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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

PAUL T. WILKES, Plaintiff and Respondent, v. BONGO LLC et al., Defendants and Appellants.	B258794 (Los Angeles County Super. Ct. No. BC541787)

APPEAL from orders of the Superior Court of Los Angeles County, Romana G. See, Judge. Affirmed.

Davis Wright Tremaine, Kelli L. Sager, Diana Palacios and Cameron Stracher for Defendants and Appellants.

Justin A. Nash, Jennifer E. Bryan and Deanna L. Diamond for Plaintiff and Respondent.

I. INTROUDCTION

Defendants, Bongo LLC, Jon Taffer and Nicole Taffer, appeal from the August 22, 2014 order denying their Code of Civil Procedure[1] section 425.16 special motion to strike. Plaintiff, Paul T. Wilkes, M.D., filed a complaint for assault, battery, conspiracy to commit these acts and intentional emotional distress infliction. Defendants argue plaintiff's claims arise from their conduct in creating and producing a television program. We disagree. The gravamen of plaintiff's claims did not arise from the categories enumerated in section 425.16, subdivision (e). Accordingly, we affirm the order denying defendants' special motion to strike.

In addition, plaintiff cross-appeals from the order denying his section 425.16, subdivision (c) attorney's fees request. Plaintiff argues the trial court abused its discretion because defendants' special motion to strike was frivolous. We find no abuse of discretion and affirm the order.

II. BACKGROUND

A. Complaint

On April 7, 2014, plaintiff filed an assault, battery, civil conspiracy to commit assault and battery and intentional emotional distress infliction complaint. The complaint alleges plaintiff is a co-owner of a bar in Las Vegas. The bar was operating at a significant loss at the time plaintiff and his two co-owners purchased it in 2012. On September 18, 2012, plaintiff e-mailed Metal Flowers Media, LLC to request the bar be featured on a show called "Bar Rescue." Bongo LLC produces "Bar Rescue," a reality television program hosted by Mr. Taffer. On the show, Mr. Taffer gives advice to

[1] Future statutory references are to the Code of Civil Procedure unless otherwise indicated.

owners of failing bars to help their businesses become profitable. Ms. Taffer, Mr. Taffer's spouse, participates in the show as a "'recon specialist.'"

In December 2012 and January 2013, plaintiff, his friends and bar employees were filmed for auditions to be on the show. On January 10, 2013, plaintiff signed and mailed back contracts and waivers. On February 2, 2013, Al Rincones, Bongo LLC's story producer, e-mailed plaintiff. The e-mail asked plaintiff and his staff to be available for the week of February 11 through 15, 2013, for additional auditions.

On February 11, 2013, Mr. Rincones and some camera operators arrived at the bar to do more filming. Mr. Rincones told plaintiff if the bar was chosen, Mr. Taffer would fly into Las Vegas and begin filming the actual episode the next morning. Mr. Rincones stated in order to "'get the show,'" plaintiff would have to make a number of offensive comments about women. Mr. Rincones instructed plaintiff to make offensive statements during plaintiff's interview.

After the owner and staff interviews were completed, Mr. Rincones told plaintiff that Ms. Taffer would be coming with a friend to the bar to help with the casting tapes. Following Mr. Rincones's instructions, plaintiff approached Ms. Taffer and attempted to flirt with her by making inappropriate comments. Plaintiff was unaware Mr. Taffer was watching the scene on a monitor in a van parked outside the bar. Mr. Taffer told a staff member to make sure there was a drink nearby. The drink was to be available so that Mr. Taffer could throw it in plaintiff's face. According to the complaint, Ms. Taffer "lured" plaintiff over to the pool tables. This was where Mr. Taffer planned to make his entrance.

Bursting into the bar with a camera crew, Mr. Taffer confronted plaintiff. Mr. Taffer yelled, "'I want you to see a few things, you piece of shit!'" Plaintiff was shown footage from the January audition tapes on Mr. Taffer's electronic tablet. Plaintiff was holding a soda in his hand. Then Mr. Taffer grabbed the soda and threw the drink in plaintiff's face. Mr. Taffer smashed the cup into plaintiff's face. Mr. Taffer called plaintiff a "'pervert'" and "'scumbag.'" Next, Mr. Taffer spit on plaintiff's face. Mr. Taffer then tore plaintiff's shirt, ripping off four buttons. Plaintiff turned away and

placed his eyeglasses on a nearby "foosball table" to prevent injury to his face. When plaintiff turned back, Mr. Taffer picked up a drink from a nearby table that had been placed there by a Bongo LLC employee. Mr. Taffer threw a second drink at plaintiff's face. Next, Mr. Taffer swung at plaintiff's head. Mr. Taffer used the electronic tablet to swing at plaintiff. Then plaintiff deflected the electronic tablet with his left arm. The electronic tablet went flying across the room.

Plaintiff's friend, Todd Watkins, intervened and stepped between the two men. With a closed fist, Mr. Taffer swung over Mr. Watkins's shoulder and punched plaintiff on the left jaw. Mr. Watkins backed Mr. Taffer against the wall to stop the attack. Mr. Taffer hyperventilated and collapsed on the floor. The entire attack was caught on camera.

The complaint alleges Mr. Taffer assaulted and committed battery against plaintiff to improve ratings for "Bar Rescue." Likewise, Bongo LLC employees and Mr. and Mrs. Taffer conspired to commit assault and battery against plaintiff to improve the show's ratings. As a result of defendants' actions, plaintiff suffered severe emotional distress. Plaintiff had migraine headaches, nausea, vomiting, night terrors, crying spells, severe depression and anxiety attacks.

B. Defendants' Special Motion to Strike

On May 29, 2014, defendants filed a special motion to strike plaintiff's complaint under section 425.16. Defendants argued plaintiff's claims arose from defendants' acts in furtherance of the right of free speech in connection with an issue of public interest. Defendants contended the production of a television show about a regulated industry falls within the scope of section 425.16, subdivision (e). Defendants also argued plaintiff cannot establish a probability of prevailing on the merits because the claims are barred by the four releases plaintiff signed.

C. Plaintiff's Opposition and Attorney's Fees Motion

Plaintiff filed an opposition to the special motion to strike on August 11, 2014. Plaintiff argued the gravamen of his causes of action did not arise from any activity in section 425.16, subdivision (e). Plaintiff contended the physical attack was not conduct that further defendants' exercise of their free speech rights. Plaintiff also argued the waivers he signed did not exonerate defendants from liability for violent conduct. Plaintiff requested attorney's fees, arguing defendant's special motion to strike was frivolous.

D. Trial Court Ruling

On August 22, 2014, the trial court denied defendants' special motion to strike. The trial court ruled defendants failed to show plaintiff's claims arose from defendants' conduct taken in furtherance of their constitutional right to free speech. In addition, the trial court ruled defendants' conduct did not occur in connection with a matter of public interest. The trial court explained: "The gravamen of Plaintiff's claims arises from the alleged willful acts of assault and battery as well as the alleged conspiracy to conduct these willful acts. Violent and illegal acts do not constitute protected conduct that is subject to the protection of [section 425.16]. . . . The causes of action do not arise from conduct in furtherance of [d]efendants' First Amendment rights. Defendants argue that the causes of action arise simply due to [p]laintiff's participation in a television show and that [d]efendants' actions in conjunction with the show are protected conduct[.] [H]owever, [p]laintiff's causes of action allege assault and battery to which [p]laintiff allegedly did not consent and do not constitute conduct that would be a legitimate part of the creation of a television show. Simply because the conduct arose in connection with a protected activity does not demonstrate that the conduct itself is protected conduct." In addition, the trial court denied plaintiff's request for attorney's fees and costs. The trial

court found defendants' motion was not made frivolously or solely to cause unnecessary delay.

III. DISCUSSION

A. Defendants' Appeal of Denial of Special Motion to Strike under Section 425.16

Section 425.16, subdivision (b)(1) states: "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." The court must engage in a two-step process when determining a special motion to strike. First, the moving party must make a threshold prima facie showing that the challenged cause of action is one "arising from" the moving party's actions in furtherance of the right of petition or free speech. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) Second, if the court finds such a showing has been made, the burden shifts to plaintiff to establish a probability of prevailing on the merits. (*Episcopal Church Cases, supra,* 45 Cal.4th at p. 477; *Flatley v. Mauro, supra,* 39 Cal.4th at p. 314; *Equilon, supra,* 29 Cal.4th at p. 67.)

We review de novo the trial court's ruling on a special motion to strike. (*Flatley v. Mauro, supra,* 39 Cal.4th at pp. 325-326; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In determining the special motion to strike, "[T]he court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Flatley v. Mauro, supra,* 39 Cal.4th at p. 326; *Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 269, fn. 3.) But as explained by our Supreme Court, we do not weigh the competing evidence: "'[W]e neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we]

accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by plaintiff as a matter of law." [Citation.]'" (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 326; *Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th p. 269, fn. 3; accord, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

Defendants challenge the trial court's denial of their special motion to strike. They contend section 425.16 must be construed broadly to strike plaintiff's causes of action. Defendants argue plaintiff's claims arise from conduct in furtherance of defendants' right of free speech in connection with an issue of public interest. Specifically, they contend plaintiff's claims arise from defendants' conduct in creating and producing a television program. Defendants assert the alleged assault and battery were not incidental to the show. They point out plaintiff alleges the confrontation was orchestrated as part of the dramatic and narrative arc of the program. We disagree.

The first prong analysis depends upon conduct enumerated in section 425.16, subdivision (e). Section 425.16, subdivision (e) states: "As used in this section, '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." (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734; *D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 799.) Discussing the first prong, our Supreme Court explained: "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself*

have been an act in furtherance of the right of petition or free speech. [Citation.] . . . . [T]he critical point is whether the plaintiff's cause of action itself was *based* on an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; accord *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1277.)

In determining whether a cause of action arises from any act in furtherance of the right of petition or free speech, we look at "'the gravamen or principle thrust'" of the action. (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 477; *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1399; *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 269.) Our Supreme Court has stated: "The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; accord, *Episcopal Church Cases, supra,* 45 Cal.4th at p. 477.) There is no requirement that defendant prove the suit was intended to chill its speech or actually had that affect. Our Supreme Court explained, "[W]e held that the plain language of the 'arising from' prong encompasses any action based on protected speech or petitioning activity as defined in the statute (*Navellier v. Sletten*[, supra,] 29 Cal.4th [at pp.] 89-95), rejecting proposals that we judicially engraft the statute with requirements that defendants moving thereunder also prove the suit was intended to chill their speech (*Equilon, supra,* 29 Cal.4th p. 58) or actually had that effect. (*City of Cotati v. Cashman*[, supra,] 29 Cal.4th [at p.] 75.)" (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 734.)

Here, the causes of action do not arise from any act in furtherance of defendants' right of free speech in connection with an issue of public interest. The reality television program "Bar Rescue" is premised on the rescue and turn-around of a failing bar. The causes of action do not arise from defendants' turn-around of plaintiff's bar for the show.

Rather, the gravamen of the claims concerns Mr. Taffer's acts of assault and battery and defendants' conspiracy to commit these acts. The assault, battery, conspiracy to commit assault and battery and the intentional infliction of emotional distress do not fit into any of the section 425.16, subdivision (e) enumerated categories. Mr. Taffer allegedly verbally abused plaintiff. In addition, Mr. Taffer threw two drinks in plaintiff's face. Mr. Taffer allegedly spit on plaintiff's face and tore plaintiff's shirt, ripping off four buttons. In addition, Mr. Taffer allegedly swung at plaintiff's head with an electronic tablet. And Mr. Taffer is alleged to have been punched plaintiff in the left jaw. The codefendants allegedly conspired with Mr. Taffer to commit the assault and battery against plaintiff. As a result of defendants' actions, plaintiff suffered severe emotional distress. Defendants fail to make a threshold showing that plaintiff's claims arise from conduct protected by section 425.16, subdivision (e). (*Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc.* (2015) 235 Cal.App.4th 361, 368 ["If the core injury-causing conduct on which the plaintiff's claim is premised does not rest on protected speech, collateral or incidental allusions to protected activity will not trigger application of [section 425.16]."]; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1274.)

There is no merit to defendants' argument that we should separately evaluate the first-prong application of the special motion to strike as to each defendants' potential liability. However, no such argument *with separate heading* in defendants' briefs was made as to Ms. Taffer and the production company. Hence, any argument in that regard has been forfeited. (*T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1440, fn. 12; *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 209-210; Cal. Rules of Court, rule 8.204(a)(1)(B).)

In addition, the present record is insufficient to establish the merits of defendants' appeal. In numerous situations, appellate courts have refused to reach the merits of an appellant's claim because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney's fees motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of

Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 185-188 [appeal solely on partial clerk's transcript]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [no transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [no transcript of attorney's fees hearing]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1076-1077 [preliminary injunction hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532-1533 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [no transcript of argument to jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof].) These courts have refused to reach the merits of an appellant's claim absent a reporter's transcript or a suitable substitute because error is never presumed. (*Null v. City of Los Angeles, supra,* 206 Cal.App.3d at p. 1532; *Rossiter v. Benoit, supra,* 88 Cal.App.3d at p. 712.) An appellant must affirmatively establish error by an adequate record. (*Foust v. San Jose Const. Co., Inc., supra,* 198 Cal.App.4th at p. 187; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; *Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal.App.4th 427, 433; *Null v. City of Los Angeles, supra,* 206 Cal.App.3d at p. 1532.) In other words, it is an appellant's burden to provide an adequate record on appeal. (*Ballard v. Uribe, supra,* 41 Cal.3d at pp. 574-575; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 (plur. opn. of George,

C.J.); *Foust v. San Jose Const. Co., Inc., supra,* 198 Cal.App.4th at p. 187; *Null v. City of Los Angeles, supra,* 206 Cal.App.3d at p. 1532-1533.)

B. Plaintiff's Cross-Appeal of Denial of Request for Attorney's Fees

Plaintiff cross-appeals from the order denying his motion for attorney's fees under section 425.16, subdivision (c)(1). The trial court found defendants' special motion to strike was not made frivolously or solely to cause unnecessary delay. Plaintiff contends the trial court abused its discretion in denying his attorney's fees request because defendants' section 425.16 motion is frivolous. He reasons defendants' motion is frivolous because case law is unambiguous that defendants' violent conduct is not protected activity.

Section 425.16, subdivision (c)(1) states in pertinent part: "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." Section 128.5, subdivision (a) provides, "A trial court may order a party, the party's attorney, or both to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . . ." Frivolous means any reasonable attorney would agree the motion was totally devoid of merit. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450; *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 469; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388.) We review an order on attorney's fees under 425.16, subdivision (c) for abuse of discretion. (*Foundation for Taxpayer & Consumer Rights v. Garamendi, supra,* 132 Cal.App.4th at p. 1388; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) An abuse of discretion occurs if the trial court's exercise of discretion exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44

Cal.3d 474, 478; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

The trial court's denial of plaintiff's request for attorney's fees was not an abuse of discretion. Although we reject defendants' contentions, we cannot say, based on incomplete record provided, defendants' special motion to strike was totally devoid of merit as to be frivolous. (See *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 937.) Plaintiff fails to demonstrate the trial court exceeded the bounds of reason by exercising its discretion in denying the motion for attorney's fees. This is particularly so given that we have no idea what occurred during the hearing on the special motion to strike and plaintiff's attorney fee request.

Also, the order denying attorney fees must be denied because the record provided by plaintiff is inadequate to conclude the trial court abused its discretion. As the party challenging the denial of attorney's fees, plaintiff has an obligation to provide an adequate record so that we may assess whether the trial court abused its discretion. (*Maria P. v. Riles, supra,* 43 Cal. 3d at pp. 1295-1296; *Vo v. Las Virgenes Municipal Water Dist., supra,* 79 Cal.App.4th at p. 447.) The absence of a record or settled statement precludes a determination that the trial court abused its discretion in denying plaintiff's motion for attorney's fees.

IV. DISPOSITION

The orders under review are affirmed. Plaintiff, Paul T. Wilkes, M.D., shall recover only those costs incurred in connection with the appeal of defendants, Bongo LLC, Jon Taffer and Nicole Taffer. No party shall not recover any costs incurred in connection with defendants' cross-appeal. Any issue concerning allocation of costs on appeal should be resolved pursuant to California Rules of Court, rules 3.1700 and 8.278(c).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J.

KIRSCHNER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.