protected activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If defendant makes such a showing, the burden shifts to the plaintiff to demonstrate that he or she will probably prevail on the claim. (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.) These determinations are legal questions, subject to de novo review on appeal. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

Protected Speech Activity

The first prong was satisfied because "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute. [Citations.]" (*Cabral v. Martins, supra,* 177 Cal.App.4th at p. 480.) Relying on *Flatley v. Mauro, supra,* 39 Cal.4th 299, Pelkola argues that respondents engaged in extortion which is a crime and outside the scope of the anti-SLAPP statute. *Flatley* is a narrow exception and applies only where the defendant concedes the illegality of his conduct or the evidence conclusively establishes the conduct complained of was illegal as a matter of law. (*Flatley*, at p. 320; see, e.g., *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210.)

Feder's declaration and preliminary hearing testimony clearly show that no extortion demand was made. Feder did not seek anything from Pelkola and, in 2009, no longer represented Bruce or Edna. The trial court reasonably concluded that one or more of the causes of action arise from an act in furtherance of the constitutional right of petition and that the burden shifted to Pelkola to demonstrate a probability of prevailing on his claims. (*Kurz v. Syrus Systems, LLC* (2013) 221 Cal.App.4th 748, 760.)

Probability of Prevailing on Claim

Pelkola cannot establish a probability of prevailing if the litigation privilege, codified as Civil Code section 47, subdivision (b), precludes liability. (*Flatley, supra,* 39 Cal.4th at p. 323.)[2] 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) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silverberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The litigation privilege encompasses not only statements made in litigation but statements in anticipation of litigation or to investigate the feasibility of a lawsuit. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

The trial court correctly found that the litigation privilege bars the causes of action for abuse of process, fraud, intentional infliction of emotional distress, and defamation. Feder's declaration was prepared at the request of his former clients pursuant to a bona fide financial elder abuse investigation and comes within the purview of the litigation privilege. (Civ. Code, § 47, subd. (b)(2).) Feder's preliminary hearing testimony was an absolute privilege. With respect to the cause of action for malicious prosecution, Pelkola makes no showing that Feder initiated litigation against Pelkola or maliciously prepared and signed the declaration detailing his prior representation of Bruce and Edna. (*Zamos v.*

[2] Civil Code section 47, subdivision provides in pertinent part: "A privileged publication or broadcast is one made: [¶] . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law. . . ."

Stroud (2004) 32 Cal.4th 958, 965, 970 [malicious prosecution requires lack of probable cause, favorable termination of a prior action, and malice].)

Legal Malpractice

Pelkola argues that the fourth cause of action for legal malpractice is not subject to the anti-SLAPP statute. No one claims otherwise. (See *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702 [attorney malpractice claim not subject to anti-SLAPP statute].) The complaint alleges that Feder represented Pelkola in other matters and failed to disclose that he had a conflict of interest. Section 425.16 does not bar a malpractice action against a former attorney arising out of an irreconcilable conflict of interest. (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226-1227.)

Heustis

Pelkola's assertion that the trial court erred in granting the anti-SLAPP motion in favor of Heustis is without merit. Huestis's letter to the Ventura Police Department, which is the gravamen of the complaint, "sought official investigation[s] into perceived wrongdoing . . . [and was] protected by section 425.16." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570 [report of child abuse to authorities protected by statute].) Huestis's letter and communications fall within the broad scope of the anti-SLAPP statute and are privileged communication in anticipation of criminal and civil litigation. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Unlike *Flatley*, there was no threat to publicly accuse Pelkola of criminal activity and no extortion demand. (See *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478-1479 [*Flatley* exception for illegal activity applies only if no factual dispute about illegality]; *Miller v. Filter* (2007) 150 Cal.App.4th 652, 661 [allegation that defendant's conduct was illegal insufficient to invoke *Flatley* exception].) "'[J]ust as communications preparatory or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.' [Citations.]" (*Briggs*, at p. 1115.)

Pelkola cannot show a probability of prevailing on the action because the litigation privilege provides Huestis a complete defense. The privilege is absolute and applies to all torts except malicious prosecution. (*Silberg v. Anderson, supra,* 50 Cal.3d at pp. 215-216; *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955 [litigation privilege applies regardless of malice]; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360-364 [false statements to investigating officers absolutely privileged]; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1104 [report to police of suspected crime falls within litigation privilege].) "Without the litigation privilege, attorneys would simply be unable to do their jobs properly." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 212.)

With respect to the cause of action for malicious prosecution, Pelkola makes no showing that an underlying action was brought without probable cause and initiated with malice. Huestis's letter was supported by the declarations of Bruce, Edna, and Feder, who stated that Pelkola was to manage his parents' assets, not steal or encumber them. No reasonable attorney would believe that the financial elder abuse claim was untenable. '"The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 292; see also *Daniel v. Robbins* (2010) 182 Cal.App.4th 204, 225 [lack of probable cause by itself insufficient to show malice].)

Pelkola's complaint against Huestis is also time-barred. (See *Gerbosi v. Gaims, Wells, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 447.) The causes of action for abuse of process, infliction of emotional distress, defamation, and negligence are all subject to a one-year statute of limitations (§ 340.6; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881), which commenced to run in April 2010 when Huestis sent the elder

abuse letter to the Ventura Police Department. Pelkola did not sue for damages until June 2014, four years later.[3]

Motion for Reconsideration

Pelkola argues that trial court abused its discretion in denying his motion for reconsideration. The motion is bereft of new or different facts or law. (§ 1008, subd. (a); *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1105, 1012-1013.) """[T]he party seeking reconsideration must provide not only new evidence *but also a satisfactory explanation for the failure to produce that evidence at an earlier time*."""" (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198.) Section 1008 did not give the trial court authority to reevaluate or reanalyze facts and authority presented in the earlier motion. (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 384-385.)

Dismissal Order Signed by Different Judge

Pelkola complains that Judge Kent Kellegrew, who previously recused himself, signed a dismissal order after Judge Henry Walsh granted Huestis's anti-SLAPP motion on November 26, 2014. Pelkola did not object and forfeited any claim that the order should have been signed by Judge Walsh. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 454-455 [disqualified judge ruled on mistrial motion; error forfeited by not timely objecting]; *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 525-526 [party acquiesced to assumption of jurisdiction by disqualified judge].) Pelkola concedes that the November 26, 2014, minute order is the appealable order. (See §§ 425.16, subd. (i); 904.1, subd. (a)(13); Cal. Rules of Court, rule 8.104(c)(2); *In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1523 [appeal may be taken from unsigned minute order unless the order specifically recites that a formal order must be prepared].) It is irrelevant that another judge signed a formal order dismissing the action.

Conclusion

The judgment (orders granting special motion to strike) is affirmed. Respondents are awarded costs and reasonable attorney fees in an amount to be determined

[3] The fraud cause of action is barred by the three-year statute of limitations. (§ 338, subd. (d); *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1122.)

by the trial court on noticed motion. (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; *Kurz v. Syrus Systems, LLC, supra*, 221 Cal.App.4th at pp. 766-767.)

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

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