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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MICHAEL TERRY, Plaintiff and Appellant, v. FOX TELEVISION STUDIOS, INC. et al., Defendants and Respondents.	B243249 (Los Angeles County Super. Ct. No. BC478450)

APPEAL from an order of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Michael Terry, in pro. per., for Plaintiff and Appellant.

Fox Rothschild and Lawrence C. Hinkle II. for Defendants and Respondents.

We affirm an order granting a special motion to strike a complaint pursuant to the Anti-SLAPP statute. (See Code Civ. Proc., § 425.16.)[1]

FACTS

This appeal stems from a dispute about a television series, *Burn Notice*, created by Matt Nix and produced by Fox Television Studios, Inc. *Burn Notice* premiered in June 2007. In the idiom of the series, a "burn notice" is issued by an intelligence agency to a spy who becomes unreliable in the eyes of the agency. When an agency "burns" a spy, the agency terminates his or her relationship with the organization, leaving the person with no established identity, prior work history, money or support. One of the main characters in *Burn Notice* is named Michael Westen, a former CIA contractor who has been "burned" and must live off his own wits while he searches to find answers about who burned him and why.

In early 2012, Plaintiff and appellant Michael Terry, representing himself, sued Fox and Nix concerning *Burn Notice.* Terry filed his operative second amended complaint (SAC). Terry's SAC alleges these three causes of action, listed respectively: misappropriation of his "likeness" in violation of his statutory right of publicity protected under Civil Code section 3344; misappropriation of his "likeness" as protected by the common law right of publicity; and injunctive relief. Terry prayed for more than $500 million in damages, and court orders commanding the defendants to recognize his connection and contribution to *Burn Notice*. All three causes of action are based on allegations that certain experiences of the Michael Westen character in *Burn Notice* are "very much like" certain experiences in Terry's life, demonstrating that Nix and Fox misappropriated Terry's "likeness" in making the series. Terry alleges he wrote a "memoir" entitled "The Setup: Memoir of an NSA Black Operation," and that Fox and Nix used stories from his book in making *Burn Notice*.

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[1] All further statutory codes are to the Code of Civil Procedure unless otherwise specified.

Terry's SAC openly alleges that he suffers from schizophrenia, and that events in "The Setup" largely came from "voices" in his head. He further alleges he cannot be sure whether events in "The Setup" actually happened, but they "seem to be the truth" to him.

Fox and Nix filed an Anti-SLAPP motion to strike Terry's SAC. On May 16, 2012, the parties argued the matter to the trial court. At the end of the hearing, the court signed and entered a written order granting the motion. On May 18, 2012, Fox served notice of entry of the order by overnight delivery.

On May 31, 2012, Terry filed a motion for reconsideration. On June 8, 2012, the court entered judgment in favor of Fox and Nix. On June 28, 2012, Fox and Nix filed a motion for attorney's fees. On August 9, 2012, Terry filed a notice of appeal from the order granting Fox and Nix's anti-SLAPP motion, which identified June 8, 2012 as the date the order was entered. Terry later withdrew his motion for reconsideration. On August 15, 2012, the court granted Fox and Nix's motion for attorney's fees.

DISCUSSION

I. Timeliness of the Appeal

Fox and Nix (collectively Fox except as otherwise noted) have filed a motion to dismiss Terry's appeal on the ground it is untimely. The motion is denied.

The trial court signed and entered the order granting Fox's Anti-SLAPP motion on May 16, 2012. Fox served notice of entry the order on May 18, 2012. The service of notice of entry of the order started the running of the usual time for filing a notice of appeal. California Rules of Court, rule 8.104(a) provides that an appellant must file a notice of appeal on or before the 60th day after the appellant was served with a notice of entry of judgment or order being appealed. "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56.) If rule 8.104(a) applies, then Terry filed his notice of appeal too late because August 9, 2012 (the day Terry filed his notice of appeal from the order granting Fox's Anti-SLAPP motion) is more than 60 days after May 18, 2012 (the day Fox served notice of entry of the order granting its Anti-SLAPP motion).

On May 31, 2012, Terry filed a motion for reconsideration. California Rules of Court, rule 8.108(e) provides: "If any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until . . . 90 days after the first motion to reconsider is filed . . . ." Thus, if Terry filed a valid motion to reconsider the trial court's order granting Fox's Anti-SLAPP motion, then Terry filed a timely notice of appeal because the 90th day after May 31, 2012 (the day Terry filed his motion for reconsideration) fell after August 9, 2012 (the day Terry filed his notice of appeal from the order granting Fox's Anti-SLAPP motion). A "valid" motion for reconsideration under rule 8.108(e) means a motion that was timely, and accompanied by a declaration showing the grounds for reconsideration; it does not mean a motion that had substantive merit. We are satisfied Terry filed a valid motion for reconsideration within the meaning of rule 8.108(e). Thus, we find he filed a timely notice of appeal.[2]

II. The Order Granting Fox's Anti-SLAPP Motion

Terry contends the trial court's order granting Fox's Anti-SLAPP motion must be reversed because Fox "did not deserve to win." We will not reverse the order because Terry has not met his burden on appeal to show the trial court wrongly entered the order under the law and or facts. As stated in *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564: "'A judgment or order of the lower court is *presumed correct* . . . and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'"

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[2] Fox served its notice of entry of the trial court's order granting the Anti-SLAPP motion on May 18, 2012, by overnight service. This means that Terry had 10 days from May 18, 2012 to file his motion to reconsider. (§ 1008, subd. (a).) Ten days from May 18, 2012 is May 28, 2012, which happened to be Memorial Day, a court holiday, and, thus, Terry had until the next day, May 29, 2012, to file his reconsideration motion. (§ 12a, subd. (a).) The time for Terry to act was then extended two court days. (§ 1013, subd. (c).) Two court days after May 29, 2012 is May 31, 2012, the day Terry filed his motion to reconsider. Fox also argues that Terry withdrew his motion to reconsider, rendering it moot, and of no consequence for purpose of determining the time to file an appeal. Because Terry's motion to reconsider was valid on the date it was filed, we are satisfied that California Rules of Court, rule 8.108(e) applies.

The Anti-SLAPP Statute

The Anti-SLAPP statute is intended to address a problem with meritless lawsuits filed to "chill" the exercise of the constitutional right of free speech. (§ 425.16, subd. (a).) To this end, the Anti-SLAPP statute authorizes a two-step procedure for striking a cause of action at the earlier stages of litigation. In the first step, the court determines whether the moving defendant has shown that a cause of action "arises from protected activity," that is, "from any act of that person in furtherance of the person's right of . . . free speech under the United States Constitution or California Constitution in connection with a public issue . . . ." (See § 425.16, subd. (b)(1); and see, e.g., *Martinez v. Metabolife Internat., Inc*. (2003) 113 Cal.App.4th 181, 188 [it is the gravamen of the plaintiff's cause of action that determines whether the Anti-SLAPP statute applies in the first instance].) In the second step, the court looks at the evidence to determine whether a plaintiff has a probability of winning his or her on the merits. (See § 425.16, subd. (b)(1); and see, e.g. *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

On appeal, we review an order granting an Anti-SLAPP motion under the de novo standard of review, meaning we undertake the same two-step procedure as the trial court. (See *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

Analysis

Terry's opening brief on appeal does not appear to challenge the trial court's order granting the Anti-SLAPP motion at the first step of the Anti-SLAPP procedure – namely, "protected activity." Though Terry raised this issue in the trial court, it must be reiterated on appeal to be considered here. Assuming Terry has intended to assert such an argument, we reject it. (See *Tamkin v. CBS Broadcasting, Inc*. (2011) 193 Cal.App.4th 133, 143 [the creation of a television show is an act in the furtherance of a person's exercise of the right of free speech within the meaning of the Anti-SLAPP statute].)

Turning to the second step, we find the record discloses no evidence showing Terry has a probability of prevailing against Fox on the merits of his "misappropriation of likeness" claims. Fox's evidence showed that *Burn Notice* creator Matt Nix never met

Terry, and never heard of Terry or his memoir "The Setup" prior to Terry's lawsuit. Further, that Nix never read "The Setup." Nix created *Burn Notice* without input from Terry; the characters in *Burn Notice* are purely fictional. Nix "pitched" *Burn Notice*, with the Michael Westen character, to Fox in August 2005. Filming of the *Burn Notice* pilot was completed in December 2006. In his SAC, Terry alleged that he distributed drafts of "The Setup" to various unnamed literary agents "in search of a book deal" in January to March 2007. Against Fox's evidence, the trial court found that Terry had failed to submit any admissible evidence tending to establish the elements of his claims. Terry's opening brief on appeal does not address the trial court's ruling.

Apart from the state of the evidence, Terry cannot prevail on his theory that Fox and Nix misappropriated Terry's "likeness." The allegation is that they misappropriated his personal life experiences. Terry's theory is that his protected "likeness," under both statutory and common law, gives him a viable cause of action because a character in a television show is like him. The law does not protect such a wide-encompassing concept of "likeness." Similarities between a real person's personal life experiences and those of a fictional character do not support a claim for misappropriation of the former's "likeness." (See *Polydoros v. Twentieth Century Fox Film Corp*. (1997) 67 Cal.App.4th 318, 322-323 (*Polydoros*); and see *Mathews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 438 [a person's "likeness" under Texas misappropriation tort law includes his or her picture or voice, not "general incidents from a person's life, especially when fictionalized"].) If the law of "likeness" afforded protection as broadly as Terry's argument seems to propose, then every person who sees some similarity between their personal life experiences and a character on a television show or movie could assert a misappropriation claim.

Polydoros, supra, 67 Cal.App.4th 318 is instructive. In *Polydoros*, Division Two of our court affirmed a summary judgment in an action for misappropriation of identity, invasion of privacy, negligence, and defamation. The action was filed against the writer and director of the movie The Sandlot; the plaintiff was a childhood schoolmate of the writer and director. One of the film's characters was a 10-year-old boy named Michael

Palledorous. The plaintiff alleged his likeness was misappropriated in that the Michael Palledorous character shared a number of similarities to the plaintiff, including a name that was similar, growing up in a similar setting, wearing eyeglasses, swimming in the community pool, and being "somewhat obstreperous." (*Id*. at pp. 320-321.) In affirming summary judgment, Division Two ruled there was no misappropriation of the plaintiff's "likeness" because no one viewing The Sandlot would confuse the Michael Palledorous character for the plaintiff. (*Id*. at p. 323.) As Division Two stated: "[T]he rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about [the plaintiff]'s life. This is a universal theme and a concededly fictional film. The faint outlines [the plaintiff] has seized upon do not transform the fiction into fact." (*Ibid*.)

We have the same sentiments in Terry's current case. Stories about a spy, alone and fending for himself or herself, are a universal theme. Absent an evidentiary showing by Terry that the Michael Westen character in *Burn Notice* is modeled on or designed to be viewed by the public as being Terry, there is no evidence of misappropriation of his "likeness." We are not persuaded to reverse the trial court's order granting Fox's Anti-SLAPP motion.

DISPOSITION

The order granting Fox's Anti-SLAPP motion is affirmed. Respondents are awarded costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.