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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

DILLARD JAMES McNELEY, Plaintiff and Appellant, v. SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP et al., Defendants and Respondents.	B283022 (Los Angeles County Super. Ct. No. BC642682)

APPEAL from orders of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Dillard James McNeley, in pro. per., for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tracey A. Kennedy, Melanie M. Hamilton, Timothy T. Kim, for Defendants and Respondents.

INTRODUCTION

The trial court granted a special motion to strike under Code of Civil Procedure section 425.16[1] (the anti-SLAPP statute),[2] and sustained a demurrer without leave to amend in favor of defendants and respondents Jason W. Kearnaghan and Sheppard, Mullin, Richter & Hampton, LLP (collectively, Sheppard Mullin), and Swift Transportation and Swift Transportation Co. of Arizona LLC (collectively, Swift). Plaintiff and appellant Dillard James McNeley appeals from the judgment entered after the trial court's rulings.[3] We affirm.

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

[2] "To combat lawsuits designed to chill the exercise of free speech and petition rights (typically known as strategic lawsuits against public participation, or SLAPPs), the Legislature has authorized a special motion to strike claims that are based on a defendant's engagement in such protected activity. (See Code Civ. Proc., § 425.16, subd. (a).)" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.)

[3] The California Rules of Court give McNeley 180 days to appeal, absent service of a notice of entry of order. (Cal. Rules of Court, rule 8.104(c)(2); see also *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659 ["time to commence an appeal from the order granting the anti-SLAPP motion expired well before plaintiff filed its only notice of appeal"].)

FACTUAL AND PROCEDURAL BACKGROUND

McNeley ceased working for Swift in 2009. His 2011 lawsuit for wrongful termination and discrimination ended in a judgment in Swift's favor. McNeley filed a second lawsuit at the end of 2016, bringing similar claims against Swift, and adding claims of misrepresentation against Swift and Sheppard Mullin.

McNeley's 2011 lawsuit against his former employer Swift included claims of wrongful termination, breach of contract, failure to pay wages and overtime compensation, and several different violations of the Fair and Employment Housing Act ("FEHA") (Gov. Code, § 12940 et seq.). Sheppard Mullin represented Swift. In August 2012, the trial court granted summary judgment in favor of Swift. The judgment was affirmed by this court in August 2013. (*McNeley v. Swift Transportation Co. of Arizona, LLC* (Aug. 12, 2013, B243769) [nonpub. opn.].)

In December 2016, McNeley filed the instant lawsuit against Swift and Sheppard Mullin. The complaint alleged causes of action for: (1) fraud; (2) disability discrimination; (3) failure to accommodate; (4) fraudulent misrepresentation; (5) fraudulent inducement; (6) negligent misrepresentation; (7) breach of fiduciary duty; and (8) intentional infliction of emotional distress.

Finding no notice of entry of order in the record, McNeley's June 5, 2017 appeal of the February 27, 2017 order granting the anti-SLAPP motion is timely.

In January 2017, respondents filed a special motion to strike the first, fourth, fifth, six, and seventh causes of action from the complaint. Respondents argued that McNeley's fraud-related claims arose from statements and conduct during his first lawsuit against Swift. Respondents also demurred to the second, third, and eighth causes of action. McNeley filed an opposition to the demurrer, but not to the anti-SLAPP motion. The trial court granted the anti-SLAPP motion and sustained the demurrer with leave to amend.

McNeley's first amended complaint alleged four causes of action against Swift: (1) disability discrimination; (2) failure to accommodate; (3) breach of implied covenant and fair dealing; and (4) intentional infliction of emotional distress. Swift filed a second demurrer, arguing that all four causes of action were untimely under applicable statutes of limitations, and the first and second causes of action were barred under the doctrine of res judicata. McNeley opposed the demurrer with a lengthy opposition that included exhibits and a separate statement of facts. He argued Swift had failed to give him a reasonable medical accommodation and fraudulently altered his request for medical leave. In May 2017, the trial court sustained the demurrer to the first amended complaint and denied leave to amend.

DISCUSSION

Anti-SLAPP motion

Beyond repeatedly insisting that the result in the 2011 lawsuit was fraudulently obtained, McNeley offers no relevant argument about why the trial court erred in granting respondents' anti-SLAPP motion. We conclude the motion was properly granted.

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. (§ 425.16, subd. (b)(2); *Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89.) We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff

must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park*, *supra*, 2 Cal.5th at p. 1061.)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] 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.] '[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.' [Citations.] 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.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.]" (*Park, supra*, 2 Cal.5th at pp. 1062-1063.) These categories include "any written or oral statement or writing" that is "made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" (§ 425.16, subd. (e)(1)), "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" (§ 425.16, subd. (e)(2)), or "made in a place open to the public or a public forum in connection with an issue of public interest"

(§ 425.16, subd. (e)(3)), as well as "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)(4)).

Courts have adopted "a fairly expansive view of what constitute litigation-related activities within the scope of section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) "[S]tatements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest." (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35 (*Rohde*).)

The court struck five causes of action from McNeley's complaint—fraud, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty. The gravamen of each claim was that in the 2011 lawsuit, Swift and Sheppard Mullin falsely represented the length and nature of McNeley's leave of absence from Swift, leading the trial court in McNeley's first case to deprive him of his right to damages. Because the claims arose from statements made during litigation, they are protected activity under section 425.16, subdivisions (e)(1) and (e)(2). (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 811.)

At this point, the burden shifts to McNeley to show a probability of prevailing on the merits. McNeley did not file

an opposition to respondents' anti-SLAPP motion. Regardless, the litigation privilege prevents McNeley from meeting his burden on the second prong. The question of whether the litigation privilege applies to the statements and actions that form the basis of McNeley's fraud-based claims "is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]' [Citation.]" (*Rohde*, *supra*, 154 Cal.App.4th at p. 38.) The litigation privilege is absolute and applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The purpose of the privilege is "to afford litigants . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Id.* at p. 213.) "The breadth of the litigation privilege cannot be understated. It immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution." (*Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333.) Here, the litigation privilege protects Swift and Sheppard Mullin from tort liability for their statements in the 2011 lawsuit. The court correctly granted the motion to strike McNeley's misrepresentation claims.

Demurrer

McNeley challenges the order sustaining Swift's demurrer to his first amended complaint without leave to amend. "On appeal, '[w]hen a demurrer [has been] sustained, we determine whether the complaint states facts sufficient to constitute a cause of action.'" (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) "'We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] If no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer. [Citation.]' [Citation.]" (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 606–607.) "'While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion

if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed. [Citation.]' [Citation.]" (*Id.* at p. 607.)

Each of McNeley's causes of action in the first amended complaint are barred by the applicable statutes of limitations. "A complaint disclosing on its face that the limitations period has expired in connection with one or more counts is subject to demurrer." (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.)

McNeley's claims of disability discrimination and failure to accommodate were brought under the FEHA and must be filed in superior court within one year of the "right to sue" notice. (*Hall v. Goodwill Industries of Southern Cal.* (2011) 193 Cal.App.4th 718, 726 [one-year limitations period runs from the date of the right-to-sue notice].) The U.S. Equal Employment Opportunity Commission issued a right to sue notice to McNeley on April 18, 2011. Both December 2016 claims in the current lawsuit were filed far after the one-year limitations period.

A claim for breach of implied covenant of good faith and fair dealing is subject to a four-year statute of limitations. (§ 337.1.) As alleged in the first amended complaint, this cause of action accrued on September 28, 2009, more than seven years before McNeley filed the current lawsuit.

McNeley's first amended complaint does not expressly allege when his cause of action for intentional infliction of emotional distress accrued. Claims for intentional infliction of emotional distress are subject to a two-year limitations period. (§ 335.1; *Kaldis v. Wells Fargo Bank, N.A.* (C.D. Cal. 2017) 263 F.Supp.3d 856 [IIED claim is subject to a two-year statute of limitations].) Even under a generous reading of the factual allegations, the most recent actions by Swift that could support this claim took place in late 2009. This cause of action is also time barred.

Because we conclude that each of McNeley's claims are barred by the applicable statutes of limitations, we need not examine respondents' contention that they are also barred under the doctrine of res judicata. We are not bound by the trial court's stated reasons and must affirm the judgment if any ground offered in support of the demurrer was well taken. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

Adequacy of the record on appeal as to leave to amend

On December 1, 2017, this court ordered the parties "to brief the issue of whether plaintiff's failure to provide a reporter's transcript or suitable substitute warrants affirmance based on the inadequacy of the record." McNeley sought judicial notice of the reporter's transcripts of hearings

from his initial 2011 case.[4] He did not offer a reporter's transcript or suitable substitute from the May 31, 2017 hearing in the case currently on appeal, nor does he explain how this court can effectively review the 2017 order sustaining the demurrer without leave to amend without considering the content of the hearing. Respondents argued that a reporter's transcript or similar substitute is indispensable. We agree.

"[I]t is appellant's burden to provide a reporter's transcript if 'an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . .' (Cal. Rules of Court, rule 8.120(b)), and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4))." (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1034, fn. 5.) "It is the burden of the appellant to produce an adequate record demonstrating trial court error." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1226.)

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[4] During the pendency of this appeal, McNeley filed two separate requests for judicial notice, both of which were deferred to the panel. The first request, filed on November 6, 2017, is denied because the documents attached as exhibits to the request are duplicative of those already contained in the court record. The second request, filed on December 7, 2017, asks this court to take judicial notice of a reporter's transcript of proceedings that took place on July 17, 2012, and August 16, 2012. We deny the second request because the documents are not relevant to the issues on appeal.

McNeley's status as a litigant representing himself does not relieve him of the obligation to provide the court with an adequate record on appeal. "Pro. per. litigants are held to the same standards as attorneys." (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) "[M]ere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985.)

Without a reporter's transcript or suitable substitute of the hearing, McNeley cannot demonstrate that the trial court abused its discretion in denying leave to amend after sustaining the demurrer. (See *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187 [describing the myriad situations where the absence of a reporter's transcript or a suitable substitute permit appellate courts to refuse to reach the merits of an appellant's contentions].)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents Jason W. Kearnaghan; Sheppard, Mullin, Richter & Hampton, LLP; Swift Transportation; and Swift Transportation Co. of Arizona LLC.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.