Filed 3/28/18 Dolzhenko v. Liu CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ZINA DOLZHENKO, Plaintiff and Respondent, v. THOMAS LIU and SQUIRE PATTON BOGGS (US), LLP, erroneously sued as SQUIRE, SANDERS & DEMPSEY, LLP, Defendants and Appellants.	B266988 (Los Angeles County Super. Ct. No. BC560238)

APPEAL from an order of the Superior Court of Los Angeles County. Debre Katz Weintraub, Judge. Reversed and remanded.

Zina Dolzhenko, in pro. per., for Plaintiff and Respondent.

Squire Patton Boggs (US) LLP, Stephen T. Owens, Adam R. Fox and Marisol C. Mork for Defendants and Appellants.

Defendants and appellants Thomas Liu and Squire Patton Boggs (US), LLP (Squire), erroneously sued as Squire, Sanders & Dempsey, LLP (collectively, Respondents), appeal from an order denying, in part, their special motion to strike the verified complaint filed by plaintiff and respondent Zina Dolzhenko pursuant to Code of Civil Procedure section 425.16,[1] hereinafter, the anti-SLAPP statute.[2] After an article appeared in the L.A. Weekly newspaper discussing numerous frivolous lawsuits filed by Zina[3] and her brother, Gennady Dolzhenko, they filed suit against the newspaper, the author of the article, and all individuals and businesses that were quoted or discussed in the article, alleging the "libelous article" ruined their reputation and caused them harm. Respondents, a partner of the law firm Squire, was mentioned in the article as saying Zina had "snuck past building security" and "created a ruckus." Liu contends that Zina cannot demonstrate a probability of prevailing on the merits because the statements Liu actually made to the newspaper were not defamatory as a matter of law. We reverse the order denying the anti-SLAPP motion.

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

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

[3] We refer to respondent and her brother by their first names in order to avoid any confusion because they share the same last name. We mean no disrespect.

FACTUAL AND PROCEDURAL BACKGROUND[4]

In September or early October 2013, Liu, a partner of the law firm Squire, was contacted by telephone by an "investigative journalist" working on an article for L.A. Weekly about Zina and Gennady and their abuse of the state's legal system. Liu's client, Valley Temps, had been sued by Gennady. Liu described his experience with Zina and Gennady to the journalist. In particular, while the litigation was pending, Liu stated that "Zina Dolzhenko had come to [his] office building and somehow managed to persuade [the] building security to allow her access to [his] firm's offices, even though [he] was not in the office at that time, had created a disturbance and was ultimately removed from [the] offices by building security."

In October 2013, L.A. Weekly published the article, written by Joseph Tsidulko, entitled "In Sheep's Clothing" (the Article), about Zina and Gennady. The Article was also published on L.A. Weekly's internet site under the title, "How a Brother and Sister Took L.A.'s Russian Immigrant Community on a Wild Ride." According to the Article, Zina and Gennady had for several years taken jobs with small businesses in the Russian and Armenian

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[4] This appeal (B266988) was consolidated with four other pending appeals related to this litigation, mainly B267388 (notice of appeal filed September 21, 2015 by Zina); B268802 (notice of appeal filed December 7, 2015 by Zina); B270166 (notices of appeal filed February 8, 2016 and February 25, 2016 by Zina); and B272033 (notice of appeal filed April 29, 2016 by Zina). After the appeals were consolidated, we ordered Zina to furnish security in the amount of $50,000 pursuant to the vexatious litigant statutes. Because Zina failed to furnish the required security, we dismissed her appeals pursuant to section 391.4. Our dismissal order had no effect on this appeal.

communities for short periods of time and then subsequently brought improper administrative and judicial proceedings against those business alleging violations of the Labor Code and seeking thousands of dollars in claimed unpaid wages and statutory penalties. The Article further described how the lawsuits often contained false statements about the dates of their employment, the amount of time worked, and the working conditions.

Liu's comments about Zina were mentioned in the Article as follows: "Gennady then sued Valley Temps for 'national origin discrimination.' As the case heated up, Zina Dolzhenko suddenly appeared at the downtown offices of Squire Sanders, one of the world's largest law firms. Thomas T. Liu, an attorney handling the Valley Temps case, says Zina snuck past building security, made it to the firm's 31st-floor offices, and demanded to see him. 'She refused to leave and created a ruckus,' Liu says. Security escorted Zina out."

In October 2014, Zina and Gennady[5] sued L.A. Weekly, Tsidulko, Liu, Squire, and others (in total 22 defendants), asserting causes of action for libel (publication in newspaper and on the internet), common law misappropriation of likeness, misappropriation of right to publicity under Civil Code section 3344, violation of constitutional right to privacy, and false light.

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[5] On December 3, 2014, the trial court dismissed the claims of Gennady because he had failed to seek permission to file the action in violation of the vexatious litigation pre-filing order issued against him in October 2012 by the trial court (Hon. James R. Dunn).

Respondents filed a special motion to strike the verified complaint pursuant to the anti-SLAPP statute, arguing they were being sued for exercising their constitutional right of free speech on a matter of public interest, and that Zina could not succeed on the merits of the claims she had alleged against them because Liu's statements were not defamatory as a matter of law.

Zina opposed the motion, arguing Liu's statements were not made in furtherance of his right of free speech because at the time he made the statements he was no longer counsel of record for Valley Temps. Zina further requested the trial court take judicial notice of the Merriam Webster dictionary's definition of the word "sneak", and argued in her supporting declaration that Liu's use of the word accused her of criminal activity because the word "sneak" was synonymous with the words "steal," "a sneak thief," "creep," and "a sneak attack." She also noted that Liu did not have personal knowledge of the incident at his office building because he admitted he was not there at the time.

The trial court denied, in part, the anti-SLAPP motion.[6] The court determined the Article was of particular importance to

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[6] The trial court also granted Zina's request for judicial notice of the Merriam Webster dictionary's definition of the word "sneak." In connection with this appeal, Zina re-filed her same request for judicial notice. As discussed in this opinion, Zina's libel claim based on Liu's use of the word "snuck" fails because the Article does not contain quotation marks around the word "snuck" and therefore it is apparent the author of the Article was paraphrasing or indirectly interpreting what Liu said. (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 511 (*Masson*).) Accordingly, we deny Zina's request for judicial notice as moot as it is unnecessary to our resolution on appeal. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th

the Russian community small business owners because they were portrayed as victims of a litigation scheme by Zina and Gennady. It therefore concluded that Liu, in speaking with the L.A. Weekly journalist, was exercising his constitutional right of free speech in connection with an issue of public interest. The trial court further concluded that Zina was likely to prevail on the merits of her claims for libel (publication in newspaper and on the internet) and false light, but not her claims for common law misappropriation of likeness, misappropriation of right to publicity under Civil Code section 3344, and violation of constitutional right to privacy The trial court reasoned that Zina could prove that the statements made by Liu in the Article were not only false and negligently made (because Liu did not have personal knowledge as to what occurred), but defamatory because he "[a]ccuse[d] [Zina] of trespassing into law offices by sneaking past security without permission, creating a ruckus and refusing to leave."

On September 18, 2015, Respondents filed a timely notice of appeal.[7]

DISCUSSION

Respondents challenge the trial court's denial of their anti-SLAPP motion as to Zina's claims for libel (publication in newspaper and on the internet) and false light. They contend the trial court erred because there was no competent, admissible evidence of falsity or Liu's use of defamatory words. We agree.

739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

[7] In connection with this appeal, we granted Respondents' request for judicial notice of the trial court's order (Hon. Kevin C. Brazile) in October 2016 declaring Zina to be a vexatious litigant.

I. The Anti-SLAPP Statute and the Standard of Review

"We review de novo the grant or denial of an anti-SLAPP motion." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) We 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 do not, however, weigh the evidence, but accept the 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, supra*, at p. 1067.)

The anti-SLAPP statute states, in relevant part, that 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 Constitution or the 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).) The anti-SLAPP statute is to be broadly construed to encourage continued participation in matters of public significance. (§ 425.16, subd. (a).)

In determining whether an action is subject to dismissal under the anti-SLAPP statute, we engage in 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.' " (*Park, supra,* 2 Cal.5th at p. 1061.) The Supreme Court has defined the probability of prevailing burden as follows: " '[T]he plaintiff "must demonstrate

that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89.) "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." (*Id.* at p. 89.)

II. Zina Has Not Established a Probability of Prevailing

Here, we are concerned only with the second prong of the anti-SLAPP test—whether Zina has established a probability of prevailing. The parties do not dispute the first prong has been satisfied.[8]

In order to establish a probability of prevailing, Zina has the burden to show the elements of her claims. A claim for libel requires proof of a false and unprivileged publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) To establish a false light invasion of privacy claim, the plaintiff must meet the same requirements. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16; *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 149.)

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[8] The parties also do not dispute the trial court's ruling that Zina is a private person, and not a limited public figure. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 ["When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation."].)

" 'The sine qua non of recovery for defamation . . . is the existence of falsehood.' [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112 (*McGarry*).) Statements of opinion, however, do not enjoy blanket protection. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 384–385 (*Franklin*).) Rather, "a statement that implies a false assertion of fact, even if couched as an opinion, can be actionable." (*McGarry, supra,* 154 Cal.App.4th at p. 112, relying on *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18–19.) The dispositive question is not whether a statement is fact or opinion, but "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." (*Franklin*, *supra*, 116 Cal.App.4th at p. 385.)

"To determine whether a statement is actionable fact or nonactionable opinion, courts use a totality of the circumstances test of whether the statement in question communicates or implies a provably false statement of fact. [Citation.] Under the totality of the circumstances test, '[f]irst, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. . . . [¶] Next, the context in which the statement was made must be considered.' [Citation.]" (*McGarry*, *supra*, 154 Cal.App.4th at p. 113.) "The 'crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court.

[Citation.]' " (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696.)

At issue here is whether Liu's statements in the Article that Zina "snuck past security" and " 'refused to leave and created a ruckus' " created a prima facie case of actionable provable facts or nonactionable opinion. We find that use of the descriptive terms cannot form the basis of a libel claim against Respondents.

A. The word "snuck"

In terms of the word "snuck," we agree with Respondents that the trial court erred by attributing that statement as a direct quote by Liu, which it is clearly not. The fact that the author does not place quotations around the word "snuck" in the Article indicates that he was paraphrasing that part of his conversation with Liu. As the U.S. Supreme Court explained, "In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author." (*Masson, supra,* 501 U.S. at p. 511.) Zina argues that the failure to place quotations marks around the word "snuck" was a mistake by the author; however, she offers no evidence in support of such contention. (*Anderson v. Geist* (2015) 236 Cal.App.4th 79, 85–86 ["It is well established that 'a plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial.' "].) Instead, a review of the Article reveals the author was well aware of the distinction between a paraphrase and a direct quote, as there are other instances in the Article where a statement was attributed to an individual without the use of quotations marks.

Without any proof that Liu uttered the word "snuck" to describe Zina's conduct, Zina's claim against Respondents fail. (*McGarry*, *supra,* 154 Cal.App.4th at p. 121 [plaintiff cannot rely on "speculation" to prove the source of the defamatory statements].)

Assuming arguendo that Liu did state that Zina "snuck past security," we find that use of the word "snuck" in that context was a nonactionable opinion. "Another factor to consider in the context portion of the totality of the circumstances test is whether the statement is so-called 'predictable opinion.' 'Part of the totality of the circumstances used in evaluating the language in question is whether the statements were made by participants in an adversarial setting. "[W]here potentially defamatory statements are published in a . . . setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." [Citation.]' " (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 686–687, fn. omitted.)

Here, the Article made clear that Liu was an attorney representing a client who had been sued by Gennady, and his statements were made in an adversarial setting. We find a reasonable reader would therefore conclude that Liu's statements, at most, were merely flippant remarks against opponents he did not like. (*Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 859 [candidate's characterization of opponent as a "crook" was nonactionable opinion]; *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 280 ["use of the words 'thief' and 'liar' in the course of a chance confrontation with a political foe at a shopping center was the type of loose, figurative, or hyperbolic language

that is constitutionally protected"]; *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1403 ["the numerous descriptions of the lawsuit and the motion as 'stupid,' 'laughed at,' 'a joke,' 'spurious,' and 'frivolous,' are common characterizations which are nothing more than 'the predictable opinion' of one side to the lawsuit"].)

The fact that Liu was not in the office at the time of the incident is also of no consequence. "[T]he defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark." (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 582.) As Respondents point out, Zina does not deny that she showed up at Lui's office building, refused to leave, and was ultimately removed by security. " 'California law permits the defense of substantial truth,' and thus a defendant is not liable ' "if the substance of the charge be proved true. . . ." ' 'Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the . . . truth would have produced." ' " (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344–345.) Since it appears the gist of Liu's statement was substantially true, Zina has failed to carry her burden of establishing a prima facie case that the statement was false. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 33 ["By failing to deny the charge of under-the-table payments, [plaintiff] has tacitly admitted that the challenged statement was substantially true."].)

B. The word "ruckus"

Respondents admit that Liu used the word "ruckus" to describe Zina's conduct, but argues that use of that word is not a provable false statement, but merely a subjective

characterization of an occurrence. We agree. Neither the trial court nor Zina provide any explanation as to why Liu's use of the word "ruckus" was defamatory. Instead, we find the word "ruckus" was nothing more than a colorful description of the incident, and therefore was not a defamatory statement as a matter of law. (*Ferlauto v. Hamsher, supra*, 74 Cal.App.4th at p. 1401 ["Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot ' "reasonably [be] interpreted as stating actual facts" about an individual.' "].) Moreover, Zina does not deny showing up at Liu's office building, and therefore she failed to carry her burden of proving a prima facie case that the statement was false. (*Gilbert v. Sykes, supra,* 147 Cal.App.4th at p. 33.)

Accordingly, Zina has not established the probability of prevailing on her claims alleged against Respondents.

DISPOSITION

The trial court's order denying Respondents' special motion to strike under the anti-SLAPP statute is reversed. On remand, the superior court shall enter a new order granting the motion to strike. Respondents are awarded costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J. HALL, J.*

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