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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ROBERT H. BISNO, Plaintiff and Appellant, v. BARRY LEVINE et al., Defendants and Respondents.	B270242 (Los Angeles County Super. Ct. No. BC585019)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffey-Lewis, Judge. Affirmed.

Law Offices of Andrew D. Weiss and Andrew D. Weiss, for Plaintiff and Appellant.

Raines Feldman LLP, Miles J. Feldman, Robert M. Shore, Laith D. Mosely, for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Robert H. Bisno appeals from an order granting a motion to strike under Code of Civil Procedure section 425.16[1] (the anti-SLAPP statute).[2] The anti-SLAPP motion was filed by defendants and respondents Barry Levine and Ari Schottenstein,[3] who sought to strike specified causes of action from Bisno's complaint.

Bisno is a licensed attorney who has mostly worked as a real estate developer and consultant. Bisno's claims center around an alleged oral contract between Bisno and Ryan Ogulnick, under which Ogulnick promised to pay Bisno a percentage of profits from a real estate development project

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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] Defendants Ridgemount Investments, Inc., Alex Iscoe, and David Ulmer joined in the motion to strike, and were identified as respondents. They were later dismissed from the current appeal by order of this court on March 15, 2017.

involving real property in Santa Ana (Property). In exchange, Bisno promised to work on obtaining or modifying entitlements[4] for the Property. Respondents are two of multiple investors involved in purchasing and developing the Property. In this opinion, we will refer to Ogulnick and his business entities collectively as Vineyards; to respondents, their fellow investors, and their business entities collectively as Ilus; and to Bisno and his company Bisno Development Enterprise, LLC (BDE) collectively as Bisno.[5]

In March 2011, Vineyards and Ilus formed a corporate entity named VDC at the Met, LLC, (VDC), and divided the membership interests in VDC between themselves. Between March 2011, when VDC was formed, and June 2015, when Bisno filed the current lawsuit, certain relevant events took place. VDC purchased the Property, and then VDC engaged Bisno to provide entitlement services. The Property was

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[4] As we explained in an earlier unpublished opinion involving a separate lawsuit filed by Bisno, "'Entitlements' are discretionary approvals by government authorities with jurisdiction over the property required for development of the property, including, for example, zoning changes, variances for open space and parking requirements, and plan review." (*Bisno Development Enterprise, LLC v. Vineyards Development, Inc.* (Dec. 22, 2016, B265478 [nonpub. opn.].)

[5] Because the issues in this appeal do not hinge on the details of individual or entity relationships, a reference to the collective name may refer to one or more individuals or entities within the collective.

placed into receivership in the context of litigation between Vineyards and Ilus. The receiver sold property for an amount well above the purchase price. Vineyards and Ilus entered into a settlement agreement (Settlement Agreement) that included distribution of the Property sale proceeds. Bisno's company sued Ilus, but Ilus prevailed on summary judgment.

Bisno claims that the distribution of the Property sale proceeds interfered with his right to—or expectation of—a 40% profits interest in the Property. Respondents argue that Bisno's suit is a SLAPP because his claims arise from the Settlement Agreement and are barred by various affirmative defenses, including the litigation privilege and issue preclusion.[6]

We affirm the court's order granting respondents' anti-SLAPP motion. Bisno's claims against respondents rest exclusively on a settlement agreement in a different case and therefore fall squarely under the protections of the anti-SLAPP statute. The trial court also correctly concluded that Bisno could not show a probability of prevailing on his claims because respondents were protected by the litigation privilege (Civ. Code, § 47) and because issue preclusion prevents Bisno from relitigating a key element of his claims.

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[6] Issue preclusion is the aspect of the doctrine of res judicata historically referred to as collateral estoppel, and it "describes the bar on relitigating issues that were argued and decided in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

FACTUAL AND PROCEDURAL BACKGROUND

Bisno was introduced to Ogulnick in late 2010. Bisno claims he and Ogulnick reached an oral agreement under which Bisno "would provide entitlement and consulting services . . . with the goal of re-entitling the Property for a low rise residential development." Bisno would receive hourly compensation up to $26,000 per month, plus "an interest in profits from the development, sale or refinancing of the Property." In March 2011, VDC was formed, with Vineyards and Ilus as the original owners. VDC acquired the Property for around $6 million. At some point, Vineyards sought to renegotiate Bisno's profits interest and Bisno sought to reduce the oral agreement to a writing. In August 2011, VDC and Bisno entered into an independent contractor agreement (ICA), under which VDC paid $8,000 per month for Bisno's "development and entitlement related services." The ICA acknowledged that Bisno might also be paid by a third party for the same work, and attached a copy of a draft agreement (the Entitlement Representation Agreement, or ERA) between Bisno and Vineyards.[7] The

[7] The ICA contains language reflecting the parties' awareness of ongoing discussions regarding the ERA, as follows: "3.01. In consideration for the services to be performed by Contractor, Client agrees to pay Contractor the sum of Eight Thousand Dollars ($8,000.00) per month for each month Contractor performs the services to be

ERA, which was dated July 11, 2011, but was never signed by Vineyards, would permit Bisno to bill Vineyards an hourly rate, up to $26,000 per month, for "entitlement and related consultancy and real estate advisory services" as well as a 40% profits interest.[8] The draft ERA is on Bisno's letterhead, and the last two sentences of the first paragraph state, "This agreement is not binding upon [VDC.] VDC is not a party to this Agreement."

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performed under this Agreement (the 'Compensation'). All monthly payments shall be payable in arrears. Client acknowledges that Contractor is receiving, or will receive, additional compensation from others for related tasks for which Client is paying Contractor hereunder. Client is not bound by any agreement Contractor has with any third party nor is Client obligated to pay any sums due to Contractor under any other agreement. Contractor warrants and represents that the attached Exhibit 'B' is a true and correct copy of the current draft of the aforementioned agreement between Contractor and other third parties." Exhibit B is copy of the ERA, signed by Bisno, but unsigned by Vineyards.

[8] The language in the draft ERA states, "In addition to the above described compensation You agree to provide, and hereby assign to BDE, or it's assignee a profits interests of 40% which includes all proceeds, income and other consideration . . . after payment of the minimum payments or yields of any secured lender on the Property or preferred equity in the LLC that owns the property and return of your investment (up to a maximum of $8,800,000 in the aggregate)."

Related cases

Two other lawsuits are relevant to the determination of respondents' anti-SLAPP motion in the current case.

1. *VDC Litigation*

After a dispute over ownership and control of VDC arose, Vineyards sued Ilus in May 2012 (VDC Litigation). Vineyards alleged various breaches of contract and duties, and sought rescission, restitution, and dissolution of VDC. The court appointed a receiver to manage the Property in September 2012. The receiver sold the Property for $17,250,000 in October 2013. Vineyards and Ilus executed the Settlement Agreement in March 2014. According to the recitals of the Settlement Agreement, once the receiver sold the Property, the sale proceeds were reduced to pay various expenses, and the "remaining portion of the Sale Proceeds (the 'Remaining Proceeds') are currently being held in various accounts controlled by the Receiver." "The Parties now desire to seek an order to remove the Receiver, make provision for any actual or potential liabilities and/or obligations, provide for the distribution of the Remaining Proceeds, assign the entire [Vineyards] Interest to [Ilus] and otherwise settle and fully terminate each and every one of the disputes that exist between each other in a mutually satisfactory manner, and have agreed to resolve their

differences all on the terms set forth in this Agreement." The Settlement Agreement established a method for distributing the Remaining Proceeds, the details of which are not relevant here. The receiver submitted a final report on June 16, 2014.

2. Federal Action

In October 2013, Bisno sued Ilus, asserting various claims, including fraud, interference with contract, and quantum meruit (Federal Action). The case was removed to federal district court, where the court granted defendants' motion for summary judgment. In its findings of fact, the court found based on uncontroverted evidence "that no version of the alleged ERA is an enforceable contract," and Vineyards "did not assent to grant [Bisno] any profits interest." Focusing specifically on Bisno's claim that Ilus intentionally interfered with his 40% profits interest, the court stated: "Plaintiff failed to show that the ERA is an enforceable contract or that it is entitled to a 40% profits interest. [¶] The Court therefore concludes that there was no enforceable contract for Defendants to interfere with, and that Defendants' acts or omissions did not result in any legally cognizable damages to Plaintiff, so Defendants are entitled to summary judgment on Plaintiff's claim for intentional interference with contract."

Bisno's Complaint

In the case currently on appeal, Bisno's complaint asserts the following claims against respondents: intentional interference with contract (fourth cause of action); intentional interference with prospective economic advantage (fifth cause of action); negligent interference with prospective economic advantage (sixth cause of action); conversion (eighth cause of action); and theft pursuant to Penal Code section 496 (tenth cause of action).

Bisno's fourth cause of action for intentional interference with contract alleges Ilus "entered into an agreement to distribute, and have distributed, the profits from the sale of the Property to members or managers of [VDC]," and "through their aforementioned agreement distributed the profits from the sale of the Property to themselves and others thus depriving [Bisno] of his assigned interest in those funds."

Bisno's fifth cause of action for intentional interference with prospective economic advantage and sixth cause of action for negligent interference with prospective economic advantage focus on Bisno's existing economic relationships and the anticipated economic benefit of his continued involvement in the project to develop the Property. Bisno claims Ilus was aware of his prospective economic advantage, and "nevertheless distributed the funds from the proceeds of the sale of the Property - including those owed to Plaintiff . . . in disruption of Plaintiffs' economic advantage

and economic relationships." The complaint then alleges Ilus "participated in a settlement of claims among certain other Defendants and other parties but not including [Bisno], which claims pertained to the distribution of funds from the sale of the Property; this settlement resolved various litigation matters among numerous parties, some of which are named as Defendants herein." Bisno alleges Ilus intended "to disrupt the relationship between [Bisno] and [Vineyards], including but not limited to agreeing to transfer full control of [VDC], in derogation of Plaintiffs' rights, and distributing the profits from the sale of the Property to others and not to Plaintiff, even after this instant lawsuit was initiated." The complaint also alleges respondents and others "distributed the funds from the sale of the Property to others including members and managers of [VDC] . . . and directly or indirectly to all of the [Ilus defendants]."

Bisno's eighth cause of action for conversion alleges the Settlement Agreement gave respondents and others "control over the profits from the sale of the Property . . . , which profits include [Bisno's] assigned Profits Interest, for the purpose of distributing the profits from the sale of the Property to persons other than [Bisno]."

Bisno's tenth cause of action for breach of Penal Code section 496 alleges Vineyards and Ilus "agreed to, and did, distribute the proceeds from the sale of the Property to themselves with the intent of embezzling and/or stealing the funds representing [Bisno's] assigned Profits Interest" and such actions amounted to theft or larceny.

Respondents' anti-SLAPP motion

Respondents argued Bisno's claims against them arose from the Settlement Agreement, which was protected conduct under the anti-SLAPP statute. Respondents argued there were a number of reasons why Bisno could not demonstrate a probability of prevailing on his claims. First, the Settlement Agreement and respondents' actions under it were protected by the litigation privilege, as set forth in Civil Code section 47, subdivision (b). Second, issue preclusion prevented Bisno from relitigating the question of whether he had a 40% profits interest in the Property, as that question had already been determined in the Federal Action. Third, the doctrine of unclean hands barred Bisno from claiming damages from respondents. The motion was supported with declarations by Ogulnick, respondents, and the appointed counsel for the court-appointed receiver in the VDC Litigation, as well as a four-volume Appendix of Exhibits.

Bisno's opposition

Bisno opposed respondents' anti-SLAPP motion, providing a history of the relationship between the parties and arguing that the gravamen of his claims against respondents did not arise from protected activity and did not involve a matter of public interest. He argued he had established sufficient facts to show a probability of

prevailing and respondents had failed to establish any relevant defenses, including litigation privilege, issue preclusion, or unclean hands. He also argued that respondents were requesting excessive attorney fees. Bisno submitted his own declaration in support of his opposition, including a number of attachments.

Order granting Defendants' motion

The trial court granted respondents' anti-SLAPP motion, and gave a brief explanation of its reasoning. First, the court concluded that Bisno's claims were based on respondents' protected free speech and petitioning activity. It noted that respondents were not involved in the underlying contract or any actions pertaining to it, and that Bisno's claims arose solely from "their participation in the distribution of settlement proceeds." The court rejected Bisno's argument that his allegations are ancillary or incidental to the settlement, instead concluding that they were "directly related to the settlement" and therefore protected activity under the anti-SLAPP statute.

Addressing the second prong of the anti-SLAPP analysis, the court concluded Bisno could not demonstrate a probability of prevailing at trial because the litigation privilege restricted his ability to present evidence.

DISCUSSION

Standard of review

"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. [Citation.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

Anti-SLAPP analysis

"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.)

1. Arising from protected activity

Bisno contends his claims against respondents do not arise from protected activity and do not involve a matter of public interest. Because Bisno's claims arise from the Settlement Agreement, which is protected activity under the anti-SLAPP statute, we reject his first contention. On the question of public interest, because respondents were engaged in petitioning activity, the law does not require the conduct to concern a matter of public interest.

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon Enterprises v. Consumer Cause, Inc.* [(2002)] 29 Cal.4th [53,] 66; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114 [(*Briggs*)].) 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.' (*City of Cotati*, at p. 78; accord, *Equilon Enterprises*, at p. 66.) '[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.' (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 89; see *City of Cotati*, at p. 78 [suit may be in 'response to, or in retaliation for' protected activity without necessarily arising from it].) 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.' (*Navellier*, at p. 92, italics omitted.) '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) . . . .' (*Equilon Enterprises*, at p. 66, italics added.) In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park, supra*, 2 Cal.5th at pp. 1062-1063.)

The four categories of protected activity under the anti-SLAPP statute are: "(1) 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," "(2) . . . 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," or "(3) made in a place open to the public or a public forum in connection with an issue of public interest," as well as "(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).)

In determining whether a plaintiff's claim arises from protected activity as defined in the anti-SLAPP statute, "'the nature or form of the action is not what is critical but rather

that it is against a person who has exercised certain rights' [citation]." (*Navellier, supra,* 29 Cal.4th at p. 93.) "In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier, supra*, 29 Cal.4th at p. 89.)

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.) A settlement agreement executed in the context of active litigation is "made in connection with an issue under consideration or review by a . . . judicial body." (§ 425.16, subd. (e); *Navellier, supra*, 29 Cal.4th at p. 90 [finding defendant's negotiation and execution of a release to be protected activity]; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841-842 [plaintiff's claims concerning fraud in the context of negotiating stipulated judgment subject to anti-SLAPP statute].)

Bisno's claims arise from the Settlement Agreement

The gravamen of Bisno's claims is that respondents wrongfully deprived him of a 40% profits interest in the Property. Bisno argues the Settlement Agreement and communications in connection with that agreement "are only incidental to" his claims against respondents. He also

argues his claims existed before the Settlement Agreement, and were initially asserted in the Federal Action.

In each of the five causes of action subject to respondents' anti-SLAPP motion, the allegations regarding respondents' wrongful conduct stem from their settlement communications within the litigation or actions taken in accordance with the Settlement Agreement. Bisno's allegations of wrongful conduct centered around respondent's failure or refusal to pay Bisno a profits interest. The nature of Bisno's claims (for torts like interference with contract or prospective economic advantage, conversion, etc.) reflects Bisno's recognition that any agreement for payment of a profits interest was only between himself and Ogulnick. In his declaration, Bisno asserts that the Property was sold for $17,250,000 at a court-approved sale around October 2013, a price that "was in excess of $11,000,000.00 more than the purchase price," resulting in "a substantial profit." According to Bisno's declaration, "VDC, which was controlled by Defendants, refused to distribute profits to [Vineyards] and Bisno." At the end of his declaration, Bisno sums up his argument as follows: "Although my efforts were entirely successful in obtaining a new development agreement, with new entitlements for the Property, and the Property was sold approximately two and one-half years after it was purchased for more than double its purchase price, at a price of approximately $11 million above its purchase price, Defendants have refused to pay me or BDE the assigned

profits interest. Instead, Defendants have distributed the profits from the sale of the Property to themselves."

The allegations of the complaint, when considered together with the declarations and attached documentation, support the conclusion that the only agreement that "distributed the profits from the sale of the property" was the Settlement Agreement. Bisno does not contend his claims rest on any other agreement. Instead, he argues his claims "are based on conduct that pre-dates the VDB Settlement Agreement." However, nothing in the complaint or Bisno's declaration describes any other conduct that even arguably supports Bisno's claims against respondents. Despite his best attempts to do so, Bisno cannot escape the inevitable conclusion that his claims against respondents arise solely from the Settlement Agreement. The trial court correctly concluded that Bisno's claims arose from the Settlement Agreement, which is protected activity under the anti-SLAPP statute. (*Navellier, supra*, 29 Cal.4th at p. 90; *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118 [entering into a settlement agreement is a protected activity].)

Bisno's claims against respondents are not based solely on conduct, untethered from protected speech or petitioning activity.

Bisno also contends[9] that even if the wrongful conduct occurred in connection with litigation, it is not protected activity under the anti-SLAPP statute because respondents did not argue or establish that it was a matter of public interest, as required under subdivision (e) of section 425.16. Bisno's argument tries to draw a distinction between speech and conduct, separating the Settlement Agreement from Ilus's distribution of funds in accordance with the terms of the Settlement Agreement. We disagree that Ilus's conduct in carrying out the terms of the Settlement Agreement can be separated from the Settlement Agreement itself. The scenario before us is different from that considered by the Sixth District in an anti-SLAPP case where the plaintiffs' cause of action arose from the defendant law firm's conduct *in violation of* a written stipulation to not distribute settlement funds until certain conditions were met. (*Old Republic Construction Program Group v. Boccardo Law*

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[9] Bisno's brief consists of 15 consecutively numbered sections, and the point discussed here appears on the fifth page of section 6, entitled "The trial court's judgment should be reversed in that appellant's claims do not arise from protected activity." We consider the issue on the merits, but note that an appellate brief must state each point under a separate heading or subheading. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

Firm, Inc. (2014) 230 Cal.App.4th 859, 867-869 (*Old Republic*); see also *Greco v. Greco* (2016) 2 Cal.App.5th 810, 823-825 [anti-SLAPP statute does not apply where the plaintiff's claim "was not based on the wrongful act of pursuing meritless or wasteful litigation, but on taking trust and estate funds"].)

In our case Ilus's conduct was dictated by the Settlement Agreement. Far from being "incidental" to the agreement, it is inextricably intertwined with Vineyards' and Ilus's statements and writings "made in connection with an issue under consideration or review by a . . . judicial body . . ." (§ 425.16, subd. (e).) When the subject activity is petitioning activity falling under subdivision (e) of section 425.16, the moving defendant "need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs*, *supra*, 19 Cal. 4th at p. 1123.)

2. Minimal merit

"To satisfy the second prong—the probability of prevailing—the plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is accepted. The trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. Although "'the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if,

as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'"' (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 962-963, citations omitted.) The party defending against an anti-SLAPP motion need only show that the claim has "minimal merit" to survive an anti-SLAPP motion. (*Navellier, supra*, 29 Cal.4th at p. 93-94.)

Bisno cannot establish a probability of prevailing on his claims against respondents. Each of his claims fails as a matter of law for two separate reasons. First, the litigation privilege protects respondents from any tort claims in connection with the Settlement Agreement. Second, even if the litigation privilege was inapplicable, the doctrine of issue preclusion prevents Bisno from relitigating his right to payment of a 40% profits interest, as that issue was already decided adversely to Bisno in the Federal Action.

Litigation privilege

Because the Settlement Agreement is protected by the litigation privilege, Bisno cannot satisfy the second prong required to defeat an anti-SLAPP motion. The question of whether the litigation privilege applies to settlement agreement "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 v. Wolf* (2007) 154 Cal.App.4th 28, 38, fn. omitted.) "A plaintiff cannot

establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1172.)

Civil Code section 47, subdivision (b), defines the litigation privilege: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding." 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 (*Silberg*).) 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 first part of the test for determining whether the litigation privilege applies is quite broad; the privilege applies to "any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Id.* at p. 212.)

"Although originally enacted with reference to defamation [citation], the privilege is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.] Further, it applies to any

publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation." (*Silberg*, *supra*, 50 Cal.3d at p. 212.)

"Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 913.) "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.)

The Settlement Agreement was a communication made in the course of a judicial proceeding by the parties to the VDC Litigation. Because it resolved the parties' claims in the action, it had a logical relation to achieving the object of the litigation. (*Silberg*, *supra*, 50 Cal.3d at 212.) The Settlement Agreement is protected by the litigation privilege, and nothing in Bisno's complaint or declaration establishes any facts that would overcome the privilege.

Bisno argues the litigation privilege does not apply because his claims against respondents rest not on the Settlement Agreement, but on respondents' noncommunicative conduct, presumably distributing the proceeds from the receiver's sale of the Property. This argument fails because "the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct . . . . Stated another way, unless it is demonstrated that an independent, noncommunicative,

wrongful act was the gravamen of the action, the litigation privilege applies.' [Citation.]" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 957.) As explained earlier in this opinion, there is no basis for distinguishing the Settlement Agreement from respondents' actions carrying out the terms of the agreement. On these facts, the lower court correctly concluded that the litigation privilege prevented Bisno from showing a probability of prevailing on his claims.

Issue preclusion

Bisno argues issue preclusion does not prevent him from showing that his claims have minimal merit, because he was not a party to the Federal Action, and the existence of an oral contract for his 40% profits interest was not litigated in the Federal Action. We disagree.

The doctrine of res judicata encompasses both claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823–824 (*DKN Holdings*).) "*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' . . . [¶] *Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] There is a limit to the reach of issue preclusion, however. In accordance with

due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party." (*Id.* at p. 824.) Issue preclusion applies: "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 825.) For purposes of issue preclusion, a federal judgment is deemed final in the California courts whether the time for appeal from the judgment has expired or whether the there is an appeal pending from that judgment. (*Calhoun v. Franchise Tax Board* (1978) 20 Cal.3d 881, 887.)

a. Privity

Bisno argues issue preclusion does not prevent him from proving respondents' liability because his company BDE was the only plaintiff in the Federal Action, and Bisno, as an individual, did not appear as a party to the litigation. This argument ignores the fact that issue preclusion can be applied not only to a party from the first lawsuit, but also to "one in privity with that party." (*DKN Holdings, supra*, 61 Cal.4th at p. 825.)

"[P]rivity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. [Citation.] A nonparty alleged to be in

privity must have an interest so similar to the party's interest that the party acted as the nonparty's ""virtual representative"" in the first action. [Citation.]" (*DKN Holdings*, *supra*, 61 Cal.4th 826.)

Respondents demonstrated that BDE and Bisno are in privity. Bisno is the sole member and CEO for BDE, and the company takes all of its actions through Bisno. In addition, Bisno acted as BDE's attorney in the Federal Action. These facts, which are uncontroverted, establish that BDE and Bisno are in privity, clearing the way for Bisno to be precluded from relitigating issues decided adversely to BDE in the Federal Action.

b. Actually litigated

Bisno argues that the summary judgment motion in the Federal Action concerned the ERA only, taking the position that federal court's prior adverse ruling does not have issue preclusive effect over claims involving the oral contract (presumably in contrast to the ERA). Ultimately, his argument fails because the parties litigated whether BDE had a profits interest under any theory, and the federal court unequivocally determined it did not.[10]

[10] The U.S. Court of Appeals for the Ninth Circuit subsequently affirmed the decision of the district court. (*Bisno Dev. Enter., LLC v. Levine* (9th Cir. 2016) 671 Fed.Appx. 427.)

"For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts. [Citations.] 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [Citation.]' [Citation.]" (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511-512.)

The record shows that the parties to the Federal Action actually litigated whether Bisno had a 40% profits interest in the Property sale proceeds under any theory, and the matter was determined adversely to Bisno. BDE's complaint in the Federal Action alleged that around the time Ogulnick was beginning the process of acquiring the Property, BDE and Ogulnick were in discussions, which "resulted in an oral understanding which thereafter led to a written agreement," which was the ERA, an unsigned version of which was attached to BDE's complaint. Consistent with Bisno's assertions in the present case, the complaint in the Federal Action alleged BDE and VDC entered into the ICA, with the ERA attached as an exhibit. The complaint also references e-mails reflecting respondents' awareness of the ERA, and alleged "[t]he ICA specifically provided that [BDE] would be

entitled to substantial compensation under the [ERA]." Bisno's declaration in opposition to respondents' anti-SLAPP motion provides a consistent explanation for why respondents were aware of Bisno's claim to a 40% profits interest. BDE's complaint in the Federal Action asserted that the defendants acted fraudulently to deprive BDE of its profits interest: "It is the tortious and otherwise unlawful actions of all Defendants, both prior to the codification of the [ERA] and thereafter, that deceived Plaintiff and fraudulently concealed material matters from Plaintiff as set forth herein and deprived Plaintiff of its rightful and earned compensation and consideration thereunder the [ERA]. [¶] . . . [BDE] has been damaged by the acts of Defendants as to Plaintiffs rights to profits as set forth herein."

In their motion for summary judgment, the defendants in the Federal Action argued that BDE's claims of fraud and negligent and intentional interference with contract must fail. Defendants' argument characterized the 40% profits interest as the basis for BDE's claims. For example, they argued "[Bisno's] request that his wholly owned company, BDE, receive a 40% of the profits [Vineyards] might realize from its investment in [VDC] was therefore an effort by an attorney to engage in a business transaction with a client." The motion for summary judgment also stated "BDE's claims for negligent and intentional interference with contract seek as damages the alleged value of the claimed 40% interest in VDI's profits." BDE's opposition papers also reflected this expansive characterization of the basis for BDE's profits

interest by stating, "Defendants contend BDE did not have an enforceable agreement with Ogulnick, which as set forth above doesn't help them in this litigation. At a bare minimum, the existence of a contract with Ogulnick is an issue of fact, however, based on the full performance by Bisno, partial payment by Ogulnick, representations made to Bisno and the Defendants as to the existence of said agreement, Defendants claims have no weight."

The court's ruling on defendant's motion for summary judgment similarly reflected the extent to which the parties had taken an expansive approach to determining whether there was any basis for BDE's claim to a profits interest. The federal court's findings of fact and conclusions of law unambiguously determined there was no basis for BDE's profits interest claim, concluding there was uncontroverted evidence that Ogulnick "never signed any version of the ERA, and never agreed to the terms of the ERA *or to any profits interest*." (Italics added.) It further concluded that BDE failed to demonstrate or raise a material factual issue "that any version of the ERA is an enforceable agreement *or that VDI assented to grant BDE or its principal, Robert Bisno, a 40% profits interest*." (Italics added.) The court ultimately found based on uncontroverted evidence "that no version of the alleged ERA is an enforceable contract" and "that VDI did not assent to grant BDE or its principal, Robert Bisno, any profits interest."

Because BDE and Bisno had a full opportunity and adequate incentive to fully litigate the issue of whether BDE

was entitled to a 40% profits interest, we conclude the question was adequately litigated, and issue preclusion applies. Having placed his 40% profits interest at issue in the Federal Action, and having lost at summary judgment, Bisno is precluded from relitigating the matter. He therefore cannot show that any of his claims against respondents have minimal merit.

Other substantive defenses

Because we have already determined that Bisno cannot overcome the litigation privilege or issue preclusion to demonstrate that his claims have minimal merit, we decline to address whether other substantive defenses apply, including the affirmative defense of unclean hands or one based on Rule 3-300 of the Rules of Professional Conduct.

DISPOSITION

The order granting the motion to strike filed by respondents Barry Levine and Ari Schottenstein under Code of Civil Procedure section 425.16 is affirmed. Costs on appeal are awarded to respondents.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, 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.