Filed 11/20/19 Zhang v. Peterson CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JINSHU ZHANG, Plaintiff and Respondent, v. CHARLES F. PETERSON, Defendant and Appellant.	B290291 (Los Angeles County Super. Ct. No. YC072471)

APPEAL from an order of the Superior Court of Los Angeles County. Michael P. Vicencia, Judge. Affirmed.

Thomas Vogele & Associates, Thomas A. Vogele and Timothy M. Kowal; Jeff Lewis Law, Jeffrey Lewis and Sean Rotstan for Defendant and Appellant.

Jinshu Zhang, in pro. per., for Plaintiff and Respondent.

Charles F. Peterson (appellant) appeals from an order denying his special motion to strike pursuant to Code of Civil Procedure section 425.16 (section 425.16 or "anti-SLAPP statute"). Appellant is a defendant in a lawsuit brought by Jinshu Zhang (respondent) for breach of contract and breach of fiduciary duty against Palos Verdes Homes Association, Sidney F. Croft (Croft), and appellant. The sole cause of action alleged against appellant is breach of fiduciary duty. Appellant brought an anti-SLAPP motion on the ground that the cause of action alleged against him arose from his constitutionally protected right of free speech and that respondent could not establish a probability of prevailing on the merits of his claim.

We find no error in the trial court's denial of the anti-SLAPP motion, therefore we affirm the order.

BACKGROUND

Respondent is a resident of Palos Verdes Estates (the City). Palos Verdes Homes Association (PVHA) is the managing association for the properties in the City and is administered by its Board of Directors. During the relevant time period, both appellant and defendant Croft were listed under the heading "Board of Directors" on PVHA's website. The contractual relationship between the respondent and defendants is defined in the "Declaration of Establishment of Basic Protective Restrictions, Conditions, Covenants, Reservations, Liens and Charges and Certain Local Restrictions of Palos Verdes Estates and portions of Miraleste" (the Restrictions).

Article V, Section 7 of the Restrictions provides, in part:

> "'Representatives of the Homes Association . . . shall have the right at any time to enter on or upon any property for the purpose of cutting back trees or other plantings which may grow up to a

> greater height than in the opinion of the Homes Association is warranted to maintain the view and protect adjoining property.' . . . (Tree Covenant)."

PVHA "maintains a dispute resolution process for resolving disputes between members who claim a neighbor's trees or vegetation block their views [and the tree owners]." The process is documented in Homes Association Resolution No. 172.

In 2013, respondent submitted an "Application for Trimming of Tree" (2013 application) to PVHA, seeking removal of certain tree branches blocking his view. Appellant, PVHA's designated tree arbitrator, handled the application. With appellant's intervention and a promise from the owner of the offending tree that he would properly trim the tree, respondent withdrew the 2013 application.

On July 5, 2017, respondent submitted another Application for Trimming of Tree (2017 application) to PVHA, seeking removal of the same tree branches blocking his view, as the nearby property owner had failed to comply with his promise to trim the branches and they had grown larger. Appellant was again designated as PVHA's arbitrator to handle respondent's application. In late July 2017, appellant visited respondent's house to examine the view obstruction. Appellant indicated that he would speak to the nearby property owner to ask him to cut back the offending branches.

On August 18, 2017, respondent received a letter from Croft, the in-house attorney for PVHA, wherein respondent was informed that, since respondent's property does not adjoin the property of the owner of the offending tree, respondent had no right to submit the 2017 application, and PVHA would not hear

the dispute. Respondent alleges that the text of the Tree Covenant does not support such an interpretation.

Respondent discovered that appellant had authored an article entitled "Restoring Obstructed Views in Palos Verdes Estates posted on Apr 6, 2014 by attorney Charles Peterson" on the website https://www.avvo.com/legal-guides/ugc/restoring-obstructed-views-in-palos-verdes-estates which contained a conclusion contrary to the correspondence respondent had received from PVHA regarding his 2017 application.

> "'Recently, the Association revised its view protection procedures. The phrase in Article V, Section 7 of the Restrictions "to maintain the view and protect adjoining property," is now interpreted as if there was a comma after the word "view." This policy modification is to clarify that it is the Association's policy to protect primary views that are significantly obstructed by distant trees; *the phrase will not be interpreted to require that the view-seeker's and tree-owner's properties be adjacent in order for the Association to protect a view*. Significant view obstructions can and do occur even when the properties are separated by sizeable distances. This change simply reflects the Association's ongoing efforts to preserve the views enjoyed by its members.'" (Italics added.)

Respondent filed the operative first amended complaint (FAC) against appellant and the other defendants on November 21, 2017. Respondent alleged that both appellant and Croft were aware of appellant's article's interpretation at the time they declined to accept respondent's request. Respondent further alleged that PVHA had, on more than one occasion, accepted applications for trimming trees where the applicant was not an

owner of property adjacent to the offending trees. Respondent alleged that appellant and defendant Croft colluded with each other to fabricate the "adjoining properties" prerequisite while knowing it was contrary to PVHA's interpretation, and that his application was rejected on a false pretense.

In his breach of contract cause of action against PVHA, respondent alleged that PVHA breached its contractual obligations to respondent in refusing to process his application in good faith. In his breach of fiduciary duty cause of action against all defendants, including appellant, respondent alleged that they had a fiduciary duty to him by reason of their special relationship to him. In addition, they had a fiduciary duty to protect his view rights under the Restrictions by accepting and processing his application in good faith. Respondent alleged ongoing racial discrimination by all defendants as motivation for the defendants' decisions to frustrate his view preservation efforts.

On February 14, 2018, appellant filed his anti-SLAPP motion. On March 12, 2018, respondent filed his opposition. On March 16, 2018, appellant filed his reply and evidentiary objections. On April 24, 2018, the trial court heard and denied the motion. On May 21, 2018, appellant filed his notice of appeal.

DISCUSSION

I. Applicable law and standard of review

"A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. '"While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant,

and not to vindicate a legally cognizable right.'" [Citations.]" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).) Section 425.16 authorizes the filing of a special motion to strike "to expedite the early dismissal of these unmeritorious claims. [Citation.]" (*Ibid.*)

Analysis of an anti-SLAPP motion involves a two-step process. (*Simpson, supra,* 49 Cal.4th at p. 21.) "First, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.' [Citation.]" (*Ibid.*, fn. omitted.) An act in furtherance of a person's right of petition or free speech includes the following: "(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." (Section 425.16, subd. (e).)

If the moving party makes the required threshold showing that the cause of action against him arises from an act in furtherance of his right of petition or free speech on a public issue, then "the cause of action shall be stricken unless the

plaintiff can establish 'a probability that the plaintiff will prevail on the claim.' [Citation.]" (*Simpson, supra*, 49 Cal.4th at p. 21.)

We review a trial court's decision on an anti-SLAPP motion de novo. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 129 (*Colyear*).)

II. The cause of action does not arise from protected activity

Appellant falls short of meeting the threshold test for application of the anti-SLAPP statute. The single cause of action alleged against him in the FAC is breach of fiduciary duty. Appellant's alleged breach of this fiduciary duty was his acts of "fabricating, in bad faith, a prerequisite" to acceptance of respondent's application for tree trimming. In addition, appellant was accused of "continuing to refuse to order the cutting of the offending tree branches while knowing that" the rejection of respondent's application was groundless. In sum, appellant is accused of fabricating the adjoining properties prerequisite with full knowledge of its falsehood, motivated by racial discrimination. Such racial discrimination is also alleged to be a breach of fiduciary duty.

None of the wrongful acts alleged against appellant implicate his right of petition or free speech as defined in section 425.16. The allegations do not implicate any "written or oral statements," as required to come under the first three subdivisions of section 425.16, subdivision (e). Nor do they implicate "any other conduct in furtherance" of appellant's "exercise of the constitutional right of petition or the constitutional right of free speech," as required to fall under the fourth subsection of section 425.16, subdivision (e).

Instead, appellant is accused of breaching his fiduciary duties by wrongfully refusing to accept and process respondent's view protection application. "A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*).) "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.' [Citations.]" (*Id.* at p. 1063.) Thus, we must focus on the specific action which gives rise to appellant's alleged liability. (*Ibid.*) Here, appellant's alleged acts of fabricating a bad-faith excuse to deny respondent's application, and continuing to deny the application in bad faith, were not acts in furtherance of appellant's rights of petition or free speech.

A. The PVHA dispute resolution process

Appellant suggests that the cause of action alleged against him involves protected activity because it concerns a view dispute that was submitted to the jurisdiction of the PVHA. However, appellant's alleged bad faith and breach of fiduciary duty did not constitute petitioning activity. The mere fact that some sort of legal action or petitioning activity was involved does not mean that the cause of action arose from that petitioning activity. (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 353.) "A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action *arises* from that act. [Citation.]" (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537, citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78; see also *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109

Cal.App.4th 1308, 1318 [lawsuit based on the alleged act of charging unlawful rent did not arise from defendants' protected act of filing paperwork to restore rental units to the market].) Appellant's references to the association's dispute resolution process do not change the nature of the allegations, which do not center around any free speech or petitioning activity, but center around appellant's alleged breaches of fiduciary duty.

Appellant relies heavily on *Colyear, supra,* 9 Cal.App.5th 119, which arose in a similar factual context in a neighboring city to respondent's residence. The *Colyear* court determined that a homeowner's application to trim trees was a statement made in connection with an issue of public interest, thus found section 425.16 applicable when the homeowner was later sued by a neighboring homeowner in a second lawsuit. Further analysis of the case shows that it is distinguishable and not persuasive in this matter.

In *Colyear*, homeowner Yu Ping Liu, submitted an application to a homeowner's association (HOA) seeking to invoke the HOA's dispute resolution process with a neighbor who refused to trim trees blocking Liu's view. (*Colyear, supra*, 9 Cal.App.5th at p. 123.) A second neighbor, Colyear, sued Liu and the HOA, alleging that two of the offending trees were on Colyear's property and that the tree-trimming covenant did not encumber his property. He alleged that Liu and the HOA were wrongfully clouding his title and sought a declaration that his property was not subject to the tree-trimming covenant; to quiet title; and for injunctive relief barring defendants from seeking to enforce the covenant against his lot. Under these circumstances, Liu, the applicant-homeowner, successfully brought an anti-SLAPP motion in Colyear's lawsuit. The HOA's authority to

apply the tree-trimming covenants to all lots in the community was a subject of interest to the entire community, and therefore met the definition of "public interest" under section 425.16, subd. (e)(4). (*Colyear*, at pp. 133-134.) Because Liu's conduct was protected as "a statement made in connection with 'an issue of public interest,'" the *Colyear* court did not reach the issue of "whether the HOA process is an 'official proceeding' under subdivision (e)(2)." (*Colyear*, at p. 130.)

Colyear does not support appellant's position that respondent's cause of action against appellant is based on protected activity. Unlike the applicant-homeowner in *Colyear*, appellant is not a defendant based on any statements regarding matters of public interest made in connection with respondent's 2017 application. Appellant has not referenced any statement, written or oral, made either in connection with the 2017 application or the events that followed. Instead, appellant was named a defendant because he purportedly acted wrongfully and in bad faith in violation of his fiduciary obligations. Thus, section 425.16 is not applicable.

B. Appellant's article on Avvo.com

Appellant next argues that respondent's complaint "raised an issue" regarding appellant's April 6, 2014 online article on Avvo.com. Appellant argues that websites accessible to the public are "public forums" for the purposes of anti-SLAPP law. (Citing *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41; *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 693; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366.) Appellant claims that his posts on this online legal advice website are protected activity within the purview of section 425.16.

The allegations against appellant do not arise from his online post on Avvo.com. While the complaint mentions the April 6, 2014 article, it is to show that appellant was aware of the interpretation of the Restrictions described in the article. Because the article sets forth a different interpretation from that which the defendants used to reject respondent's tree trimming application, it is support for respondent's allegations of bad faith. As the Supreme Court recently articulated, "a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) Appellant's article on Avvo.com is not the complained of wrong. Respondent's mention of the article in the complaint does not make appellant eligible for anti-SLAPP relief.

III. Appellant's anti-SLAPP motion was properly denied

The cause of action alleged against appellant does not arise from any act in furtherance of appellant's right of petition or free speech as defined in section 425.16. As appellant has failed to make this required threshold showing, we decline to address the second step of the analysis: respondent's probability of prevailing. (*Simpson, supra*, 49 Cal.4th at p. 21.)

DISPOSITION

The order is affirmed. Respondent is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST