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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

BRADFORD D. LUND, Plaintiff and Appellant, v. MICHELLE A. LUND, Defendant and Respondent.	B268798 (Los Angeles County Super. Ct. No. BC558190)

APPEAL from orders of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

Bohm Wildish, James G. Bohm and Cynthia R. Beek for Plaintiff and Appellant.

Loeb & Loeb, David C. Nelson and Amy L. Koch for Defendant and Respondent.

SUMMARY

Plaintiff Bradford D. Lund sued his twin sister, defendant Michelle A. Lund, seeking injunctive relief and damages for the alleged breach of a covenant not to sue. The covenant not to sue was contained in a settlement agreement resolving disputes over the internal affairs of two residuary trusts. Plaintiff sought a preliminary injunction to prevent defendant from continuing to participate as a litigant (and from financially supporting any other litigant) in an ongoing involuntary conservatorship proceeding against plaintiff in Arizona. Defendant brought a special motion to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute. (Code Civ. Proc., § 425.16.)[1]

The trial court denied the preliminary injunction and granted defendant's anti-SLAPP motion, finding plaintiff's complaint arose from protected activity and plaintiff did not meet his burden to demonstrate a probability of prevailing on his claims. We affirm the trial court's orders.

FACTS

Plaintiff and defendant are the grandchildren of Walt Disney. This is one of several lawsuits in which plaintiff and defendant are interested parties. They are beneficiaries of various family trusts, including two trusts created by their late mother, Sharon Lund (Mr. Disney's daughter), one for plaintiff's benefit and one for defendant's benefit. Their father, William Lund, was one of four trustees of each of these two trusts.

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise specified.

In October 2009, two lawsuits were filed by the other three trustees of both trusts seeking, among other things, the removal of William Lund as a cotrustee. Mr. Lund in turn petitioned to have the other three trustees removed.

On September 14, 2010, the parties (the four trustees, plaintiff and defendant) signed a settlement agreement, the terms of which included Mr. Lund's resignation as a cotrustee of the trusts, and (at plaintiff's request) a provision for payment to Mr. Lund from plaintiff's trusts of $500,000 per year for the rest of his life. The terms of the settlement agreement pertinent to this case are the following.

First, the "Litigation" is defined as the two lawsuits filed by the cotrustees in October 2009.

Second, paragraph 1 of the agreement states: "This Settlement Agreement is subject to approval by the Court hearing the Litigation."

Third, paragraph 11 of the agreement contains a covenant not to sue and releases by all the parties, as well as a provision describing conditions under which Mr. Lund would forfeit his right to the payments described in the settlement agreement. Specifically:

The first sentence of paragraph 11 contains the covenant not to sue and the releases. It states:

"Subject to paragraph 12, below [(exclusions from the releases)], [each party] on behalf of themselves and their respective agents, representatives, and spouses, covenants not to sue or file a complaint against another party with any professional association, federal or state regulatory body, law enforcement organization, or licensing organization, and hereby fully, finally and forever releases and discharges each other party

. . . with respect to and from, any and all claims . . . and liabilities of whatever kind or nature in law, equity or otherwise, whether now known or unknown, . . . which the parties, or any of them, now owns or holds, or has at any time heretofore owned or held, or may in the future hold against each other, or any of them, arising out of, grounded upon, or in any way connected with the subject matter of the Litigation."

The second sentence of paragraph 11 describes conditions under which Mr. Lund would forfeit his right to payments under the agreement (such as if his wife, Sherry Lund, were to sue or file a complaint against another party).[2]

Fourth, paragraph 12 of the agreement states, in pertinent part: "For clarity only, and without expanding or limiting the scope of the releases described in paragraph 11, above, those releases do not include the pending guardianship/conservatorship proceeding in Arizona relating to [plaintiff] . . . ."

As we have mentioned, the settlement agreement expressly stated it was "subject to approval by the Court . . . ." Following is a chronology of events occurring after the agreement was signed on September 14, 2010.

On November 1, 2010, the court held a hearing and "ruled from the bench and approved the settlement . . . ." (There is no

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[2] "While [Mr. Lund] and Sherry Lund are living together as husband and wife, if Sherry Lund or any of her children, parents, or siblings, sues or files a complaint against another party with any professional association, federal or state regulatory body, law enforcement organization, or licensing organization, against any of the parties to this Settlement Agreement or any of their attorneys, [Mr. Lund], as an individual, shall forfeit his right to the payment described in paragraph 6, above, and be personally liable for all damages caused by any such suit or filing."

minute order in the record showing the court's action, but the court so stated in a later minute order (in August 2011) ruling on another matter.)

On November 8, 2010, defendant joined an ongoing lawsuit in Arizona (the Arizona proceeding), seeking orders appointing a guardian and conservator for plaintiff. (This is the lawsuit mentioned in paragraph 12 of the settlement agreement, clarifying that it is *not* included in the releases. The Arizona proceeding had been filed the previous year, on October 26, 2009, by plaintiff's aunt and two half sisters. The November 8, 2010 filing was a first amended verified petition.)

On November 12, 2010, the court signed an order granting the parties' petition for approval of the settlement agreement and directing them "to comply with the terms of the Settlement."

On September 19, 2014, almost four years later, plaintiff filed a complaint (this case) for injunctive relief and damages for breach of contract, alleging defendant's joinder in the Arizona conservatorship proceeding breached the covenant not to sue in the settlement agreement. Plaintiff alleged that without defendant's participation in the Arizona proceeding, "it would never have continued because the other petitioners were not willing to fund it." The complaint sought compensatory damages of $3 million in attorney fees for defending the Arizona proceeding, and a permanent injunction preventing defendant from participating in or financially supporting the Arizona proceeding. No summons was served on defendant.

On January 12, 2015, plaintiff filed a first amended complaint, and served the summons on January 13, 2015.

On February 10, 2015, defendant filed her special motion to strike the complaint, contending plaintiff's claims arose from

protected activity. Plaintiff could not show a probability of prevailing, defendant argued, because the Arizona proceeding did not fall within the scope of the covenant not to sue in the settlement agreement. In addition, defendant contended the settlement agreement was not in effect when she joined the Arizona proceeding, and in any event her joinder caused no damages because she would have funded the Arizona proceeding even if she were precluded from becoming a party. Defendant filed a declaration attesting to the last point, as well as a declaration from Kristen Olson (plaintiff's half sister and one of the other petitioners in the Arizona proceedings).

Ms. Olson's declaration stated that she "categorically den[ied]" plaintiff's assertion that " 'the other petitioners were not willing to continue with the [Arizona Protective Proceeding] because they all knew it was without merit . . . .' " The declaration stated Ms. Olson's belief that the Arizona proceeding was "essential to protect Plaintiff," and she "therefore would have continued to prosecute that proceeding even if . . . Defendant had been precluded from joining us as an additional petitioner. And, I would continue to prosecute it even if the Court were to determine that . . . Defendant is precluded from continuing to participate as a petitioner."

Both parties then attempted to transfer the case to probate court or, in the alternative, to Judge Beckloff, who had ruled on other matters involving the parties' trusts while assigned to probate court. On May 7, 2015, the transfer was denied and the matter was returned to Judge Recana, to whom it had initially been assigned.

On July 14, 2015, plaintiff filed an ex parte application for a temporary restraining order and an order shortening time on a

motion for a preliminary injunction. The ex parte application was denied; the court saw "no irreparable harm."

On September 3, 2015, plaintiff filed a motion for a preliminary injunction, seeking the same substantive relief he sought in his complaint: to enjoin defendant from continuing to participate in or financially support other litigants in the Arizona proceeding, directly or indirectly.

Plaintiff filed four volumes of evidence in support of the preliminary injunction motion. Much of it consisted of documents, deposition testimony, trial testimony, pleadings and rulings in the Arizona proceeding and in other cases concerning plaintiff's various trusts and his efforts to obtain distributions being withheld by the trustees of those trusts. Plaintiff's declaration described some of these proceedings and the trusts, and stated he is "unable to freely use my personal assets and income." The declaration stated his defense against the Arizona proceeding had cost him over $3 million, and he "cannot afford to pay my legal bills without the distributions that are being withheld from me" from various trusts, and he worries "about being able to continue defending myself against the [Arizona proceeding] if I can't afford to pay my attorneys."

On October 7, 2015, the trial court denied the preliminary injunction motion. The court found the covenant not to sue was not limited to matters arising out of the Litigation, but that the covenant "does not seem to encompass the Conservatorship Proceeding as [defendant] is not 'suing' [plaintiff]." In addition, the settlement agreement was not approved until after defendant joined as a petitioner in the Arizona proceeding. Further, "[t]he parties were aware of the Conservatorship Proceeding and addressed it in par. 12 as to not affect or limit the general release

but to clarify that the release does not include the Conservatorship Proceeding. If the Conservatorship Proceeding is not included in the release, then it does not make sense that the covenant not to sue would include not participating in the Conservatorship Proceeding." In addition, "Mere joinder could not have caused or does not threaten plaintiff any damage," and "even if [defendant] were barred from being a petitioner, there is nothing in the settlement agreement preventing her from funding it."

The court also found plaintiff did not meet his burden to show irreparable or imminent harm: there was no evidence showing plaintiff's resources were insufficient to provide for his defense; the decision whether a conservatorship was needed was for the Arizona court; plaintiff's arguments assumed that the Arizona court and any conservator (if appointed) would not protect his interests; and the Arizona proceeding had been pending for over six years, with defendant a petitioner for five years. The court also found the relief plaintiff requested was "overbroad and vague."

On November 23, 2015, plaintiff filed his opposition to defendant's anti-SLAPP motion, and defendant thereafter filed a reply. The trial court granted defendant's motion, adopting its tentative ruling. The stated bases for the court's ruling that plaintiff did not show a probability of prevailing on the merits were as stated in the court's ruling denying the preliminary injunction.

Plaintiff filed timely notices of appeal from both orders, and the two appeals were consolidated.

DISCUSSION

1. The SLAPP Motion

a. The legal principles

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 the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) As relevant here, an " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' " includes "any written or oral statement or writing" that is "made before a . . . judicial proceeding" or "made in connection with an issue under consideration or review by a . . . judicial body . . . ." (*Id.*, subd. (e)(1) & (2).)

When ruling on an anti-SLAPP motion, the trial court employs a two-step process. It first looks to see whether the moving party has made a threshold showing that the challenged causes of action arise from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the moving party meets this threshold requirement, the burden then shifts to the other party to demonstrate a probability of prevailing on its claims. (*Ibid.*) 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); *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 ["In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."].)

Our review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

b. This case

As we observed at the outset, we conclude defendant made the necessary threshold showing that plaintiff's complaint arose from protected activity, and plaintiff failed to produce evidence legally sufficient, if credited, to support a judgment in his favor.

i. The first prong: protected activity

The Supreme Court has explained clearly how courts are to determine whether a claim arises from protected activity. "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*).) *Park* explains: "Critically, '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.' " (*Id.* at p. 1063.) The fact that a lawsuit is filed after protected activity occurred does not mean the action arose from protected activity. "Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' " (*Ibid.*) "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*)

Here, the basis for both causes of action – for breach of contract and for injunctive relief – arise from defendant's joinder in the Arizona conservatorship proceeding. That was protected activity. " '[B]ut for the [Arizona] lawsuit and [defendant's] alleged actions taken in connection with that litigation,

[plaintiff's] present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's "arising from" prong.' " (*Park, supra,* 2 Cal.5th at p. 1063, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 (*Navellier*).)

That leaves little more to be said on the point. Plaintiff insists, however, that defendant "waived [her] right to anti-SLAPP protection," quoting *Navellier*'s statement that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches the contract." (*Navellier, supra,* 29 Cal.4th at p. 94.) Plaintiff misreads *Navellier*. The court was simply explaining that the "inclusion of a merits prong to the statutory SLAPP definition . . . preserves appropriate remedies for breaches of contracts involving speech by ensuring that claims with the requisite minimal merit may proceed." (*Id.* at p. 94; see *ibid.* ["[n]or will our . . . construction of the anti-SLAPP statute unduly burden plaintiffs alleging breach of an agreement not to sue"; "any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case' "].)

Plaintiff's further contention that defendant's conduct in joining the Arizona lawsuit was "illegal as a matter of law," because it allegedly violated the court order approving the settlement agreement, is likewise without merit. "[C]onduct must be illegal *as a matter of law* to defeat a defendant's showing of protected activity. The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality

to defeat an anti-SLAPP motion at the first step." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424.) This is not such a case.

ii. The second prong: probability of prevailing on the merits

As *Navellier* tells us, "no cause of action qualifies as a SLAPP merely because the defendant's actions conceptually fall within the ambit of the statute's initial prong." (*Navellier, supra,* 29 Cal.4th at p. 95.) In the second step of a SLAPP analysis, we determine whether plaintiff has produced evidence demonstrating a probability of prevailing on his claims. We conclude he has not.

To prevail on a breach of contract claim, the plaintiff must prove the contract, his performance, defendant's breach, and the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) Plaintiff cannot establish defendant breached the covenant not to sue in the settlement agreement. Further, even assuming defendant's participation in the Arizona proceeding breached the covenant not to sue, there is no evidence of resulting damages.

A. No breach of contract

There was no breach of the covenant not to sue. Here, this point is a matter of contract interpretation that we decide as a matter of law.

The governing principles are settled. " 'The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting.' " (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979.) " '[T]he parties' intention is determined from the writing alone, if possible. [Citation.]' [Citation.] 'The words of a contract are to be

understood in their ordinary and popular sense . . . .' " [Citation.] [¶] 'When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" to the interpretation urged by the party. If it is not, the case is over. [Citation.] If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean?' [Citations.] . . . When no extrinsic evidence is introduced or the extrinsic evidence was not relied on by the trial court or is not in conflict, we independently construe the contract." (*Id.* at pp. 979-980.)

In this case, there are no relevant disputed facts, and plaintiff offered no evidence the parties intended a meaning other than the usual meaning of the terms they used to express their agreement. Thus the fundamental issue is whether the words "covenants not to sue" mean (1) the parties agreed not to sue each other, at any time in the future and "for any reason" (as plaintiff claims), or (2) the parties agreed not to sue each other at any time over any matter "arising out of, grounded upon, or in any way connected with the subject matter of the Litigation" (as defendant claims, and as expressly stated in the parties' releases of each other).

In our view, the ordinary meaning of the words the parties used to express their agreement requires the conclusion that the covenant not to sue, like the release, is confined to claims related to the subject matter of the litigation being settled. That is, the words are not "reasonably susceptible" to the meaning plaintiff now seeks to assign to them: that the parties agreed never to sue one another "for any reason." That is not the nature of a covenant not to sue.

A covenant not to sue is among those provisions "typically contained in the settlement agreement . . . ." (Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, ch. 31, § 31.36[5].) "[A] covenant not to sue is not a present abandonment or relinquishment of a right or claim, but merely an agreement not to enforce an existing cause of action." (Matthew Bender Practice Guide: California Pretrial Civil Procedure, ch. 37, § 37.54[2].) A covenant not to sue and a release "have the same effect, which is that there can be no further recovery from the settling defendant [citation]. Thus, a covenant not to sue operates as a complete bar to the underlying litigation [citation]." (*Ibid.*)

In *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, the court explained that the covenant not to sue was developed because of the now-abrogated rule that a settlement with one joint tortfeasor released the others. The court stated: "In order to avoid this harsh rule, the covenant not to sue was developed. These covenants were not releases, but rather promises not to prosecute a lawsuit against the covenantee. Since the 'language is of covenant and indemnity, not of release' [citation], it would not preclude suit against other tortfeasors. [Citation.]" (*Id.* at p. 298.) Further: " 'the distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement . . . .' " (*Ibid.*)

In short, the covenant not to sue developed in the context of, and ordinarily refers to, specific litigation underlying a settlement. Nothing in the cases plaintiff cites suggests otherwise. (See *Leung v. Verdugo Hills Hospital* (2012)

55 Cal.4th 291, 297, 301 (*Leung*) [repudiating the common law release rule and repeating that the distinction between a release and a covenant not to sue is " 'entirely artificial' " and both have the result that " 'there is no further recovery from the defendant who makes the settlement' "]; *Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 712, 713, overruled on another ground in *Leung, supra,* 55 Cal.4th at p. 302 & fn. 1 [agreement was neither a release nor a covenant not to sue, but was "closely akin to a covenant not to sue"; the plaintiff agreed "he would not levy execution on any property of the covenantee or make demand upon him for payment of the judgment"]; *Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 551, 552 [agreement not to execute a judgment is similar to a covenant not to sue, and may be given the effect of an outright release]; *Smith v. MacDonald* (1918) 37 Cal.App. 503, 505 [" 'it is reasonable to release the remedies of a debt, not itself released, which is done in covenants not to sue' "].)

Further, plaintiff offered no evidence to suggest the parties agreed never to sue each other "for any reason." And other provisions of the settlement agreement plainly support a contrary conclusion. As the trial court pointed out, the Arizona proceeding was expressly excluded from the parties' releases, so "it does not make sense that the covenant not to sue would include not participating in the [Arizona] Proceeding." We find that logic unassailable. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 [" 'language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract,' " italics omitted].) Indeed, under plaintiff's construction, the covenant not to sue would render meaningless

all the exclusions in paragraph 12 from the releases in paragraph 11 – including an exclusion for plaintiff: "The releases described in paragraph 11, above, do not include any claims or actions by [plaintiff] with respect to his right to receive his 35th and 40th year distributions under the [plaintiff's] Trusts." If the covenant not to sue nonetheless applied, this exclusion from the releases would also be meaningless. That cannot be what the parties intended by their covenant not to sue.

In sum, we see no ambiguity and no reason to construe the covenant not to sue in any way other than consonant with the ordinary scope of a covenant not to sue – that is, tethered to the underlying litigation, and with the same "final result" as the releases that appear in the same sentence and from which the Arizona proceeding is expressly excluded. Any other interpretation would render the exclusions from the releases meaningless.

B. No damages

Even if the covenant not to sue could be construed as plaintiff suggests, he cannot prevail because he has not shown that defendant's joinder in the Arizona proceeding was the cause of any harm. The Arizona proceeding was initiated almost a year before defendant joined as a petitioner. Moreover, it is undisputed that defendant would fund the proceeding whether or not she is permitted to continue as a party. Nothing in the settlement agreement prevents her from doing so. Plaintiff says that defendant's "funding of and any other assistance she provides" to the Arizona proceeding breaches the covenant not to sue "because those actions make the other petitioners Defendant's agents." Plaintiff cites no evidence and no legal authority for that proposition, and we need not consider it

further. (See *Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948 ["We repeatedly have held that the failure to provide legal authorities to support arguments forfeits contentions of error."].)

C. Other contentions

Because we conclude that participation in the Arizona proceeding did not breach the covenant not to sue, and in any event plaintiff did not show defendant's participation was the cause of any damages, it is unnecessary to consider most of plaintiff's contentions on related issues, such as whether a petition for conservatorship constitutes a "suit" within the meaning of a covenant not to sue. We do, however, note and reject plaintiff's contention that defendant is barred by the principle of collateral estoppel from contesting issues that were decided by Judge Beckloff in previous rulings that were not appealed.

Specifically, plaintiff refers to Judge Beckloff's ruling on December 12, 2013, on a petition filed by the four cotrustees of plaintiff's residuary trust.[3] The trustees sought an order that

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[3] Plaintiff also contends defendant was bound by another ruling Judge Beckloff made concerning the effective date of the settlement agreement. Plaintiff cites an August 11, 2011 ruling that "the effective date of the settlement agreement is the date the agreement was signed by the parties [(September 14, 2010)]," and claims the covenant not to sue became effective on that date rather than on November 12, 2010, when the court signed its order approving the settlement. We note, however, that the settlement agreement on its face states it is "subject to approval by the Court," and the only contemporaneous evidence of that approval is the court's order of November 12, 2010. More to the point, plaintiff omits the court's limiting language both preceding

conduct by Sherry Lund had triggered the forfeiture provision of the settlement agreement (under which Mr. Lund would forfeit his payments of $500,000 a year from plaintiff's residuary trust) if his wife, Sherry Lund, sued any party to the settlement agreement). Judge Beckloff found that Sherry Lund triggered the forfeiture provision when she joined in a conservatorship proceeding alleging that defendant (Michelle Lund) was in need of a conservator. Judge Beckloff rejected the argument that the prohibited lawsuit must be one "arising out of . . . the subject matter of the litigation," finding the forfeiture provision had "three distinct parts, a covenant not to sue, a release, and a penalty." Judge Beckloff concluded the "arising out of" language "modifies only the release language of the provision," and "[t]he penalty is distinctly separate from the release."

The principle of collateral estoppel has no application here. Collateral estoppel applies to preclude relitigation of an issue when the issue is identical to that decided in the former proceeding; was actually litigated and necessarily decided in that proceeding; when the decision was final and on the merits; and when "the party against whom preclusion is sought" is "the same as, or in privity with," the party in the former proceeding. (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231

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and following the language plaintiff cites. The court expressly stated that its ruling was "without prejudice to any party arguing otherwise at some future date in this litigation," and that "[f]or purposes of discovery" it found "September 14 to be the relevant date," and that "[t]o the extent that whether the parties were bound on September 14 or not until two months later . . . is determinative on certain issues, the parties are free to raise the issue in the future." Collateral estoppel necessarily cannot apply to that ruling.

Cal.App.4th 134, 179.) Here, the issue was not identical; the trial court was addressing whether Sherry Lund's action violated the forfeiture provision (the second sentence of paragraph 11), not whether a party to the agreement had violated the covenant not to sue in the first sentence. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342 ["The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings . . . ."].)

Even if the issue were identical, defendant was not a party to the forfeiture petition (filed by the cotrustees of plaintiff's trust), and therefore cannot be bound by Judge Beckloff's ruling. Plaintiff's assertion defendant was in privity with the trustees of plaintiff's trust has no merit. When Sherry Lund joined in a petition by Mr. Lund and plaintiff to impose a conservatorship over defendant's person and estate, defendant advised plaintiff's trustees (who were responsible for the payments to Mr. Lund) of her belief that Sherry Lund's joinder constituted a ground for forfeiture of the payments, and requested the trustees to enforce the forfeiture provision. We fail to see how such a request puts her in privity with plaintiff's trustees. She had no financial or proprietary interest in the forfeiture issue, and no actual or legal control over the actions of the trustees of plaintiff's trust. The cases plaintiff cites do not support a contrary conclusion.[4]

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[4] See *Citizens for Open Access To Sand & Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1074 [appellant citizen group was in privity with designated state agencies and could not "bring a repetitive suit to litigate matters previously determined in actions pursued for the public benefit by state agencies acting in a representative capacity"]; *Rynsburger v. Dairymen's Fertilizer Cooperative, Inc.* (1968) 266 Cal.App.2d 269, 277-278 [appellant property owners similarly injured by a

In sum, the trial court did not err in granting defendant's special motion to strike the complaint.

2. The Denial of a Preliminary Injunction

Our conclusion that plaintiff cannot establish a probability of prevailing on the merits of his claim dictates the conclusion that the trial court did not abuse its discretion when it denied plaintiff's application for a preliminary injunction. " 'A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]' " (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) There was no such possibility here.

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nuisance constituted a class that was well represented in an earlier action by the city, and were bound by the judgments against the governmental body]; *Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 820-821, 822 [nonparty who was "vitally interested" in earlier action, "retained some control over the action," was a witness, and whose attorney was present at the hearing, was bound by decision in the earlier action; "collateral preclusion . . . must be affirmed to discourage repetitive litigation, to prevent inconsistent judgments, and to discourage vexatious litigation"]; *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 902-903 [rejecting application of the doctrine of "virtual representation," which "posits that a person not a party to a prior action nonetheless is bound if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action"]; *United States v. Geophysical Corp. of Alaska* (9th Cir. 1984) 732 F.2d 693, 697 ["A finding of virtual representation may be based on an express or implied legal relationship that makes a party to the prior action accountable to a non-party."].)

DISPOSITION

The orders denying plaintiff's motion for a preliminary injunction and granting defendant's special motion to strike the complaint are affirmed. Defendant shall recover her costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.