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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID K. GOTTLIEB, Plaintiff and Respondent, v. RAY B. BOWEN, JR., et al., Defendants and Appellants.	B270659 (Los Angeles County Super. Ct. No. BC595126)

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Michael J. Raphael, Judge. Affirmed.

Law Offices of Ray B. Bowen, Jr., Ray B. Bowen Jr., James A. Howard, for Defendants and Appellants.

Epps & Coulson, LLP, Dawn M. Coulson, Kari A. Keidser, for Plaintiff and Respondent.

Defendants and appellants Ray B. Bowen, Jr. and the Law Offices of Ray B. Bowen, Jr. (collectively, defendants) were sued for legal malpractice. Their anti-SLAPP motion (Code Civ. Proc., § 425.16[1]) was denied. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff David K. Gottlieb (plaintiff) is the trustee of the bankruptcy estate of Edmundo and Tiffany Bustamante (Bustamantes). The Bustamantes petitioned for bankruptcy relief after they lost the underlying litigation and were ordered to pay the prevailing party more than $1 million in attorney fees, plus 10 percent annual interest.[2]

The complaint in this action is a mere nine pages in length. Plaintiff sets forth specific facts in support of the claim that defendants' representation of the Bustamantes fell below the standard of care. One set of facts concerns defendants' alleged failure to obtain a valid conflict waiver or to recognize the

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

[2] The judgment against the Bustamantes was affirmed in *Bustamante v. T.O.* (July 10, 2012, B237167), a nonpublished opinion. The award of attorney fees was affirmed in *Bustamante v. T.O.* (Oct. 25, 2012, B241233), also a nonpublished opinion. Defendants represented the Bustamantes in both matters.

This did not end litigation involving the parties. We take judicial notice of court records reflecting that the Bustamantes, along with defendants and another of defendants' clients, Jeffrey Ludlow (Ludlow), were sued in the developer's subsequent action for malicious prosecution. (See *D & S Homes v. Ludlow* (July 7, 2015, B257783) [nonpub. opn.].) Defendants represented themselves and the clients.

existence of a non-waivable conflict between the Bustamantes and Asphalt Professionals Inc. (API) and Ludlow, its principal.

Defendants' representation of API and Ludlow spanned more than 10 years and spawned a number of lawsuits.[3] API was a subcontractor for the developer who built plaintiff's home, one in a nine-home subdivision. The long-running dispute between API and the developer apparently began with that project. The Bustamantes purchased their home in 2005. In 2008, Ludlow introduced himself to the Bustamantes and told them the developer from whom they purchased the home was an unlicensed contractor and their property was burdened with a mechanic's lien. Ludlow suggested the Bustamantes may be able to recover the price of their home from the developer and they could contact defendants, *his* attorneys, "to discuss the matter and to represent the Bustamantes." (Defendants, of course, were the attorneys responsible for the mechanic's lien on the Bustamante home.)

The Bustamantes did. This led to defendants' representing them in the ill-fated underlying action, the appeal after that lawsuit was lost, and the malicious prosecution action subsequently filed against them by the successful defendants in the underlying lawsuit. All the while, defendants were still representing API and Ludlow. (See fn. 3.)

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[3] See, e.g., *T.O. IX, LLC v. Superior Court* (2008) 165 Cal.App.4th 140, 144; *Asphalt Professionals v. Emaron Homes* (Jan. 20, 2016, B261674) (nonpub. opn.); *Asphalt Professionals, Inc. v. D and S Homes* (Dec. 19, 2012, B238597) (nonpub. opn.); *Asphalt Professionals v. T.O.* (Nov. 22, 2011, B230927) (nonpub. opn.); *Asphalt Professionals v. Bock* (Mar. 29, 2011, B224105) (nonpub. opn.)

The trial court effectively summarized the remaining allegations as follows: "Defendants allegedly breached their duties by failing to advise the Bustamantes that they would be liable for attorneys' fees if they did not prevail, opposing the petition for judicial reference without explaining to the Bustamantes the risk of maintaining the lawsuit rather than judicial reference, failing to argue in opposition to the motion for attorneys' fees or in the appeal that the agreement does not entitle the prevailing parties to attorneys' fees because the matter was resolved by judicial reference and the agreement controlling the proceedings precluded attorneys' fees if the dispute were to be resolved in a judicial reference proceeding, failing to properly and timely communicate a written settlement offer to the Bustamantes, and failing to explain the risks of rejecting the settlement offer before rejecting it. Additionally, defendants failed to plead a cause of action under Business and Professions Code section 7031, which creates liability for unlicensed contractors. (At all stages in the proceedings, including writ and appeal, however, the bench officers found this provision inapplicable)."

Defendants' demurrer and motion to strike failed. They then filed a special motion to strike. (§ 425.16.) The memorandum of points and authorities in support of the anti-SLAPP motion was 45 pages long and accompanied by Bowen's declaration and more than 390 pages of exhibits. Plaintiff opposed the motion, objected that defendants had not obtained permission to file the longer memorandum, and filed evidentiary

objections to the Bowen declaration. (Cal. Rules of Court, rule 3.1113.[4])

Defendants submitted a reply, also in excess of the allowable page limit, and again without first obtaining the trial court's permission. The reply included three declarations, raising new matters. They responded to plaintiff's objection to the overly long memorandum of points and authorities, and filed evidentiary objections to plaintiff's declarations, accompanied by an incomplete proposed order.

Defendants' special motion to strike was argued on the record on February 24, 2016. The trial court adopted its previously issued, comprehensive tentative ruling and denied the motion. The court did not consider defendants' arguments in excess of the allowable page limits or the new information raised for the first time in the reply papers. It did not rule on defendants' evidentiary objections. The court concluded defendants did not meet the threshold showing that their conduct arose from protected activity. Accordingly, the motion did not shift the burden to plaintiff to demonstrate a probability of prevailing on the merits.

Defendants timely appealed.

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[4] All rule references are to the California Rules of Court.

DISCUSSION

The Trial Court Did Not Abuse its Discretion

Defendants first challenge the trial court's decision to disregard the excess pages in the moving and reply memoranda of points and authorities. This treatment is expressly authorized by rule 3.1113(g). The ruling was properly reflected in the trial court's order. (Rule 3.1300(d).)

Defendants could have applied to the trial court for permission to file longer memoranda (rule 3.1113(e)), but chose not to do so. They could have reconsidered the decision to devote almost 10 pages of argument to API's litigation history against the developer and the trustee's motives for bringing this action, but did not. Instead, defendants acknowledge the page limit rule and argue, "Logic, reason and common sense, some of the tools attorneys traditionally use in interpreting rules, dictate that rule 3.1113(d), CRC should not apply to anti-SLAPP motions." Defendants then state, without citing any authority, "This leads one to the logical conclusion that the Judicial Council did not intend 3.1113(d) to apply to anti-SLAPP motions."

We disagree. The page limit rules are clear. The procedure to obtain permission to file longer memoranda is not onerous. We find no abuse of discretion.

The trial court also declined to rule on defendants' evidentiary objections to the declarations plaintiff submitted in opposition to the section 425.16 motion, citing rule 3.1354(c) and defendants' failure to include a proper proposed order. Defendants are correct, the cited rule applies to summary judgment motions. There are no similar rules for other law and motion matters, including anti-SLAPP motions. That other judges may sign proposed orders not submitted in a proper

format, however, does not make this judge's decision an abuse of discretion.

In any event, defendants have not suggested how rulings on their evidentiary objections, even if completely favorable to them, would have been relevant. Unless the moving defendants make "their prima facie showing that the essence of plaintiff's claims concerned defendants' protected speech . . . [the trial court never reaches plaintiff's proof.] . . . [T]he procedural posture of the case below made it irrelevant that the court neglected to rule on defendants' evidentiary objections." (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 630-631.)

Section 425.16 Motion

Our "'[r]eview of an order granting or denying a motion to strike under section 425.16 is de novo.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) "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." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) At the first step, "[t]he moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).)" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Appellate authority addressing section 425.16 motions in the context of legal malpractice actions is plentiful. This body of law is so developed that our analysis begins by asking if this lawsuit is a "'garden variety legal malpractice action.'" (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1535 (*Kolar*).) To answer that question, we review the record and independently engage in the first step of the section 425.16 analysis. If we conclude the legal malpractice action is of the "garden variety," then the anti-SLAPP motion is not available to defendants; and the court does not move to the second step. At the first step, we do not evaluate the merits of plaintiff's action.

The term "garden variety" in the context of anti-SLAPP motions appears to have entered the legal lexicon with *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*). There, the Supreme Court rejected plaintiffs' assertion that the lawsuit was simply "'a garden variety breach of contract and fraud claim' not covered by section 425.16." (*Id.* at p. 90.) As the number of anti-SLAPP motions and their concomitant appeals increased, however, "garden variety" has become the descriptive phrase for lawsuits that cannot be attacked via section 425.16 because they do not implicate protected petitioning activity. *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181 explained, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] We conclude it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected

activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Id.* at p. 188, italics in original.)

This was also the focus in *Park v. Board of Trustees of the California State University* (2017) 2 Cal.5th 1057 (*Park*), the Supreme Court's most recent decision to address anti-SLAPP motions.[5] The Supreme Court began the opinion by noting, "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. " (*Id.* at p. 1060, italics in original.) *Park's* citation with approval to *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, a legal malpractice action, is pertinent: "While the declaration supplying '*evidence* of [the attorneys'] conduct' [citing *Jespersen*] might be protected, this was insufficient to carry the attorney defendants' first-step burden: they were being sued not for [a particular petitioning activity], but for the underlying misconduct." (*Park, supra,* 2 Cal.5th at p. 1057.)

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5 *Park, supra,* 2 Cal.5th 1057 was decided after briefing in this matter was complete, and we gave counsel the opportunity after oral argument to file supplemental briefs. Defendants focused on one of what they have numbered as eight predicate malpractice allegations in the complaint—that defendants presented false trial evidence. Relying on *Park* and *Baral, supra,* 1 Cal.5th 376, defendants asserted they had a defense to this one allegation and it should have been stricken under the second prong of the anti-SLAPP analysis. The argument, however, ignored that the speech complained of, the evidence defendant presented at trial, was simply "evidence of liability" and not "petitioning activity *itself*." (*Park, supra*, 2 Cal.5th at p. 1060.) This one allegation, like the others in plaintiff's complaint, did not arise from activity protected by section 425.16.

Kolar, supra, 145 Cal.App.4th 1532 is also instructive for our purposes. In affirming the trial court's denial of a section 425.16 motion, the Court of Appeal wrote, "this case presents a 'garden variety legal malpractice action.' A legal malpractice action alleges the client's attorney failed to competently represent the client's interests. Legal malpractice is not an activity protected under the anti-SLAPP statute. That the malpractice allegedly occurred in the course of petitioning activity does not mean the claim arose from the activity itself. Because Kolar's malpractice action does not arise from an activity protected under the anti-SLAPP statute, [defendant law firm] failed to meet its initial burden." (*Id.* at p. 1535.) *Kolar* added, "A malpractice claim focusing on an attorney's incompetent handling of a previous lawsuit does not have the chilling effect on advocacy found in malicious prosecution, libel, and other claims typically covered by the anti-SLAPP statute. In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so." (*Id.* at p. 1540.)

Kolar, supra, 145 Cal.App.4th 1532 is at the forefront of a long line of appellate decisions addressing anti-SLAPP motions in legal malpractice actions. For example, in *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, the appellate court noted, "[w]here . . . a legal malpractice action is brought by an attorney's former client, claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest or other deficiency in the representation of the client, the action does not threaten to chill the exercise of protected rights and the first prong of the anti-SLAPP analysis is not satisfied." (*Id* at p.

504; see also *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1170 [citing cases].)

Rather than focus on whether the primary thrust of plaintiff's claims was conduct protected by the anti-SLAPP statute, defendants attack the merits of the lawsuit, particularly what they refer to as "Claim Eight" (see fn. 5, *ante*). They argue this case is "different than a so-called garden variety legal malpractice case because [in the eighth allegation of malpractice, the Bustamantes] did not tell [defendant attorney] the truth regarding relevant, material facts of the case." What this argument ignores is that the relevancy, if any, of such evidence does not arise until the second step of the section 425.16 analysis, after the court has determined section 425.16 applies. (See, e.g., *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 679-683 [at the second step of the analysis, defendant law firm established the affirmative defense of unclean hands as a matter of law].) The first step is dedicated to "defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier, supra,* 29 Cal.4th at p. 92; see also *Park, supra,* 2 Cal.5th at p. 1063.)

Defendants' suggestion that *Baral, supra,* 1 Cal.5th 376 "significantly modified the order of the procedure for determining the application of the anti-SLAPP statute," i.e., the second step could be decided before the first, is simply incorrect. As the Supreme Court stated, "The question here arises at the second step of the analysis." (*Id.* at p. 385.)

In sum, this is a straightforward legal malpractice action where plaintiff alleges defendant's representation of the clients fell below the standard of care. The facts in the decisions

defendants cite are distinguishable from those in this case. "The anti-SLAPP statute does not 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, supra,* 1 Cal.5th at p. 384.) In cases where "the protected rights of petition or speech" are not implicated, the anti-SLAPP statute does not insulate defendants at all.[6]

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[6] Defendants did not satisfy their threshold burden. Plaintiff was not required to demonstrate a probability of prevailing on the merits.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, appointed by the Chief Justice pursuant to article IV, section 6 of the California Constitution.