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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ELAN SHUKARTSI et al., Plaintiffs and Appellants, v. LYNN NELSON KESSELMAN et al., Defendants and Appellants.	B235190 (Los Angeles County Super. Ct. No. SC109828)

APPEAL from orders of the Superior Court of Los Angeles County. Linda J. Lefkowitz, Judge. Affirmed in part; reversed in part.

Enenstein & Ribakoff, Darren S. Enenstein and Teri T. Pham for Plaintiffs and Appellants.

Law Offices of Lisa M. Howard, Lisa M. Howard; and Lynn Nelson Kesselman, in pro. per., for Defendants and Appellants.

The trial court denied a defendant's special motion to strike a complaint pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] The trial court denied plaintiffs' request for attorney's fees. (§ 425.16, subd. (c).) Both sides appeal. We affirm the order denying the anti-SLAPP motion; we reverse the order denying attorney's fees.

FACTS

Background

Plaintiffs and appellants Elan Shukartsi and Dove Shukartsi Mayo are the adult children of Moshe Shukartsi (now deceased) and Corrine Shukartsi (now deceased). Moshe and Corrine were married for more than 30 years. They acquired significant wealth and assets during their marriage, including business, personal and real estate holdings. Moshe and Corrine's estate planning included the creation of the Shukartsi Living Trust dated October 18, 1990, as amended and restated on February 14, 1995. Moshe died in 2001.

In 2005, Corrine began dating defendant and appellant Lynn Nelson Kesselman, a soi-disant psychotherapist.[2] In 2006, Kesselman moved into Corrine's Brentwood residence on Burlingame Avenue. At about the same time, Corrine began providing Kesselman with $6,000 per month pursuant to an "irrevocable lifetime grant." Kesselman thereafter continuously pressed Corrine to marry him; she eventually agreed. They executed a premarital agreement (PMA) dated March 31, 2008. The PMA provided that Corrine would provide Kesselman with $10,000 per month (the $6,000 per month noted above, plus another $4,000 per month), along with further living and professional expenses. The PMA also granted Kesselman specified rights to reside in the Burlingame Avenue property. In April 2008, Kesselman and Corrine were married in Las Vegas.

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

[2] Our references to Kesselman include a defendant and appellant identified as the Kesselman Foundation.

In September 2010, Corrine died from respiratory failure related to metastatic cancer which was diagnosed for the first time eight days before she died. After Corrine's death, Kesselman continued living in the Burlingame Avenue property. On the very day Corrine died, someone signed a $170,0000 check drawn on an account in her name and Kesselman's name, payable to Kesselman. Within one week of Corrine's death, there were wire transfers of more than $100,000 to Kesselman out of another bank account.

The Litigation

On October 1, 2010, plaintiffs and appellants Elan Shukartsi and Dove Shukartsi Mayo, individually and as successor trustees of the Shukartsi Living Trust,[3] filed a civil action against Kesselman. The original complaint alleged a cause of action for "common counts" and for "an order to inspect" trust property, namely, the property on Burlingame Avenue and various bank and other financial accounts. The gist of the action rested on allegations that Kesselman had exercised undue influence over Corrine, allowing him to obtain money and personal and real property that rightfully belonged to Corrine and/or the Shukartsi Living Trust. The current appeal traces back to this initial filing.[4]

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[3] Hereafter, plaintiffs.

[4] On October 5, 2010, plaintiffs filed a separate unlawful detainer (UD) complaint to evict Kesselman from the Burlingame Avenue property. On November 24, 2010, the parties executed a written settlement agreement of the UD action. Under the terms of the UD settlement agreement, Kesselman agreed to vacate the Burlingame Avenue property and to return certain personal property belonging to Corrine, including two vehicles that Kesselman had purchased using funds obtained from Corrine. The record before us on appeal indicates there is also a probate case involving Corrine. (Super. Ct. L.A. County, No. BP125616.) Plaintiffs have also filed a "RICO" action (18 U.S.C. §§ 1341, 1343) against Kesselman and several entities, domestic and foreign. The RICO action alleges Kesselman and others were involved in various wrongful mail and wire fraud transactions from Corrine's accounts. (Super. Ct. L.A. County, No. SC111600.) For purposes of the appeal before us today, we need not be concerned with the UD action nor the probate action nor the RICO action. Accordingly, plaintiffs' motion on appeal for judicial notice of rulings in the RICO action is denied.

1. The Operative First Amended Complaint

Plaintiffs filed a first amended complaint (FAC), the operative pleading for purposes of the anti-SLAPP motion at issue in the current appeal. The FAC expands on plaintiffs' original claims that Kesselman appropriated money and property that rightfully belonged to Corrine and/or the Shukartsi Living Trust. The FAC alleges the following causes of action, listed respectively: elder financial abuse (Welf. & Inst. Code, §§ 15610.27, 15610.30, 15657.3); dependent adult financial abuse (§§ 15610.23, 15610.30, 15657.3); four causes of action for conversion; and last, common counts.[5]

2. The Anti-SLAPP Motion

Kesselman filed an anti-SLAPP motion to strike the FAC. The plaintiffs filed an opposition. On June 14, 2011, the trial court heard arguments and denied Kesselman's motion. The court denied the motion on the ground that plaintiffs' claims did not arise from any "protected activity" on Kesselman's part. The trial court entered a formal order denying Kesselman's anti-SLAPP motion and denying plaintiffs' request for attorney's fees.

Kesselman filed a timely notice of appeal from the order denying his anti-SLAPP motion. Plaintiffs filed a timely notice of cross-appeal from the denial of their request for attorney's fees.

DISCUSSION

I. The Anti-SLAPP Statute

The Legislature enacted the anti-SLAPP statute to address the disturbing societal ills caused by meritless lawsuits filed to "chill" the exercise of the "*constitutional rights of freedom of speech and petition for the redress of grievances*." (§ 425.16, subd. (a), italics added.) To this end, the statute authorizes a special procedure for striking certain chilling and meritless causes of action at the earlier stages of litigation.

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[5] The FAC initially also carried forward the plaintiffs' original claim for an order to inspect the Burlingame Avenue property. That claim was later dismissed, we presume after Kesselman vacated the property pursuant to the UD settlement agreement.

The anti-SLAPP statute's special striking procedure entails two steps. In the first step, the court's task is to determine whether the moving defendant has made a threshold showing that a challenged cause of action is one "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 California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).)

"As used in [the anti-SLAPP statute], 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

If, and only if, the court determines the moving defendant has made the required threshold showing that a challenged cause of action "arises from protected activity" as described above, it then falls to the court to move to the second step of the anti-SLAPP statute's special striking procedure, wherein the court's task is to determine whether the plaintiff has demonstrated a "probability" that he or she will prevail on his or her claim. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumers Cause, Inc*. (2002) 29 Cal.4th 53, 67; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1218 (*PrediWave*); *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1317.)

An appellate court reviews an order denying an anti-SLAPP motion under the de novo standard of review. (*PrediWave, supra*, 179 Cal.App.4th at p. 1220.) As a result, we will employ the same two-step procedure as did the trial court in determining if the anti-SLAPP motion was properly denied.

II. Protected Activity

Kesselman contends the trial court erred in denying his anti-SLAPP motion because, contrary to the court's determination, the FAC "arises from protected activity." According to Kesselman, the FAC "is clearly a SLAPP suit because it attempts to chill the valid exercise of protected speech, namely, the privileged and protected confidential [spousal] communications between [him] and Corrine relating to their personal financial and business affairs . . . ." He is wrong.

None of plaintiffs' causes of action against Kesselman arise from any written or oral statement or writing made by Kesselman before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law (§ 425.16, subd. (e)(1)); any written or oral statement or writing made by Kesselman 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, subd. (e)(2)); any written or oral statement or writing made by Kesselman in a place open to the public or a public forum in connection with an issue of public interest (§ 425.16, subd. (e)(3)); or from any other conduct on his part in furtherance of the exercise of his constitutional rights of petition or of free speech in connection with a public issue or an issue of public interest (§ 425.16, subd. (e)(4)).

Kesselman's argument that plaintiffs' claims arise from *statutorily privileged* spousal communications between Kesselman and Corrine is irrelevant and bespeaks ignorance of the purpose of the anti-SLAPP statute. The anti-SLAPP statute protects *constitutionally protected* speech and petitioning activity. Kesselman himself admits in his opening brief on appeal that he has found no case supporting the proposition that the anti-SLAPP statute may be invoked to strike claims arising from *statutorily privileged* marital communications (even assuming that were the nature of plaintiffs' current case).

All of the cases cited by Kesselman as supportive of the principle that the anti-SLAPP statute may be invoked to strike claims arising from marital communications are inapposite.

Kesselman's reliance on *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, is misplaced. In that case, the plaintiff, a nonprofit corporation, alleged claims against its founder for breach of fiduciary duties. The breach alleged was that the founder had conspired with attorneys to give false testimony in depositions in ongoing litigation concerning the corporation's interest in a partnership. (*Id*. at pp. 1543, 1548.) The Court of Appeal ruled that the anti-SLAPP statute applied to such claims because the alleged conspiratorial statements "about how to testify in upcoming depositions in a pending lawsuit" were "made *in connection with an issue under consideration by a judicial body*." (*Id*. at p. 1548, italics added.) Whether or not the attorney-client privilege may have made it impossible to prove the alleged conspiracy was an issue for the second step of the anti-SLAPP procedure — the probability that the plaintiff would prevail. But the first step of the anti-SLAPP procedure was satisfied by the moving defendant because the defendant showed the plaintiff's claims arose within a litigation framework.

In the current case, plaintiffs' claims against Kesselman are not based on any act or statement by Kesselman "in connection with an issue under consideration by a judicial body." To the extent that plaintiffs' claims attack a *legal document* involving Kesselman, namely, the PMA between Kesselman and Corrine, this does not mean the anti-SLAPP statute may be invoked. The PMA between Kesselman and Corrine was not prepared in connection with litigation or any other type of official proceeding. It was a private contract. Claims concerning private contracts unrelated to litigation or any other official proceeding do not fall within the reach of the anti-SLAPP statute's protections.

The other cases upon which Kesselman relies are equally unavailing. *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232 is not an anti-SLAPP case. It has nothing to do with the issue here — namely, whether the particular nature of a plaintiff's claim, e.g., a claim arising from marital communications, is covered by the protective umbrella of the

anti-SLAPP statute. The issue in *Hurvitz* was whether a trial court's order for sealing discovery amounted to an unconstitutional prior restraint on free speech. (*Id*. at p. 1241.) *City of Albany v. Meyer* (1929) 99 Cal.App. 651 predates the anti-SLAPP statute by more than 50 years. *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 is not an anti-SLAPP case. The issue in *McDermott* — presented in the context of a motion for judgment on the pleadings — was whether a shareholder could state a cause of action for legal malpractice against a corporation's outside counsel in a derivative action when the corporation refuses a demand to commence the action. (*Id*. at p. 380.) Finally, *Rico v. Mitsubishi Motors Corp*. (2007) 42 Cal.4th 807 is not an anti-SLAPP case. *Rico* dealt with the issue of disqualifying an opposing party's attorney.

In sum, none of the cases cited by Kesselman support the proposition that the anti-SLAPP statute may be invoked to strike a complaint arising from a defendant's act in furtherance of his or her statutorily privileged speech. The anti-SLAPP statute is available to strike a cause of action arising from a person's act in furtherance of his or her constitutionally protected rights of petition or free speech.

III. Attorney's Fees

Section 425.16, subdivision (c)(1), provides: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." This language means what it says: if a court determines an anti-SLAPP motion is frivolous or intended to cause unnecessary delay, the imposition of sanctions becomes mandatory. (See, e.g., *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198-199.) The test is whether any reasonable attorney would agree that the anti-SLAPP motion had merit. (*Id*. at p. 200.) A trial court's denial of a request for attorney's fees is reviewed for an abuse of discretion. (*Ibid*.)

Here, the trial court expressly found that the anti-SLAPP motion was not well-taken because the plaintiffs' action arises out of private matters which were not before any judicial body. There was no factual or legal support for the motion. Kesselman himself did not bother to submit a personal declaration in support of his motion. We find

no reasonable attorney would agree that the motion had any merit. We find it was filed for no reason other than to delay and increase plaintiffs' costs of litigation. We therefore reverse the trial court's decision to deny attorney's fees to plaintiffs.

For the same reasons, we find attorney's fees are recoverable on appeal. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637-639 [to the extent attorney's fees are recoverable at the trial court level by statute, they are also recoverable on appeal]; *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 311-313 [accord].) Here, the cases cited by Kesselman are, as we have noted, inapposite and irrelevant to the claims asserted on this appeal. No reasonable attorney could have agreed the appeal had merit.

The trial court shall determine the reasonable amount of attorney's fees awarded to plaintiffs for the anti-SLAPP motion and the appeal.

DISPOSITION

The trial court's order denying Kesselman's anti-SLAPP motion is affirmed. The trial court's order denying plaintiffs' request for attorney's fees incurred in defending against the anti-SLAPP motion is reversed, and plaintiffs are awarded their costs on appeal, including their attorney's fees. (§ 425.16, subd. (c).) Following remand, the trial court shall determine the amount of reasonable attorney's fees incurred in defending against the anti-SLAPP motion both in the trial court and on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J