Filed 5/28/14 Gelbard v. Hummer CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALLEN W. GELBARD et al., Plaintiffs and Respondents, v. ROSSLYN HUMMER et al., Defendants and Appellants.	B244330 (Los Angeles County Super. Ct. No. LC088263)

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

Baker, Keener & Nahra, Mitchell F. Mulbarger and James D. Hepworth for Defendant and Appellant Rosslyn Hummer.

Gaglione, Dolan & Kaplan, Robert T. Dolan, Jack M. LaPedis; Freeman | Freeman | Smiley and Dawn B. Eyerly for Defendant and Appellant Eric C. Peterson.

Fuchs & Associates, John R. Fuchs and Gail S. Gilfillan for Plaintiffs and Respondents.

Allen W. Gelbard and Lisa Du Boise filed a complaint against several parties after their eviction from a ranch in Agoura Hills, California. They allege in their fourth amended complaint that Rodney Unger and his attorneys, Rosslyn Hummer and Eric C. Peterson, converted their personal property at the ranch after the eviction.

Hummer and Peterson appeal the denial of their special motion to strike (Code Civ. Proc., § 425.16) the conversion count.[1] They contend (1) the trial court erroneously concluded that the motion was untimely; (2) the conversion count arises from protected activity under the anti-SLAPP statute; and (3) plaintiffs failed to establish a probability of prevailing on the merits. We hold that the trial court erred in concluding that the motion was untimely but properly concluded that the conversion count does not arise from protected activity. We therefore will affirm the denial of the special motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Gelbard and his children lived at the ranch for several years together with Du Boise, his companion. According to Gelbard, he purchased the property in 1999, but AB Investments, LLC (ABI) held legal title. Gelbard and Robert Beaton founded ABI in 1998, and Unger later became a member.

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[1] Code of Civil Procedure section 425.16 is commonly known as the anti-SLAPP statute. SLAPP is an acronym for Strategic Lawsuit Against Public Participation. All statutory references are to the Code of Civil Procedure unless stated otherwise.

Gelbard claims that Beaton and Unger cheated him out of millions of dollars and that Beaton transferred title to the ranch from ABI to Unger in November 2004 for no consideration. Unger filed an unlawful detainer complaint against Gelbard and Du Boise in May 2008, and they were evicted on October 14, 2008. Gelbard, Du Boise, Beaton, and Unger also were parties to other judicial proceedings relating to ABI and Gelbard's bankruptcy.

Plaintiffs' counsel sent a letter to Hummer dated October 15, 2008, demanding that she and Unger surrender plaintiffs' personal property left at the ranch. The letter stated that Gelbard's eviction was an act of retaliation for his cooperation with a federal grand jury investigating alleged misconduct by Unger, Beaton, and others. Hummer responded in a letter of the same date stating that she was preparing an inventory of the personal property at the ranch. She stated that after completing the inventory she would schedule a time for plaintiffs to recover their personal property "as provided for by the Code of Civil Procedure." She stated, however, that she would not turn over to plaintiffs any property belonging to the bankruptcy trustee and that she would turn over to the sheriff all firearms and ammunition on the property. She also stated that a county health inspector had inspected the stables, swimming pool, and other areas on the property and that measures would be taken to care for the horses and clean the property.

Plaintiffs' counsel sent a second letter to Hummer dated October 17, 2008, demanding that she and Unger stop tampering with plaintiffs' personal property and release the property to them. Plaintiffs were denied access to their personal property at the ranch until October 30, 2008, when they were first allowed to revisit the property.

Plaintiffs were allowed to remove some of their personal property from the ranch in the following days, but the parties continued to dispute conditions imposed on their removal of personal property.

2. *Trial Court Proceedings*

Plaintiffs filed a complaint against Unger and others in January 2010 alleging 10 counts, including a count for conversion against Unger, Hummer, and Peterson. They alleged that Gelbard was the equitable owner of the ranch and that ABI held legal title until Beaton and Unger fraudulently transferred title from ABI to Unger. They also alleged that Beaton and Unger had embezzled over $150 million from ABI. Plaintiffs filed a first amended complaint in June 2010 also alleging 10 counts. After the sustaining of demurrers to the first amended complaint, plaintiffs filed a second amended complaint in November 2010 alleging only a single count for conversion against Unger, Hummer, Peterson, and others.[2]

The trial court overruled demurrers by Unger and Hummer to the second amended complaint and sustained Peterson's demurrer with leave to amend. Plaintiffs filed a third amended complaint in April 2011 alleging a single count for conversion against Unger, Hummer, Peterson, and others. The court overruled demurrers by Hummer and Peterson to the third amended complaint. Hummer and Peterson answered the third amended complaint in August 2011.

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[2] The trial court entered a judgment in favor of Beaton, ABI, and others after sustaining demurrers to the first amended complaint. We reversed the judgment in part and affirmed it in part in a nonpublished opinion (*Gelbard v. AB Investments, LLC* (Sept. 6, 2012, B233155)).

Plaintiffs filed an amendment to their third amended complaint in February 2012 substituting Geoffrey M. Gold for a fictitious defendant. Gold, an attorney, was a member of the same law firm as Hummer and Peterson and worked together with them representing Unger in the unlawful detainer action. Gold demurred and filed a special motion to strike the complaint against him. The trial court granted the special motion to strike on May 14, 2012, based on the three-year statute of limitations for conversion (§ 338, subd. (c)), and stated that the demurrer was moot. The court also granted plaintiffs' motion for leave to file a fourth amended complaint at that time. The fourth amended complaint alleges one count for conversion against Unger, Hummer, Peterson, and others, and two counts for fraudulent transfer against Unger.

Plaintiffs allege that Hummer and Peterson, acting as counsel for Unger, prosecuted an unlawful detainer action against plaintiffs, causing them to be evicted. They also allege that Hummer and Peterson, acting as counsel for Unger and on their own behalf, exercised control over plaintiffs' personal property at the ranch after the eviction; failed to provide a written notice describing the personal property left at the ranch, as required by statute; failed to comply with plaintiffs' demands to turn over the property; and wrongfully disposed of their personal property.

Hummer filed a special motion to strike the fourth amended complaint on June 13, 2012. Peterson and Unger filed joinders in the motion. Hummer and Peterson also demurred to the fourth amended complaint.

Plaintiffs opposed the special motion to strike and filed objections to evidence presented by Hummer and Peterson. Hummer and Peterson filed objections to evidence presented by plaintiffs.

The trial court denied the special motion to strike and overruled the demurrers by Hummer and Peterson in an order filed on September 12, 2012. The court also ruled on evidentiary objections. The court concluded that the special motion to strike was untimely because it was filed "more than 60 days from service of the complaint on Hummer." The court also stated, "Given the advanced stage of litigation, and redundant arguments, nothing in the motion justifies special relief from the court deeming this motion appropriate. Hummer failed to seek prior leave of court to file this untimely motion, and the court does not hereby grant such leave. Accordingly, the motion is untimely."

The trial court stated that even if the motion were timely, Hummer failed to show that the conversion count arose from protected activity under the anti-SLAPP statute. The court also stated:

"Even assuming the motion is proper, Hummer also fails to establish that plaintiffs' is [*sic*] not likely to prevail on the merits; Plaintiffs do. On 8/8/11, the Court overruled the demurrer of Hummer to the conversion cause of action in the third amended complaint. The arguments submitted to the court specifically debated Civil Code sections 1174, 1714.10, and 1965. Plaintiffs prevailed. Nothing in the demurrer alleges that the gravamen of the conversion cause of action substantially changed, thereby supporting another demurrer to a previously overruled cause of action."

Hummer and Peterson timely appealed the order denying the special motion to strike.[3]

CONTENTIONS

Hummer and Peterson contend (1) their special motion to strike was timely because they filed the motion within 60 days after the service of plaintiffs' fourth amended complaint; the conversion count arises out of their representation of Unger in the unlawful detainer action and therefore arises out of protected activity under the anti-SLAPP statute; and (3) plaintiffs failed to establish a probability of prevailing on their claim.

DISCUSSION

1. *Special Motion to Strike*

"A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056 [39 Cal.Rptr.3d 516, 128 P.3d 713].) The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. (§ 425.16, subd. (a).) The Legislature has declared that the statute must be 'construed broadly' to that end. (*Ibid.*)

"A cause of action is subject to a special motion to strike if the defendant shows that the cause of action arises from an act in furtherance of the defendant's

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[3] An order granting or denying a special motion to strike is appealable. (§§ 425.16, subd. (i), 904.1, subd. a)(13).)

constitutional right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507, 52 P.3d 685].) On appeal, we independently review both of these determinations. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345-1346 [63 Cal.Rptr.3d 798].)

"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" ' is defined by statute to include '(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).) If the defendant shows that the cause of action arises from a statement described in clause (1) or (2) of section 425.16, subdivision (e), the defendant is not required to separately demonstrate that the statement was made in connection with a 'public issue.' (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 [81 Cal.Rptr.2d 471, 969 P.2d 564] (*Briggs*).)

"A cause of action is one 'arising from' protected activity within the meaning of section 425.16, subdivision (b)(1) only if the defendant's act on which the cause of action is based was an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal.Rptr.2d 519, 52 P.3d 695].) Whether the 'arising from' requirement is satisfied depends on the ' "gravamen or principal thrust" ' of the claim. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 [87 Cal.Rptr.3d 275, 198 P.3d 66], quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193 [6 Cal.Rptr.3d 494].) A cause of action does not arise from protected activity for purposes of the anti-SLAPP statute if the protected activity is merely incidental to the cause of action. (*Martinez, supra*, at p. 188.) In deciding whether the 'arising from' requirement is satisfied, 'the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)

"A cause of action that arises from protected activity is subject to dismissal unless the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) A plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714 [54 Cal.Rptr.3d 775, 151 P.3d 1185].) The court cannot weigh the evidence, but must determine as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Ibid.*) The court must

consider not only facts supported by direct evidence, but also facts that reasonably can be inferred from the evidence. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 [124 Cal.Rptr.3d 256, 250 P.3d 1115] (*Oasis West*).) The defendant can defeat the plaintiff's evidentiary showing by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [123 Cal.Rptr.2d 19, 50 P.3d 733].) The defendant cannot defeat the plaintiff's evidentiary showing, however, by presenting evidence that merely contradicts that evidence but does not establish as a matter of law that the plaintiff cannot prevail. (*Oasis West*, *supra*, at p. 820.)" (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1165-1166 (*Faigin*).)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

2. *The Special Motion to Strike Was Timely Filed Within 60 Days After Service of the Amended Complaint*

A special motion to strike must be filed within 60 days after the complaint is served on the moving defendant, unless the trial court exercises its discretion to consider a later-filed motion. (§ 425.16, subd. (f); *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 682.)[4] Courts construe the term "the complaint" in

[4] "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f).)

section 425.16, subdivision (f) to mean the most recent amended complaint, consistent with the policy of construing the anti-SLAPP statute broadly and the policy favoring a hearing on the merits. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314-315; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840-841.) Regardless of whether the amendments in an amended complaint are considered "substantive" with respect to the special motion to strike, the service of an amended complaint on a defendant triggers a new 60-day period within which the defendant may file a special motion to strike as a matter of right. (*Yu, supra,* at p. 315.)

Country Side Villas Homeowners Assn. v. Ivie (2011) 193 Cal.App.4th 1110 did not hold or suggest to the contrary. The plaintiff in that case argued that a special motion to strike was untimely because it was not filed within 60 days after service of the original complaint, and the first amended complaint contained no substantive amendment. *Country Side Villas* concluded that the amendment was substantive and rejected the plaintiff's argument. (*Id.* at pp. 1115-1116.) *Country Side Villas* did not cite or discuss the cases holding that the term "the complaint" in section 425.16, subdivision (f) should be construed to mean the most recent amended complaint and did not state that this rule should be qualified, but instead rejected the plaintiff's argument on its own terms.

Hummer filed a special motion to strike the fourth amended complaint on June 13, 2012, 30 days after the trial court had granted plaintiffs leave to file their fourth amended complaint. We conclude that the motion was timely, regardless of whether the fourth amended complaint contained any substantive amendment relating to the subject

of the special motion to strike, because it was filed within 60 days after service on Hummer of the fourth amended complaint.

3. *The Conversion Count Does Not Arise From Protected Activity*

A cause of action arises from protected speech or petitioning activity under the anti-SLAPP statute only if the gravamen or principal thrust of the claim is based on protected activity. A cause of action does not arise from protected activity if the protected activity is merely incidental to the cause of action. (*Episcopal Church Cases*, *supra*, 45 Cal.4th at pp. 477-478; *Faigin*, *supra*, 198 Cal.App.4th at pp. 1165-1166.)

Hummer and Peterson contend the conversion count arises from their protected activity of prosecuting an unlawful detainer action against plaintiffs. The unlawful detainer action is the means by which Hummer and Peterson gained possession of plaintiffs' personal property at the ranch, and plaintiffs' complaint alleges facts concerning the unlawful detainer action, its origins and its aftermath. The present dispute, however, concerns the disposition of plaintiffs' personal property at the ranch. The gravamen of the conversion count is that Hummer and Peterson wrongfully disposed of plaintiffs' personal property, and not that the unlawful detainer action was fraudulent or invalid or that the eviction was improper. The fact that the unlawful detainer action and eviction preceded the alleged conversion and the allegation that the unlawful detainer action and eviction were wrongful are only incidental to the alleged conversion.

Episcopal Church Cases, *supra*, 45 Cal.4th 467, is instructive. That case involved a dispute between a local parish church and the larger general church with

which it was formerly affiliated. The dispute concerned ownership of a building used by the local church for worship. The dispute arose after the local church had disaffiliated from the general church because of doctrinal differences. The Los Angeles diocese of the general church sued individuals associated with the local church to resolve the property dispute. (*Id.* at pp. 474-476.) The California Supreme Court rejected the argument that the action arose from the local church's protected activity of expressing its disagreement with and disaffiliating from the general church. *Episcopal Church Cases* concluded instead that the action was based on a property dispute and stated that the property dispute, rather than any protected activity, was the gravamen or principal thrust of the action. (*Id.* at p. 477.)

Episcopal Church Cases, supra, 45 Cal.4th 467, stated: " '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been "triggered" by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' (*Navallier v. Sletten* (2002) 29 Cal.4th 82, 89 [124 Cal.Rptr.2d 530, 52 P.3d 703].) In filing this action, the Los Angeles Diocese sought to resolve a *property dispute*. The property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is 'the gravamen or principal thrust' of the action. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193 [6 Cal.Rptr. 494].) The additional fact

that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit." (*Id.* at pp. 477-478.)

Similarly here, the unlawful detainer action and the eviction are part of the factual background to the present dispute but are not the gravamen of the dispute, which concerns the alleged conversion of personal property. The alleged acts of conversion do not constitute protected activity, and Hummer and Peterson do not argue otherwise. We therefore conclude that the conversion count does not arise from protected activity under the anti-SLAPP statute, so the denial of the special motion to strike was proper. Accordingly, we need not decide whether plaintiffs established a probability of prevailing on the merits.[5]

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[5] Hummer and Peterson argue that they cannot be liable for conversion because the obligations under section 1174 and Civil Code section 1965, regarding the disposition of personal property after a tenant has vacated the premises, apply only to a landlord and are inapplicable to a landlord's agent. We conclude to the contrary that regardless of the extent of the statutory obligations, an attorney acting as agent for another can be liable to the owner of personal property for conversion if the attorney committed wrongful acts constituting conversion, as plaintiffs here allege. An agent is personally liable to a third party for wrongful acts committed in the course of the agency. (Civ. Code, § 2343; *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68-69.)

DISPOSITION

The order denying the special motion to strike is affirmed. Plaintiffs are entitled to recover their costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.