Filed 3/9/12 International Technical Coating v. Massman CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

INTERNATIONAL TECHNICAL COATINGS, INC., Plaintiff and Respondent, v. BRUCE MASSMAN et al., Defendants and Appellants.	B235600 (Los Angeles County Super. Ct. No. BC445950)

APPEAL from an order of the Superior Court of Los Angeles County, Theresa Sanchez Gordon, Judge. Affirmed.

The Byrne Law Office, John P. Byrne and Sherin Hackman, for Defendants and Appellants.

Meserve, Mumper & Hughes, William E. von Behren, Zachary J. Brown; The Quinlan Law Firm, William J. Quinlan, Sarah D. McTurnan, and Lisa H. Quinlan, for Plaintiff and Respondent.

Appellants Bruce and Martin Massman appeal from an order of the trial court denying their special motion to strike under Code of Civil Procedure section 425.16.[1] We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

This factual summary is based in part on our previous decision in *Massman v. Superior Court* (Jan. 10, 2012, B235721) [nonpub. opn.] (*Massman I*).

Appellants leased their commercial property to U.S. Fasteners. U.S. Fasteners owed substantial back rent, and appellants filed an unlawful detainer action. In May 2010, judgment was entered for appellants and the lease was declared forfeited. In June, appellants obtained a writ of possession and instructed the sheriff to evict U.S. Fasteners. The sheriff did so the next month.

Appellants discovered that U.S. Fasteners had abandoned personal property on the premises, including heavy machinery. They also found there were several recorded creditor liens against the machinery. Two of these liens were held by respondent International Technical Coatings and WireTech. On July 20, appellants sent these creditors a "notice of right to reclaim abandoned property," in which they gave respondent and WireTech an opportunity to claim the property by August 7 and pay storage costs, or the property would be sold.[2]

On July 22, WireTech responded, claiming a priority interest in the machinery of about $110,000. On August 2, respondent responded, confirming that it had a security interest in the property and stating that it intended to take possession before August 7.

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

[2] The itemized list of property does not appear in the record. Respondent claims the property included a number of "wire stems" owned by respondent that U.S. Fasteners had borrowed. (Respondent states a wire stem is a device for properly transporting steel wire.) Respondent claims appellants and WireTech deliberately failed to distinguish these from the other property left by U.S. Fasteners. Respondent also claims WireTech did not have a recorded lien on the wire stems.

Appellants responded to respondent, informing it that WireTech claimed a priority interest and was interested in a collaborative effort to liquidate the property.

Respondent advised WireTech of its security interest and inquired as to the value of WireTech's security interest. WireTech did not respond. Respondent informed appellants that it had not received a response from WireTech and requested that appellants advise it of the status of the property so it could participate in any procedure to transfer or liquidate the collateral.

The August 7 deadline passed without either party having tendered costs or removed the property. On August 9, appellants advised both parties by letter that the property remained on their premises, but that they were agreeable to a collaborative resolution.

During the next month, WireTech rejected respondent's offers to purchase its security interest in the machinery, including an offer of $400,000. On September 3, WireTech noticed a private foreclosure sale of the machinery under section 9610 of the Uniform Commercial Code. Respondent responded with a demand to receive its share of the proceeds from any disposition due to its security interest in the collateral of approximately $353,000, and expressed its wish to participate in the sale and to inspect the machinery. WireTech advised respondent it could not inspect the collateral as it was "neither accepting bids nor selling particular items within the collateral." On September 13, WireTech rejected a cashier's check from U.S. Fasteners to satisfy its debt.

On September 20, respondent filed a lawsuit against appellants and WireTech, and the court issued a temporary restraining order prohibiting WireTech and appellants from selling the collateral or moving it outside the court's jurisdiction. At the hearing on the temporary restraining order, respondent learned that WireTech already had foreclosed on the property, including wire stems purportedly owned by respondent, by private sale to Libla Industries (Libla) for $214,268 on September 14, and that Libla had resold the wire stems back to WireTech for $1 each. On September 24, Libla took possession of the machinery and removed it from appellants' premises where it had been stored since U.S. Fasteners was evicted on June 30.

In the first amended complaint, respondent asserted claims against appellants for intentional interference with contract, conversion of collateral, conversion of wire stems, violation of Civil Code section 1988, unfair business practices, and civil conspiracy. Respondent's theory was that WireTech and appellants colluded to prevent respondent from recovering the property or any funds from its sale. Respondent contended that in exchange for its participation in this arrangement, appellants accepted inflated storage costs from WireTech and that these funds constituted improper payments to an unsecured creditor. Respondent further alleged it was unreasonable for appellants to believe WireTech owned the property since: (1) U.S. Fasteners had tendered full payment of its debt, thereby extinguishing WireTech's security interest in the machinery; (2) WireTech did not have any claim to the wire stems or intellectual property contained in the machinery; and (3) WireTech had not perfected its security interest in the machinery.

Appellants demurred on the ground that each cause of action failed to state facts sufficient to state a cause of action. (§ 430.10, subd. (e).) The court sustained the demurrer with regard to respondent's claims for violations of Civil Code section 1988 and overruled the demurrer for the remaining causes of action. We denied appellants' petition for a writ of mandate in *Massman I.*

Appellants also filed a special motion to strike the complaint under section 425.16. The court denied the motion, concluding that respondent's causes of action did not arise from appellants' right of petition or free speech. This timely appeal followed.

DISCUSSION

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

The statute provides: "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 . . . or . . . 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).)

Resolution of an anti-SLAPP motion requires a two-step inquiry. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.) Since the trial court in this case denied appellants' anti-SLAPP motion on the ground that the statute's "arising from" prong does not encompass respondent's claims, it did not reach the "probability of prevailing" prong.

We review the trial court's ruling de novo (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325), and consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We """accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."""" (*Flatley v. Mauro*, at p. 326.)

In determining whether appellants have met their burden under the first prong of the anti-SLAPP analysis, the "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, italics omitted.) "[W]e disregard the labeling of the claim [citation] and instead 'examine the principal thrust or gravamen of a plaintiff's

cause of action to determine whether the anti-SLAPP statute applies' and whether the trial court correctly ruled on the anti-SLAPP motion. [Citation.] We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272, italics omitted.)

Prosecution of an unlawful detainer action is protected activity within the meaning of section 425.16. (*Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281.) This includes service of the three-day notice to quit since it is a legally required prerequisite to the filing of an unlawful detainer action. (*Id.*, at pp. 281-285.)

Appellants contend that the disposition of property left behind by an evicted tenant, including notice of this property to its owners, is protected because it is part and parcel of the unlawful detainer action. In support of their argument, appellants note that the provisions addressing the enforcement of a judgment for possession and the disposition of property abandoned by an evicted tenant are contained within the same statutory section—section 1174. We are not persuaded by this formalistic reasoning and instead examine the objective of the unlawful detainer action to determine whether the disposition of abandoned personal property is logically related to the prosecution and enforcement of this action. (Cf. *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [litigation privilege extends to post-judgment actions when they are logically and legally related to the realization of a litigation objective].)

An unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain possession of real property. (*Underwood v. Corsino* (2005) 133 Cal.App.4th 132, 135; *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 17-18; see *Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 [cognizable claims in unlawful detainer action are those bearing directly upon the right of immediate possession].) The judgment for such

possession may be enforced by a writ of possession. (§ 1174, subd. (d) [cross-referencing § 712.010].) The writ must include a statement that any personal property remaining on the real property after the landlord is in possession will be disposed of under section 1174 unless the tenant pays the reasonable cost of storage and takes possession of the personal property not later than 15 days after the landlord takes possession of the real property. (§ 715.010, subd. (b)(3).)

After the landlord regains possession of the real property under the writ of possession, if he or she finds the tenant left behind personal property, section 1174 grants immunity if the landlord disposes of this property according to the statute. (§ 1174, subds. (k)-(*l*); see also § 715.030.[3]) The landlord must store the property and give notice to any person reasonably believed to be its owner. (§ 1174, subds. (f)-(g).) The landlord must then release the property to any person reasonably believed to be its owner if that person pays the costs of storage and claims the property before the date specified in the notice. (§ 1174, subd. (h).) Where there is no timely claim and release of the property, the landlord must conduct a public sale and is entitled to recover his or her costs incurred in storing and selling it. If the landlord follows this procedure, he or she "is not liable with respect to that property to . . . [¶] . . . [¶] . . . any person to whom notice was given." (§ 1174, subd. (k)(1).)

The trial court found that none of the causes of action arose from appellants' right of petition. It determined the gravamen of respondent's claims is that appellants improperly disposed of the personal property they found *after* the unlawful detainer action judgment had been enforced since appellants had realized the sole objective of the action—possession of the real property. Respondent claimed appellants were required to conduct a public sale of the property since there had been no timely claim and release of the property. (§ 1174, subds. (h)-(i) [cross-referencing Civ. Code, § 1988].) Had

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[3] "The disposition of personal property remaining on the real property *after the judgment creditor is placed in possession thereof pursuant to the writ of possession* is governed by subdivisions (e) to (m), inclusive, of Section 1174." (§ 715.030, italics added.)

appellants done so, respondent would have been able to participate in the public auction or recover a portion of its security interest in the property from any surplus resulting from a public sale. (Civ. Code, §§ 1988, 1993.07.) Respondent also claimed appellants released property to WireTech and Libla which belonged solely to respondent. The court further concluded that the disposition of the property was not part of enforcing the unlawful detainer judgment since execution of the writ of possession constituted its enforcement.

We agree that the acts alleged by respondent occurred after the unlawful detainer judgment had been enforced and its objectives fully realized. Although the petitioning activity—the unlawful detainer action—necessarily led to respondent's claim, the acts alleged by respondent occurred after the conclusion of the unlawful detainer action and thus did not arise from a petitioning activity. (See *Clark v. Mizgani*, *supra*, 170 Cal.App.4th at p. 1287 [the pivotal distinction is whether the protected action merely preceded or triggered the tenant's lawsuit, or whether it was instead the basis or cause of that suit].) In other words, the unlawful detainer action triggered the events leading to the wrongful acts alleged by respondent, but the prosecution of the action and enforcement of the judgment were not the cause of respondent's suit since the purpose of the unlawful detainer action had been satisfied.

Appellants argue that because the writ of possession must provide the tenant with notice that any property left on the premises after enforcement of the writ will be disposed of pursuant to section 1174 (§ 715.010, subd. (b)(3)), the separate notice a landlord provides to owners of any actually abandoned personal property (§ 1174, subd. (f)) necessarily is part of the unlawful detainer action. However, the notice provided in the writ of possession is for any property the tenant *might* leave on the premises *after* he or she vacates. (See § 715.010, subd. (b)(3).) The notice to owners of abandoned personal property is for property that is *actually* present on the premises once the tenant has been evicted and the landlord has regained possession. (See § 1174, subd. (f).)

Appellants further contend that personal property abandoned by an evicted tenant frustrates the objective of the unlawful detainer action because it interferes with the landlord's possession of the real property. Since the property here included heavy machinery, appellants argue they were precluded from re-leasing its premises.

This argument does not account for the statutory options available to landlords who find abandoned personal property on their premises. They may pay to have the property stored off of their premises and be reimbursed for these costs, or they may store the property on their premises and recover the fair rental value. (Civ. Code, § 1990.) Here appellants chose to store the personal property on their premises and forgo storing it elsewhere in order to lease the premises. We find this choice did not frustrate their right to possession, particularly since they had the right to condition release of the personal property upon the payment of the fair rental value of the premises (§ 1174, subd. (h) [cross-referencing Civ. Code, § 1990]; see also *Gray v. Whitmore*, *supra*, 17 Cal.App.3d at p. 16 [section 1174 grants landlords a "special lien" on abandoned personal property].) They were essentially paid rent for the premises during the time the property was located there.

We are further persuaded by the statute's specific grant of immunity to landlords who comply with the statutory procedure for releasing the property. (§ 1174, subds. (k)-(*l*).) Had appellants complied with this procedure, they would have been immune from liability with respect to respondent, but they did not. If the anti-SLAPP statute protected a landlord's disposal of abandoned property after the conclusion of an unlawful detainer action, there would be no need for the separate immunity provision in section 1174.

In sum, respondent's action against appellants is not based on appellants' prosecution and enforcement of the unlawful detainer action and thus is not protected activity under the anti-SLAPP statute. The complaint is based on their allegedly improper acts to transfer respondent's property and property in which respondent held a security interest to WireTech and Libla. These acts occurred after the unlawful detainer judgment was fully enforced.

DISPOSITION

The order of the trial court is affirmed. Respondent to have its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.