Filed 12/21/16 Zilberstein v. Schwimer CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

| | |
|---|---|
| AHRON ZILBERSTEIN,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MICHAEL SCHWIMER,<br><br>Defendant and Appellant. | B268749<br><br>(Los Angeles County Super. Ct. No. BC589412) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Reversed.

Berman Berman Berman Schneider & Lowary, Stephanie Berman Scheider and Howard Smith for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * * * * *

Defendant Michael Schwimer appeals the trial court's denial of his motion to strike plaintiff Ahron Zilberstein's complaint pursuant to the anti-SLAPP[1] statute. (Code Civ. Proc., § 425.16.)[2] The trial court concluded Schwimer failed to show Zilberstein's complaint was based on protected activity, so it did not address whether Zilberstein showed a probability of success on the merits. We find the court erred and reverse.

## BACKGROUND

Zilberstein did not file a respondent's brief, so we decide this appeal on the record and Schwimer's opening brief and oral argument. (Cal. Rules of Court, rule 8.220(a).)

Schwimer is an attorney who represented two defendants (the Vizels) in a case titled *Lavan, Inc. v. Siag* (Super. Ct. L.A. County, 2014, LC095549) (the *Lavan* case). In that case, the Vizels filed a cross-complaint against Zilberstein and others. The parties then settled. As part of the settlement, Schwimer signed a written nondisclosure agreement (the nondisclosure agreement) that stated in relevant part: "As a material inducement for the parties to settle this matter, I will not at any time disclose to any person or entity, in whole or in part, the existence or subject matter of the Settlement Agreement entered pursuant to this matter, the identities of the parties, the identity of counsel, the subject matter of the lawsuits comprising this matter, the nature and amount of the settlement, or any details of discussions by and between the parties or their counsel concerning settlement or related matters,

---

[1] SLAPP stands for "strategic lawsuit against public participation."

[2] Undesignated statutory citations are to the Code of Civil Procedure unless otherwise noted.

with the exception of any communications to any of the parties, their counsel, or agents, or as otherwise required by law."

In the complaint in this case, Zilberstein alleged Schwimer breached this agreement by disclosing the existence of the settlement to Ronald Mattson, who was involved in a court case with Zilberstein at the time, in order to convince Mattson Schwimer had "considerable experience litigating against Zilberstein and should be considered for the position as his new attorney of record in the *Spannhoff v. Mattson* matter" (the *Mattson* case). Zilberstein asserted claims for (1) breach of contract, (2) fraud, and (3) a declaration of the rights of the parties under the nondisclosure agreement.

Schwimer moved to strike the complaint pursuant to the anti-SLAPP statute. In a declaration, he confirmed he represented the Vizels in the *Lavan* case and filed a cross-complaint against Zilberstein and others. He also confirmed he entered the nondisclosure agreement as part of the settlement. As for his alleged breach, he explained the *Mattson* case was another case pending in Los Angeles Superior Court in which Zilberstein was a plaintiff. Mattson had consulted with Schwimer about representation because Zilberstein had effectively sued Mattson's and Mattson's wife's then-current attorney to create a conflict of interest. Schwimer consulted with Mattson only once, and Mattson never retained him.

Schwimer argued Zilberstein's claims were all based on Schwimer's protected communications regarding the pending *Mattson* case and involved matters of public interest. Schwimer further argued Zilberstein could not demonstrate a probability of prevailing for several reasons, including because Schwimer's statements were protected by the litigation privilege (Civ. Code,

§ 47, subd. (b)) and the attorney client privilege; the agreement improperly restricted Schwimer's ability to practice law; and Zilberstein could not prove damages.

In opposition, Zilberstein filed a declaration in which he claimed, "Mr. Mattson informed me that he had a conversation with Schwimer and that Schwimer told him that he 'settled the *Lavan* matter and received $100,000 settlement from you (Zilberstein)." He did not submit a declaration from Mattson. He argued his claims did not arise from protected activity because they were based on the private conversation between Schwimer and Mattson. He also argued Schwimer waived the protection of the anti-SLAPP statute when he entered the agreement. In arguing he had a probability of succeeding on his claims, Zilberstein asserted, among other points, that the litigation privilege did not apply, the agreement did not restrict Schwimer's ability to practice law, and Zilberstein submitted sufficient facts to demonstrate a prima facie case.

In reply, Schwimer lodged a hearsay objection to the portion of Zilberstein's declaration stating Mattson told Zilberstein that Schwimer disclosed the existence and amount of the settlement in the *Lavan* case. Schwimer then argued there was no admissible evidence he made any statement that breached the agreement and therefore Zilberstein could not show a probability of prevailing on his claims. He also claimed Zilberstein failed to offer admissible evidence of damages.

The trial court denied the motion, agreeing with Zilberstein that his claims did not arise from protected activity. It did not rule on whether Zilberstein showed a probability of prevailing. Schwimer timely appealed.

## DISCUSSION

Section 425.16 provides as relevant here, "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).)

To resolve an anti-SLAPP motion, the trial court engages in a two step-process. " 'First, the court decides 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 whether the plaintiff has demonstrated a probability of prevailing on the claim.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733, citation omitted.) We review de novo the trial court's ruling on an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) In doing so, " '[w]e consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)' " (*Id.* at p. 326.) We review de novo the trial court's ruling on an anti-SLAPP motion. (*Id.* at p. 325.)

*Arising from Protected Activity*

The anti-SLAPP statute applies to all types of claims, including fraud, breach of contract, and declaratory relief. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 92-93 (*Navellier*) [breach of contract and fraud]; *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262, 265 [declaratory relief].) The key consideration is "whether the cause of action is *based on* the defendant's protected free speech or petitioning activity."

(*Navellier*, at p. 89.) "The moving party has the initial burden of making a prima facie showing that one or more causes of action arise from protected activity." (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 803.)

As relevant here, acts in furtherance of the rights of free speech or petition include "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." (§ 425.16, subd. (e)(2).) This subdivision covers a statement that " 'relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.' " (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962.)

Zilberstein based all of his claims on Schwimer's alleged disclosure of the settlement agreement to Mattson in the course of convincing Mattson to hire him as his attorney in the pending *Mattson* case. Schwimer's statement was a protected communication because it was "made in connection with an issue under consideration or review by a . . . judicial body"—that is, the *Mattson* case. We reached the same conclusion under similar facts in *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482. In that case, one attorney sued another attorney for improperly soliciting a client during pending litigation in which the client was a party. (*Id.* at p. 485.) Rejecting the argument that the claims were based on the nonprotected conduct of simply soliciting a client, we concluded the "complaint plainly shows it arose from [the defendant-attorney's] communications with [the client] about pending litigation." (*Id.* at p. 489; see *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 354 [applying anti-SLAPP statute to claims based on communications between plaintiff and defendant-attorney

"within the context of anticipated litigation and settlement"]; *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 273 [applying anti-SLAPP statute to communications made to court and internal affairs investigator in breach of settlement agreement].)

Nor did Schwimer waive anti-SLAPP protection by entering the nondisclosure agreement. The issue of waiver in this context may be relevant to the *second* prong of the anti-SLAPP analysis, not the first. In *Navellier*, for example, our high court indicated that by creating the second merits prong under the anti-SLAPP statute, the Legislature "preserve[d] appropriate remedies for breaches of contracts involving speech by ensuring that claims with requisite minimal merit may proceed." (*Navellier, supra,* 29 Cal.4th at p. 94.) The court observed, "Indeed, as the statute is designed and as we have construed it, a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Ibid.*) These passages indicate that the "breach [of contract] was to be addressed under the statute's merits prong," and "the mere fact the constitutional speech occurred in violation of a contract did not by itself preempt the application of the anti-SLAPP statute." (*DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 351 [discussing *Navellier*].)

In suggesting otherwise, the trial court cited *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516 and *Paul v. Friedman* (2002) 95 Cal.App.4th 853, but neither of those cases addressed whether a party waives anti-SLAPP protection by entering a confidentiality agreement. (See *Sanchez, supra,* at p. 528 [discussing waiver of party's 1st Amend. rights by signing nondisclosure agreement in context of summary judgment]; *Paul, supra,* at p. 869 [finding waiver of litigation privilege in Civ. Code,

§ 47, subd. (b) by entering confidentiality agreement].) Thus, Schwimer did not waive the application of the anti-SLAPP statute by entering the nondisclosure agreement.

*Probability of Prevailing*

Because Zilberstein's complaint arose from protected activity, the burden shifts to Zilberstein to " ' " '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 the plaintiff is credited.' " ' " (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 405 (*Contreras*).) The trial court did not reach this issue, but we have discretion to decide it because it is subject to our independent review. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 615-616.)

In order to show a probability of prevailing, the nonmoving party must present *admissible* evidence to substantiate the complaint. (*Contreras, supra,* 5 Cal.App.5th at p. 405 [" '[T]he prima facie showing of merit must be made with evidence that is admissible at trial.' "]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497 (*Evans*) ["An assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time. [Citation.] Such evidence must be *admissible*."].) "Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)

Zilberstein failed to offer admissible evidence to demonstrate Schwimer disclosed the existence of the settlement agreement. Zilberstein offered only his own declaration that Mattson told him that Schwimer disclosed the settlement agreement to him. The statement from Mattson to Zilberstein was inadmissible hearsay

offered to prove its truth—that Schwimer disclosed the existence of the settlement agreement to Mattson. (Evid. Code, § 1200.) Zilberstein did not offer a declaration from Mattson to eliminate the hearsay character of this statement and did not identify any applicable hearsay exception that would have rendered Mattson's statement admissible. Because all of Zilberstein's claims were based on this fundamental allegation, Zilberstein failed to show a probability he would prevail at trial. His complaint must be stricken.[3]

**DISPOSITION**

We reverse the trial's court order denying appellant's motion to strike under section 425.16. The matter is remanded with instructions to vacate the order, enter a new order granting the motion, and conduct further proceedings consistent with this decision.

Appellant is awarded costs on appeal. As the prevailing party, appellant is also awarded statutory attorney fees, including fees incurred on appeal. (§ 425.16, subd. (c); *Evans, supra,* 38 Cal.App.4th at p. 1499.) The trial court shall determine the amount of attorney fees on remand.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

---

[3] In light of our conclusion, we need not also decide whether Zilberstein's claims were barred by the litigation privilege in Civil Code section 47, subdivision (b).