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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHETAN THAKAR,

Plaintiff and Appellant,

v.

SMITRAY, INC. et al.,

Defendants and Respondents.

B276436

(Los Angeles County  
Super. Ct. No. YC064739)

APPEAL from a judgment and an order of the Superior Court for Los Angeles County, Ramona G. See, Judge. Affirmed.

Chetan Thakar, in pro. per., for Plaintiff and Appellant.

Kaufman Dolowich & Voluck, Barry Z. Brodsky and Jodi L. Girten for Defendant and Respondent Robert Conti.

No appearance for Defendants and Respondents Smitray, Inc. and S.D.P. Investments, Inc.

This is the sixth appeal brought and maintained<sup>1</sup> by plaintiff Chetan Thakar (who has represented himself throughout this litigation) against numerous defendants in New Jersey and California based upon an alleged conspiracy to deprive Thakar of employment and legal representation. All but one of the appeals were unsuccessful. In the other, we reversed the trial court's order dismissing on demurrer all of the claims against defendant Robert Conti (respondent in this appeal), finding that some of the claims, while factually improbable, were legally adequate. Conti was the attorney for Smitray, Inc., S.D.P. Investments, Inc. (the Smitray corporate defendants), Dinu Dahyabhai Patel, and Nick Dahya (all of whom are collectively referred to as the Smitray defendants) in various actions Thakar filed against them, including the present action. In this appeal, we affirm the summary judgment in favor of Conti. We also affirm the trial court's order granting the motion brought by the Smitray corporate defendants to declare Thakar a vexatious litigant.

## **BACKGROUND<sup>2</sup>**

### *A. Prior Lawsuit*

On December 20, 2010, Thakar filed a complaint in Los Angeles Superior Court (case No. YC063943) against the Smitray defendants,

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<sup>1</sup> Thakar has filed, and subsequently dismissed, three other appeals (case Nos. B270444, B275859, and B287270), and has filed three writ petitions that we summarily denied (case Nos. B269953, B270714, and B280826).

<sup>2</sup> Some of the background facts are taken from our prior opinions in this case.

Dr. Martin Gizzi, Dr. Subramanian Hariharan (sometimes referred to as Harry), and The Community Hospital Group Inc. t/a JFK Medical Center (JFK), and Dr. Ajit Chunilal Shah, and Aaron Hoke. This complaint alleged most of the same facts and claims alleged in the present case, plus federal civil rights claims. The Smitray defendants, represented by Conti, filed a notice of removal to federal court. After the district court denied Thakar's motion to remand back to state court, Thakar moved to voluntarily dismiss the case, which the district court granted on April 7, 2011.

B. *Present Lawsuit*

A month later, Thakar filed the present lawsuit in Los Angeles Superior Court against the same defendants, plus two additional defendants, including Conti. As noted, most of the factual allegations and claims are the same as in the previous lawsuit, although Thakar no longer alleged federal civil rights claims. He alleged that in 1998, Gizzi and Hariharan wrongfully terminated him from a hospital residency program at JFK in New Jersey (these defendants are collectively referred to as the New Jersey defendants)<sup>3</sup> and falsified the results of his medical licensing examination to make it appear he had failed. The New Jersey defendants purportedly conducted surveillance of him and interfered with his attempts to obtain a medical license and

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<sup>3</sup> Although we identify all of the defendants in our discussion of the complaint, the only defendants relevant to this appeal are the Smitray defendants and Robert Conti.

employment. Thakar tried to engage attorneys in order to sue the New Jersey defendants, but he alleged he was thwarted by their interference with his efforts to do so.

At some point, Thakar moved to California, and in 2006, he began working as Resident Manager for Smitray, Inc., dba Days Inn Airport Center (the hotel). The hotel was managed by Nick Dahya and S.D.P. Investments, Inc.; Dinu Dahyabhai Patel was alleged to be the dominant owner of Smitray, Inc. and S.D.P. Investments, Inc. Thakar alleged that the Smitray defendants were contacted by Gizzi and Hariharan and given false information, which eventually led to the Smitray defendants conspiring with the New Jersey defendants to wrongfully terminate Thakar's employment at the hotel and interfere with his rights in a multitude of ways, including causing him to be criminally prosecuted.

Conti is an attorney retained by the Smitray defendants in various legal actions (including the present action) initiated by Thakar arising out of his employment with the Smitray defendants. Thakar alleged Conti had connections with Gizzi and Hariharan and also was part of the conspiracy to thwart Thakar's efforts to obtain legal assistance and employment.

The remaining defendants were Dr. Ajit Chunilal Shah, American International Marketing, and Aaron Hoke. Shah was Thakar's physician who allegedly joined the conspiracy against plaintiff. American International Marketing and Hoke hired Thakar as an insurances sales agent in May 2010. Thakar alleged that he faced discrimination and unfair treatment in that position as well, including

interference with his business relationships with clients and potential clients.

In his complaint, Thakar sought an injunction prohibiting all of the defendants from interfering with his search for legal representation and with his employment. He also asserted causes of action for invasion of privacy, intentional interference with his exercise of legal rights, defamation, intentional interference with contract, breach of contract, malicious prosecution, fraud, false imprisonment, intentional infliction of pain and suffering, various forms of conspiracy, and interference with prospective economic advantage. He prayed for injunctive relief, compensatory and punitive damages, and costs of suit.

Conti filed a demurrer, asserting numerous grounds upon which the complaint failed to state a cognizable cause of action. The court sustained Conti's demurrer without leave to amend on the ground that the entire complaint was barred by Civil Code section 1714.10, and entered judgment in favor of Conti. Thakar appealed from the judgment and, as noted below, we affirmed the dismissal of some of the claims but found that Thakar adequately alleged causes of action (however implausible those claims might be) for invasion of privacy, defamation, intentional interference with contract, intentional interference with prospective economic advantage, intentional infliction of pain and suffering, and conspiracy to inflict pain and suffering. (*Thakar v. Conti* (March 18, 2013, B238498) [nonpub. opn.].) Remittitur from that appeal issued on May 22, 2013.

In the meantime, Thakar amended the complaint multiple times and added additional defendants, and some defendants successfully

challenged the claims against them; we need not discuss those matters for purposes of this appeal. We do, however, note that Thakar filed five appeals between July 2011 and February 2013.

1. *Prior Appeals in This Case*

In the first appeal, we affirmed the trial court's denial of Thakar's ex parte application for a preliminary injunction prohibiting all defendants from interfering with Thakar's search for legal representation and interfering with his employment. (*Thakar v. Smitray, Inc.* (June 19, 2012, B234776) [nonpub. opn.].) We observed that "Thakar presented no evidence other than his own declaration, which the trial court was entitled to discredit, that defendants were engaged in or even desired to engage in the activities Thakar sought to enjoin," and found that "[t]he trial court acted well within its discretion in implicitly concluding that Thakar will not prevail on the merits of his complaint." (*Ibid.*) In response to the Smitray defendants' request that we impose sanctions on Thakar for filing a frivolous appeal, we denied it only because "doing so would lead to a noticed hearing and thus a further expenditure of judicial resources." (*Ibid.*)

In the second appeal, we affirmed the trial court's order granting the New Jersey defendants' motion to quash service of process for lack of personal jurisdiction. (*Thakar v. The Community Hospital Group, Inc.* (Jan. 28, 2013, B236926) [nonpub. opn.].) We observed that "Thakar did not file written opposition to the motion to quash or present any evidence in opposition," and merely asserted orally at the

hearing that the motion was untimely. (*Ibid.*) We noted that Thakar did not raise the timeliness issue in his opening brief on appeal, and we rejected Thakar's attempt to challenge the merits of the motion to quash on appeal, concluding that his "lack of opposition below -- other than on timeliness grounds -- resulted in his undeniable failure to meet his burden of proof" to show by a preponderance of the evidence facts justifying the exercise of jurisdiction. (*Ibid.*)

In the third appeal -- Thakar's only (partially) successful appeal -- as discussed, we reversed in part and affirmed in part the trial court's dismissal of all claims against Conti. (*Thakar v. Conti* (March 18, 2013, B238498) [nonpub. opn.].)

In the fourth appeal, we affirmed the trial court's dismissal of all causes of action asserted against defendant Ajit Chunilal Shah, M.D. for failure to state a cause of action. (*Thakar v. Shah* (March 25, 2014, B242286) [nonpub. opn.].) We found the record on appeal was inadequate to review some of the issues Thakar raised, and that despite two attempts to amend the complaint, Thakar appeared to be unable to allege sufficient facts to state a cause of action.

In the fifth appeal, we affirmed the judgment in favor of Dinu Dahyabhai Patel and Nick Dahya following the granting of the Smitray defendants' motion for summary adjudication, and also affirmed an order denying Thakar's motion to disqualify Conti as counsel for some of the Smitray defendants. (*Thakar v. Smitray, Inc.* (May 21, 2015, B246828) [nonpub. opn.].) We found that Thakar raised several issues over which we had no jurisdiction (because Thakar did not timely file a notice of appeal from the challenged ruling), that he forfeited other

issues for failure to provide an adequate record or argument, and that there was no merit to Thakar's remaining arguments.

2. *Proceedings at Issue in This Appeal*

a. *Conti's Motion for Summary Judgment*

Conti filed a motion for summary judgment on November 23, 2015, two and a half years after remittitur issued. The motion was supported by Conti's declaration and, among other items, Thakar's amended responses to various discovery requests. Those responses, which were dated October 19, 2015, repeatedly stated that "Plaintiff is yet to begin his discovery upon Conti and Doe Defendants. Consequently, Plaintiff has not yet collected evidences [*sic*] against Conti." All of the critical facts in his separate statement of undisputed material facts are supported by citations to Conti's declaration.

Thakar raised several arguments in opposition to the motion (several of which are repeated in his appellant's opening brief and will be discussed below), and purported to support his opposition with his declaration and a request for judicial notice of several documents that are not subject to judicial notice or whose contents are not judicially noticeable. In his separate statement in support of his opposition to the summary judgment motion, virtually all of his responses are based upon the allegations of the complaint and/or the assertions he made in a brief that he asked the court to judicially notice; he also asserted that he had not been able to complete discovery.

At the February 3, 2016 hearing, the trial court continued the motion to April 28, 2016 and allowed the parties to file additional



papers. On April 5, Thakar filed an ex parte application for a continuance of the trial (the trial date was set for June 1, 2016) and of the hearing on Conti's motion for summary judgment. In his declaration filed in support of the ex parte application, Thakar stated that his discovery against the Doe defendants "has just started," and that he "was unable to complete Discovery against Conti and Smitray Corporate Defendants due to Preoccupation with Hoke Trial,<sup>[4]</sup> Evasive Responses and my Disability." He also stated that several of the defendants, including Conti "have propounded almost simultaneous Discovery and Motions upon me to take advantage of my Disability and Pro Se Status created by blacklisting me." He presented no facts to show a likelihood that the evidence he sought may exist, nor did he explain why the evidence he sought was essential to oppose the summary judgment motion. It appears the trial court denied the ex parte application (although there is no minute order so stating in the record).

Thakar filed an amended opposition to the summary judgment motion on April 14, 2016. In his amended opposition, Thakar stated that the facts establishing his claims against Conti were set forth in his original complaint, in the briefs for the earlier appeal from the demurrer ruling, and his statements of factual background previously filed with regard to other motions. He did not provide citations to any

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<sup>4</sup> As noted, Hoke is one of the many defendants in this action; trial of the one cause of action alleged against him was bifurcated and apparently was scheduled to begin either shortly before or after the continued hearing on the summary judgment motion, despite Thakar's numerous attempts to get the trial court to reconsider its bifurcation ruling.

evidence to support those asserted facts. He attached as exhibits to his amended opposition several documents, none of which were properly authenticated. He also filed his declaration, in which he made several assertions of facts based entirely upon speculation. In his amended separate statement, he once again relied primarily on the allegations of his complaint and the facts he asserted in prior briefs in attempting to dispute the material facts set forth by Conti.

Conti filed an amended reply in support of his motion, and an amended reply separate statement. Conti also filed written objections to Thakar's declaration, all of the documents Thakar attached to his amended opposition, and all of the documents for which Thakar requested judicial notice.

The trial court sustained all of Conti's objections and denied Thakar's request for judicial notice. The court also denied Thakar's request that the summary judgment motion be denied or continued under Code of Civil Procedure<sup>5</sup> section 437c, subdivision (h), finding that Thakar "fail[ed] to demonstrate that facts essential to [his] opposition exist, but cannot be presented at this time." The court then granted the motion for summary judgment "on the grounds that the Court finds Plaintiff has no competent admissible evidence to support [his] claims." The court found "the undisputed evidence demonstrates that [Conti's] only connection to the facts alleged in [Thakar's] operative pleading is as counsel to the Smitray Defendants during the time period

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<sup>5</sup> Further undesignated statutory references are to the Code of Civil Procedure.

of [Thakar's] wrongful termination claims against the Smitray Defendants.” The court observed that Conti met his burden of proof, and the burden shifted to Thakar, but Thakar “only provided speculation to support his claims against Mr. Conti which is not enough to defeat a motion for summary judgment.”

The court entered judgment in favor of Conti, from which Thakar timely filed a notice of appeal.

b. *Vexatious Litigant Motion*

On March 18, 2016, after the first hearing on Conti's motion for summary judgment but before the continued hearing, the Smitray corporate defendants filed a motion for an order declaring Thakar to be a vexatious litigant.<sup>6</sup> The motion was brought on three grounds set forth in section 391, subdivision (b) (hereafter section 391(b)): in the preceding seven-year period Thakar brought or maintained, in propria persona, at least five litigations that were determined adversely to him (§ 391(b)(1)); Thakar repeatedly relitigated or attempted to relitigate causes of action, controversies, or issues of fact or law that had been finally determined against him (§ 391(b)(2)); and Thakar repeatedly filed unmeritorious motions, pleadings, or other papers, conducted unnecessary discovery, or engaged in other tactics that were frivolous or solely intended to cause unnecessary delay (§ 391(b)(3)). The Smitray corporate defendants filed a request for judicial notice in support of

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<sup>6</sup> Conti represented the Smitray corporate defendants in the motion, as he has represented them throughout the litigation.

their motion, asking the trial court to take judicial notice of the complaints Thakar filed in Los Angeles Superior Court and rulings in various appeals arising from the present case and other cases, as well as trial court rulings in the present case.

Thakar filed an opposition to the motion, supported by his declaration in which he stated that he did not file any appeals or motions with the intention to harass or cause delay. He explained that the defects in his appeals were due to errors on his part.

The trial court granted the Smitray corporate defendants' motion on the grounds that they sufficiently demonstrated that Thakar commenced at least five litigations as a self-represented party in the preceding seven years that had been adversely determined against him, that Thakar had attempted to relitigate claims and issues that were adversely determined against him, and that Thakar had filed numerous unmeritorious pleadings, motions, and papers in the instant action.

On August 23, 2017, we ordered that Thakar's notice of appeal from the judgment in favor of Conti be deemed to also constitute a notice of appeal from the order declaring him a vexatious litigant.

## **DISCUSSION**

### ***A. Showings Made in Support of and in Opposition to Summary Judgment Motion***

At the time Conti brought his motion for summary judgment, seven causes of action against Conti remained: invasion of privacy, defamation, intentional interference with contract, intentional infliction of pain and suffering, conspiracy to inflict pain and suffering,

intentional interference with prospective economic advantage, and conspiracy to interfere with prospective economic advantage. We address each claim separately.

1. *Invasion of Privacy (Third Cause of Action)*

To establish an invasion of privacy claim, the plaintiff must prove “(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.” (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) Thakar did not dispute that his claim was premised on his assertion that the defendants, including Conti, subjected him to “continuous audio and video surveillance including at his own place of residence.” In his separate statement, Conti included a fact stating that he did not conduct any audio or video surveillance of Thakar, nor did he direct or conspire with anyone else to do so; this fact was supported by his declaration. The only evidence Thakar cited in response to Conti’s statement of fact was the allegations of his complaint.

2. *Defamation (Fifth Cause of Action)*

“The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) In his cause of action for defamation, Thakar alleged that “Defendants Gizzi, Harry and JFK first defamed the Plaintiff by wrongfully firing him and perpetuated derogatory propaganda against the Plaintiff over the past thirteen years to black

list him in order to deprive Plaintiff of legal representation as well as aid from organizations specifically designed to assist individuals in his situation. . . . Defendant Conti acted as go between the NJ defendants and Smitray defendants to submit false, manufactured statements against the Plaintiff in writing to obtain restraining order, Coaching order in lieu of eviction from the Inglewood Superior Court. Smitray Defendants and Conti also twisted the information in confidential past employment record of Plaintiff with another NJ employer and used it in their defense with EEOC. During the hearing for overtime wage complaint, Smitray Defendants and Conti coached Plaintiff's subordinates into making false, Derogatory statements against him."

In his separate statement, Conti included the following facts: he never communicated or conspired with the New Jersey defendants; he never acted as a go-between for the New Jersey defendants and the Smitray defendants on any matter; he never knowingly submitted any false statements against Thakar in any of the employment matters in which he represented the Smitray defendants; he did not forge or direct his clients to forge any letters related to Thakar's employment; and he did not coach any of Thakar's subordinates into making false, derogatory statements against Thakar. All of those asserted facts are supported by his declaration.

Thakar did not cite to any evidence in response to this statement of fact; instead, he contended that Conti's declaration was inadmissible. Thakar, however, did not file separate written objections to Conti's declaration or other evidence. The trial court did not make an express ruling on that objection, but the court impliedly overruled Thakar's

objection, inasmuch as it found that Conti met his burden of proof through his declaration.

3. *Intentional Interference With Contract*  
(*Sixth Cause of Action*)

The elements of a claim for intentional interference with contract are: “(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Thakar did not dispute that his claim is premised upon his allegation that the New Jersey defendants interfered with his employment contract with the Smitray defendants, that “Conti played an active role in providing legal expertise before and after [the] breach of contract by acting as a go between the NJ defendants and Smitray Defendants,” and that “defendants instigated and brainwashed Hoke” into harassing Thakar and breaching the contract.

One of the facts in Conti’s separate statement stated that he neither communicated with the New Jersey defendants or Hoke, except as to the status of the instant case after it was filed, nor entered into any conspiracy with them, much less a conspiracy to harm Thakar in any way. Once again, this fact was supported by his declaration.

In response to Conti’s assertion, Thakar stated that he “tried to get a complete picture of Conti’s Involvement but all Discovery requests

were Evaded by Conti.” He then cited to the allegations of his complaint and assertions he made in a prior statement of facts in an effort to raise a disputed issue.

4. *Intentional Infliction of Pain and Suffering  
(Eleventh Cause of Action)*

To establish a claim for intentional infliction of pain and suffering (i.e., emotional distress), a plaintiff must prove: ““(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. . . .” Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Thakar’s cause of action for intentional infliction of pain and suffering alleged that the defendants’ conduct as alleged in the previous causes of action was deliberate, malicious, and intentional, and caused him pain and suffering. In his separate statement, Conti asserted as an undisputed fact that he never communicated with or conspired with the New Jersey defendants and never acted as a go between for the New Jersey defendants and the Smitray defendants on any matter. He also asserted that he never knowingly submitted any false statements against Thakar in any of the employment-related proceedings in which he represented the Smitray defendants, nor did he forge or cause his



clients to forge any letters related to Thakar's employment or coach any of Thakar's subordinates into making false or derogatory statements against Thakar. In addition, he asserted that he did not conduct, nor did he direct or conspire with anyone to conduct, any audio or video surveillance on Thakar, and he did not fund anyone else's purported surveillance. Finally, he asserted that he did not interfere in any way with Thakar's efforts to obtain legal representation in any matter. All of Conti's assertions are supported by his declaration.

In response to Conti's assertion, Thakar contended that Conti's declaration was inadmissible and that Conti evaded discovery, and cited to allegations of his complaint and to documents the trial court found to be inadmissible.

5. *Conspiracy to Inflict Pain and Suffering  
(Twelfth Cause of Action)*

"The elements of a civil conspiracy are: '(1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from an act done in furtherance of the common design.'" (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 272, fn. 2.) The twelfth cause of action alleged that the defendants conspired with each other, as encompassed in the previous causes of action, to cause him pain and suffering. In his separate statement, Conti makes the same assertions of undisputed facts he made with respect to the eleventh cause of action, supported by his declaration. Once again, Thakar responded by contending that Conti's declaration

was inadmissible and by citing to the allegations of the complaint and documents the trial court found to be inadmissible.

6. *Intentional Interference With Prospective Economic Advantage (Thirteenth Cause of Action)*

The elements of a claim for intentional interference with prospective economic advantage are: “(1) an economic relationship between [the plaintiff and some third person] containing the probability of future economic benefit to the [plaintiff], (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, [and] (5) damages to the plaintiff proximately caused by the acts of the defendant.” (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 260.) Thakar’s cause of action for intentional interference with prospective economic advantage alleged that “Defendants’ intentional wrongdoings against plaintiff are aimed at escaping liability for ruining Plaintiff’s MD career and to block his attempts to salvage his career by exercising his legal rights”; it did not specifically identify the alleged “wrongdoings.”

Conti asserted as undisputed facts in his separate statement that Thakar was fired by the New Jersey defendants from his position as a neurology resident in 1998, and it was not until 10 years later, in 2008, that Conti was retained by the Smitray defendants to represent them in Thakar’s employment-based claims. He had never heard of the New Jersey defendants before then, and had no communications or agreements with them on any matter, much less matters related to

Thakar or his former employment. Conti's assertions were supported by his declaration and, for the timing of Thakar's firing, to the complaint.

In his response to this fact, Thakar contended that Conti evaded discovery requests and that Conti's declaration was inadmissible. He then cited to the allegations of the complaint and documents ruled inadmissible in an attempt to raise a disputed issue.

7. *Conspiracy to Interfere With Prospective Economic Advantage (Fourteenth Cause of Action)*

Thakar's cause of action for conspiracy to interfere with prospective economic advantage alleged that all of the defendants conspired to deprive Thakar of his medical career as well as "any compensation for ruining his scholastic career by thwarting his legal pursuit with multi pronged strategy"; no further details were alleged. In his separate statement, Conti made the same assertions of undisputed facts he made with regard to the thirteenth cause of action, supported by his declaration. Thakar's response to this fact consisted of his objections to Conti's declaration and Conti's responses to discovery, as well as citations to the complaint and to documents deemed inadmissible by the trial court.

B. *Conti Was Entitled to Summary Judgment*

In determining a motion for summary judgment and on review of that judgment, both the trial court and the appellate court engage in the same three-step process. "Because summary judgment is defined

by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought.’ [Citation.] [¶] ‘We then examine the moving party’s motion, including the evidence offered in support of the motion.’ [Citation.] A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. [Citations.] [¶] . . . [I]f the moving papers make a prima facie showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact.” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144.) The plaintiff “cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead *must produce admissible evidence* raising a triable issue of fact.” (*Id.* at pp. 1144-1145, italics added.)

As is evident by the our discussion of the summary judgment moving and opposition papers, Conti submitted evidence to show that the allegations against him were untrue, and Thakar failed to present *any* admissible evidence in opposition.<sup>7</sup> Thus, he failed to meet his burden to raise a triable issue of fact. None of the arguments he makes in his appellant’s opening brief can overcome this failure.

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<sup>7</sup> Thakar does not challenge on appeal the trial court’s ruling sustaining Conti’s objections to Thakar’s evidence.

For example, Thakar argues that Conti's evasive responses to discovery, his refusal to submit to a DNA test, and the early closing of discovery preclude summary judgment. But even if we agreed that Conti's responses were evasive (and we do not) there is nothing in the record to indicate that Thakar moved to compel further responses from Conti. To the extent Thakar complains there was insufficient time to bring such a motion or conduct discovery, we note that Thakar had two and a half years from the date remittitur issued following our reversal of the dismissal of some of the claims against Conti before Conti brought his motion for summary judgment for Thakar to conduct discovery. Yet, as Thakar admitted, he had not begun to take discovery from Conti and had collected no evidence against him as of October 19, 2015 -- two years and five months after remittitur issued. (See *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 76 [denial of summary judgment motion for lack of discovery is not warranted where "there was no justification for the failure to have commenced the use of appropriate discovery tools at an earlier date"].) Finally, as Conti notes in his respondent's brief, Thakar failed to file an affidavit under section 437c, subdivision (h), showing that facts essential to justify opposition to the summary judgment motion may exist, and showing why those facts could not have been presented at the time of the hearing. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [trial court not required to grant continuance or deny summary judgment motion if plaintiff failed to present an affidavit under § 437c, subd. (h)]; *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190 ["Where a lack of diligence results in a party's

having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit under Code of Civil Procedure section 437c, subdivision (h), the trial judge may deny the request for continuance of the motion”].)

Thakar also contends that Conti’s declaration was inadmissible because (1) Conti’s prior actions, filings, and statements establish that he has a character and habit of untruthfulness, and his declaration was untruthful, and (2) the declaration lacked foundation. Neither contention has merit. First, the purported instances of prior “untruthfulness” that Thakar sets forth are either not evidence of untruthfulness or are based upon pure speculation. Second, as to Thakar’s assertion that Conti’s declaration lacks foundation because it is not competent and does not meet traditional requirements of reliability, Conti states in his declaration that the statements therein are within his personal knowledge; our review of the statements confirm that they are matters that properly would be within his personal knowledge, since they involve whether he himself engaged in certain alleged conduct. (*Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 742 [foundation properly laid for declaration where the statements in the declaration make clear that declarant had actual personal knowledge].)

Thakar’s contentions that summary judgment is precluded because (1) Conti’s separate statement did not include Thakar’s revised amended responses to discovery, and (2) Thakar was blackballed from getting an attorney to defend against the summary judgment motion

also fail to provide grounds for reversal. Conti was not required to include any of Thakar's responses to discovery in his separate statement. If Thakar had admissible evidence that he set forth in those responses it was his responsibility to submit that evidence in opposition to the motion in order to raise a triable issue; he did not submit any such evidence. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, *supra*, 199 Cal.App.4th at pp. 1144-1145.) Similarly, a litigant's inability to retain an attorney is not a cognizable reason to deny a summary judgment motion. Not only is there no evidence that, in fact, Thakar was unable to retain an attorney because he was "blackballed," but it is well established that a litigant who appears in propria persona "is entitled to the same, but no greater, consideration than other litigants" who are represented by counsel. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638.) Thus, his lack of an attorney does not protect him from summary judgment when, as in this case, he fails to produce evidence sufficient to raise a disputed material fact.

Thakar's argument that summary judgment was precluded because the defendants exercised undue influence over him, resulting in extreme duress, is unsupported by any admissible evidence establishing undue influence or by any *relevant* law. None of the law Thakar cites has anything to do with undue influence in the context of bringing or opposing a summary judgment motion.

Finally, Thakar's assertions that the granting of summary judgment was contrary to our prior decision reversing the sustaining of Conti's demurrer to certain claims, or that it violated his right to due process and to a jury trial are simply incorrect. Our prior ruling was

based upon the allegations of the complaint, which we were required to accept as true -- regardless of how improbable they might be -- for purposes of the demurrer. (*Thakar v. Conti* (March 18, 2013, B238498) [nonpub. opn.], citing *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 576.) Contrary to Thakar's assertion, Conti's summary judgment motion did not raise legal issues regarding privilege that we previously had found against Conti, nor did our decision preclude the trial court from resolving the claims against Conti on a motion for summary judgment. With regard to Thakar's arguments regarding his right to due process and jury trial, it is well established that the granting of summary judgment does not offend those rights. (See, e.g., *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 991; *Bank of America, etc. v. Oil Well S. Co.* (1936) 12 Cal.App.2d 265, 270.)

In short, we conclude that the trial court properly granted summary judgment in favor of Conti.

C. *Substantial Evidence Supports the Trial Court's Order Declaring Thakar a Vexatious Litigant*

"The vexatious litigant statutes (§§ 391-391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants. . . . [¶] 'Vexatious litigant' is defined in section 391, subdivision (b) as a person who has, while acting in propria persona, initiated or prosecuted numerous meritless litigations [(§ 391(b)(1))], relitigated or attempted to relitigate matters previously determined



against him or her [ (§ 391(b)(2))], repeatedly pursued unmeritorious or frivolous tactics in litigation [ (§ 391(b)(3))], or who has previously been declared a vexatious litigant in a related action [ (§ 391(b)(4))].”

(*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169 (*Shalant*).)

Under section 391.7, a court “may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or the presiding judge of the court where the litigation is proposed to be filed.” (§ 391.7, subd. (a).) “Section 391.7 does not deny the vexatious litigant access to the courts, but operates solely to preclude the initiation of meritless lawsuits and their attendant expenditures of time and costs. [Citation.] Vexatious litigant statutes are constitutional and do not deprive a litigant of due process of law. [Citations.]” (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 221-222.) On appeal from an order declaring a litigant vexatious, we assume the order is correct and uphold the trial court’s ruling if it is supported by substantial evidence. (*Id.* at p. 219.)

Thakar contends the trial court erred in finding him a vexatious litigant because (1) the defendants did not show there was no reasonable probability that he will prevail in the instant case, as required by section 391.1; (2) Thakar did not file five litigations within the meaning of section 391(b)(1); (3) Thakar has not relitigated any claims; (4) Thakar has not filed repeated frivolous and unmeritorious motions; (5) Thakar is in propria persona only because the defendants have blackballed him from obtaining legal representation; and (6) the

Smitray defendants had no standing to bring the motion to declare him a vexatious litigant because there was only a single claim remaining against them with a damages cap of \$3,350. None of these contentions have merit.

1. *Section 391.1 Does Not Apply*

When the vexatious litigant statutes were initially enacted in 1963, they did not include section 391.7. (*Shalant, supra*, 51 Cal.4th at p. 1169.) Thus initially, all vexatious litigant motions were brought under section 391.1, which provides that “in any litigation pending in a California court, the defendant may move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant.” (*Shalant, supra*, 51 Cal.4th at p. 1170.) In 1990, section 391.7 was enacted “to provide the courts with an additional means to counter misuse of the system by vexatious litigants. Section 391.7 ‘operates beyond the pending case’ and authorizes a court to enter a ‘prefiling order’ that prohibits a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge.” (*Bravo v. Ismaj, supra*, 99 Cal.App.4th at p. 221; accord, *Shalant, supra*, 51 Cal.4th at p. 1170.)

Thakar’s argument that the trial court erred in granting the vexatious litigant motion because the Smitray defendants failed to show there was no reasonable probability that he will prevail in the instant case ignores that the motion was brought under 391.7, which offers a remedy separate from the remedy offered under section 391.1 and does

not require a showing that the plaintiff has no reasonable probability of prevailing in the action in which the motion is brought. (*Shalant, supra*, 51 Cal.4th at p. 1170; *Bravo v. Ismaj, supra*, 99 Cal.App.4th at pp. 221-222.) Instead, the Smitray defendants made the showing necessary for the trial court to require Thakar to obtain a prefiling order under section 391.7.

2. *The Five Litigations Relied Upon by the Court Satisfied Section 391(b)(1)*

Section 391(b)(1) provides that a person is a vexatious litigant if “[i]n the immediately preceding seven-year period [he or she] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.” Section 391, subdivision (a) defines “litigation” as “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” It is a broad definition that “includes an appeal or civil writ proceeding filed in an appellate court.” (*Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406; see also *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1171 [where plaintiff prevailed in trial court against one defendant but appealed as to other defendants and appellate court affirmed the judgment, the appeal met the statutory requirement under § 391, subd. (b)(1)].)

In granting the Smitray corporate defendants’ motion, the court identified six litigations that Thakar commenced and prosecuted over

the previous seven years that were adversely determined against him: the first lawsuit Thakar filed against the Smitray defendants and others in 2010 (L.A.S.C. case No. YC063943, hereafter, the original lawsuit), the first, second, fourth and fifth appeals he filed in this case (case Nos. B234776, B236926, B242286, and B246828), and an appeal in the Third Circuit Court of Appeals in a case Thakar filed in the United States District Court for the District of New Jersey against his former attorneys and one of the New Jersey defendants (*Thakar v. Tan*, case No. 09-2084). On appeal, Thakar contends most of these cases do not meet the requirements under section 391(b)(1) because (1) he had to dismiss the original lawsuit because Conti had the case removed to federal court; (2) the filing of the first and second appeals was due his “legal idiocy”; (3) the fourth appeal was unsuccessful mostly because he forgot to include an important document in the record; (4) in the fifth appeal, only half of his arguments failed on the merits (the other half failed on jurisdictional grounds or due to an inadequate record); and (5) the *Thakar v. Tan* case was filed in the district court more than seven years before the vexatious litigant motion was filed. None of Thakar’s contentions undermine the trial court’s ruling.

First, under section 391(b)(1), it does not matter that Thakar felt that he had to dismiss the original lawsuit; what matters is that he filed the lawsuit and it was “determined adversely” to him. (§ 391(b)(1).) “[A] voluntary, unilateral dismissal of [a lawsuit] is generally considered a termination in favor of the defendant. [Citation.] Only where the dismissal leaves some doubt regarding the defendant’s liability, as where the dismissal is part of a negotiated settlement, will

the dismissal not be deemed a termination favorable to the defendant.” (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779-780.) Of course, a voluntary dismissal is only prima facie proof that the litigation was “determined adversely” to the plaintiff, and the plaintiff may rebut this showing by contrary proof, such as proof that the plaintiff had accomplished the object of the litigation. (*Id.* at p. 780, fn. 3.) In this case, Thakar provided no such proof in opposition to the vexatious litigation motion.

Second, his “legal idiocy” or the resolution of the appeals on “technical” grounds such as an inadequate record or lack of jurisdiction do not shield him from the operation of section 391(b)(1). Indeed, that is exactly what the vexatious litigant statutes are designed to protect against. (*Shalant, supra*, 51 Cal.4th at p. 1169; *Bravo v. Ismaj, supra*, 99 Cal.App.4th at pp. 220-221.)

Finally, the fact that the underlying litigation in *Thakar v. Tan* was filed outside of the seven-year window described in section 391(b)(1) is irrelevant. The Third Circuit’s opinion, of which the trial court took judicial notice, shows that the *appeal* was filed within the seven-year window. The Third Circuit states that the district court dismissed the underlying case on March 20, 2009. Thakar necessarily filed his appeal from that dismissal sometime after that. Therefore, the appeal -- which is a “litigation” for purposes of section 391(b)(1) (*Garcia v. Lacey, supra*, 231 Cal.App.4th at p. 406; *Fink v. Shemtov, supra*, 180 Cal.App.4th at p. 1171) -- was filed less than seven years before the

Smitray defendants filed their vexatious litigant motion on March 18, 2016.

3. *The Court Correctly Found That Thakar Relitigated Claims Within the Meaning of Section 391(b)(2)*

In finding that Thakar met the criteria for a vexatious litigant under section 391(b)(2), the trial court identified three cases (in addition to the present case) in which Thakar has relitigated claims and issues: *Thakar v. John F. Kennedy Med. Ctr.*, case No. 03-CV-04536 (a case Thakar filed in the United States District Court for the District of New Jersey), *Thakar v. Tan*, and the original lawsuit. Thakar contends that none of these actions constituted relitigation of the same claims against the same defendant. However, in his appellant's opening brief he provides no discussion of the claims and issues asserted in those cases, nor does he provide any analysis of those claims or issues. Thus, he has forfeited the issue on appeal. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078 ["Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review"].)

4. *The Motions and Other Pleadings Relied Upon by the Court Under Section 391(b)(3) Were Unmeritorious and/or Frivolous*

In ruling that Thakar met the criteria for a vexatious litigant under section 391(b)(3), the trial court found that Thakar had filed "numerous unmeritorious pleadings and motions in the instant action

that were frivolous and caused unnecessary delay including filing motions that had already been adversely determined against [him],” citing exhibits 8 and 13 through 15 from the Smitray corporate defendants’ request for judicial notice in support of their vexatious litigant motion.

Exhibit 8 is our opinion in the fifth appeal in this case (case No. B246828).<sup>8</sup> We ruled against Thakar on all issues he raised in that appeal, finding that we did not have jurisdiction as to some issues, there was an inadequate record as to others, and the remaining issues had no merit.

Exhibit 13 is Thakar’s motion for preliminary injunction that was heard on August 2, 2012.

Exhibit 14 is a notice of ruling on various motions heard on August 2, 2012, including the motion for preliminary injunction as well as a motion for reconsideration and a “Motion for a Court Order for Interim Relief.” With regard to both the motion for preliminary injunction and the “Motion for a Court Order for Interim Relief,” the notice states that the motions are denied and that Thakar “is further put on notice that he may not refile a motion seeking such relief.”

Exhibit 15 is a minute order from August 12, 2015 in which the court ruled on a number of motions, including Thakar’s renewed

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<sup>8</sup> It may be that the trial court was mistaken, and intended to cite to Exhibit 9 rather than Exhibit 8. Exhibit 9 was a minute order from November 24, 2015, in which the court denied motions to quash service of summons on out-of-state defendants on the ground that Thakar failed to present any facts to show that the defendants met the standard for the court to impose jurisdiction over them.

request for a preliminary injunction. In the order, the court denied Thakar's motion to consolidate the trial, finding it was "a renewed motion for reconsideration [of an earlier ruling] . . . without any . . . new or different facts, circumstance, or law upon which to reconsider the Court's prior ruling." The court also stated, in denying Thakar's motion for a preliminary injunction, that "this is [Thakar's] third request for a preliminary injunction," that all of his prior applications were denied, that he "fails to provide any new or different facts, circumstance, or law to justify reconsideration of the Court's prior rulings," and that he "fails to submit sufficient [facts] to establish a likelihood of success on the merits," in that "[t]he motion is based simply on [Thakar's] conjecture and speculation regarding the existence of an alleged conspiracy between the parties to prevent him from obtaining employment and . . . from obtaining legal counsel." Finally, in denying Thakar's motion for a protective order to prevent his deposition, the court stated that Thakar "fails to provide any facts . . . to meet his burden to establish that a protective order is required to prevent [him] from unwarranted annoyance, embarrassment, oppression, or undue burden and expense."

In arguing that he has not filed repeated frivolous and unmeritorious motions, Thakar ignores most of the above, and focuses almost exclusively on his attempts to obtain a preliminary injunction. He admits he made three attempts (and appealed from the denial of two of those attempts) to obtain a preliminary injunction, and tries to explain why he made the second and third attempts. But rather than helping him, his explanation helps to establish that the motions were unmeritorious: in essence, he says that his first two attempts were



legally defective, so each time they were denied he brought another motion to try to correct his previous errors. Thus, those motions, along with the other unmeritorious motions (and appeal) cited by the trial court fully support its finding that Thakar is a vexatious litigant under section 391(b)(3).

5. *Thakar's Inability to Retain an Attorney Does Not Shield Him From Being Declared a Vexatious Litigant*

Thakar argues that the vexatious litigant statutes should not apply to him because the defendants have prevented him from retaining an attorney through their alleged conspiracy. Thakar has been making this claim of conspiracy since at least the original lawsuit filed in 2010, and to date has failed to produce a single piece of evidence to support his claim. The fact that he has contacted numerous attorneys, all of whom have declined to represent him, simply is not evidence of a conspiracy. Rather, it could be explained by the fact that his claims appear to be supported only by his speculation, rather than evidence, which would lead any responsible attorney to decline to pursue such claims.

6. *The Smitray Corporate Defendants Had Standing to Bring the Vexatious Litigant Motion*

Thakar's contention that the Smitray corporate defendants did not have standing to bring the vexatious litigant motion is contrary to the facts and the law. Indeed, the court in *Bravo v. Ismaj* rejected the same argument under almost identical circumstances as those present here.

(*Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at p. 222.) First, as Thakar admits, the Smitray corporate defendants were still parties to the lawsuit, albeit on a single claim with limited damages. Thus, as in *Bravo*, they were parties to pending litigation in which the motion was brought. Second, as the *Bravo* court observed, a defendant may file for an order declaring a plaintiff a vexatious litigant under section 391.7 even after the current litigation has ended, if there is an indication that the plaintiff will file new litigation against that defendant. In this case, considering Thakar's litigation history, there is a clear threat that he might file another lawsuit. Thus, any of the defendants in the instant action has standing to move to have him declared a vexatious litigant under section 391.7.

In short, the Smitray corporate defendants had standing to bring the motion to declare Thakar a vexatious litigant, and substantial evidence supports the trial court's order declaring Thakar a vexatious litigant under section 391.7.

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## **DISPOSITION**

The judgment is affirmed. The order declaring Thakar a vexatious litigant is affirmed. Conti shall recover his costs on appeal.

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

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.