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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

FRED HARVEY COLLINS,

Plaintiff and Appellant,

v.

SALINAN HERITAGE
PRESERVATION ASSOCIATION
et al.,

Defendants and Respondents.

2d Civil No. B267301
(Super. Ct. No. 15CV-0154)
(San Luis Obispo County)

Fred Harvey Collins appeals a judgment entered after the trial court granted a special motion to strike pursuant to the anti-SLAPP statute, and dismissed his lawsuit. (Code Civ. Proc., § 425.16.)¹ We affirm.

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

FACTUAL AND PROCEDURAL HISTORY

On March 24, 2015, Collins filed a verified complaint against the Salinan Heritage Preservation Association, three members and officers of the Salinan Indian Tribe, and an individual who is a professor of history at a local university. The complaint alleges causes of action for defamation based upon defendants' statements that Collins is not an Indian of California Chumash descent. The first statement was made to counsel for the Native American Heritage Commission (NAHC), a California public entity charged by law with identifying and cataloguing places of religious or social significance to Native Americans, including known graves and cemeteries (Pub. Res. Code, § 5097.94, subd. (a)); the second statement was made to a local newspaper reporter who sought information regarding Collins's legal conflicts with the Salinan tribe; and the third statement was a written statement to the Sierra Club with copies to local political representatives and others, regarding Collins's endeavors to establish a Chumash maritime sanctuary.

In response to the lawsuit, defendants filed a special motion to strike pursuant to the anti-SLAPP statute, asserting that Collins's claims arose from defendants' constitutionally protected free speech. Collins resisted the motion and the parties presented declarations, documentary evidence, and written and oral argument concerning application of the anti-SLAPP law to Collins's defamation claims.

Collins alleges that he is a Native American of Chumash descent and a spokesman, advocate, and Tribal Administrator for the Northern Chumash Tribal Council. The Salinan Heritage Preservation Association is a non-profit corporation through which the Salinan Tribe of Monterey and San Luis Obispo

Counties (collectively Salinan) operates. Salinan has approximately 700 members and an elected tribal council. Defendants Gary Pierce, John Burch, and Patti Dunton are members and officers of the Salinan Tribe and have responsibilities regarding tribal business, financial, spiritual, and ceremonial affairs, among other things. Dunton also works in the Salinan tribal office as the office administrator, responding to telephone calls and email communications. Defendant Professor Daniel Krieger is the tribal historian but is not a member of the Salinan Tribe.

NAHC Proceedings Concerning Morro Rock

For some time, Collins and Salinan have disputed boundaries between the ancestral territories of the Northern Chumash tribe and the Salinan tribe. Specifically, Collins has objected to Salinan tribal members ascending Morro Rock, an important ritual in the tribe's winter and summer solstice ceremonies. In 2006, and again in 2011, the NAHC entered into an agreement with the Salinan Tribe to permit ceremonial ascents of Morro Rock. In 2014, Collins, through his attorney, communicated frequently with NAHC, disputed Salinan's cultural affiliation with Morro Rock, and requested that NAHC recognize his Chumash status.

On January 8, 2015, the NAHC directed Collins and Salinan to present evidence supporting their positions regarding their ancestral territorial boundaries. NAHC also advised the parties that it had retained an anthropologist to determine whether "Morro Rock is exclusively within the cultural territory of the Chumash People or the Salinan Tribe, or whether it is shared territory." NAHC also advised that the anthropologist's

findings and conclusions would be subject to a public hearing with notice to interested parties and an opportunity to be heard.

Collins's Writ Proceeding Against NAHC

On December 5, 2014, Collins filed a petition for writ of mandate against NAHC, seeking production of records pursuant to the Public Records Act. (*Northern Chumash Tribal Council v. Native American Heritage Com.* (Super. Ct. San Luis Obispo County, 2014, No. 14CV-0610).) The requested information involved documents relating to Collins's Native American ancestry or asserted lack thereof, and his disputes with the Salinan Tribe.

After Collins filed his writ petition, a local newspaper reporter telephoned the Salinan tribal office. Dunton stated in a declaration that she answered the telephone call and informed the reporter that she was unaware of the recently filed writ petition. She stated, however, that she knew the parties were disputing access to Morro Rock and had a history of conflict: "We . . . had a brief conversation concerning the dispute over the Tribe's access to Morro Rock." She also said she was aware of the genealogy report that questioned Collins's Indian ancestry.

Chumash Heritage National Marine Sanctuary

In 2014, Collins nominated a local marine environment to be designated as the "Chumash Heritage National Marine Sanctuary." In connection with this nomination to the National Oceanic and Atmospheric Agency (NOAA), Collins solicited support from the Sierra Club, the California Coastal Commission, and local political representatives, among others. Collins's nomination alarmed Salinan officers and members who believed the proposed sanctuary included a significant portion of Salinan ancestral territory. On February 27, 2015, Pierce, Burch, and

Krieger sent a letter to the Sierra Club, the Coastal Commission, and local political representatives objecting to the boundary lines proposed by Collins and questioning his standing to represent the Chumash Indian Tribe because “he is not even of California Indian descent.” Salinan referred to the conclusions of a certified genealogist whom it retained to research Collins’s ancestry. On March 6, 2015, NOAA wrote Collins and rejected his proposed sanctuary, but suggested that he resubmit his nomination with additional information.

In 2013, the Salinan Tribe had retained a certified genealogist, Lorraine Escobar, to research Collins's ancestry. Escobar prepared a written report that concluded that Collins was not of Native American ancestry and that his maternal lineage was from Mexico. On May 15, 2013, the Salinan Tribe submitted the genealogist's report to the NAHC.

Collins’s Most Likely Descended (MLD) Status

Public Resource Code section 5097.94, subdivision (a) requires the NAHC to identify persons “most likely descended” from Native Americans interred on California land. At times, the NAHC has designated Collins as MLD, appointing him to perform monitoring activities on excavation sites for which he is compensated. Members of the Salinan Tribe have also been designated as MLD and compensated. Over the years, Salinan members have questioned Collins's MLD status regarding areas within claimed Salinan ancestral territory.

Collins's Declaration of Chumash Ancestry

In response to the motion to strike, Collins declared that his mother's cousin, Chumash Elder Mary Trejo, revealed his Chumash ancestry to him many years ago. Trejo did not provide a declaration and Collins did not state that she was unavailable.

Salinan objected to this statement as hearsay and the trial court sustained the objection.

Following its consideration of the evidence, exhibits, and arguments by the parties, the trial court concluded that the anti-SLAPP law of section 425.16 applied because issues regarding the proposed marine sanctuary, access to Morro Rock, and Collins's status as a Chumash advocate and spokesman were of public interest. It then granted defendants' special motion to strike. In ruling, the trial judge stated that Civil Code section 47, subdivision (b) also applied: "[T]he litigation privilege applies as regards the second prong of the SLAPP analysis."

Collins appeals and contends that the trial court erred by deciding that the litigation privilege applied to the three asserted defamations, thereby precluding him from establishing a probability of prevailing to defeat defendants' anti-SLAPP motion. (§ 425.16, subd. (b).)

DISCUSSION

Collins argues that the defamatory statements were not privileged because they were not made in the context of any official proceeding. He also contends that the trial court abused its discretion by sustaining defendants' hearsay objection to Trejo's statements and by denying his motion for discovery.

Section 425.16, subdivision (b)(1) provides that a cause of action "arising from" a defendant's act in furtherance of a constitutionally protected right of free speech or petition may be struck unless the plaintiff establishes a probability that he will prevail on his claim. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) Section 425.16 "provides a procedure for the early dismissal of what are commonly known as SLAPP

suits . . . litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen*, at p. 665, fn. 3.) A SLAPP suit is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 129; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1215 [SLAPP plaintiff does not expect to succeed in his lawsuit, only to tie up defendant's resources to allow plaintiff sufficient time to accomplish his underlying goals].) The anti-SLAPP statute instructs that its provisions are to be "construed broadly" to implement its legislative objectives. (§ 425.16, subd. (a); *Barry*, at p. 321; *Colyear*, at p. 129.)

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability--and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)

The analysis of an anti-SLAPP motion filed pursuant to section 425.16 is two-fold. (*Barry v. State Bar of California*, *supra*, 2 Cal.5th 318, 321; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291, 1297.) The trial court first decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds that a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Barry*, at p. 321; *Abuemeira*, at pp. 1297-1298.) Only a cause of action that satisfies both prongs of the anti-SLAPP statute is subject to a special motion to strike. (*Barry*, at p. 321.)

We independently review the trial court's determination of each step of the analysis. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes*, *supra*, 9 Cal.App.5th 119, 129-130.)

The litigation privilege of Civil Code section 47, subdivision (b), pertains 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. (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 152.) The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of litigation reprisal. (*Ibid.*) The privilege extends to communications made before trial or after trial. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The privilege also encompasses actions by administrative bodies and includes statements made to initiate official action. (*Wang v. Heck* (2012) 203 Cal.App.4th 677, 684 [judicial and quasi-judicial proceedings are defined broadly to include administrative, legislative, and other truth-seeking proceedings]; *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303.) The litigation privilege is broadly applied and doubts are resolved in favor of the privilege. (*Wang*, at p. 684.)

The three asserted defamatory statements concern public disputes that satisfy the anti-SLAPP statute as well as the broad litigation privilege of Civil Code section 47, subdivision (b). Salinan members' statements to NAHC involved the disputes between Collins and Salinan involving the Morro Rock assent and Collins's MLD status. In 2006, and again in 2011, NAHC agreed that Salinan members could ascend Morro Rock.

Salinan's statements to the Sierra Club, the Coastal Commission, and local political representatives involved Collins's marine sanctuary application then pending before NOAA. Collins had solicited the support of those entities and individuals who were already involved as interested parties. Finally, Dunton's conversation with a newspaper reporter involved Collins's pending writ proceeding that described the various disputes he had with Salinan regarding his Chumash ancestry and Morro Rock. Dunton, a Salinan Tribe member and the office administrator, was aware of Collins's longstanding claims and disputes with Salinan and her statements to the reporter were a republication of many of Collins's claims.

Collins's remaining claims have no merit. Trejo's statements are hearsay and Collins did not establish their admissibility pursuant to Evidence Code sections 1310 and 1311 because he did not establish Trejo's unavailability. We review the trial court's ruling on an evidentiary objection in connection with a special motion to strike for an abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.) In any event, Trejo's statements have no bearing on application of the litigation privilege and we need not decide the nature of Collins's ancestry.

Neither did the trial court abuse its discretion by denying Collins's motion for discovery pursuant to section 425.16, subdivision (g). (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 ["an order denying a motion to permit discovery, notwithstanding section 425.16, subdivision (g)'s general discovery stay, is subject to review for abuse of discretion"].) Good cause to permit discovery includes a showing that a defendant or witness possesses evidence necessary to

establish plaintiff's prima facie case. (*Ibid.*) "Discovery may not be obtained merely to 'test' the opponent's declarations." (*Ibid.*) Here the litigation privilege of section 47, subdivision (b) defeats Collins's defamation claims, and depositions and other discovery would not be of assistance in establishing a prima facie case.

A defendant who successfully moves to strike a plaintiff's cause of action, whether on the merits or not, has "prevailed" on the motion and is therefore entitled to attorney fees and costs pursuant to section 425.16, subdivision (c). (*Barry v. State Bar of California, supra*, 2 Cal.5th 318, 327.) This fee provision serves to compensate the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of his free speech and petition rights. (*Id.* at pp. 327-328.) Following issuance of the remittitur, the trial court shall determine respondents' attorney fees and costs.

The judgment is affirmed. Respondents shall recover costs.
NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

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