Filed 11/9/18 Geselowitz v. Allstate Insurance Co. CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| DENNIS GERALD GESELOWITZ,<br><br>Cross-complainant and Appellant,<br><br>v.<br><br>ALLSTATE INSURANCE COMPANY et al.,<br><br>Cross-defendants and Respondents. | B278637<br><br>Los Angeles County Super. Ct. No. BC570835 |

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Tucker Ellis and Marc R. Greenberg; Benedon & Serlin, Douglas G. Benedon and Kelly R. Horowitz for Cross-complainant and Appellant.

Knox Ricksen, Thomas E. Fraysse, Gregory D. Pike and Maisie C. Sokolove for Cross-defendants and Respondents.

## INTRODUCTION

Code of Civil Procedure section 425.16[1] (anti-SLAPP statute) provides a mechanism to resolve, at an early stage of litigation, lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The anti-SLAPP statute allows a defendant to bring a special motion to strike a claim, or portions of a claim, targeted at protected speech or conduct. Once the defendant shows its actions are protected under the anti-SLAPP statute, the plaintiff must then produce prima facie evidence supporting its claim, i.e., must demonstrate a reasonable probability of success. If the plaintiff fails, the claim will be dismissed.

Dennis Gerald Geselowitz, an attorney, appeals the trial court's order granting in part the special motion to strike his cross-complaint brought by cross-defendants Allstate Insurance Company (Allstate) and attorney Richard DiCorrado (collectively, respondents). In the underlying action, Allstate filed a qui tam complaint alleging Geselowitz had participated in an insurance fraud scheme. In response, Geselowitz filed a cross-complaint against respondents containing nine causes of action including abuse of process and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). The cross-complaint generally alleges respondents misused deposition and document subpoenas directed at Geselowitz in three unrelated personal injury cases in which Geselowitz was initially counsel of record but had later withdrawn.

---

[1] All undesignated statutory references are to the Code of Civil Procedure.

The trial court found the conduct at issue—issuing and serving subpoenas—was plainly protected under the anti-SLAPP statute because the alleged misconduct occurred in the course of ongoing litigation. Furthermore, the court concluded Geselowitz could not succeed on the abuse of process claim because respondents' conduct was absolutely protected by the litigation privilege (Civ. Code, § 47, subd. (b)). And because the unfair business practices claim was predicated on the same litigation conduct by respondents, the court concluded that claim was barred by the litigation privilege as well. We agree and affirm.

## FACTS AND PROCEDURAL BACKGROUND

### 1. Allstate's Qui Tam Action Against Geselowitz and His Law Office

In 2015, Allstate filed a qui tam complaint alleging Geselowitz and his eponymous law office were involved in an insurance fraud scheme. According to the complaint, the law office operated from late 2008 to sometime in 2012 and, during most of that time, Geselowitz was employed by a private high school on a full-time basis as the chief accounting officer and general counsel. Geselowitz generally spent only a few hours a week at the law office and knew little about its operations, yet the office submitted hundreds of claims to insurance companies and demanded millions of dollars in connection with those claims. Allstate asserted the law office was in fact owned and managed by a handful of non-lawyers who submitted numerous false insurance claims to Allstate and other insurance companies. The complaint stated causes of action for violation of the California Insurance Frauds Prevention Act (Ins. Code, § 1871.7) and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

**2. Geselowitz's Cross-complaint**

In 2016, Geselowitz filed a cross-complaint against Allstate and DiCorrado asserting causes of action for abuse of process, defamation, breach of contract, fraud, unfair business practices, extortion, racketeering, interference with existing and prospective contractual relationships, and violation of Insurance Code section 790.03. Geselowitz generally alleged Allstate and DiCorrado engaged in a campaign to smear Geselowitz's reputation after Geselowitz successfully represented a family friend in a claim against Allstate and the results of the case were widely published.[2]

With respect to the abuse of process claim, Geselowitz alleged respondents maliciously and wrongfully misused the subpoena process. According to the cross-complaint, DiCorrado attempted to subpoena Geselowitz's deposition in two personal injury cases: *Lee v. Lee* (Super. Ct. Orange County, No. 30-2012-00619486-CU-PA-CJC) and *Hailu v. Bailey* (Super. Ct. Los Angeles County, No. YC067318). Geselowitz alleged DiCorrado used the deposition subpoenas for "an improper purpose, namely prying into Cross-Complainant's office procedures, in order later to exploit and misstate those procedures and parlay them into an appearance of impropriety, when those were unrelated to the lawsuits in which the process was used." The cross-complaint also includes a reference *to Geselowitz v. Superior Court* (B257528), a writ proceeding arising out of a qui tam action brought by Allstate against Prima Care Medical Group and other healthcare providers (*Allstate v. Prima Care* (Super. Ct. Los Angeles County,

[2] Geselowitz never revealed the name of the case or his client.

No. BC490640)). In that case, Allstate deposed Geselowitz and issued a document subpoena seeking corporate bank records relating to the law office. Geselowitz resisted the subpoena and a different division of this court concluded the subpoena was overbroad because it sought records relating to *all* of Geselowitz's clients.[3]

**3. Respondents' Anti-SLAPP Motion**

Respondents filed a special motion to strike the complaint as a strategic lawsuit against public participation under the anti-SLAPP statute. Respondents noted the conduct at issue—issuing and serving subpoenas in connection with ongoing litigation—falls squarely within the scope of the anti-SLAPP statute. Further, respondents argued, because that conduct is absolutely privileged under Civil Code section 47, subdivision (b), Geselowitz had no chance of success on the abuse of process claim, should it proceed to trial. And, in any event, even if respondents had ulterior motives when they issued and attempted to enforce the subpoenas, the conduct was not wrongful—and therefore is not actionable as an abuse of process.

In opposition to the anti-SLAPP motion, and with respect to the abuse of process claim specifically, Geselowitz did not contend respondents' conduct was unprotected. Instead, he argued the litigation privilege did not apply. Geselowitz noted the trial court quashed the deposition subpoena in *Hailu v. Bailey*, finding the defendant (who was represented by DiCorrado) had

---

[3] We take judicial notice of the court's order under Evidence Code sections 452 and 459. Accordingly, and in light of the applicable de novo standard of review, we conclude any error by the trial court in refusing to take judicial notice of the order was not prejudicial.

not shown the information expected to be learned in Geselowitz's deposition was " 'crucial to the preparation of the case … .' " Further, the trial court concluded Geselowitz's " 'case handling practices [are] irrelevant to the issue of negligence asserted in this action for injury sustained in an automobile accident.' " Geselowitz suggested the same facts were true in *Lee v. Lee*, and then urged that "the litigation privilege must be deemed to be inapplicable because subpoenas were not served to achieve the objects of the litigation or that they do not have some connection or logical relation to the action in question." In the same vein, Geselowitz asserted that because the trial court quashed a portion of the documents-only subpoena in *Allstate v. Prima Care*, Allstate's conduct in seeking those documents had no connection or logical relationship to that action and was therefore not within the litigation privilege.

**4. The Court's Ruling and the Appeal**

The trial court granted respondents' anti-SLAPP motion in part and denied it in part. With respect to the abuse of process claim, the court granted respondents' motion in its entirety. Addressing the first prong of the anti-SLAPP analysis, the court concluded respondents' conduct—attempting to subpoena Geselowitz and his bank records in ongoing litigation—constituted protected activity within the meaning of section 425.16, subdivision (e)(1), which protects statements made in judicial proceedings. The court went on to conclude the litigation privilege also applied to respondents' conduct, thus precluding any possibility of success on the merits of the abuse of process claim. Also, because Geselowitz's unfair business practices claim was predicated on the same conduct at issue in the abuse of

process claim, the court concluded the unfair business practices claim was also barred by the litigation privilege.

Geselowitz timely appeals.

## DISCUSSION

Geselowitz contends the court erred by striking the abuse of process and unfair business practices claims. We disagree.

### 1. Standard of Review

In an appeal from an order granting or denying a motion to strike under section 425.16, the standard of review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

### 2. Legal Principles Regarding the Anti-SLAPP Statute

"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." (§ 425.16, subd. (b)(1).)

Our Supreme Court has clarified the scope of the anti-SLAPP statute: "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure

for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [The Supreme Court has] described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted.)

### 3. The court properly granted respondents' special motion to strike the abuse of process claim.

#### 3.1. First Prong: The conduct at issue—serving subpoenas to compel depositions and production of documents in ongoing litigation—is activity protected under the anti-SLAPP statute.

Section 425.16 provides that an " '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." (§ 425.16, subd. (e).)

Here, Geselowitz predicated his abuse of process claim on respondents' efforts to subpoena his deposition in *Hailu v. Bailey* and *Lee v. Lee*, and his business records in *Allstate v. Prima Care*—activities that are plainly protected under the anti-SLAPP statute. "The gravamen of the [abuse of process] claim is misconduct *in* the underlying litigation. Indeed, that is the essence of the tort of abuse of process—some misuse of process in a prior action—and it is hard to imagine an abuse of process claim that would not fall under the protection of the [anti-SLAPP] statute. Abuse of process claims are subject to a special motion to strike." (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370; and see, e.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056–1057.) As Geselowitz concedes the point, we proceed with our analysis under the second prong.

### 3.2. Second Prong: The abuse of process claim is barred by the litigation privilege.

Under the second prong of the section 425.16 analysis, Geselowitz must demonstrate a probability of prevailing on his claim for abuse of process. We conclude, as the trial court did, that he has failed to meet this burden because his claim is barred

by the litigation privilege under Civil Code section 47, subdivision (b).

The litigation privilege applies "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 v. Anderson* (1990) 50 Cal.3d 205, 212.) " 'The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." [Citation.]' (*Action Apartment* [*Assn., Inc. v. City of Santa Monica* (2007)] 41 Cal.4th [1232,] 1241.) The litigation privilege is interpreted broadly in order to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions. (*Ibid*.) The privilege is absolute and applies regardless of malice. (*Action Apartment*, at p. 1241.)" (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 889, fn. omitted; *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1301.) Respondents argue their service of subpoenas in the context of ongoing litigation is protected under the litigation privilege and therefore bars the abuse of process claim. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 [noting litigation privilege may present a defense plaintiff must overcome to demonstrate a reasonable probability of prevailing]; *Digerati,* at p. 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim"]; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926–927 [noting that where plaintiff's defamation action was barred by Civil Code section 47,

subdivision (b), plaintiff could not demonstrate a probability of prevailing under the anti-SLAPP statute].)

Geselowitz contends the litigation privilege does not apply here because respondents will be unable to establish the third and fourth elements, i.e., he suggests the challenged subpoenas were not issued to achieve the objects of the litigation and/or had no connection or logical relation to the action. Specifically, Geselowitz asserts that "[c]ourts repeatedly determined that Respondents' discovery efforts were unconnected to the cases in which they were undertaken." For example, Geselowitz notes that the trial court quashed his deposition subpoena in *Hailu v. Bailey* "on grounds that his testimony would be utterly irrelevant to the issues raised in a negligence case arising from a car accident." Geselowitz goes on, asserting that the finding of irrelevance by the trial court in *Hailu v. Bailey* is not only binding on this court but also requires us to conclude the subpoena did not "have some connection or logical relation to the action," and therefore does not fall within the scope of the litigation privilege. Geselowitz also claims that DiCorrado's decision to withdraw his deposition subpoena in *Lee v. Lee* effectively constitutes an admission that DiCorrado was seeking irrelevant information. He further notes that Division Eight of this court found Allstate's subpoena to his bank in *Allstate v. Prima Care* to be overbroad.

Geselowitz apparently believes, though he cites no supporting authority, that only litigation activities yielding relevant information are protected by the litigation privilege. In essence, Geselowitz invites us to conclude that any time counsel serves a discovery request later determined to be overbroad or irrelevant by a trial court, counsel would potentially be subject to

tort liability for abuse of process—a rule that would substantially frustrate the purpose of the litigation privilege. To support this breathtaking proposition, Geselowitz directs our attention to two cases, *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134 (*Rothman*) and *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768 (*Argentieri*), neither of which is of assistance to him on this point.

Argentieri was a lawyer whose client sued Facebook, Inc. (Facebook) and its founder Mark Zuckerberg. (*Argentieri, supra*, 8 Cal.App.5th at pp. 772–773.) After the client's lawsuit was dismissed because it was found to be a fraud on the court, Facebook and Zuckerberg sued Argentieri for malicious prosecution. (*Ibid*.) In connection with that suit, Facebook's general counsel sent an e-mail to members of the press describing the malicious prosecution suit and stating Argentieri and others " 'knew [his client's lawsuit] was based on forged documents yet they pursued it anyway.' " (*Ibid*.) Argentieri then sued Facebook, its general counsel, and Zuckerberg for defamation. (*Ibid*.) The trial court dismissed Argentieri's lawsuit under the anti-SLAPP law after finding the litigation privilege barred the defamation claim. (*Ibid*.) The Court of Appeal, however, concluded the litigation privilege did not apply to Facebook's counsel's statement to the press because the statement was designed to advise the public of Facebook's "view of the dispute—which does not further the litigation *itself*. A desire to vindicate a client does not constitute the type of furtherance or connection [to litigation] sufficient for the litigation privilege to apply." (*Id.* at pp. 786–787.)

Geselowitz quotes *Argentieri* for the proposition that " 'the litigation privilege does not insulate statements that do not further the objects of the litigation.' " Although that is an

accurate quotation from the case, it does not support Geselowitz's argument because the conduct at issue here—attempting to use subpoenas to obtain information in the course of ongoing litigation—was plainly part of the litigation process, as opposed to a public statement made in relation to litigation but that was not part of the litigation process itself.

Geselowitz also cites *Rothman*, another case involving statements to the press. There, an attorney was retained to represent a child who had accused Michael Jackson of committing torts against him. (*Rothman, supra*, 49 Cal.App.4th at p. 1138.) Before a suit was filed, but during the attempted negotiations between the attorney and Jackson, the press became aware of a psychological evaluation of the child which contained "sensational" charges against Jackson. (*Ibid*.) In response, Jackson made numerous statements to the press regarding his innocence and accusing the child and his attorney of lying in order to extort money from him. (*Id*. at p. 1139.) The attorney sued Jackson for defamation and other torts but the trial court sustained Jackson's demurrer on the ground that the complaint was barred by the litigation privilege. (*Ibid*.) The Court of Appeal reversed, however, noting that although the statements were "intended to vindicate Jackson" in the eyes of the public, that was insufficient to bring the statements within the scope of the litigation privilege. "While a person's motives for litigating a dispute may include a desire to be vindicated in the eyes of the world—a result which the litigation may achieve—this is not what is meant by the term 'objects of the litigation.' " (*Id*. at p. 1147.) Geselowitz cites *Rothman* for the proposition that "[i]rrelevant discovery efforts, by definition, do not 'function as a necessary or useful step in the litigation process.' " But that issue

was not before the court in *Rothman* and it is unmentioned in the court's opinion.

Aside from quoting a few phrases of marginal relevance from *Argentieri* and *Rothman*, Geselowitz offers no further analysis of these cases. And we see no obvious parallel between the conduct at issue in *Rothman* and *Argentieri*—statements made to the press about pending or ongoing litigation—and the conduct at issue here. We therefore conclude the litigation privilege bars the abuse of process claim.[4]

**4. The court properly granted respondents' special motion to strike the unfair business practices claim.**

Geselowitz also asserts the court erred in striking his claim for unfair business practices in violation of Business and Professions Code section 17200 et seq. But Geselowitz concedes the viability of that claim is predicated entirely on the validity of the abuse of process claim. For the reasons stated *ante*, we conclude the court did not err in striking the unfair business practices claim in its entirety.

[4] Because we conclude the abuse of process claim is barred by the litigation privilege we need not, and do not, address Geselowitz's argument that he established a probability of success on the merits of that claim.

## DISPOSITION

The order granting in part and denying in part respondent's anti-SLAPP motion is affirmed. Allstate and DiCorrado to recover their costs on appeal.

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

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.