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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT J. KULICK,

Plaintiff and Appellant,

v.

LEISURE VILLAGE ASSOCIATION,
INC., et al.,

Defendants and Respondents.

2d Civil No. B281922
(Super. Ct. No. 56-2016-00478277-
CU-DF-VTA)
(Ventura County)

Robert J. Kulick appeals an order of the trial court granting a special motion to strike his cause of action for defamation pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)¹ We affirm.

This lawsuit and a prior lawsuit concern longstanding disputes between Kulick, a resident in a senior planned community, and the community's homeowners' association, the

¹ All statutory references are to the Code of Civil Procedure unless stated otherwise.

directors of the governing board, and the association's attorneys. Kulick published newsletters under an assumed name and circulated them within the community in violation of the homeowners' rules prohibiting anonymous publications. The association later successfully sued Kulick when he interfered with the insurance coverage for the association and the governing board. Kulick then published another newsletter criticizing the lawsuit and accusing the governing board of malfeasance. When the association wrote a response to the newsletter and distributed it to the community, Kulick filed this lawsuit for defamation, among other causes of action.

FACTUAL AND PROCEDURAL HISTORY

Kulick is a resident of Leisure Village, a common interest senior development in Camarillo, consisting of 2,136 homes. Leisure Village Association, Inc. (Association) is the Leisure Village homeowners' association which is governed by a board of volunteer directors (Board). Kulick is a longtime homeowner in Leisure Village and a member of the Association.

From time to time, Kulick published a newsletter entitled "Leisure Village News" (Newsletter), which he distributed to Leisure Village residents. All but one Newsletter was published anonymously under the pseudonym "Joe Byrne." The Newsletters are critical of the Association and the Board, specifically Board affairs and financial management of the Association. At times, the Newsletter has insulted individual Board members and also accused them and the Association's attorneys of unlawful activities and "hate mongering." The anonymous nature of the Newsletter contravenes Rule 2.08 of the

Association's rules and regulations, which prohibits distribution of anonymous publications within the community.²

In November 2013, the Association filed a lawsuit against Kulick, alleging that he had breached the Association's Declaration of Covenants, Conditions, and Restrictions; intentionally interfered with the Association's contractual relationship with its insurers; and created a nuisance. Following a jury trial and post-trial motions, the Association prevailed and received \$129,643.80 damages, consisting of compensatory and punitive damages. Kulick appealed. We affirmed the judgment in *Leisure Village Association, Inc. v. Kulick* (Jan. 17, 2018, B271709) [nonpub.opn.].

In June 2015, Kulick, under the pseudonym Joe Byrne, published and distributed a Newsletter disparaging the then-pending lawsuit against him as based upon perjury, obstruction of justice, and racketeering, among other things. The Newsletter also accused the Association general manager of perjury, the Association attorney of extortion and "hate-mongering tactics," and a Board member of lying and cheating. The Newsletter described the Board election as "rigged," and stated that the Association "may be forced . . . into bankruptcy."

The Association's attorneys then prepared a July 6, 2015, letter response (Letter) to the Newsletter, answering the

² Rule 2.08 provides: "No Owner, Member or Resident shall distribute or post any anonymous document within Leisure Village, and no Owner, Member or Resident shall send any anonymous document via any means to any other Owner, Member or Resident, or to any Member of the Association's Board of Directors or Employed Staff containing threats of physical violence, threatening language, slanderous and or defamatory remarks, etc."

Newsletter's specific accusations. The Letter also discussed aspects of the then-pending lawsuit against Kulick and invited Association members to view the courthouse filings. In particular, the Letter described the recent Newsletter as a "reckless communication" that contained "unfounded, inaccurate and spiteful allegations" regarding the Association, the Board members, employees, and the Association's attorneys. The Letter explained the Association's position in the then-pending lawsuit, the discussions during a court settlement conference, and the Association's success in obtaining a preliminary injunction against Kulick contacting the Association's insurance carriers. The Letter also denied that any Board member was a cheat or a liar or that the Association attorneys have engaged in unlawful conduct during the litigation. The Association distributed the Letter to each member of the Association.

Kulick then brought this lawsuit against the Association, individual Board members, the Association's manager, and the Association's attorneys. His first amended complaint alleges causes of action for defamation, and declaratory and injunctive relief regarding enforcement of rule 2.08 *ante*, footnote 2. Kulick alleges that these six statements within the Association's Letter are defamatory: his 2015 Newsletter was "a reckless publication . . . yet again"; the Newsletter contains "unfounded, inaccurate and spiteful allegations"; the implication that he lied to the court settlement judge; the characterization of Newsletter statements as "malicious [and] devious"; his "unwanted intrusions" to Association members; and the implication that his dissatisfaction with the pending litigation is illegal.

The Association then filed an anti-SLAPP motion pursuant to section 425.16.³ Following written and oral argument by the parties, the trial court granted the anti-SLAPP motion as to the defamation cause of action. The court then dismissed that cause of action with prejudice and awarded attorney fees and costs to the Association and its attorneys. (§ 425.16, subd. (c).)⁴

Kulick appeals and contends that the trial court erred by granting the special motion to strike pursuant to the anti-SLAPP statute. (§ 425.16, subd. (i) [appeal of anti-SLAPP motion].)

On February 16, 2018, the Association filed a request for judicial notice that Kulick had filed a Chapter 13 bankruptcy petition on January 29, 2018. We grant the request. (Evid. Code, §§ 452, subd. (d)(2), 453, 459.) We proceed to decide Kulick's appeal, however, because the automatic bankruptcy stay is not applicable where the debtor commenced the action and later prosecutes the appeal. (*Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1376 [“The automatic stay provision was not intended to prevent debtors from prosecuting actions against others”].)

DISCUSSION

I.

Kulick argues that the anti-SLAPP statute does not apply because the Letter was not communicated “in a place open to the

³ We shall refer to the defendants collectively as "Association," except where clarity demands that we draw a distinction.

⁴ The court also sustained the demurrer of the attorney defendants to the second and third causes of action. It then dismissed those causes of action with prejudice as to the attorney defendants.

public or a public forum in connection with an issue of public interest” (§ 425.16, subd. (e)(3)) or “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.” (*Id.*, subd. (e)(4).) He points out that the trial court, in denying his application for an injunction against enforcement of rule 2.08, ruled that the relationship between homeowners and the Association was one of contract and not one of First Amendment expression.

Section 425.16, subdivision (b)(1) provides that a cause of action “arising from” a defendant’s act in furtherance of a constitutionally protected right of free speech or petition may be struck unless the plaintiff establishes a probability that he will prevail on his claim. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) Section 425.16 “provides a procedure for the early dismissal of what are commonly known as SLAPP suits . . . litigation of a harassing nature, brought to challenge the exercise of protected free speech rights.” (*Fahlen*, at p. 665, fn. 3.) “The anti-SLAPP statute’s definitional focus is not 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.) The anti-SLAPP statute instructs that its provisions are to be “construed broadly” to implement its legislative objectives. (§ 425.16, subd. (a); *Barry*, at p. 321.)

The analysis of an anti-SLAPP motion filed pursuant to section 425.16 is two-fold. (*Barry v. State Bar of California*, *supra*, 2 Cal.5th 318, 321; *Abuemeira v. Stephens* (2016) 246

Cal.App.4th 1291, 1297.) The trial court first decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 774.) If the court finds that a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on his claim. (*Barry*, at p. 320; *Abuemeira*, at pp. 1297-1298.) Only a cause of action that satisfies both prongs of the anti-SLAPP statute is subject to a special motion to strike. (*Barry*, at p. 321.) We independently review the trial court's determination of each step of the analysis. (*Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 412; *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1162.)

The trial court did not err in granting the anti-SLAPP motion because the Letter constitutes protected activity as set forth in section 426.16, subdivision (e)(3): “[A]ny 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.” A statement made by or on behalf of the governing body of a planned development may constitute a “public forum.” (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475 [defamation lawsuit brought by former manager of planned development homeowners’ association against authors of non-official community newsletter].) A writing may be “a public forum in the sense that it [is] a vehicle for communicating a message about public matters to a large and interested community.” (*Id.* at p. 476.) Here the Letter was a communication by the Board, through its attorneys, to approximately 2,100 homeowners in furtherance of the Association government. (*Id.* at p. 478 [widely distributed

writing may constitute a “public forum” where it is a vehicle for open discussion of public issues].)

The content of the Letter was also “an issue of public interest,” i.e., a controversy initiated by Kulick when he distributed the 2015 Newsletter. (§ 425.16, subd. (e)(3).) “Public interest” within the anti-SLAPP statute is broadly defined to include private conduct that impacts a broad segment of society or that affects a community in a manner similar to that of a governmental entity. (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468 [letters written by association’s attorney to plaintiff homeowner concerned ongoing disputes of interest to definable portion of the public, i.e., 523 homeowners/members of association].) Here the challenged communication occurred “in the context of an ongoing controversy, dispute or discussion” and thus “warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance.” (*Ibid.*)

The trial court’s decision regarding Kulick’s application for a preliminary injunction against enforcement of rule 2.08 does not compel a different result. Whether Kulick had a right to anonymously publish the Newsletter in violation of the Association rules is a different issue from whether the Letter is a protected activity within the anti-SLAPP statute.

In any event, the Letter falls within the purview of section 425.16, subdivision (e)(2), any writing “made in connection with an issue under consideration or review by a . . . judicial body.” The Letter discusses the pending lawsuit it filed against Kulick, the Association’s success in obtaining a preliminary injunction

against Kulick contacting the Association's insurers and vendors, and the mandatory settlement conference.

II.

Kulick also argues that he has met the burden of establishing a probability that he will prevail on the merits of his defamation claim. (*Barry v. State Bar of California, supra*, 2 Cal.5th 318, 320.)

For several reasons, Kulick has not met his burden. First, expressions of opinion that do not include or imply false factual assertions do not constitute actionable defamation. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607.) Thus, the Letter's characterization of the Newsletter as "reckless," Kulick's accusations as "spiteful," and the Newsletter as an "unwanted intrusion" are expressions of opinion and not actionable defamation.

Second, the remaining challenged statements in the Letter are privileged pursuant to Civil Code section 47. The litigation privilege of Civil Code section 47, subdivision (b), pertains 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. (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 152.) The litigation privilege extends to communications made before, during, or after trial. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 731 [attorney who is made a defendant based upon statements made on behalf of clients in a judicial proceeding or an issue under review by a court has standing to bring anti-SLAPP motion].) The Letter was written and distributed to the Association's

members during the pendency of the Association's previous lawsuit against Kulick. The Letter discusses the lawsuit and invites the Association members to review the courthouse filings.

The order is affirmed. Respondents shall recover costs.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Kevin De Noce, Judge

Superior Court County of Ventura

Law Offices of Steven Rein, Steven Rein; Robert J. Kulick,
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