Filed 12/3/18 Alers v. Bank of America CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALEJANDRO ALERS, SR., Plaintiff and Appellant, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	B285623 (Los Angeles County Super. Ct. No. BC657186)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

Alejandro Alers, Jr., for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Erik Kemp for Defendant and Respondent.

This is the fifth lawsuit appellant Alejandro Alers, Sr. (Alers), has filed concerning an alleged wrongful $4,500 debit to the checking account he maintained with Bank of America, N.A. (the Bank). After his first lawsuit against the Bank failed, Alers filed a succession of cases claiming that the Bank and its outside counsel, Severson & Werson (Severson), engaged in fraud in defending against Alers's claims. The current action, against both the Bank and Severson (collectively, Respondents), is the fourth lawsuit alleging such litigation misconduct.

The trial court granted Respondents' motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16).[1] We affirm. Alers's claims arise from communications in connection with litigation. Such conduct is protected petitioning activity under section 425.16, subdivision (e). This means that to proceed with his lawsuit, Alers was required to show a likelihood that he would succeed on his claims. He failed to do so because the litigation conduct that he challenges was shielded by the litigation privilege (Civ. Code, § 47, subd. (b)(2)) and by the *Noerr-Pennington* doctrine.[2]

---

[1] Subsequent undesignated statutory references are to the Code of Civil Procedure. "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

[2] The *Noerr-Pennington* doctrine is based on the right to petition the government under the First Amendment to the United States Constitution. It originated in cases interpreting the federal antitrust laws to exclude liability for concerted action in connection with petitioning the government. (See *Eastern R. Conf. v. Noerr Motor* (1961) 365 U.S. 127, 136; *Mine Workers v. Pennington* (1965) 381 U.S. 657, 670.) This immunity was later

This lawsuit essentially repackages Alers's claims of fraudulent litigation conduct that Division Seven of this district recently rejected in Alers's appeal of a prior case. (See *Alers v. Bank of America* (Dec. 13, 2016, B266958) 2016 Cal.App.Unpub. LEXIS 9008 (*Alers IV Opinion*).) In that case, the court concluded that Alers's claims of fraud could not support setting aside the judgment in Alers's original lawsuit because the alleged fraud was intrinsic rather than extrinsic. (*Id.* at *12–*17.)

Alers purports to justify his decision to file yet another lawsuit by citing a comment in the *Alers IV Opinion* that Alers claims invited further litigation. His interpretation of that comment is baseless. In its opinion, the court soundly rejected all of Alers's arguments for reversal. The court also affirmed the trial court's award of sanctions against Alers's counsel (his son, Alers, Jr.) for filing a frivolous action. (2016 Cal.App.Unpub. LEXIS 9008 at *26.) While the court reversed the trial court's award of sanctions against Alers personally, nothing in the court's opinion suggested that Alers had any basis to pursue another action against Respondents.

---

applied to "situations where groups 'use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.' " (*BE&K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 525 (*BE&K*), quoting *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 511.) The doctrine applies to claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), title 18 of the United States Code, section 1961 et seq. (*Sosa v. DIRECTV, Inc.* (2006) 437 F.3d 923, 930–933.)

Alers's arguments on this appeal are similarly meritless. This lawsuit should not have been filed and was properly dismissed.

BACKGROUND

1. The Anti-SLAPP Procedure

Section 425.16 provides for a "special motion to strike" when a plaintiff asserts claims 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." (§ 425.16, subd. (b)(1).) Such claims must be stricken "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must show that the challenged claims arise from protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral,* at p. 396.) Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Ibid.*)

Section 425.16, subdivision (e) defines the categories of acts that are in "furtherance of a person's right of petition or free speech." Those categories include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative,

executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1), (2).)

We apply a de novo standard of review to the trial court's order on Respondents' motion to strike. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. Alers's Prior Litigation History[3]

On June 30, 2008, Alers deposited a $600 social security check and withdrew $1,000 from his checking account at the Bank. The Bank later charged a $4,500 debit to Alers's checking account based upon another transaction that occurred around the same time that day. Alers claims that he was not involved in that transaction and that the debit was charged without his consent.

Alers claims that he "filed a fraud claim" with the Bank concerning the debit charge. The Bank allegedly "agreed to return the debited amount" and sent a letter to that effect, but subsequently "for no apparent reason" refused to reverse the debit.

Alers then filed a lawsuit against the Bank. When that suit was unsuccessful, he filed a series of subsequent actions challenging Respondents' litigation conduct. Those actions are summarized briefly below.

a. *Alers I*

Alers filed his initial lawsuit against the Bank on February 16, 2012. The Bank filed a motion for summary judgment supported by a declaration from a Bank litigation

---

[3] The relevant facts concerning Alers's history of litigation against Respondents are set out in detail in the *Alers IV Opinion*. We summarize the facts only briefly here.

specialist. The declaration summarized the Bank's records concerning Alers's transactions on the day of the challenged debit.

The Bank records showed that on June 30, 2008, Alers cashed a check payable to " 'cash' " for $4,500 against his checking account within minutes of his other two transactions. The check was drawn on an account under a different name in a different bank. That bank refused to honor the check because the account on which it was drawn was closed. Pursuant to the terms of Alers's checking account, the Bank charged the $4,500 against Alers's account on July 9, 2008.

The trial court granted the Bank's summary judgment motion, and Alers appealed to the appellate division of the superior court. That court affirmed the judgment on October 18, 2013, on the ground that the appellate record was inadequate to support Alers's claim of error. The court explained that Alers "failed to produce the essential documents which the trial court considered in granting the motion."

b. *Alers II*

Alers subsequently filed an action against the Bank in federal court. That action alleged that the teller who processed Alers's transactions on June 30, 2008, was complicit in using a stolen check from another bank to obtain the $4,500 fraudulently from Alers's account. Alers also alleged that Severson lawyers were aware of the fraud but refused to disclose it to the court in *Alers I*. Alers asserted a claim under RICO.

The district court granted the Bank's motion to dismiss, and the Ninth Circuit Court of Appeals affirmed.

c. *Alers III*

Alers next filed an action in superior court against Severson and the Severson lawyers who represented the Bank in *Alers I*.

The complaint alleged that the lawyers had engaged in fraudulent and frivolous litigation conduct in *Alers I*.

The trial court granted the defendants' anti-SLAPP motion. Division Seven of the Second District Court of Appeal affirmed the trial court's ruling in an unpublished decision. (*Alers v. Wraight* (June 27, 2016, B265070) 2016 Cal.App.Unpub. LEXIS 4823 (*Alers III Opinion*).) The court concluded that the defendants' alleged conduct arose from protected activity under section 425.16, subdivision (e)(1) and (2), and was shielded by the litigation privilege under Civil Code section 47. (*Alers III Opinion*, at *13, *22.)

d. *Alers IV*

Alers filed another action in superior court against the Bank in January 2015. This time Alers sued in equity to set aside the judgment in *Alers I* based upon alleged extrinsic fraud. The trial court sustained the Bank's demurrer without leave to amend, finding that Alers alleged only intrinsic fraud, not extrinsic fraud, because he was not deprived of his opportunity to present his claim in *Alers I*. Division Seven affirmed, concluding that Alers "was neither unaware of [the Bank's] summary judgment motion nor deprived of an opportunity to fully litigate it." (*Alers IV Opinion, supra,* 2016 Cal.App.Unpub. LEXIS 9008 at *17.)

3. Alers's Claims in this Case

Alers's complaint in this case alleges that "[s]ometime after Alers filed his initial lawsuit," the Bank and Severson "entered into an agreement to conspire to defraud Alers out of the $4,500." He alleges that the Bank paid Severson "to create schemes to mislead the court to rule in favor of" the Bank.

Alers alleges 11 schemes, each of which involved alleged fraudulent or misleading representations during prior litigation.

Based on these alleged schemes, Alers asserts nine different causes of action, including a RICO claim as well as claims for mail fraud, wire fraud, and various state law torts.

4. The Trial Court's Ruling

Respondents filed a motion to strike Alers's complaint under section 425.16. The motion argued that all of Alers's claims arise from protected litigation activity, and that Alers could not show a probability of success because Respondents' litigation conduct is protected by the litigation privilege (Civ. Code, § 47) and the *Noerr-Pennington* doctrine.

The trial court granted Respondents' motion on August 24, 2017. The court concluded that each of Alers's causes of action alleged litigation conduct that amounted to protected petitioning activity under section 425.16, subdivision (e). The court also concluded that Alers's "claim based on the June 30, 2008 transaction" in several of his causes of action "is obviously time-barred." With respect to the second step of the anti-SLAPP procedure, the court ruled that Alers could not show a probability of success because he "cannot overcome the litigation privilege."

DISCUSSION

1. Alers's Claims Arise From Protected Conduct

a. *Alers's allegations of litigation misconduct*

As mentioned, each of Alers's alleged schemes challenges Respondents' conduct in defending Alers's various lawsuits. Respondents allegedly (1) filed false documents; (2) asserted improper arguments; (3) made improper redactions; (4) failed to disclose information to the superior court, the Court of Appeal, the federal district court, and the Ninth Circuit Court of Appeals; and (5) made improper evidentiary objections.

Alers's complaint incorporates his general allegations concerning these schemes into all but one of Alers's causes of

action.[4] Each of Alers's causes of action also separately alleges particular litigation conduct.

In *Alers III*, Division Seven held that Alers's claims of litigation conduct against Severson arose from protected activity. As in this case, those claims included allegations that Severson used "inadmissible evidence to support the bank's summary judgment motion"; filed papers that "failed to disclose information that was inconsistent with the bank's theory that Alers had cashed the $4,500 check"; and made "false statements in the course of presenting the bank's defenses." The court concluded that each of the 13 causes of action in the complaint "unquestionably arose from the lawyer defendants' protected petitioning activity within the meaning of section 425.16, subdivision (e)(1) and (e)(2)." (*Alers III Opinion, supra,* 2016 Cal.App.Unpub. LEXIS 4823 at *13.)[5]

The decision in *Alers III* is dispositive with respect to the identical litigation conduct alleged in this case. (See *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 724–725 (*Pacific Mutual*) ["it is settled that even though the causes of action be

---

[4] Whether by design or not, Alers did not incorporate these general allegations into his fifth cause of action for "conversion." However, that cause of action independently alleges litigation conduct: "The intrinsic fraud activities by [Severson], at the MSJ hearing were also conversion by wrongful acts which resulted in the conversion of the $4,500."

[5] We cite the court's unpublished opinion in that case pursuant to California Rules of Court, rule 8.1115(b)(1), which permits citation of unpublished opinions when relevant under the doctrines of res judicata or collateral estoppel.

different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination"].) Although Alers's complaint in this case also alleges additional litigation misconduct in connection with the *Alers III* and *Alers IV* litigation, the same reasoning applies.

All of Alers's claims of litigation misconduct arise from Respondents' right of petition under section 425.16, subdivision (e). A " 'cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' " (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056, quoting *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 648.) Protected litigation activity includes conduct by attorneys. " ' "Under the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, *all* communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." ' " (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113 (*Optional Capital*), quoting *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210.) Thus, all of the conduct that Alers alleges concerning false or misleading communications in prior litigation is protected under section 425.16, subdivision (e).

b. *Alers's allegations concerning the $4,500 debit*

As Respondents acknowledge, portions of Alers's complaint also refer to the Bank's allegedly wrongful $4,500 debit to his account that led to Alers's initial claim. That conduct was not

connected to any litigation and is not protected under section 425.16, subdivision (e).[6]

Courts have taken different approaches to identifying the permissible scope of an anti-SLAPP motion when a plaintiff alleges both protected and unprotected conduct in support of his or her claims. Division One of this district has held that where a defendant moves to strike a plaintiff's entire complaint and the plaintiff has not specifically asked for relief based upon unprotected conduct alleged in the complaint, a court may look to the "gravamen" of the plaintiff's claim to determine if the claim arises from protected activity. (See *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 589–590; *Optional Capital, supra,* 18 Cal.App.5th at p. 111–112 & fn. 5; see also *Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 886 [under our Supreme Court's decisions in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062–1064, and *Baral, supra,* 1 Cal.5th at pp. 394–395, "a court must continue to analyze whether the allegations of protected activity within each 'claim' are incidental or whether the principal thrust of the claim triggers anti-SLAPP protection"].) In contrast, in *Sheley v.*

---

[6] As mentioned above, the trial court observed that claims based on this alleged conduct in 2008 were "obviously time-barred." Whatever relevance the statute of limitations might have to Alers's attempt to show probable success on the merits in the second step of the anti-SLAPP analysis, that issue is not relevant to whether Alers's claims arise from protected activity under step one. Thus, we must consider whether the Bank's alleged conduct in 2008 concerning the $4,500 debit supports any claim in Alers's complaint.

Harrop (2017) 9 Cal.App.5th 1147, 1169, the Third District Court of Appeal rejected any use of a " 'gravamen' " analysis to identify the claims arising from protected conduct on the ground that such an approach is inconsistent with our Supreme Court's decision in *Baral, supra,* 1 Cal.5th at page 394. (See also *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48–49 [considering only particular allegations of protected conduct in step two of the anti-SLAPP analysis where the defendants moved to strike specific allegations within causes of action that also contained allegations of unprotected conduct].)

We need not consider this issue, as we agree with Respondents that Alers has forfeited any argument that allegations of unprotected conduct in his complaint independently support any of his claims. He did not make such an argument in the trial court and has not presented one in this court. Indeed, Alers expressly *disclaims* any such contention in his reply brief on appeal, apparently with the goal of distinguishing the claims in this case from his claims concerning the alleged wrongful debit in 2008 that have already been adjudicated against him. In his reply brief, Alers asserts that the "gravamen" of this lawsuit is "based on the alleged misconduct by the Respondents which began at the MSJ hearing in 2013." He explains even more specifically that "[t]he present lawsuit is based on the Respondents' separate and independent false statements at the MSJ hearing in 2013 that gave rise to new independent causes of action which does not anyway [*sic*] interfere with the first amendment right of petition of the Respondents in their 2008 factual claims." Alers has therefore forfeited any claim that the trial court erred in striking his entire complaint based upon Respondents' anti-SLAPP motion.

c. *Alers's interpretation of section 425.16, subdivision (b) and the* Alers IV Opinion

Alers argues, without benefit of logic or authority, that the litigation-related conduct he alleges against Respondents as the basis for his claims in this case was not protected under section 425.16, subdivision (e) because it was not at issue in his *original* lawsuit against the Bank. He argues that "the alleged false statements made by the Respondents were not under review by the trial court in the initial lawsuit in 2012," which concerned "the bank activity that occurred on June 30, 2008." Of course that is true, as Alers had not yet asserted any claims based upon Respondents' alleged conduct in that litigation, and Respondents' alleged conduct in subsequent litigation had not yet occurred. But Alers chose to make all of that conduct the basis for his damage claims *in this case*. Alers's contention that section 425.16, subdivision (e) does not apply to claims asserting wrongful litigation conduct simply because a court in prior litigation did not anticipate those claims is nonsensical.

Alers attempts to ground his argument in the language in section 425.16, subdivision (e)(2), protecting statements or writings "made in connection with an issue *under consideration or review* by a . . . judicial body." (Italics added.) Alers argues that "in *Alers I*, the court did not review the alleged misconduct of the Respondents in the MSJ hearing in 2013 and subsequent facts that occurred in 2015 and 2016." Again his argument is nonsensical. Of course the trial court in *Alers I* did not "review" claims that had not yet been made, or consider the propriety of conduct that had not yet occurred. But Respondents' alleged wrongful litigation conduct *did* concern matters that were "under . . . review" in the cases in which that conduct allegedly occurred.

Respondents' alleged conduct was therefore protected under the express language of section 425.16, subdivision (b).

Alers also argues that Respondents' conduct was not protected under section 425.16, subdivision (b) because Division Seven's opinion in *Alers IV* somehow provided Alers with license to file this lawsuit. Alers bases his argument on a comment in the court's opinion referring to Alers's "as-yet-untried allegations of litigation-related misconduct." (*Alers IV Opinion, supra,* 2016 Cal.App.Unpub. 2016 LEXIS 9008 at *24.) From this comment, Alers draws the conclusion that the "Court of Appeal appeared to provide Alers with the opportunity to file a subsequent lawsuit to litigate these alleged false statements."

That conclusion is baseless. The court made that comment while explaining why it was reversing the trial court's award of monetary sanctions against Alers. The court observed that, contrary to the trial court's conclusion, Alers had not relitigated exactly the same issues in successive lawsuits. Whereas *Alers I* challenged the Bank's action in debiting Alers's account, subsequent actions "challenged the litigation-related conduct" of the Bank and its counsel "and were not attempts to relitigate the original contract claim." (*Alers IV Opinion, supra,* 2016 Cal.App.Unpub. LEXIS 9008 at *24.) The court noted that *Alers IV* "repeated those as-yet-untried allegations of litigation-related misconduct and sought to set aside the final judgment in the original action based on extrinsic fraud, a valid legal theory." (*Ibid.*) The court concluded that although "the current action may be objectively unreasonable," the litigation history did not show that it was filed for an "improper purpose." (*Id.* at *24–*25.) Nothing in this discussion indicated that the court anticipated or approved yet another case challenging Respondents' litigation conduct.

Division Seven's *holdings* in *Alers IV* also preclude any reasonable inference that the court intended to recognize or create any exception to the finality of the judgment in that case or in any of the previous cases that Alers filed. The court affirmed the trial court's dismissal of Alers's claims. (*Alers IV Opinion, supra,* 2016 Cal.App.Unpub. LEXIS 9008 at *26.) The court also affirmed the trial court's award of sanctions against Alers, Jr., under section 128.7 for filing a frivolous action. (*Id.* at *21–*22.) In deciding the sanctions issues, the court also noted that, in Alers' two prior cases, "the courts, including this one, held, even if the alleged misconduct did take place, the actions were absolutely privileged—by the *Noerr-Pennington* doctrine in the federal case and by Civil Code section 47, subdivision (b), in [*Alers III*]—and thus not a viable ground for Alers's liability claims." (*Id.* at *24.) In light of these findings, the court's passing comment that Alers's claims of litigation misconduct were "as-yet-untried" was clearly not a suggestion that those claims *could* be tried in a subsequent case.

2. Alers Failed to Show a Probability that He Would Prevail on His Claims

In *Alers IV*, Division Seven also held that Alers could not show a probability of success under step two of the anti-SLAPP procedure because his claims were barred by the litigation privilege under Civil Code section 47, subdivision (b). (*Alers III Opinion, supra,* 2016 Cal.App.Unpub. LEXIS 4823 at *20.) That holding is dispositive for the same allegations of litigation misconduct that Alers asserts in this case. (See *Pacific Mutual, supra,* 44 Cal.2d at p. 724.)

The litigation privilege also applies to Alers's similar allegations of misconduct concerning the subsequent litigation in *Alers III* and *Alers IV*. Civil Code section 47, subdivision (b)

creates an absolute privilege for communications in a "judicial proceeding" that applies to all tort claims other than for malicious prosecution. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 211–212 (*Silberg*).) The privilege applies broadly to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg,* at p. 212.) The privilege also applies to communications that are alleged to be false or misleading because relevant information was withheld. (See *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1299 [privilege applied to allegations that a party concealed liability by instructing a witness to lie].)

The litigation misconduct that Alers alleges all fall within the scope of the litigation privilege. Each of his 11 alleged "schemes" concerns Respondents' alleged false or misleading conduct in defending against his prior litigation. The alleged schemes consist of (1) filing a false declaration claiming personal knowledge; (2) filing a misleadingly redacted deposit agreement; (3) presenting inadmissible evidence in a summary judgment motion; (4) falsely challenging the authenticity of evidence that Alers presented; (5) refusing to disclose Respondents' "intrinsic fraud behavior" affecting the summary judgment proceedings in subsequent appellate briefs and during oral argument; (6) failing to disclose Respondents' intrinsic fraud in a motion to dismiss in federal district court in *Alers II*; (7) refusing to disclose the intrinsic fraud in Respondents' appellate brief in the Ninth Circuit Court of Appeals in *Alers II*; (8) failing to disclose the intrinsic fraud in pleadings filed in the superior court in *Alers III*; (9) refusing to disclose the intrinsic fraud in briefing and

argument on appeal in *Alers III*; (10) requesting that the trial court designate Alers as a "vexatious litigant"; and (11) filing a motion for sanctions against Alers in the Court of Appeal.

Alers claims that the litigation privilege does not apply to his claims in this case because those claims are not "derivative" of the claims in *Alers I*. He similarly argues that the *Alers I* court did not review "the alleged acts of misconduct perpetrated by the Respondents and their attorneys in 2013 and later."

Although unclear, Alers's contention apparently is that the litigation privilege applies only in an action that is the same or similar to the action in which the challenged communications occurred. That argument is a distortion of Civil Code section 47, subdivision (b), and the cases interpreting it. The litigation privilege applies to communications in "any . . . judicial proceeding." (Civ. Code, § 47, subd. (b).) Our Supreme Court has explained that the purpose of the privilege "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently *by derivative tort actions*." (*Silberg, supra,* 50 Cal.3d at p. 213, italics added.) The court clearly used "derivative tort actions" in this context to describe *subsequent* litigation seeking relief based upon an opponent's conduct in a prior lawsuit. Indeed, those were the facts that the court considered in *Silberg* in holding that the litigation privilege applied. (*Id.* at pp. 210–211.) Those are also the facts here.

The court in *Silberg* explained that the litigation privilege "places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." (*Silberg, supra,* 50 Cal.3d at p. 214.) An "unending roundelay" of

litigation is a fair description of what has occurred here. An initial action concerning the propriety of a $4,500 bank charge has spawned four subsequent lawsuits, including this one, challenging conduct that occurred in the initial litigation as well as the lawsuits that followed. Whether the result in the initial action was fair or unfair, Alers's claims based on alleged fraudulent and misleading conduct in that and subsequent litigation are clearly barred by the litigation privilege.

Without citation to any authority, Alers claims that the litigation privilege does not apply to his RICO claim. We need not consider this argument, as Alers's RICO claim is also barred under the *Noerr-Pennington* doctrine.

Alers argues that the *Noerr-Pennington* doctrine does not apply to litigation claims that are no more than a sham. (See *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1161.) Even assuming that the "sham" exception applies to particular alleged false statements made in defending a lawsuit (a proposition that is not settled),[7] Alers may not rely on that exception here for several reasons.

First, the judgment in *Alers II* precludes Alers from arguing the sham exception with respect to the alleged fraudulent litigation misconduct concerning *Alers I*. Alers litigated that issue in the district court and lost. The district court's ruling was affirmed in the Ninth Circuit. Collateral estoppel precludes Alers from rearguing that issue in this case. (See *Pacific Mutual, supra,* 44 Cal.2d at p. 724.)

---

[7] (See *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 967–968 (*Gallegos*).)

Second, Alers failed to provide any evidence in response to Respondents' anti-SLAPP motion showing that the sham exception applies to any of Respondents' alleged litigation conduct. A party attempting to prove that a litigation claim was a "sham" faces a high hurdle. A litigation claim may only be considered a sham if it is both "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits *and* subjectively motivated by an unlawful purpose." (*Gallegos, supra,* 158 Cal.App.4th at p. 968, citing *BE&K, supra,* 536 U.S. at p. 526.)

A plaintiff opposing an anti-SLAPP motion may not simply rely upon the allegations of his or her complaint to show a probability of success, but must provide evidence that would be admissible at trial. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) That evidence must establish "a prima facie showing of facts that would support a judgment in plaintiff's favor." (*Id.* at p. 211.)

In opposing Respondents' anti-SLAPP motion, Alers submitted only copies of the *Alers IV Opinion* and the district court's summary judgment ruling in *Alers II*. He did not provide any evidence to support his current claim that Respondents' communications in prior litigation were objectively baseless. His opposition memorandum did not even mention the sham exception in response to Respondents' argument that the *Noerr-Pennington* doctrine applied. Alers failed to meet his burden below, and he therefore may not rely on the sham exception on appeal.

3. Sanctions

On its own motion, this court may impose sanctions "on a party or an attorney" for taking a frivolous appeal and for

committing "any other unreasonable violation" of the California Rules of Court. (Cal. Rules of Court, rule 8.276(a)(1) & (4); Code Civ. Proc., § 907.) We provided Alers's attorney, Alers, Jr., with notice that we were considering imposing sanctions in this case based upon: (1) pursuing an appeal that is frivolous; and (2) including misrepresentations concerning the appellate case history in the Civil Case Information Statement that he filed pursuant to California Rules of Court, rule 8.100(g)(1). Alers, Jr. filed a written response. We have considered both that response and also his argument at the hearing on this matter. We now order sanctions in the amount of $2,000 on both grounds identified in the court's notice, to be paid by Alers, Jr.

A frivolous appeal is one that "indisputably has no merit" when considered under an objective standard. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–650.) The issue is whether "any reasonable attorney would agree that the appeal is totally and completely without merit." (*Id.* at p. 650.)

This appeal is frivolous under that standard. The indisputable lack of merit to Alers, Jr.'s arguments is apparent from the discussion of those arguments in the body of this opinion. Further, Alers, Jr., filed this appeal on behalf of his client against a background of four previous unsuccessful lawsuits that: (1) resolved Alers's claim concerning the allegedly wrongful $4,500 debit against him on the merits; (2) rejected a RICO claim that was indistinguishable from the one he asserts in this case; (3) rejected nearly identical claims of litigation misconduct on the ground that the challenged conduct was absolutely privileged; and (4) upheld an award of sanctions against Alers, Jr., for filing a previous frivolous action arising from the same events. Moreover, any reasonable attorney would find meritless Alers, Jr.'s asserted reason for filing this lawsuit,

which is based on a distorted and irrational interpretation of a passing comment in a prior appellate opinion.

In addition to pursuing a frivolous appeal, Alers, Jr., failed to provide accurate information in the Civil Case Information Statement (Statement) that he filed in this court on October 18, 2017. The Statement is required under California Rules of Court, rule 8.100(g)(1). Part I, section D of the Statement asked: "Is there now, or has there previously been, an appeal, writ, or other proceeding related to this case pending in any California appellate court?" Despite the two prior appeals decided by Division Seven of this appellate district, Alers, Jr., responded to this question by checking the box for "no." Obviously he was aware of the prior appellate opinions in this district in related cases, as he relied upon one of them in arguing (nonsensically) that Division Seven authorized this lawsuit.

The administrative staff of this court relies upon counsel for truthful information concerning case history so that they may assign and process appeals efficiently. Alers, Jr.'s misrepresentation undermined that task.

We therefore order Alers, Jr., to pay sanctions in the amount of $2,000, payable to the Clerk of this court. This amount is well within the scope of sanctions that courts have determined is a reasonable amount as reimbursement for the institutional costs of processing a frivolous appeal. (See *Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1163.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

Attorney Alejandro Alers, Jr., is ordered to pay sanctions in the amount of $2,000, payable to the Clerk of this court within 30 days of the date this court issues its remittitur.

Upon issuance of the remittitur, the Clerk of this court is directed to transmit a copy of this opinion to the State Bar of California. Alers, Jr., is likewise directed to transmit a copy of the opinion to the State Bar. (Bus. & Prof. Code, §§ 6068, subd. (*o*)(3), 6086.7, subd. (a)(3).)

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.