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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TROY A. STEWART,

Plaintiff and Appellant,

v.

EXTENDED STAY AMERICA et al.,

Defendants and Respondents.

B272333

(Los Angeles County
Super. Ct. No. BC606346)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Robert L. Hess, Judge. Affirmed.

Troy A. Stewart, in pro. per., for Plaintiff and Appellant.

LeClairRyan, Christiane E. Cargill Kinney and Ellie
Saadat for Defendants and Respondents.

INTRODUCTION

Plaintiff Troy A. Stewart occupied a room at an Extended Stay America hotel for over a year. Hotel staff asked Stewart to leave, and after Stewart refused, the hotel evicted Stewart through an unlawful detainer action. Stewart then sued Extended Stay America, Inc. and ESA Management, LLC (collectively, ESA), and two ESA employees, alleging that the allegations in the unlawful detainer action demonstrated fraud and evidenced that ESA breached contracts with Stewart.

ESA filed a special motion to strike under Code of Civil Procedure section 425.16 (section 425.16), and Stewart did not oppose the motion or appear at the hearing on the motion. The court granted the motion, and Stewart appealed. Because Stewart did not oppose the motion or appear at the hearing below, he has forfeited any arguments that the trial court erred in granting the motion. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Stewart's complaint

Stewart sued ESA and ESA employees Ashe Ajmera and Sophia Nguyen (collectively, defendants). Stewart's allegations included factual background, information about a prior complaint Stewart filed against ESA and others, and information about the unlawful detainer action ESA filed against Stewart. The following facts are summarized from Stewart's complaint.

ESA ran a chain of Extended Stay America hotels, including an Extended Stay America hotel in Burbank, California (ESA Burbank). Stewart reserved a room at ESA Burbank from October 1 to November 19, 2014. Thereafter, Stewart and ESA Burbank orally agreed several times to extend Stewart's

occupancy, and Stewart paid for his room at a daily rate. The daily rates varied from \$90.24 to \$101.99.

In February and March 2015, Stewart prepaid ESA Burbank for two 30-day occupancies at a discounted rate. In April 2015, Stewart began paying ESA Burbank daily rates again. Stewart and ESA Burbank orally agreed to extend Stewart's occupancy, and Stewart continued paying daily rates that ranged from \$82.39 to \$97.74.

Stewart alleged that the entire time he stayed at ESA Burbank, the property "was maintained in a wholly unsanitary and filthy condition." ESA Burbank permitted smokers to congregate at building entryways, pet excrement was on the grounds outside, the hallways were dirty, trash cans overflowed, and vacuum cleaners used by ESA Burbank staff brought pet hair into non-pet rooms. Stewart complained to hotel staff about the condition of the property from July to September 2015.

In October 2015, Stewart was told that ESA Burbank would not accept any further payment from him. In response, Stewart made a reservation to stay at ESA Burbank from October 20-31, 2015. He informed ESA Burbank staff on October 16, 2015 that their refusal to take payment from him breached his rights under this reservation, and if ESA continued to refuse to accept payment from him, he would sue. On October 19, 2015 Stewart filed a complaint in Los Angeles Superior Court.

On October 20, 2015, ESA filed an unlawful detainer complaint against Stewart. (Los Angeles Superior Court, case no. 15P07587.) The unlawful detainer complaint was served on Stewart on October 21, 2015. Stewart alleged in his complaint that the facts asserted in the unlawful detainer complaint were false and that the unlawful detainer action was filed "solely to

extort plaintiff into agreeing to leave” ESA Burbank. Stewart alleged that Ajmera committed perjury by verifying the unlawful detainer complaint, and that defendants conspired to preclude Stewart from defending against the unlawful detainer complaint by refusing to schedule Ajmera’s deposition. A judgment in the unlawful detainer action was entered against Stewart on January 4, 2016. In the meantime, Stewart continued residing at ESA Burbank. On January 6, 2016, Stewart dismissed the initial lawsuit he filed against ESA without prejudice.

Stewart filed the instant action against defendants the following day, on January 7, 2016. Stewart alleged the facts summarized above, and asserted causes of action for fraudulent concealment, breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17200, et seq., declaratory relief, and invasion of privacy.

In the fraudulent concealment cause of action against all defendants, Stewart alleged that according to the “allegations of the unlawful detainer complaint verified by Ajmera,” ESA asserted that ESA Burbank was a rental property, Stewart was a tenant, and his occupancy was a periodic tenancy. Prior to the unlawful detainer action, however, defendants never disclosed that Stewart’s occupancy at ESA Burbank was a periodic tenancy. Stewart alleged that he was “completely ignorant of the purported periodic tenancy until [he] was served with the unlawful detainer complaint.” Stewart alleged that had he known his occupancy was subject to a periodic tenancy, he would not have agreed to stay at ESA Burbank. Stewart alleged he was damaged in excess of \$25,000, and sought punitive damages.

In his second cause of action for breach of contract against ESA, Stewart alleged that ESA breached the contracts created by Stewart's reservations with ESA Burbank. Stewart also alleged that ESA interfered with Stewart's rights under the contract because it kept ESA Burbank in an uninhabitable condition, it failed to "treat plaintiff as a hotel guest," and it "filed the unlawful detainer action without any right to do so under the terms" of the parties' agreements. Stewart also alleged that ESA "unfairly interfered with plaintiff's right to receive the benefits of" his reservations at ESA Burbank.

In his third cause of action for breach of the implied covenant of good faith and fair dealing, Stewart alleged that he performed under the terms of the parties' agreements. He alleged that ESA interfered with his right to the benefits of the agreement by failing to maintain ESA Burbank in a habitable condition, refusing to accept payment from Stewart in October 2015, failing to treat Stewart as a hotel guest, and filing the unlawful detainer action based on "completely false" allegations.

Stewart's fourth cause of action for violations of Business and Professions Code section 17200, et seq., contained both class and individual claims. First, representing himself and "others pursuant to § 17203," Stewart alleged that ESA "file[s] unlawful detainer actions against ESA hotel guests" that contain allegations that guests are subject to periodic tenancies, similar to the allegations in the unlawful detainer action against Stewart. ESA asserted in the unlawful detainer action that the fair daily rental value of a room was \$84.99 per day, but Stewart alleged that fair rental value of rooms was far less. Stewart contended that ESA does not disclose to guests that they are subject to periodic tenancies, and ESA charges guests more than

the fair market value for rooms. Stewart also asserted a claim against ESA and Ajmera, alleging that allegations in the unlawful detainer complaint and Ajmera's verification were false and were filed solely to coerce Stewart to leave ESA Burbank. Stewart alleged that these actions constituted unfair business practices under Business and Professions Code section 17200, et seq. Stewart sought restitution, injunctive relief, and attorney fees.

In his fifth cause of action against ESA, Stewart alleged that the allegations in the unlawful detainer complaint gave rise to an actual controversy about Stewart's legal rights and duties under his reservations and oral agreements with ESA. Stewart sought declaratory relief regarding various issues such as whether Stewart was a guest or a tenant, whether ESA was a hotel proprietor or a landlord, and whether the room Stewart occupied at ESA Burbank was a hotel room or a rental unit.

In his sixth cause of action for invasion of privacy against all defendants, Stewart alleged that the unlawful detainer complaint alleged that the room Stewart occupied at ESA Burbank was occupied by Stewart as a tenant. However, "contrary to the allegations of the UD complaint," defendants have "asserted an unconditional right of access to and control of" the room for maintenance and cleaning. Because the unlawful detainer complaint alleged that Stewart had a periodic tenancy, he had a reasonable expectation of privacy as a tenant, which defendants breached. Stewart sought punitive damages on this cause of action.

B. ESA's anti-SLAPP motion

ESA filed an anti-SLAPP¹ motion under section 425.16 on February 16, 2016. It asserted that it decided to terminate Stewart's tenancy at ESA Burbank after Stewart yelled at ESA staff and tenants, and made unwanted advances toward an ESA Burbank employee. ESA said it served Stewart with a 30-day notice of termination of tenancy on September 17, 2015, and filed the unlawful detainer action October 20, 2015. Stewart demurred to the unlawful detainer complaint, but he did not file a reply or appear at the demurrer hearing, and the demurrer was overruled. ESA represented that Stewart failed to appear at the unlawful detainer trial, and judgment was entered against him on January 4, 2016. Stewart filed this action three days later, on January 7, 2016. ESA asserted that Stewart's lawsuit was filed "in direct response to ESA exercising its right to petition."

ESA argued that its notice of termination of tenancy and the unlawful detainer action were protected activities under section 425.16. It asserted that Stewart's causes of action arose from the filing of the unlawful detainer complaint, which Stewart alleged was the basis for determining that ESA concealed information from him, breached its agreements with Stewart, and violated Business and Professions Code section 17200, et seq. Stewart's alleged loss of contractual rights to stay at ESA Burbank stemmed directly from the unlawful detainer action. Stewart relied on facts asserted in the unlawful detainer action to allege that ESA engaged in unfair business practices and to assert that declaratory relief was warranted. Stewart's breach of

¹ "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

privacy claim was based on the allegations in the unlawful detainer action.

ESA also asserted that Stewart could not meet his burden to establish a probability of prevailing on his claims. It argued that Stewart's claims were barred by the litigation privilege, collateral estoppel, and other affirmative defenses. ESA requested an award of attorney fees and costs.

C. Amended complaint

On March 1, 2016, about two weeks after ESA filed its anti-SLAPP motion, Stewart filed an amended complaint asserting the same six causes of action. The amended complaint included updated information about the unlawful detainer trial and judgment, and stated that after the judgment was rendered, an eviction notice was posted on Stewart's door. The allegations in the causes of action were identical to those in the original complaint, except for a single added allegation in the declaratory relief cause of action, seeking a declaration as to whether "UD Exhibit 1 is a contract or rental agreement that establishes a periodic tenancy."

D. Court ruling on the anti-SLAPP motion

In a minute order, the court noted that Stewart did not file an opposition to ESA's anti-SLAPP motion and he did not appear at the hearing on the motion. The court stated, "The court finds that defendants have made a prima facie case under Code of Civil Procedure 425.16(b)(1) and plaintiff has not met his responsive burden." The court therefore granted the motion and awarded ESA attorney fees of \$4,725.

The court signed a written order stating, "All of Plaintiff's causes of action are based upon the allegation that the information contained in Defendants' Unlawful Detainer

Complaint was concealed from him and that he could not discover this information until the Unlawful Detainer Complaint was served on him. It is clear that, but for the filing and service of the Unlawful Detainer Complaint, Plaintiff would have no basis for the causes of action contained in his complaint.”

The court entered judgment in favor of ESA on April 14, 2016. Stewart timely appealed.

DISCUSSION

A. The trial court had authority to consider the anti-SLAPP motion

Stewart first asserts that the trial court should not have considered ESA’s anti-SLAPP motion because an amended complaint had been filed after ESA filed its anti-SLAPP motion. Stewart argues that because the amended complaint was the operative complaint, “the trial court did not have jurisdiction to rule on the merits of the SLAPP motion” and “the SLAPP order and judgment are void because the trial court did not have jurisdiction to enter a judgment on the basis of the original complaint.”

An amended pleading typically supersedes a prior pleading, but that rule is not without limitations. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) In the anti-SLAPP context, it is well-established that a “plaintiff or cross-complainant may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint or cross-complaint in response to the motion.” (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477-478; see also *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537, 1547 [“A plaintiff cannot avoid a SLAPP motion by amending the complaint.”]; *Jackson v. Mayweather*

(2017) 10 Cal.App.5th 1240, 1263-1264 [same]; *Contreras v. Dowling* (2016) 4 Cal.App.5th 774, 791 [same].) Allowing a SLAPP plaintiff to amend the complaint to avoid the consequences of an anti-SLAPP motion would provide the plaintiff “a second opportunity to disguise the vexatious nature of the suit through more artful pleading.” (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.)²

Moreover, Stewart’s amendment did nothing to alleviate the issues addressed in ESA’s anti-SLAPP motion. The allegations and causes of action in the complaint and the amended complaint were nearly identical. The arguments in ESA’s anti-SLAPP motion were therefore equally applicable to the amended motion. No practical purpose would have been served had the court considered the amended complaint as the operative pleading and required ESA to re-file its anti-SLAPP motion to address the amended complaint. The trial court’s consideration of the anti-SLAPP motion to the complaint was therefore entirely appropriate, even though Stewart had filed an amended complaint.

² Stewart casts his argument as one relating to subject matter jurisdiction, asserting that the court did not have jurisdiction to hear the anti-SLAPP motion. “The principle of ‘subject matter jurisdiction’ relates to the inherent authority of the court involved to deal with the case or matter before it.’ [Citation.] Thus, in the absence of subject matter jurisdiction, a trial court has no power ‘to hear or determine [the] case.’ [Citation.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196.) Although Stewart has cited authority stating that an amended complaint generally supersedes a previously filed complaint, he has cited no authority that supports the contention that the court’s subject matter jurisdiction is affected by the filing of an amended complaint.

B. Stewart's contentions regarding the substance of the motion have been forfeited.

Stewart asks us to find that the trial court erred in granting ESA's anti-SLAPP motion for two reasons. First he argues that Extended Stay America "assigned its rights concerning any 'act' enumerated in § 425.16(e)" to ESA Management, and therefore Extended Stay America is not entitled to the protections of section 425.16. Second, Stewart argues that his causes of action are not based on any act in furtherance of defendants' rights to petition or free speech. Stewart asserts that the court failed to follow a line of cases holding that unlawful detainer actions do not necessarily constitute protected activity under the anti-SLAPP statutes in actions in which a tenant sues a former landlord.

In response, ESA argues that Stewart has forfeited any argument on appeal because he failed to oppose the motion or appear at the hearing below. ESA asserts, "Implicit in this failure was Stewart's concession that the arguments in ESA's motion were meritorious." Stewart argues in reply that his right to appeal is not "conditioned upon" filing an opposition in the trial court.

By failing to oppose the motion in the trial court, Stewart has forfeited his arguments that the trial court's ruling on the motion was erroneous. "A failure to oppose a motion may be deemed a consent to the granting of the motion." (Cal. Rules of Court, rule 8.54(c).) In addition, "[f]ailure to register a proper and timely objection to a ruling or proceeding in the trial court waives the issue on appeal." (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.) "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the

first time on appeal which could have been but were not presented to the trial court.” Thus, “we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]”” (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830.)

Stewart argues that it is incorrect to conclude that “a SLAPP motion compels a plaintiff to oppose the motion or else the plaintiff loses his right to an appellate review.” But this is exactly how appellate forfeiture works: “[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court.” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) “Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.” (*JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

An “appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue.” (*In re S.B., supra*, 32 Cal.4th at p. 1293.) Here, Stewart offers no explanation for his failure to oppose ESA’s motion in the trial court, and therefore he offers no suggestion that this is one of the rare cases in which forfeiture should be excused. Moreover, this case does not present an important legal issue not already addressed in California’s extensive anti-SLAPP

jurisprudence. In short, we find no basis to excuse Stewart's forfeiture here.

We therefore decline to consider Stewart's arguments in opposition to ESA's anti-SLAPP motion in the first instance on appeal, since Stewart had the opportunity to oppose the motion below but did not do so.³

DISPOSITION

The judgment is affirmed. ESA is entitled to costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

³ Stewart's request for judicial notice filed March 6, 2017 is denied. The submitted information is not necessary for our analysis of the issues raised in this appeal.