Filed 5/7/14 Cohan v. Chapman, Glucksman et al. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

NEDJATOLLAH COHAN, Plaintiff and Appellant, v. CHAPMAN, GLUCKSMAN, DEAN, ROEB & BARGER et al., Defendants and Respondents.	B246438 (Los Angeles County Super. Ct. No. SC116911, BC414131)

APPEAL from an order of the Superior Court of Los Angeles County, John H. Reid, Judge. Affirmed.

Nedjatollah Cohan, in pro. per.; and Gary S. Brown for Plaintiff and Appellant.

Gilbert, Kelly, Crowley & Jennett, Jon H. Tisdale and Jennifer Calderon for Defendants and Respondents.

* * * * * *

Plaintiff Nedjatollah Cohan appeals from the court's order granting a special motion to strike under Code of Civil Procedure section 425.16 (anti-SLAPP[1] motion).[2] Moving defendants Randall Dean, J. Andrew Wright, and Chapman Glucksman, Dean, Roeb & Barger (Chapman Glucksman) contend the challenged causes of action arose from protected activity, and moreover, Cohan did not demonstrate a probability of success on the merits. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Underlying Lawsuit

Cohan is the owner of Nedco International, Inc. (Nedco). In May 2009, Nedco filed a suit for professional malpractice against its accountants, Christopher Gaynor and his firm, Wayne, Gaynor, Umanoff & Pollack, L.P. (collectively, the accountants), for alleged negligence in preparing Nedco's corporate tax returns. Cohan retained Michael Drucker to represent Nedco in the underlying lawsuit. Chapman Glucksman represented the accountants in the underlying lawsuit. Dean and Wright were the Chapman Glucksman attorneys responsible for handling the case.

In August 2009, Dean attempted to meet and confer with Drucker several times regarding Nedco's discovery responses. Drucker did not respond until December 2009, when he told Dean that Nedco had engaged him only to propound limited discovery. Drucker reported that he had asked Nedco to retain new counsel by the following week.

The parties had set Cohan's deposition for January 21 and 22, 2010. On January 19, 2010, Dean received a letter from Cohan stating Drucker no longer represented Nedco and he had no attorney to represent him at his deposition. On January 20, 2010, Dean sent a response stating that both Cohan and Drucker had informed him Drucker was no longer counsel for Nedco. Dean asked that Cohan inform him as soon as Nedco obtained new counsel. He agreed to postpone Cohan's deposition for a short period so

---

1 Strategic lawsuit against public participation.

2 Further undesignated statutory references are to the Code of Civil Procedure.

that he could retain new counsel and proposed alternative dates in early February. On January 21, 2010, Cohan sent another letter to Dean stating he had no counsel and would not appear for his scheduled deposition. He did not, in fact, appear for his deposition.

On February 17, 2010, Dean received a telephone call from his client, Gaynor, saying that Cohan and his adult children were at Gaynor's office and they had agreed to settle the underlying lawsuit against the accountants for $29,999. Dean did not speak to Cohan himself. Dean then prepared a "Settlement and Mutual General Release of Claims" (the settlement agreement). The parties to the settlement agreement were the accountants on the one hand and Nedco and Cohan individually on the other. The first paragraph of the settlement agreement stated Nedco and Cohan would be referred to collectively as "Nedco" in the agreement. The settlement agreement contained the following provision: "Each of the Parties hereto has had the opportunity to receive independent legal advice from attorneys of his or her own choice, with respect to the advisability of executing this Release, and prior to the execution of this Release by each Party, each Party's attorney(s) reviewed this Release at length, and made all desired changes."

Dean emailed the settlement agreement to Gaynor, who then returned the fully executed agreement to Dean. The parties executed the agreement on February 17, 2010. Cohan signed the agreement twice, once as the authorized representative of Nedco and again for himself.

On February 19, 2010, Cohan sent a letter to Dean demanding that he amend the settlement agreement because Cohan purportedly did not agree to release any claims individually. Dean refused to amend based on the statement in the agreement that it was intended to be a final and binding agreement between the parties. On February 25, 2010, Dean filed a Notice of Settlement in the underlying lawsuit. Dean mailed the $29,999 settlement payment to Cohan on March 5, 2010, and asked that he file a request for dismissal pursuant to the terms of the settlement agreement. Cohan did not file a request for dismissal, and the court set an order to show cause (OSC) regarding dismissal.

Dean's colleague Wright appeared for the accountants at the OSC hearing. Cohan appeared without counsel for Nedco. Based on Cohan's and Drucker's previous statements that Drucker no longer represented Nedco, and Cohan's failure to appear at his deposition because of his lack of counsel, Wright communicated to the court his belief that Drucker had substituted out of the case. The court continued the OSC hearing.

At the continued OSC hearing, Wright again appeared for the accountants. Drucker appeared because he had filed an ex parte application to be relieved as counsel for Nedco, which the court was hearing simultaneously. Cohan was also present. After hearing the matter, the court ordered the underlying lawsuit dismissed because the case had been settled.

2. The Instant Action

In May 2012, Cohan filed this action against the accountants, the accountants' insurer, Dean, Wright, Chapman Glucksman, and Drucker. The complaint alleged in pertinent part as follows. Dean conspired with Drucker to defeat Cohan's claims in the underlying lawsuit. Dean drafted a "fraudulent settlement agreement" in the underlying lawsuit and "intentionally inserted" Cohan's name in the settlement agreement, even though Cohan individually was not a plaintiff in the lawsuit. Gaynor handed Cohan an eight-page settlement agreement after Cohan's family convinced him to settle the underlying lawsuit. The morning after signing the settlement agreement, Cohan read the document and realized he had been "defrauded." He wrote to Dean to revoke the settlement agreement, but Dean refused his request. Drucker intentionally did not appear at the first OSC hearing because he was conspiring with Dean and Wright, and Wright lied to and misled the court when he said Nedco did not have an attorney. Against Dean,

Wright, and Chapman Glucksman, Cohan alleged three causes of action -- fraud, financial elder abuse, and conspiracy.[3]

Dean, Wright,[4] and Chapman Glucksman filed an anti-SLAPP motion arguing Cohan's causes of action against them arose strictly from protected activity, and moreover, Cohan could not demonstrate a probability of prevailing. Cohan's opposition argued he had filed a first amended complaint (FAC) after the moving defendants filed the anti-SLAPP motion, and because the FAC deleted the offending allegations, the anti-SLAPP motion was moot. At the motion hearing, Cohan testified briefly. He said Gaynor and Dean prepared the settlement agreement and induced him to sign it.

The court granted the anti-SLAPP motion and struck the fraud, financial elder abuse, and conspiracy causes of action. It determined all the oral or written statements made by the moving defendants were protected activity. The court further determined Cohan had not established a probability of prevailing on the merits of the challenged causes of action because they were barred by the litigation privilege. Additionally, Cohan could not defeat the anti-SLAPP motion by filing an FAC after the motion had been filed. The court struck the FAC, although it indicated Cohan could file an FAC after it issued its ruling on the motion. The court entered judgment for Dean, Wright, and Chapman Glucksman. Cohan filed a timely appeal.

---

3 As against Drucker, the complaint also alleged breach of contract, legal malpractice, and accounting. Drucker is not a party to this appeal, nor are Gaynor and his accounting firm.

4 Cohan voluntarily dismissed Wright from the action before the court heard the anti-SLAPP motion. Wright is thus not a party to this appeal.

STANDARD OF REVIEW

We review an order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) We consider the pleadings and supporting and opposing affidavits upon which the liability or defense is based. (§ 425.16, subd. (b)(2).) We will affirm the order if it is correct on any legal ground, whether or not the court relied on that ground. (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1439.)

DISCUSSION

The anti-SLAPP statute provides "[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).) Thus, a court's task in ruling on an anti-SLAPP motion to strike is a two-step process. First, the court determines whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity ("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"). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the defendant makes such a showing, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*) If the challenged causes of action both arise from protected activity *and* lack merit, they are subject to being stricken under the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Both prongs have been satisfied in the present case. The court did not therefore err in granting the anti-SLAPP motion of Dean, Wright, and Chapman Glucksman.

1. The Causes of Action Arose from Protected Activity

Under the terms of the statute, protected activity includes, among other things, "(1) any written or oral statement or writing made before a legislative, executive, or

judicial proceeding, or any other official proceeding authorized by law [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).) Thus, under the plain language of the statute, "as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480; see *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907 ["Statements and writings made in connection with litigation are therefore covered by the anti-SLAPP statute"].) This includes oral or written statements made as part of settlement negotiations. (e.g., *Navellier v. Sletten, supra,* 29 Cal.4th at pp. 89-90 [alleged misrepresentations in the negotiation and execution of a settlement agreement constituted statements or writings made in connection with litigation, i.e., protected activity]; *GeneThera, Inc. v. Troy & Gould Professional Corp., supra,* 171 Cal.App.4th at pp. 907-908 [tort causes of action based on communication of offer to settle ongoing lawsuit constituted protected activity]; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841-842 [alleged fraudulent statements made to induce adversary to settle pending lawsuit constituted protected activity]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [acts of attorney in negotiating a stipulated settlement of pending lawsuit constituted protected activity].)

Here, the challenged causes of action arose from protected activity because they were based on statements made in connection with pending litigation. Cohan's main argument is that Dean drafted a "fraudulent settlement agreement" when he made Cohan a party to the settlement agreement, even though Cohan did not intend to release his individual claims. But the written statements of Dean were in the course of settlement negotiations and fell squarely within the definition of protected activity. To the extent Cohan's causes of action were based on Wright's statement that Drucker had substituted

out of the underlying lawsuit, this was a statement made before a judicial body and also fell squarely within the realm of protected activity.

Cohan argues the court erred because the moving defendants' communications constituted illegal activity, and in such a case, they cannot rely on the anti-SLAPP statute. This contention does not persuade us. "'[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical.'" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285.) "An exception to the use of section 425.16 applies only if a 'defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.'" (*Ibid*. quoting *Flatley v. Mauro, supra*, 39 Cal.4th at p. 320.) The moving defendants have not conceded they engaged in illegal activity, nor was there evidence conclusively establishing they engaged in illegal activity as a matter of law. Indeed, the only evidence adduced by Cohan was his conclusory statements at the motion hearing that Gaynor and Dean prepared the settlement agreement and induced him to sign it. He did not explain what was communicated to him or how Dean otherwise induced him.

Cohan further argues the court erred because his causes of action were not intended to chill the moving defendants' free speech rights. This contention is also unavailing. The case law is clear that a moving defendant need not prove the plaintiff intended to chill the defendant's free speech rights. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.)

2. Cohan Failed to Show a Probability of Prevailing

To demonstrate a probability of prevailing on the challenged causes of action, "the plaintiff must state and substantiate a legally sufficient claim. [Citation.] 'Put another way, the 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."'" (*Navarro v. IHOP Properties, Inc., supra*, 134 Cal.App.4th at p. 843.) In the present case, there are several reasons why Cohan cannot prevail on the merits.

First, the causes of action were based on conduct subject to an absolute litigation privilege. Civil Code section 47, subdivision (b) provides in relevant part that, with exceptions not applicable here, a privileged publication is one made "[i]n any . . . judicial proceeding . . . ." Section 47 has been held to apply broadly to any communication and all torts except malicious prosecution. (*GeneThera, Inc. v. Troy & Gould Professional Corp., supra*, 171 Cal.App.4th at p. 909.) The litigation privilege is absolute "'not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions . . . .'" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

The litigation 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. [Citations.] [¶] The usual formulation is that the privilege 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, supra*, 50 Cal.3d at p. 212.) "[O]ur Supreme Court has observed that a communication need not itself be 'accurate' or 'truthful' for the privilege to attach but simply within the 'category of communication permitted by law.'" (*GeneThera, Inc. v. Troy & Gould Professional Corp., supra*, 171 Cal.App.4th at p. 909.) Any communication with "'with "some relation" to judicial proceedings' are 'absolutely immune from tort liability.'" (*Ibid.*) Accordingly, any statements directed to Cohan as part of settlement negotiations or statements made in the settlement agreement fell within the category of communications to which the litigation privilege attached, whether or not they were misrepresentations.

Second, based on the undisputed facts, Dean and the other moving defendants could not have defrauded Cohan because they did not communicate directly with him. The settlement negotiations took place between Cohan and Gaynor. Gaynor directed Dean to send him a draft of the settlement agreement. Gaynor then handed the agreement to Cohan. There is no evidence Dean or any of the moving defendants spoke to Cohan.

In other words, there was no point at which the moving defendants could have made false promises or misrepresented any facts to Cohan.

Third, even assuming Gaynor or one of the other defendants falsely promised Cohan that he was releasing only Nedco's claims, Cohan lacks proof of justifiable reliance. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 [setting forth essential elements of fraud, including justifiable reliance].) The very first paragraph of the settlement agreement explained Cohan individually, as well as Nedco, was a party to the settlement agreement, and Cohan signed the agreement in a dual capacity. Cohan apparently did not read the agreement until the following day. But when he did read it, he realized immediately he had released his claims. Reliance on an alleged misrepresentation is not justifiable when readily available information will demonstrate the falsity. (*Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1589 [reliance unjustified as a matter of law when misrepresentations "were patently at odds with the express provisions of the written contract," which the plaintiffs failed to read].)

In sum, Cohan did not meet his burden of demonstrating a probability of success on the merits, while the moving defendants met their burden.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.