Filed 10/20/16 Moshe v. Ehinger 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

YAIR BEN MOSHE, Plaintiff and Appellant, v. JAMES EHINGER, Defendant and Respondent.	B266511 (Los Angeles County Super. Ct. No. BC567181)

APPEAL from an order of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Law Office of Jacob Reich and Jacob Reich, for Plaintiff and Appellant.

Goldfarb, Sturman & Averbach and Steven L. Crane, for Defendant and Respondent.

In 2014, Yair Ben Moshe filed a complaint against James Ehinger, asserting claims for defamation, intentional and negligent infliction of emotional distress, and intentional interference with prospective economic advantage.[1] Ehinger filed a special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 (section 425.16). The trial court granted the motion. We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2014, Moshe filed a civil suit against Ehinger. According to the complaint, Moshe is engaged in the business of investing and managing real property, mostly in California. The complaint identified Ehinger only as an individual over 18 years old and an active, licensed attorney in California and Arizona. The complaint described Ehinger's alleged conduct: "Within the last four years, Defendant James O. Ehinger, and Does 1 to 100 engaged in intentional acts of defamation and slander of the Plaintiff. The Defendant contacted various persons, some of whom are located in Los Angeles County, California, and with ulterior motive to harm the Defendant [*sic*] and to damage his reputation, published false statements stating that the Plaintiff engages in dishonest acts and/or is not conducting his business in a way which best serve [*sic*] the interests of his investors and/or the property owners for which he manage [*sic*] properties, and/or that the Plaintiffs' [*sic*] act of investing his investor's funds and/or managing their property are [*sic*] deficient, and/or unprofessional."

In the cause of action for defamation and slander, the complaint further alleged the defendants' statements "were made to investors and/or potential investors, to customers of the Plaintiff and/or potential customers, to owner [*sic*] of Properties in Los Angeles County, California, as well as to other persons who could and would pass on such publications to other [*sic*] who could or would become or were investing or considering investing with the Plaintiff. Some of those statements were published by the Defendants in Los Angeles County, California." The causes of action for intentional and negligent

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[1] Appellant's briefing on appeal refers to Yair Ben Moshe as "Moshe." We do the same.

infliction of emotional distress and intentional interference with prospective economic advantage contained no additional factual allegations.

Ehinger responded by filing a special motion to strike pursuant to section 425.16 (anti-SLAPP motion), and a demurrer. Ehinger indicated he is a member of the Board of Directors of a homeowner's association (HOA) for a condominium project in Phoenix, Arizona. Ehinger declared, on information and belief, that Moshe owns 11 of the 12 commercial units in the project. Ehinger explained there were ongoing legal disputes between the HOA and Moshe's company. Moshe's company filed suit in Arizona against the HOA and its Board members, including Ehinger. The HOA's former attorney also filed suit against the HOA in Los Angeles Superior Court.

In support of the anti-SLAPP motion, Ehinger declared that in the four years prior to the complaint, he had published statements in Los Angeles referring to Moshe only once, in a declaration filed in a civil case, in connection with a motion for a protective order sought in the action between the HOA and its former attorney. Ehinger declared: "The Declaration represents the only statements, in writing, in speech, or in any other medium of communication that mention, refer, or in any way relate to [Moshe] that I have ever made in Los Angeles or to persons in Los Angeles, except for communications with the attorneys in Los Angeles who are representing the HOA in the lawsuit in which the Declaration was filed. All of my communications with those attorneys related either to that lawsuit or to other pending or threatened litigation involving the HOA in which [Moshe] or [Moshe's company] have been mentioned."

Ehinger further declared that as an HOA board member, he was involved in defending the HOA against Moshe's company's litigation. He declared: "I have had no occasion to discuss Plaintiff, or to even refer to Plaintiff, in any place or forum other than in the context of, and in connection with, legal disputes between the HOA and Plaintiff's company . . . which includes claims that [the company] has made against me and other Board members personally. All of those discussions have occurred in Phoenix, Arizona, in the context of the HOA's Board of Directors' Meetings or conversation with the HOA's attorneys." The declaration then detailed these discussions, which included

statements "made either in the context of discussions of contemplated litigation with [Moshe's company] before the Arizona Action was filed; . . . in connection with other legal actions by or against the HOA in which [Moshe] and/or [Moshe's company] are involved; and/or in connection with requests from one of the attorneys for the HOA asking me or my law firm to perform legal services for [the condominium project]."[2]

Near the end of the declaration, Ehinger stated: "Except as discussed above with respect to the Declaration submitted in the LASC Case, I have never made any comment or statement of any kind in Los Angeles, whether in writing or by spoken word, that concerned or mentioned Plaintiff herein. Except as described above, I recall no other occasions on which I have discussed or made a statement or comment of any kind or nature, whether in writing or by spoken word, that referred or pertained to Plaintiff, Yair Ben Moshe."

The anti-SLAPP motion asserted all of the acts underlying Moshe's claims in the complaint were taken in furtherance of Ehinger's right to petition. Ehinger argued all of his statements about Moshe were pre-litigation communications, were in the course of litigation, or concerned settlement of litigation. Thus, Ehinger argued the complaint could only concern protected conduct under the anti-SLAPP statute.

In response, Moshe argued Ehinger's motion did nothing more than deny the allegations of the complaint, which was an improper basis for an anti-SLAPP motion. Moshe agreed that Ehinger's communications with the HOA Board and with attorneys were privileged and made in connection with litigation. He further agreed the declaration Ehinger submitted in the Los Angeles Superior Court litigation was subject to the

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[2] The declaration offered more details than this summary. For example, Ehinger stated that before the Arizona action was filed, the subject of what to do regarding the disputes between Moshe's company and the HOA, and whether to initiate litigation to collect assessments Moshe's company owed the HOA, were the subject of regular discussions in executive sessions of the HOA Board. Ehinger also indicated he had discussions with the HOA's attorneys regarding the HOA's disputes with Moshe's company over unpaid dues, Moshe's company's demand for additional parking spaces, and the company's claim of construction defects. Ehinger characterized these discussions as part of the HOA Board's efforts to plan its legal strategy.

litigation privilege. However, Moshe asserted the complaint was not, in fact, about those statements. Instead, Moshe argued the complaint concerned "the Defendant having reached out (contacted), certain persons, such as customers of the Plaintiff or investors etc. and with intent to harm the Plaintiff, having published to them false statements about the Plaintiff." Moshe claimed these statements were not protected conduct or privileged. In an accompanying declaration, Moshe declared:

> "I sued the Defendant after I had learned from certain individuals that Mr. Ehinger is actively engaging in defaming my name and my business reputation and that he knowingly and intentionally is trying to ruin my business by stating that I engage in dishonest acts and/or I do not conduct business in a way which best serves the interests of my investors and/or property owners, for which I manage properties, and/or that my acts of investing the investor's funds and/or managing their property are deficient, and/or unprofessional."[3]

Moshe further declared he was unaware of the declaration Ehinger filed in the Los Angeles Superior Court prior to the anti-SLAPP motion and he did not consider Ehinger's statements in that declaration to be defamatory. Instead, Moshe asserted:

> "I sued [Ehinger] for something else very specific, for something which has nothing whatsoever with his declaration or with anything mentioned in his

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[3] The trial court sustained Ehinger's objections to the following portions of Moshe's declaration: "I learned that he reached out and contacted people in California, none of whom has anything to do with the Declaration filed in case No. SC12244, and made false and defaming statements about me. [¶] I understand from my attorney, that Mr. Ehinger somehow claims that he never contacted any one of my customers and/or investors in California in order to make, to any of them, statements which are defamatory to my good name and character. I am confident that in trial I could prove he is lying and that he did contact customers and investors and did so because notwithstanding his referring to me as 'Yair' in his declaration, as if he is my buddy, in reality he hates me and wishes to destroy my business. I have gotten that information from more than one source, and in trial I am confident I could prove his wrong doing." While Moshe asserts in his reply brief that neither his declaration nor his attorney's declaration was hearsay, he does not discuss the trial court's specific evidentiary rulings or argue the trial court erred in ruling as it did. To the extent the arguments in Moshe's reply brief were intended to challenge the trial court's evidentiary rulings, we may disregard arguments raised for the first time in a reply brief. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 572-573, fn. 18.)

> declaration. I sued him for contacting people who are my customers or investors, or potential investors, meaning people who consider investing with me, and telling them untrue accusations, as if I am running my business in a dishonest way, that my actions are not in their best interest, and that the way I run my business (i.e., investing my investor's money and/or managing their property), is deficient and unprofessional."

Moshe additionally claimed he believed Ehinger's declaration regarding the nature of Ehinger's communications with the HOA Board. Still, Moshe declared:

> "I do contend however, that he contacted individuals who are my customers and investors, or considering investing with me, individuals who have nothing to do with any of the lawsuits he or the board are involved in, and he made to those individuals the defamatory statements complained about in the complaint. I am confident that in trial, I could prove, that contrary to what he claims now in his declaration, he did contact several of my investors and/or customers and/or those who consider investing with me, and with full intent to hurt my business, made to them defamatory statements about me, of the kind I am alleging in the complaint."

Moshe did not provide any dates, names, or details regarding the alleged statements. He did not argue or attempt to establish there was a probability he would prevail on his claims, except to express his confidence that he could prove his claims at trial.[4]

The trial court concluded Ehinger met his burden to establish the conduct underlying the complaint was in furtherance of the right of petition or free speech. The court further concluded Moshe did not demonstrate a probability of prevailing as he did not substantiate the alleged defamation that formed the basis of each cause of action. The court accordingly granted the anti-SLAPP motion and dismissed the action. This appeal timely followed.

[4] Moshe's counsel also submitted a declaration indicating he drafted the complaint based only on Moshe's allegations that "Ehinger contacted [Moshe's] customers (investors and/or property owners whose properties my client manages or who considers hiring my client as their manager), and published defamatory statements about him."

DISCUSSION

The Trial Court Properly Granted the Anti-SLAPP Motion

On appeal, Moshe contends the trial court erred in concluding Ehinger met his burden to establish Moshe's claims arise from protected conduct. We disagree.

A. Applicable Legal Principles

"The anti-SLAPP statute provides a 'procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' [Citation.] The statute reads in pertinent part: '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).)" (*Baughn v. Department of Forestry and Fire Protection* (2016) 246 Cal.App.4th 328, 334 (*Baughn*).)

The legal principles applicable to consideration of an anti-SLAPP motion are well established. "Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal. 5th 376, 384.) "We review the trial court's ruling de novo. [Citation.] We consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)" (*Baughn, supra*, 246 Cal.App.4th at p. 333.)

B. Ehinger Made a Prima Facie Showing that the Complaint Arises from Protected Activity

Moshe's arguments on appeal concern only the first step of the anti-SLAPP analysis. "To satisfy the first step, a defendant must show plaintiff's claim is a 'cause of action . . . arising from' an act the defendant made 'in furtherance of [the defendant's] right of petition or free speech . . . in connection with a public issue.' (§ 425.16, subd.

(b)(1).) '[T]he statutory phrase "cause of action . . . arising from" means simply that 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. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.]' [Citation.]" (*Baughn, supra*, 246 Cal.App.4th at pp. 334-335.)

The first step of the analysis thus turns on the conduct underlying the allegations of the complaint. "Determining whether a cause of action arises from protected speech or petitioning activity requires a focus on the *principal thrust* or *gravamen* of the cause of action. If the allegations of protected activity are merely incidental to a cause of action based essentially on nonprotected activity, the allegations will not transform the nonprotected cause of action into an action subject to the anti-SLAPP law. [Citations.] The focus on the gravamen of the action does not implicate 'some philosophical thrust or legal essence of the cause of action.' [Citation.] Instead, courts are to focus on the acts on which liability is alleged to be based. [Citation.]" (*People ex rel. Fire Insurance Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823 (*Anapol*).) " 'The defendant need not prove that the challenged conduct is protected by the First Amendment as a matter of law; only a prima facie showing is required.' [Citation.]" (*Id.* at p. 822.)

In this case, the only factual allegation in the complaint was that Ehinger made statements critical of Moshe's honesty, professionalism, and business acumen, to Moshe's actual and/or potential customers, his actual and/or potential investors, or property owners. The complaint did not specify when the statements occurred—other than "within four years" prior to the filing of the complaint—or in what context.[5] The complaint did not explicitly challenge protected activity; it did not allege any details about the statements sufficient to indicate whether they were protected conduct. However, we do not resolve an anti-SLAPP motion based on the complaint alone.

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[5] Although the complaint asserted multiple causes of action, they were all based on the alleged false or damaging statements identified in paragraphs 5 and 10.

"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 v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

To establish the claims arise from protected petitioning activity, Ehinger offered evidence, in the form of a declaration, regarding the entire universe of statements he ever made about Moshe, in Los Angeles and in Arizona. Ehinger declared that every statement he made about Moshe was a pre-litigation communication or related to pending litigation. Statements or writings made in connection with issues under consideration or review by official bodies or proceedings, and statements made in anticipation of such litigation are protected within the meaning of section 425.16, subdivision (e).[6] (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Anapol, supra,* 211 Cal.App.4th at p. 824 ["Communications preparatory to, or in anticipation of, bringing an action are within the protection of the anti-SLAPP statute."].) Ehinger made a prima facie showing that the complaint arises from protected conduct by offering evidence that every statement he ever made about Moshe was in anticipation of litigation or concerned an issue under consideration in pending litigation. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1419 [court considered defendant's declarations to determine whether complaint alleging only nonspecific, vague claims of defamation, misrepresentation, and emotional distress arose from protected conduct].)

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[6] Section 425.16, subdivision (e) defines " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " as including: "(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."

Moshe argues Ehinger's motion did nothing more than deny the allegations of the complaint. In general, merely denying the allegations of a complaint is insufficient to demonstrate the applicability of the anti-SLAPP statute. An assertion that there is no evidence the defendant made statements alleged in the complaint, or that the alleged statements were true, does not aid in the determination of whether the complaint arises out of protected activity within the meaning of the statute. (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371.) But this principle does not address the situation presented here. Ehinger's motion and accompanying declaration are not mere denials that he made statements as alleged in the complaint. Instead, Ehinger admitted he made statements about Moshe and *all* of the statements he *ever* made about Moshe constituted protected conduct. Ehinger's declaration indicated every statement he had ever made about Moshe—which would of necessity include the statements Moshe's complaint obliquely challenged—was in anticipation of litigation or concerned issues under review in pending litigation, and was therefore protected.[7]

Moshe contends his complaint is not about the statements Ehinger identified in the anti-SLAPP motion. He insists his complaint concerns other defamatory statements. However, he provided no specific statements, details, or competent evidence establishing the defamation alleged in the complaint was not encompassed in the statements Ehinger described, all of which were in anticipation of litigation or concerned issues under review in ongoing litigation, and which Ehinger declared comprised the entire universe of statements he ever made about Moshe. Moshe's bare assertion that the complaint was about unprotected conduct, without more, was insufficient to defeat Ehinger's prima facie

[7] Moshe also relies on the general proposition that a suit filed in response to protected activity, or in retaliation for protected activity, is not necessarily a SLAPP if the conduct challenged in the complaint is not protected activity. (See *Navellier, supra*, 29 Cal.4th at p. 89; *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 190.) This principle also does not apply to this case. Ehinger has not argued or suggested Moshe's suit was in retaliation for, or triggered by, Ehinger's protected conduct. Instead, Ehinger argued he only ever made statements about Moshe that were protected activity.

showing that the complaint arises from protected activity within the meaning of the anti-SLAPP statute.

" ' "Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed [citation] and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity. [Citation.]" ' [Citation.]" (*Anapol*, *supra*, 211 Cal.App.4th at p. 822.) Ehinger offered competent evidence that every statement he ever made about Moshe was protected activity within the meaning of the statute. Moshe cannot escape the anti-SLAPP statute by pleading only excessively vague allegations that he never further detailed. The trial court properly concluded Ehinger made a prima facie showing that the complaint arises from protected conduct.[8]

C. Moshe Has Not Attempted to Demonstrate the Merit of His Claims

Once Ehinger established a prima facie case that the complaint challenged protected conduct, it was Moshe's burden to demonstrate the merit of his claims by establishing a probability of success. Moshe did not even attempt to meet this burden in the lower court. Similarly, on appeal, he does not contend he met his burden in the second step of the anti-SLAPP analysis. Any such argument is forfeited. (*Raining Data*

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[8] Moshe argues the trial court's minute order contained numerous errors. We need not address these arguments. We review the trial court's ultimate ruling, not its reasons. (*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906-907.)

Moshe also asserts the trial court erred in failing to consider his argument that defendant failed to set the anti-SLAPP motion for hearing within 30 days of its filing. In the lower court, in opposition to the anti-SLAPP motion, Moshe contended the underlying bad faith of the motion was illustrated by Ehinger's failure to make any effort to set the motion for hearing within 30 days. Although the opposition cited to Moshe's attorney's declaration as support for this contention, the attorney's declaration does not in fact mention Ehinger's alleged failure to attempt to set the motion for hearing earlier. In any event, we, like the trial court, find merit in the anti-SLAPP motion. We therefore reject the assertion that the alleged failure to set the motion for hearing earlier was evidence of Ehinger's bad faith.

Corp. v. Barrenechea (2009) 175 Cal.App.4th 1363, 1372.) The trial court properly granted Ehinger's special motion to strike. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1270.)

DISPOSITION

The trial court order is affirmed. Respondent shall recover his costs and attorney fees on appeal, pursuant to section 425.16, subdivision (c). (*Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1271.)

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.