Filed 10/22/13 Molina Healthcare v. Beasley 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MOLINA HEALTHCARE, INC., Plaintiff and Respondent, v. JONATHAN BEASLEY et al., Defendants and Appellants.	B239208 (Los Angeles County Super. Ct. No. BC 469751)

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Law Office of James A. Otto, James A. Otto; and Regina Ashkinadze for Defendants and Appellants.

Wilke Fleury Hoffelt Gould & Birney, Kelli M. Kennaday; Snell & Wilmer and Mary-Christine Sungaila for Plaintiff and Respondent.

* * * * * *

Appellants David de Hilster, Charles Price, Tim Luk, Anna Rshtouni, Yuri Grishko, Irina Masharova, Joey Shen, Marcello Pineda, Jonathan Beasley, and Lily Bumatay appeal the denial of their motion to strike a breach of contract complaint against them pursuant to Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP (strategic lawsuit against public participation) statute.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants were among a group of employees of respondent Molina Healthcare, Inc. (Molina) laid off in 2010. Before commencing litigation against Molina, appellants' attorney sent Molina a demand letter in July 2010, alleging employment discrimination based on national origin. The parties mediated the potential claims and reached a settlement; each appellant signed a settlement agreement. In those agreements, appellants agreed to keep the settlement confidential:

"9. **Confidentiality.** You warrant that you have not and will not disclose the terms, conditions, contents and existence of this Agreement, or the negotiations leading to its execution, to anyone other than your attorneys, CPA, financial advisors, or as mandated by law, and further warrant that you have instructed these individuals that they are not to mention the terms, conditions, contents and existence of this Agreement or the negotiations leading to it or its terms to anyone else and accept responsibility under this Agreement for any such mention by them. You agree that you will keep completely and strictly confidential the terms, conditions, existence and the contents of this Agreement, and the negotiations leading thereto, and have not and will not publicize or disclose the conditions, terms, existence or contents of this Agreement or the negotiations leading to it in any manner, whether in writing or orally, to any person (other than those identified in this paragraph, each of whom shall be bound by the obligations of the non-disclosure set forth herein or as compelled by law), directly or indirectly, or by or through any agent, attorney, or representative, unless compelled to do so by law or except as necessary to

---

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

effectuate this Agreement. You further agree that any disclosure in violation of this provision shall constitute and be treated as a material violation in breach of this Agreement, entitling Molina to recover twenty percent (20%) of the Settlement Sum as liquidated damages for each such breach. In the event you are asked about your dispute with Molina, you will respond only by saying 'The matter has been resolved.'"

After entering the agreements, on April 22, 2011, appellants and eight other former Molina employees filed a lawsuit in superior court, *Jonathan Beasley et al. v. Cognizant Technology Solutions et al.*, No. NC055957 (the *Beasley v. Cognizant* case), alleging claims against Molina, Molina's former chief information officer Amir Desai, and Cognizant Technology Solutions, a company alleged to have provided Molina with workers from India to replace the former employees. According to the complaint, appellants and the other plaintiffs were among 40 programmers, managers, and security analysts in Molina's information technology (IT) department, all of whom were American citizens or green card holders, but who were laid off and replaced by Indian nationals with H-1B visas. Based on this conduct, the plaintiffs alleged claims of discrimination and violations of various laws. The 10 appellants in this case did not name Molina as a defendant in any of their causes of action, but their allegations against Cognizant and Desai were based on the same claims against Molina that had been resolved by the earlier settlement.

On September 20, 2011, Molina filed its complaint against appellants for breach of the confidentiality clauses of their settlement agreements, alleging appellants "and/or their agents and attorneys made comments in electronic media accessible to and accessed by the public that, among other things, disclosed the existence of the Agreements and the negotiations leading [to] the execution of the Agreements. Moreover, when asked about their dispute with Molina, Defendants did not respond only by saying 'The matter has been resolved', but instead provided information regarding the negotiations leading to the execution of the Agreements." Molina alleged, as a result of the breach, it had been "damaged in an amount to be proven at trial, but in no event less than (a) the minimum jurisdictional limits of this Court, and (b) the amounts specified as liquidated damages in

the final sentence of Paragraph 9 of the Agreements, described above." Molina also sought contractual attorney fees and expenses.

Appellants filed a motion to strike the complaint pursuant to section 425.16, arguing Molina's complaint arose from protected activity and Molina could not establish minimal merit to its claim. Although not specified in the complaint, appellants identified two possible sources of Molina's allegations: two online articles dated July 12, 2011, and August 16, 2011, written by Patrick Thibodeau and published in Computerworld, an online news source, which discussed the outsourcing issues and other allegations raised in the *Beasley v. Cognizant* case. Appellants' Attorney James Otto stated the author had initially approached him after finding public information on the *Beasley v. Cognizant* case and expressed interest in writing a story about Cognizant's use of nonimmigrant contractors to replace American workers. The author approached Otto again for the August 16 article, wanting to interview the plaintiffs suing Molina and appellants suing Cognizant.

Appellants attested they were not interviewed for or quoted in the July 12 article. Otto was interviewed and quoted in that article as saying "he never made any demands and he had initially sought mediation," but he was not quoted for any other statements related to the settlement with Molina. Officials from Molina also made written statements to the author, but none related to the settlement. Eight appellants attested they were not interviewed for or quoted in the August 16 article, although two appellants (de Hilster and Price) were, as was Otto. Otto, de Hilster, and Price all denied sharing any information about the settlement agreement. In suggesting a disclosure could have come from sources within Molina itself, appellants offered a declaration from Josephine Wittenberg, Molina's former manager and director of human resources, who stated she was told to brief Molina's IT department about the settlement, and even before that members of the IT department "were aware of what had occurred" and "knew of the Settlement Agreement with the defendants." In the August 16 article, the author quoted a Molina "human resource manager" for comments related to the layoffs, but did not identify the person by name.

Molina opposed the motion, clarifying that appellants breached the confidentiality clause by sharing information revealed in the following passage in the August 16 article: "Of the workers who are part of [the *Beasley v. Cognizant* case], 10 brought an earlier claim against Molina that was settled in mediation before this case was filed. The mediation agreements did not settle the case for all the workers and did not include current lawsuit defendants Cognizant and Desai." Molina argued section 425.16 did not apply to bar its claim, and if it did, it had produced sufficient evidence to demonstrate a probability of showing appellants breached their settlement agreements.

Molina submitted three declarations to support its probability of success. One declaration was from Assistant General Counsel Amy Dobberteen, who had been responsible for responding to appellants' settlement demands, had participated in the mediation with appellants, had signed the settlement agreements on behalf of Molina, and had overseen the payments to appellants as required by the agreements. She stated the settlement agreements were kept strictly confidential and not circulated to anyone else, including Wittenberg and other employees Otto had suggested knew about the terms of the agreements. She denied ever speaking with the author of the article and explained all communications between Molina and the press were handled by a third party company, which did not know any details of the mediation or settlement. Finally, she explained Molina had never taken the position in litigation that the settlement agreements excluded Desai from the scope of the settled and released claims; instead, appellants' attorney argued that position in the *Beasley v. Cognizant* case. From this, Molina argued the comment in the August 16 article must have come from appellants or their attorney, not anyone associated with Molina. Dobberteen also attached the settlement agreements with appellants, redacting the dollar amounts of the settlements.

Molina also submitted declarations from Kelli Kennaday, counsel for Molina, and Ed Raskin, counsel for Desai in the *Beasley v. Cognizant* case. Kennaday had received the original demand letter from appellants' counsel and had signed the settlement agreements. She denied ever speaking to the author of the article and did not provide copies of any settlement agreement to anyone other than Dobberteen. Raskin explained

he had communicated with the author of the articles in writing, but had not discussed appellants or the mediation or settlement agreements. He also denied stating his client Desai was not covered by the settlement agreements; his client's position has always been that he was included.

The trial court denied the motion. It sustained Molina's objections to parts of Otto's declaration and held Molina's complaint did not arise from protected activity because it was neither related to ongoing or pending litigation nor related to an issue of public interest. As a result, it did not rule on Molina's probability of success on the merits. The court also denied Molina's request for attorney fees. Appellants timely appealed.

DISCUSSION

An appeal lies from an order denying a motion to strike under section 425.16. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) We review the denial of the motion de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis West*).) The anti-SLAPP statute precludes meritless lawsuits filed to "chill" the valid exercise of the constitutional rights of free speech and to petition for the redress of grievances. (§ 425.16, subd. (a).) It authorizes a special procedure for striking such a cause of action early in litigation, which requires a court to determine whether the cause of action arises from protected activity within the meaning of the statute, and, if so, whether there is a probability the plaintiff will prevail. (*Oasis West, supra*, at pp. 819-820.)

1. Protected Activity

A claim arises from "protected activity" if it arises from "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (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).) The critical inquiry under this prong is "whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) In assessing this requirement, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b); see *City of Cotati, supra*, at p. 79.)

Isolating on the two sentences in the August 16 article mentioning the mediation and settlement between appellants and Molina, the trial court concluded Molina's breach of contract claim did not meet the first prong of the anti-SLAPP statute. First, the court reasoned the complaint did not arise from protected petitioning activity as required by section 425.16, subdivision (e)(1) and (2), but from "alleged statements by [appellants] made to the article's author . . . concerning settlement. The statements giving rise to this Complaint were not connected with the action that the article was generally discussing, NC055957. Therefore, Defendants' argument that the alleged statements that form the basis of the Complaint concern an ongoing and pending litigation is without merit." Second, the court found Molina's claim did not arise from speech or conduct concerning a public interest as required by section 425.16, subdivision (e)(3) and (4) because a "public interest involves more than mere curiosity, a broad and amorphous interest, or private information communicated to a large number of people; instead a public interest concerns a substantial number of people, some closeness between the statements and the public interest, and a focus upon the communications as being the interest and not upon a private controversy. [Citation.] Here, the alleged statements that form the basis of the Complaint concern the settlement agreement between an employer and its former employees. Although this information was communicated through a public forum via the [I]nternet [citation], this does not transform the private employment issues into a public interest. Defendants' focus on the allegations in the other action, NC055957, is

inapposite as the Complaint arises from alleged statements pertaining to Defendants' settlement agreements that did not concern NC055957."

Appellants argue the trial court was incorrect on both grounds. We agree Molina's claim met the requirements of section 425.16, subdivision (e)(3) and (4) because it concerned matters of public interest, and as a result, we need not address the trial court's holding under subdivision (e)(1) and (2). (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474 & fn. 3 (*Damon*).)

Because Molina does not contest the trial court's conclusion the online publication Computerworld was a public forum under section 425.16, subdivision (e)(3) (see, e.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 3; *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039 (*Nygård*), and cases cited therein), the question under subdivision (e)(3) and (4) is whether the statements at issue concerned a matter of public interest. (*Damon, supra*, 85 Cal.App.4th at p. 474.)[2] A statement is of public interest when it relates to "any issue in which the public is interested" (*Nygård, supra,* at p. 1042), including "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity" (*Damon, supra*, at p. 479). In assessing the public interest, we construe the term broadly and consider whether the issue is of concern to a substantial number of people and whether the challenged statements and the public interest are closely related. (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 716.)

Molina acknowledges, and we agree, the July 12 and August 16 articles generally concerned a matter of interest to the public -- domestic employers' replacement of American workers with workers from other countries. Molina's specific actions in replacing American workers would also be of significant interest to Molina's 4,200 employees mentioned in the articles, as well as Molina's patients and other public and private entities working with Molina, in the context of the ongoing public debate and

---

2 We reject Molina's contention that appellants waived a challenge under section 425.16, subdivision (e)(4) by failing to argue it in their opening brief.

discussion over Molina's and other companies' outsourcing activities. (See, e.g., *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468 [dispute over architectural guidelines for community was of public interest to community's board members and owners of 523 lots]; *Damon, supra*, 85 Cal.App.4th at p. 479 [statements in election dispute related to management of homeowners association concerned issues of public interest to over 3,000 members of the community].)

But contrary to the views of the trial court, the two sentences in the August 16 article about the parties' mediation and settlement agreements cannot be isolated from the public interest context of the articles and considered purely "private employment issues,"[3] and they implicate more than merely "'a broad and amorphous interest'" unconnected to the specific dispute at issue. (See *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570, and cases discussed therein.) The parties' mediation and settlement involved similar facts and allegations as in the *Beasley v. Cognizant* case, which the August 16 article discussed as an example of the broader issue of replacement of American workers: "While what happened at Molina is still in dispute, job displacement because of offshore outsourcing is a fact of life in today's IT workplace. While there are no government numbers that detail its extent, the broad outlines of the story told by the Molina workers should be familiar to other IT workers. [¶] Outsourcing engagements often start when offshore IT services companies bring in workers, typically on H-1B or L-1 visas, to learn a company's IT processes. Then the work is moved overseas. Molina employees contend that's what happened to them." In fact, the only reason the parties' mediation and settlement was likely mentioned in the article at all was its relationship to the discussion of outsourcing issues and the *Beasley v. Cognizant* case.

Thus, the disclosure of the mediation and settlement in the August 16 article directly involved public interest issues, triggering section 425.16 protection. (*McGarry v.*

---

[3] Nor is it proper, as Molina contends, to focus on the public interest in the specific *terms* of the settlement agreement, which were undisputedly not disclosed in the articles.

University of San Diego (2007) 154 Cal.App.4th 97, 110 [rejecting argument that even if termination of a university's football coach was of public interest, the confidential reasons for the termination were not]; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1437 [rejecting argument that article's mention of principal's retirement was a purely private matter because the fact directly concerned the school district's solution to student violence, the topic of the article].)

2. Probability of Success

When a moving defendant makes the required first-step showing, the court must determine whether the plaintiff has demonstrated a "probability" that he or she will prevail on his or her claim. (§ 425.16, subd. (b)(1); *Oasis West, supra*, 51 Cal.4th at p. 820.)[4] In assessing the probability of success, we consider the pleadings and the supporting and opposing affidavits from the parties, but we do not weigh the evidence or credibility of witnesses. We accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the plaintiff's showing as a matter of law. (*Oasis West, supra*, at p. 820.)

Molina alleges a single claim for breach of the confidentiality clause in the parties' settlement agreements, which requires evidence of (1) the existence of a contract; (2) its performance or excuse for nonperformance; (3) appellants' breach; and (4) resulting damages. (*Oasis West, supra*, 51 Cal.4th at p. 821.)

Before turning to the evidence offered by Molina, appellants argue the complaint does not sufficiently allege breach because it does not specify which appellants or their agents or attorneys disclosed confidential information to which electronic media. We

---

[4] Because the trial court determined section 425.16 did not apply, it did not reach the question of whether Molina demonstrated a probability of prevailing. Nevertheless, the issue was fully briefed and we will address it. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 468.)

find the allegations sufficient to state a claim for breach of contract. (See *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 174.)[5]

Molina has also submitted evidence to establish a prima facie case of breach of contract. Through the declaration of Dobberteen, Molina submitted the executed settlement agreements and evidence that Molina paid appellants under the agreements, demonstrating the existence of valid contracts and Molina's performance of its contractual obligations. The passage in the August 16 article demonstrates someone disclosed the existence of the settlement agreements, and Molina's evidence establishes a reasonable inference appellants were responsible for that disclosure:[6] appellants de Hilster and Price and appellants' Attorney Otto spoke with the author of the article; the declarations from Dobberteen, Kennaday, and Raskin demonstrate individuals associated with Molina who knew about the settlement kept it confidential and Molina only communicated with the author of the articles through a third party that did not have information about the settlement; and the article's comment that the settlement did not include Desai was consistent with appellants' attorney's interpretation of the agreements. Even though appellants submitted their own declarations they did not disclose any information, a declaration from Otto that he did not disclose any information, and a declaration from Wittenberg that the agreements were disclosed to other employees at Molina, that evidence merely creates a factual dispute. Because we must credit Molina's evidence at this stage, appellants' conflicting evidence does not defeat Molina's prima

---

5 Appellants argue the trial court lacked jurisdiction because Molina did not plead a specific amount for damages. But alleging that the amount of damages exceeds the minimum jurisdictional amount for an unlimited civil case is sufficient to establish jurisdiction. (*Engebretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 444.)

6 Appellants de Hilster and Price would be directly liable because they were interviewed for the August 16 article. All appellants would be liable for disclosure by their attorney, Otto, acting as their agent. (*Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1495 (*Wentland*).)

facie showing. Finally, the liquidated damages and attorney fees clauses in the settlement agreement provide evidence of damages.[7]

Appellants rely on *Nygård* to demonstrate Molina's claim lacks merit, but that case is distinguishable. In that case, the court held the plaintiff could not demonstrate breach of a confidentiality clause in an employment contract after a magazine article quoted the defendant's comments regarding the company. The court interpreted the clause to bar disclosure of only "sensitive economic information such as trade secrets, financial data, customer information, or information about other Nygård employees," and the comments in the article related to the defendant's "personal experiences while working for Nygård." (*Nygård, supra*, 159 Cal.App.4th at p. 1045.) Here, by contrast, there is evidence appellants disclosed information regarding the mediation and settlement agreements in contravention of the express terms of the confidentiality clause.

Finally, appellants argue Molina's claim is barred by the litigation privilege in Civil Code section 47, subdivision (b), which 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. [Citations.]'" (*Wentland, supra*, 126 Cal.App.4th at p. 1490.) Assuming appellants' disclosure implicates the privilege, the privilege does not bar Molina's claim for breach of the confidentiality clause in the parties' settlement agreements. (*Id.* at p. 1494; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 773-774; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869.)

---

[7] Appellants argue evidence of liquidated damages was insufficient because Dobberteen did not attest that the settlement agreements she attached to her declaration were "true and correct copies," the agreements did not fall within an exception to the hearsay rule, and the settlement amounts were redacted, so the liquidated damages were not pleaded with certainty. Appellants raised none of these objections in the trial court, so they are waived. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406.)

DISPOSITION

The order denying appellants' motion to strike is affirmed. Molina is entitled to costs on appeal.[8]

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

---

[8] Because we affirm the trial court's denial of appellants' anti-SLAPP motion, appellants are not entitled to attorney fees. (§ 425.16, subd. (c).) Molina did not cross-appeal the trial court's denial of its request for attorney fees, so we may not review that decision.