Filed 8/16/18 Simmons v. Cella 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

KRISTIN SIMMONS, Plaintiff and Appellant, v. CHRISTOPHER A. CELLA et al., Defendants and Respondents.	B283513, B285390 (Los Angeles County Super. Ct. No. BC64891)

CONSOLIDATED APPEALS from orders of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Reversed and remanded with directions.

Benice Law and Jeffrey S. Benice for Plaintiff and Appellant.

Murchison & Cumming and Edmund G. Farrell III for Defendants and Respondents.

In these consolidated appeals, we conclude plaintiff Kristin Simmons's conversion and fraudulent concealment claims based on the failure of attorney Christopher Cella and his law firm, Cella, Lange & Cella, LLP (collectively, Cella), to pay her a portion of the settlement proceeds in an underlying lawsuit (the *Heritage* action) did not arise from protected activity within the meaning of the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] Accordingly, we reverse the orders granting the anti-SLAPP motion and awarding attorney fees and costs to Cella. We remand with directions to vacate those orders and enter a new order denying Cella's anti-SLAPP motion.

FACTUAL AND PROCEDURAL BACKGRLOUND

Plaintiff and her former husband divorced. The 2007 judgment on reserved issues determined the "Cominco project" was community property and awarded each spouse a one-half interest. The Cominco project was a joint venture established during the marriage. The joint venture agreement entitled the former husband's company to a percentage of the project's profits once certain conditions were met.

In 2011, the former husband and his company initiated the *Heritage* action in the Superior Court of Los Angeles County, alleging the defendant joint venturers failed to honor the agreement. Cella represented the former husband and his company. The *Heritage* action settled, with the defendants paying $1.8 million. Cella received the settlement funds.

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[1] SLAPP is an acronym for " 'strategic lawsuits against public participation.' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).)

All undesignated statutory references are to the Code of Civil Procedure.

Asserting no knowledge of plaintiff's interest in the Cominco project, Cella deducted the firm's attorney fees and forwarded the balance to the former husband's company. Plaintiff, alleging she only learned of the *Heritage* action several years after it concluded, proceeded against her former husband in the family law court and initiated this action against Cella.

Plaintiff's original Judicial Council form complaint included two causes of action: conversion and fraudulent concealment. Plaintiff alleged Cella knew she was entitled to a one-half community property interest in the Cominco project asset and had a duty to obtain her consent to the Heritage action settlement and ensure she received her portion of the settlement. Cella filed a special motion to strike both causes of action under section 425.16. Cella asserted the litigation privilege (Civ. Code, § 47, subd. (b)) barred both theories of recovery, making this a retaliatory lawsuit subject to the summary proceedings of section 425.16. One day later, plaintiff filed a first amended complaint that retained the original claims and added causes of action for negligence and breach of fiduciary duty. Plaintiff's opposition to the anti-SLAPP motion and the trial court's ruling were keyed to the original complaint.[2]

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[2] There is no reporter's transcript for the anti-SLAPP hearing, and the appellate record does not include a disposition for the first amended complaint. At oral argument, counsel for Cella suggested the trial court and parties simply treated the first amended complaint as a nullity; both counsel acknowledged the line of authority that holds a plaintiff may not attempt "to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint" after the motion is filed. (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477-478.)

The trial court issued a detailed tentative ruling in Cella's favor. After the hearing, it adopted the tentative ruling and granted Cella's anti-SLAPP motion. The trial judge reasoned, "The prosecution, settlement, and alleged failure to obtain [plaintiff's] consent to the settlement are all communicative action that form the basis of this [lawsuit]," the distribution of the settlement funds to Cella for attorney fees and to plaintiff's former husband was " 'necessar[ily] related' to the filing and prosecution of the [*Heritage*] action. [¶] . . . As such, the Complaint is based on protected activities." Finding Cella satisfied the first step of the section 425.16 analysis, the trial court moved to the second step and concluded the conversion and fraudulent concealment claims were absolutely barred by the statutory litigation privilege, meaning plaintiff could not prove a probability of success on the merits.

The trial court invited Cella to file a motion for attorney fees (§ 425.16, subd. (c)). Cella did so, and the trial court awarded $15,183.96 in attorney fees and costs. Plaintiff timely appealed from the order granting the anti-SLAPP motion and the order awarding attorney fees. We consolidated the appeals for the purposes of oral argument and decision.

DISCUSSION

I. Standard of Review

Our review of an order granting an anti-SLAPP motion is de novo. We do not weigh the evidence, but we independently review the record and exercise our own judgment to determine whether "the challenged claims arise from protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) The applicable—and familiar—analytical process potentially involves two steps: "First, the

defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) Only a claim "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, supra,* 29 Cal.4th at p. 89.) If the defendant does not establish at the first step that the challenged claim arises from protected activity, the court does not take the second step.

II. Overview of Section 425.16

A SLAPP suit is a meritless civil action "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." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21, internal quotation marks omitted.) The Legislature defines SLAPP suits as actions "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" and mandates they "shall be subject to a special motion to strike" unless the plaintiff establishes a probability of prevailing. (§ 425.16, subd. (b)(1).)

Anti-SLAPP motions apply to constitutionally protected conduct as well as speech. (§ 425.16, subd. (e).) They are available to a defendant who is sued based on the filing of a prior lawsuit as well as conduct "that relates to" any such lawsuit. (*Kolar v. Donahue, McIntosh & Hammerton* (2006)

145 Cal.App.4th 1532, 1537 (*Kolar*) ["courts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16' "]; see also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063 [postjudgment enforcement speech and conduct were "necessarily related" to litigation and were protected activities].)

Nevertheless, not all claims associated with litigation activities "are subject to the anti-SLAPP statute. To qualify for anti-SLAPP protection, the [defendant] must demonstrate the claim arises from those activities. A claim arises from an act when the act forms the basis for the plaintiff's cause of action . . . . [Citation.] [T]he 'arising from' requirement is not always easily met. [Citation.] 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." (*Kolar, supra,* 145 Cal.App.4th at p. 1537, most internal quotation marks omitted.)

The Supreme Court analyzed the "arising from" requirement in a trio of cases filed together in 2002. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69; *Navellier, supra,* 29 Cal.4th 82.) Discussions of the "arising from" requirement have been staples of section 425.16 opinions ever since. Even so, the Supreme Court, acknowledging the issue has "perplexed" and "generated uncertainty" in the Courts of Appeal, provided much needed clarification with two recent unanimous decisions: *Baral, supra,* 1 Cal.5th 376, 381, and *Park, supra,* 2 Cal.5th 1057, 1060.[3]

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[3] Neither party cites *Baral* or *Park* in their appellate briefs.

As discussed below, *Baral* and *Park* provide critical guidance for our analysis.

In *Baral, supra,* 1 Cal.5th 376, the Supreme Court reaffirmed that defendants may be liable for claims arising from "constitutionally protected *conduct*" (*id.* at p. 393), but only if the plaintiffs first establish the claims have minimal merit (*id.* at p. 385). Like a traditional motion to strike, an anti-SLAPP special motion to strike need not target an entire cause of action. (*Id.* at p. 393.) In fact, an anti-SLAPP motion is "authorized . . . to strike only claims that arise from protected speech or petitioning activity." (*Id.* at p. 395.) "At the first step [of the anti-SLAPP procedure], the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. [Only] [i]f the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Id.* at p. 396.)

Moreover, it is not enough that a complaint simply refers to a defendant's speech or petitioning activity, such as involvement in litigation. Allegations "that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral, supra,* 1 Cal.5th at p. 394.)

In *Park, supra,* 2 Cal.5th 1057, the Supreme Court refined the analysis and noted the significant difference between an

allegation of constitutionally protected conduct that "*itself* is the wrong complained of" and an allegation of constitutionally protected conduct that provides only "evidence of liability or [is] a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.) The former allegation qualifies as protected activity and is subject to an anti-SLAPP motion; the latter allegation does not so qualify and may not be stricken via an anti-SLAPP motion. (*Ibid.*)

The Supreme Court explained, "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.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park, supra,* 2 Cal.5th at p. 1063.)

III. Analysis

Following *Park's* direction, we begin our analysis of the "arising from" requirement by describing the elements of the two challenged claims. "Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting

damages." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) Fraudulent concealment requires "(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 162, internal quotation marks omitted.) Without something more—and unlike free speech and petition rights—conversion and fraudulent concealment are not constitutionally protected activities.

Here, plaintiff alleges she was entitled to half of the *Heritage* settlement proceeds and seeks to hold defendants liable for conversion and fraudulent concealment based on Cella's disposition of those proceeds in a manner inconsistent with her right to receive a share. Cella's conduct in filing, prosecuting and settling the *Heritage* action is protected activity. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 958.) But Cella's burden does not stop there; to invoke anti-SLAPP protection, Cella also must demonstrate the conversion and fraudulent concealment claims arose from that protected litigation activity. (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 887 ["The critical point is that even assuming [the defendant] allegedly engaged in protected activities by his litigation actions, he still has the burden to show the [plaintiffs'] breach of fiduciary claim arose from these activities"].) Cella failed to do so.

Settlement of the *Heritage* action, a protected activity, is not the basis for plaintiff's claims. Rather, it merely provides the context for plaintiff's claims that arise from nonprotected activity, i.e., Cella's disbursement to others of money that allegedly belonged to her.

The distinction is apparent when one contrasts the anti-SLAPP motions and outcomes in *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95 (*Optional II*), the decision upon which Cella relies, with *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388 (*Optional I*). Both opinions centered around the conduct of DAS and its attorneys in "an extremely tangled thicket of legal proceedings in both state and federal court, as well as in Switzerland." (*Id.* at p. 1392.) One of those proceedings was a forfeiture action by the federal government and the seizure of assets belonging to another party. Those assets included funds in a Credit Suisse account. Optional claimed that money had been looted from its coffers, while DAS advanced a competing claim. At the behest of our government, the Swiss government froze the Credit Suisse account. (*Id.* at p. 1394.)

At some point, the federal government's forfeiture claim was extinguished. DAS then prevailed on the Swiss government to re-freeze the Credit Suisse account. (*Optional I, supra,* 222 Cal.App.4th at p. 1394.) DAS's attorneys in the state action settled that case. The settlement prompted the Swiss government to lift the DAS freeze, allowing DAS itself to obtain the disputed funds. (*Id.* at p. 1395.)

Optional sued DAS and the law firms that represented it in the state and federal actions for conversion and fraudulent conveyance. DAS responded with an anti-SLAPP motion,

arguing the claim arose from protected activity—the settlement of the state lawsuit—and was barred by the litigation privilege. (*Optional I, supra,* 222 Cal.App.4th at p. 1392.)

The trial court agreed; but the Court of Appeal reversed, holding DAS was not sued "for settling its dispute [in state court]. Rather, as [authorities] establish, conduct is not automatically protected merely because it is related to pending litigation; the conduct must arise from the litigation. Here, Optional's complaint seeks to recover monies looted from it and wrongfully obtained by DAS from the Credit Suisse account. The only connection between the settlement in the DAS superior court litigation and Optional's claims here is that the settlement was used as a device to permit DAS to persuade the Swiss government to release the funds, thereby depriving Optional of funds to satisfy its judgment." (*Id.* at pp. 1400-1401.)

Back in the trial court after the *Optional I* decision, Optional filed a first amended complaint. DAS's law firms filed their own anti-SLAPP motions to this pleading, and the trial court granted them. Optional again appealed, but the dismissals were affirmed. (*Optional II, supra,* 18 Cal.App.5th at p. 102.)

The Court of Appeal explained the law firms' conduct "arose directly out of the litigation in which they were respectively representing DAS. Under Plaintiff's theory of the case, there would not have been any transfer of funds from the Credit Suisse account to DAS but for [one firm's] work in negotiating a settlement of the state court action and but for [the other firm's] alleged failure to timely disclose the settlement to the federal district court. . . . [¶] In short, the gravamen of Plaintiff's claims against Defendants is based on protected activity, namely Defendants' representation of DAS in litigation

(the state court action and the federal forfeiture action). Accordingly, we hold that Defendants made a prima facie showing that Plaintiff's claims arise from Defendants' constitutionally protected petition rights." (*Optional II, supra,* 18 Cal.App.5th. at pp. 114-115, fn. omitted.)

Cella's conduct here—disbursing the settlement funds allegedly in violation of plaintiff's right to receive a share—is akin to the conduct of DAS rather than of DAS's attorneys. Optional sued DAS's attorneys based on their conduct during the litigation and did not allege the attorneys engaged in post-settlement conduct in derogation of the plaintiff's rights. DAS, on the other hand, was sued because it used a litigation outcome to engage in post-litigation conduct that disadvantaged Optional.

Paul v. Friedman (2002) 95 Cal.App.4th 853 (*Paul*) is also instructive. There, former clients of a securities broker arbitrated a dispute against him and his firm. The securities broker not only prevailed, but was awarded considerable monetary sanctions for the former clients' pursuit of frivolous claims. (*Id.* at p. 857.) The securities broker sued the former clients and their attorney on a variety of theories stemming from the attorney's conduct during the arbitration proceedings, including covert surveillance, intrusive investigation into the broker's private life and personal finances, and public disclosures of damaging information to the broker's current and prospective clients. (*Ibid.*)

The attorney filed an anti-SLAPP motion. The trial court granted the motion as to the broker's causes of action for intentional infliction of emotional distress, violation of right to privacy, interference with economic advantage, and malicious prosecution, finding the attorney's conduct was related to the

arbitration proceedings and for that reason was protected. (*Paul, supra,* 95 Cal.App.4th at p. 860.)

The Court of Appeal reversed as to all of the challenged causes of action except malicious prosecution.[4] The appellate court rejected the attorney's contention that "*any* conduct in connection with" the arbitration was protected by section 425.16 (*Paul, supra,* 95 Cal.App.4th at p. 866) and observed the broker's "tort causes of action plainly did not seek redress for any statements [by the attorney] 'made in' the arbitration or 'before' the arbitrators. (§ 425.16, subd. (e)(1).) [The broker] sought redress for a harassing investigation and disclosures made outside the arbitration. Thus, since the suit does not arise from statements 'made before' the arbitral body, [the attorney] had to show the suit arose from oral statements or writings 'made in connection with an issue under consideration or review' in the arbitration." (*Id.* at p. 865, fn. omitted.)

We make the same observation here: Prosecuting and settling the *Heritage* action constituted protected activity. The decision not to pay plaintiff a share was not made in conjunction with any issue before the *Heritage* court or in connection with an issue being considered by the *Heritage* court. Nor can that decision be analogized to a postjudgment activity necessarily related to the litigation. The conduct was not protected activity within the meaning of section 425.16.

With this finding, the burden never shifted to plaintiff to establish a probability of succeeding on the merits. The question of whether Cella has potentially successful defenses to plaintiff's

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[4] The broker conceded the anti-SLAPP motion was properly granted on the malicious prosecution claim. (*Paul, supra,* 95 Cal.App.4th at p. 860, fn. 10.)

claims is not before us. We decide only that the conversion and fraudulent concealment claims are not SLAPP suits that can be stricken via an anti-SLAPP motion. Because we reverse the order granting the anti-SLAPP motion, the order awarding Cella attorney fees also falls.

DISPOSITION

The orders granting defendants' anti-SLAPP motion and awarding attorney fees are reversed. The matter is remanded to the trial court with directions to vacate those orders and enter a new order denying defendants' anti-SLAPP motion. Plaintiff is awarded costs on appeal.

DUNNING, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

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