Filed 2/27/14 Kellermeyer Building Services v. Portillo CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KELLERMEYER BUILDING SERVICES, LLC, Plaintiff and Respondent, v. VENANCIA PORTILLO, Defendant and Appellant.	B246089 (Los Angeles County Super. Ct. No. BC468761)

APPEAL from an order of the Superior Court of Los Angeles County. James R. Dunn, Judge. Affirmed.

Law Offices of Justian Jusuf, Justian Jusuf; Law Offices of Sahag Majarian II and Sahag Majarian II for Defendant and Appellant.

Thompson & Knight, David R. Ongaro and Amelia D. Winchester for Plaintiff and Respondent.

Defendant Venancia Portillo was employed by plaintiff Kellermeyer Building Services, LLC. After she left plaintiff's employ, she filed a putative class action against plaintiff asserting various Labor Code violations. During her deposition in the class action, defendant admitted that she told employees whom she supervised that they were not to take breaks. Plaintiff then filed this action for equitable indemnity, claiming defendant was responsible for some of the damages that plaintiff faced in the class action, to the extent that defendant may have violated meal and rest period laws in her capacity as a supervisor. Defendant filed a special motion to strike the complaint, asserting it arose from her protected activity of prosecuting the class action. The trial court denied the motion, finding the gravamen of the complaint was not the filing of the class action, but defendant's conduct as a supervisor.

On appeal, defendant complains that employers facing wage and hour claims have resorted to a "new aggressive litigation tactic" to "intimidate employees" by suing them for equitable indemnity. According to defendant, "[t]he anti-SLAPP statute was designed precisely to protect litigants such as those employees petitioning in court for redress from these types of coercive litigation tactic[s]." However, the anti-SLAPP statute does not protect against oppressive litigation tactics, unless the claims asserted "arise[] from" "act[s] . . . in furtherance of the . . . right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).)[1] We agree with the trial court that this lawsuit does not arise from protected activity and affirm the order below.

BACKGROUND

Plaintiff provides janitorial services to retail and commercial clients throughout the United States. Defendant was employed by plaintiff as a janitor, and was promoted to supervisor. After defendant stopped working for plaintiff, she filed a putative class action alleging violations of the Labor Code. She claimed plaintiff failed to pay overtime

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

wages, failed to provide meal and rest breaks, and failed to pay wages upon termination, among other violations. When defendant was deposed in the class action, she admitted she told employees she supervised they could not take meal breaks. She also admitted telling these employees they were not free to take restroom breaks.

Once plaintiff discovered this conduct, it filed this action against defendant, seeking equitable indemnity. Specifically, plaintiff alleged that "[d]efendant, for her own benefit and not [plaintiff's], either knowingly failed to instruct the workers she supervised to take their rest and meal breaks, or that she knowingly instructed the workers she supervised not to take their rest and meal breaks." The complaint also alleged that defendant is "liable to [plaintiff] for any portion of the loss or expense (including its attorneys' fees and costs or any judgment) incurred in [the class action] as a result of defendant's wrongful conduct."

Defendant filed a special motion to strike the complaint under section 425.16, contending it arose from her protected petitioning activity. Plaintiff countered that its complaint was not based on defendant's litigation conduct, but rather on acts she committed as a supervisory employee, i.e., misconduct committed before she filed the class action. The trial court found that defendant failed to make a prima facie showing that the complaint arose from protected activity. The trial court concluded the claim for equitable indemnity was based on defendant's conduct as a supervisor, and the fact that plaintiff discovered the misconduct in a deposition taken in the class action did not bring the claim within the anti-SLAPP statute.[2]

DISCUSSION

A defendant may bring a special motion to strike any cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under

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[2] Plaintiff sought attorney fees, contending defendant's anti-SLAPP motion was frivolous. (§ 425.16, subd. (c)(1) ["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"].) The trial court denied the motion. Plaintiff does not challenge this ruling in this appeal.

the United States Constitution or California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) When ruling on an anti-SLAPP motion, the trial court uses a two-step process. First, it looks to see whether the moving party has made a prima facie showing that the challenged causes of action arise from protected activity. (*Ibid*.) Second, if the moving party meets this threshold requirement, the burden shifts to the other party to demonstrate a probability of prevailing on the claims. (*Ibid.*; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) In making these determinations, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) Our review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

The moving party has the burden of making a prima facie showing that one or more causes of action arise from an act in furtherance of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subd. (e); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) The motion must be denied if the required prima facie showing is not made. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80 (*City of Cotati*).) Statements made in litigation, or in connection with litigation, are protected by section 425.16, subdivision (e). Courts have taken a fairly expansive view of what constitutes litigation-related activity for purposes of section 425.16. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.)

When a cause of action involves both protected and unprotected activity, the court looks to the gravamen of the claim to determine if the claim is a SLAPP. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) Protected conduct which is incidental to the claim does not fall within the ambit of section 425.16. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; *Peregrine, supra*, at p. 672.) Where the protected activity will only be used as evidence in the case, and no claim is based on it, the protected activity is only incidental to the claims. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809-810.) Determining the gravamen of the claims requires examination of the specific acts

of alleged wrongdoing and not just the form of the claim. (*Peregrine, supra,* at pp. 671-673.)

In making a prima facie showing, it is not enough to establish that the action was triggered by or filed in response to or in retaliation for a party's exercise of petitioning rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*); *City of Cotati, supra,* 29 Cal.4th at pp. 76-77.) Moreover, "a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic." (*City of Cotati,* at p. 78.)

A claim for equitable indemnity requires proof that the same harm for which plaintiff may be held liable is properly attributable in whole or in part to the defendant. (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1445, fn. 7.) Defendant contends that plaintiff "filed this lawsuit *because of* [defendant's] activities in petitioning for redress on a class-wide basis in [the class action]." Although plaintiff's complaint makes numerous references to defendant's class action, and seeks indemnification for damages incurred in that action, the claim for equitable indemnity does not arise from defendant's litigation conduct. Rather, the basis of the complaint is that defendant violated the labor laws as a supervisory employee, before she filed the class action. Evidence of the class action is relevant to prove how plaintiff discovered the unlawful conduct, causation and damages, but the equitable indemnity claim is not based on defendant's exercise of her right to sue plaintiff for wage and hour violations.

Defendant's reliance on *Navellier*, *supra*, 29 Cal.4th 82 and *Equilon*, *supra*, 29 Cal.4th 53 is misplaced. In *Navellier*, the plaintiffs sued the defendant in federal court. During the federal action, the parties entered into an agreement that included a release of most claims. When the plaintiffs subsequently amended their complaint in the federal action, the defendant filed counterclaims. The plaintiffs obtained dismissal of some of the counterclaims based on the parties' release. (*Navallier*, at pp. 85-87.) While the federal action was pending, the plaintiffs filed a state case alleging defendant "had committed fraud in misrepresenting his intention to be bound by the Release, so as to induce plaintiffs to incur various litigation costs in the federal action that they would not

have incurred had they known [the defendant's] true intentions." (*Id*. at p. 87.) The plaintiffs also alleged that the defendant "had committed breach of contract by filing counterclaims in the federal action" which were barred by the release. (*Ibid*.) The defendant filed an anti-SLAPP motion, which the trial court denied and the appellate court affirmed.

Our Supreme Court reversed, finding that plaintiffs' claims arose from protected activity. The fraud claim was based on the defendant's "negotiation, execution, and repudiation of the Release" which "limited the types of claims that [the defendant] was permitted to file in the federal action," and the "plaintiffs relied on the Release" when they moved to dismiss the defendant's counterclaims. (*Navellier, supra*, 29 Cal.4th at p. 90.) The defendant's "negotiation and execution of the Release . . . involved 'statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body.' [Citation.]" (*Ibid*.) The plaintiffs' breach of contract claim arose from protected activity because it was based on the defendant's filing of his counterclaims in the federal action. (*Ibid*.) The court concluded that "but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Ibid*.)

In *Equilon*, a consumer group filed a Proposition 65 notice against the successor to two oil companies, alleging the oil companies polluted the groundwater. Equilon filed an action for declaratory and injunctive relief, claiming the notice did not comply with the California Code of Regulations, and had not been properly served. Equilon also sought an injunction barring the consumer group from filing a Proposition 65 enforcement action. The consumer group moved to strike Equilon's complaint. The court concluded that the pleadings and affidavits established that Equilon's actions arose from the act of filing a Proposition 65 notice and was therefore subject to a motion to strike. (*Equilon*, 29 Cal.4th at p. 67.)

Here, defendant claims that "but for" her class action complaint, plaintiff's claim for indemnity would have no basis. We recognize that plaintiff discovered defendant's misconduct at defendant's deposition in the class action, and we agree it is unlikely

plaintiff can obtain equitable indemnity without proof of damages sustained in the class action caused by defendant having denied breaks to the employees she supervised. However, the alleged damages were not caused by defendant's protected activity involving speech or petitioning the courts, but were caused by defendant's violation of the wage and hour laws that exposed plaintiff to classwide liability on a respondeat superior basis. The gravamen of the indemnity claim is that, to the extent plaintiff is damaged by defendant's lawsuit, defendant's acts as a supervisor caused a portion of those damages. Defendant's misconduct as a supervisor is not protected activity under section 425.16, subdivision (e). Although the filing of defendant's class action triggered plaintiff's indemnity claim, and defendant's admissions during discovery in the class action may be used as evidence, this lawsuit is not *based on* defendant's litigation activity.

City of Cotati, *supra*, is instructive. In that case, mobile park owners sued the city in federal court, challenging the city's mobile home rent stabilization ordinance. In response to the federal action, the city filed a state court action "to gain a more favorable forum in which to litigate the constitutionality" of the ordinance. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 72-73.) The trial court concluded the state court lawsuit was a SLAPP, as it was filed in response to the federal action. The Court of Appeal reversed, and our Supreme Court affirmed the reversal, holding the city's lawsuit legally "arose from" the parties' underlying dispute over the constitutionality of the statute, and not the earlier litigation. (*Id*. at pp. 79, 81.)

In deciding whether this lawsuit is a SLAPP, we do not consider plaintiff's motive for filing its complaint, or the practical consequences (such as discouraging defendant's petitioning activity) that may result from its filing. (*Equilon*, *supra*, 29 Cal.4th at p. 66 [the subjective intent of the plaintiff to chill protected activity is irrelevant]; *Navellier*, *supra*, 29 Cal.4th at p. 89; *City of Cotati*, *supra*, 29 Cal.4th at pp. 76-77.) If we were to adopt defendant's reasoning, every counterclaim for indemnity from litigation damages would be a SLAPP.

Because defendant failed to show that plaintiff's equitable indemnity claim arose from her protected activities, we do not reach the second prong of the anti-SLAPP analysis of whether plaintiff can show a probability of prevailing on its cause of action.

DISPOSITION

The order is affirmed. Respondent is to recover its costs on appeal.

GRIMES, J.

We concur:

FLIER, Acting P. J.

KUSSMAN, J.*

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