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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

JOSEPH L. SHALANT, Plaintiff and Appellant, v. ROBERT MACKSTON, Defendant and Respondent.	B265685 (Los Angeles County Super. Ct. No. SC116968)

APPEAL from a judgment of the Superior Court of Los Angeles County. Nancy Newman, Judge. Reversed and remanded.

Joseph L. Shalant, in pro. per., for Plaintiff and Appellant.

Doherty & Catlow, John Doherty and Susan Rousier for Defendant and Respondent.

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INTRODUCTION

The trial court granted summary judgment against plaintiff and appellant Joseph L. Shalant, and in favor of defendant and respondent Robert Mackston on plaintiff's sole cause of action for intentional infliction of emotional distress. The trial court determined that plaintiff did not demonstrate a triable issue of fact as to whether or not plaintiff suffered severe emotional distress. Although both the record below and plaintiff's briefing in this court are, as will be shown, problematic, we believe the record, considered as a whole, does disclose a triable issue of fact as to the existence of this element of plaintiff's cause of action. Thus, we reverse the trial court's grant of summary judgment against plaintiff.

BACKGROUND

Much of the factual and procedural background is contained in our earlier opinion in this case. (*Shalant v. Mackston* (Dec. 8, 2014, B250208) [nonpub. opn.].) That opinion affirmed the trial court's award of attorney fees to defendant and his codefendants (who are not parties to this appeal) in connection with their successful motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute.[1] In general, this case, as well as another that preceded it, involve a long and ongoing dispute between plaintiff and his wife, Wendy Kronick (Kronick), on the one hand, and defendant, their neighbor, on the other.

In a separate, earlier case, Kronick sued defendant. Defendant, represented by attorneys Thomas Feeley and Thomas

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[1] All further undesignated section references are to the Code of Civil Procedure.

Dempsey, cross-complained against Kronick and added plaintiff as a cross-defendant. Both Kronick's original complaint and the cross-complaint in that earlier action resolved with no party obtaining any affirmative relief.

Plaintiff and Kronick, representing themselves, then filed this lawsuit against defendant and his attorneys (Feeley and Dempsey) for malicious prosecution, based upon the cross-complaint in the previous action. They also stated a claim against defendant only for intentional infliction of emotional distress. Defendant, Feeley, and Dempsey, all represented by counsel, filed special motions to strike the malicious prosecution cause of action pursuant to section 425.16. The trial court granted the motion and, further, awarded attorney fees to defendant, Feeley, and Dempsey pursuant to section 425.16, subdivision (c). The trial court also ordered sanctions against plaintiff for filing an overlong opposition brief in violation of both rule 3.1113(d) of the California Rules of Court and the trial court's express ruling denying plaintiff's ex parte application to file the overlong brief. (*Shalant v. Mackston*, *supra*, B250208.)

Plaintiff and Kronick failed to timely appeal the trial court's ruling on the special motion to strike. They did, however, attempt to obtain review of the trial court's ruling by way of a writ, which this court summarily denied (case No. B247918).

Both plaintiff and Kronick did timely appeal the award of attorney fees on the special motion to strike, and plaintiff attempted to appeal the sanctions award. In our prior opinion, we affirmed the award of attorney fees and dismissed plaintiff's challenge to the sanction award as an improper interlocutory appeal. (*Shalant v. Mackston*, *supra*, B250208.)

After our decision above, the case returned to the trial court. Plaintiff and Kronick filed a third amended complaint which re-alleged their sole remaining cause of action for intentional infliction of emotional distress. Plaintiff and Kronick based this cause of action upon defendant's alleged violation of a number of statutes: Civil Code sections 1708.7 (stalking) and 1708.8 (invasion of privacy), and Penal Code section 632, subdivision (a) (eavesdropping upon or recording of a confidential communication). The operative time frame of plaintiff's third amended complaint, construed liberally, is the two-year period prior to May 8, 2012, the date he filed his original complaint, through the filing date of third amended complaint, April 28, 2014. This creates a relevant time frame, in terms of defendant's alleged conduct towards plaintiff, of roughly May 2010 to April 2014.

Defendant moved for summary judgment. After briefing from both sides and oral argument, the trial court granted defendant's motion, and entered judgment against both plaintiff and Kronick. The trial court found that neither plaintiff nor Kronick had established a triable issue of fact as to an essential element of their cause of action, i.e., that defendant's conduct caused them severe emotional suffering or distress. In its oral ruling, the trial court found plaintiff and Kronick's opposition to be based only on general and conclusory assertions of severe emotional distress without any supporting evidence.

This appeal followed.

DISCUSSION

1. Kronick Is Not a Proper Party to this Appeal

The opening and reply briefs in this case are purportedly filed on behalf of plaintiff and Kronick representing themselves

in propria persona. Kronick, however, is not a proper party to this appeal.

Plaintiff filed a timely notice of appeal on July 22, 2015. Kronick along with plaintiff, filed a purported "amended" joint notice of appeal on July 31, 2015. This court dismissed the latter appeal on May 4, 2016, because it was in default pursuant to rule 8.140(b) of the California Rules of Court, and later denied the motion to vacate the dismissal and restore the joint appeal to active status. Thereafter, on July 11, 2016, this court issued the remittitur in that appeal. The dismissal of the appeal involving Kronick and the judgment against her is therefore final.

Thus, we are without jurisdiction to review the merits of the trial court's decision insofar as it pertains to Kronick, and will not do so. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.) We therefore disregard all references to Kronick in the briefs, unless they are legally relevant to an issue raised by plaintiff.

2. The Record Below Shows a Triable Issue of Fact Whether Plaintiff Suffered Severe Emotional Distress

a. The law of summary judgment

A defendant may obtain summary judgment by showing, with competent evidence, that " 'one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).)

If the moving party meets its initial burden of showing no triable issue of a material fact, the burden then shifts to the opponent to demonstrate, by competent evidence, that a triable issue of material fact remains. (*Aguilar, supra,* 25 Cal.4th at pp. 850-851.) An opposing party cannot avoid summary

judgment by asserting facts based on speculation and conjecture, but instead must produce admissible evidence that raises a triable issue of fact. (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1378 (*Christina C.*).) An issue of fact is not raised by broadly phrased or conclusory assertions. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 (*Brown*).)

The purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar, supra,* 25 Cal.4th at p. 854.) Summary judgment is no longer considered a "disfavored" remedy: "[s]ummary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry,* at p. 542.)

We review a grant of summary judgment de novo. (*Christina C., supra,* 220 Cal.App.4th at p. 1378.)

b. The summary judgment record below

Plaintiff's opening and reply briefs in this appeal are rambling and confusing in terms of their citation to the record. They are of almost no help in terms of directing us to what, exactly, his *relevant* evidence in opposition to the motion for summary judgment either does or does not establish in terms of a triable issue of material fact.

The confusing and unhelpful nature of plaintiff's appellate briefs is compounded by the way in which he presented his opposition to the motion for summary judgment in the court below. Plaintiff's opposition papers failed to substantially comply with the procedural requirements of California Rules of Court, rule 3.1350. Even after submitting a revised opposition separate statement that cured some of the procedural irregularities,

plaintiff, in large part, still failed to organize and submit competent evidence, in the form of declarations, deposition excerpts, or other admissible exhibits, generated during the course of this litigation and specifically directed at issues raised by the motion for summary judgment. Instead, plaintiff submitted a declaration that incorporates by reference a prior pleading entitled "Motion under CC [*sic*] 3295(c) to Conduct Pretrial Discovery for Punitive Damages." This pleading incorporates yet another pleading, entitled in part, "Response to Court's Own Motion as to Whether this Case Should Remain in Unlimited Jurisdiction . . . ," which itself incorporates another declaration by plaintiff, a declaration by Kronick, and a number of other exhibits, including third party declarations, testimony from a 2010 restraining order hearing, and other documents.

These documents are directed, in the first instance, towards maintaining the case within the civil court's unlimited jurisdiction, rather than transferring it to a limited jurisdiction court. These documents are not specifically directed towards defendant's motion for summary judgment and the issues raised by it. As such, the "competent evidence" submitted by plaintiff in response to defendant's motion is disorganized, confusing, and not entirely relevant to the issues raised by the motion for summary judgment. This court had to sift through these lengthy documents and expend significant effort to attempt to ascertain exactly what they do, or do not, establish for purposes of demonstrating a triable issue of material fact.

Much of the purported evidence submitted by plaintiff in opposition to defendant's motion involves either alleged conduct by defendant against persons other than plaintiff, or conduct that predates the operative time frame of the allegations in the third

amended complaint, or both. Thus, to the extent it is relevant at all, it is relevant only to plaintiff's state of mind vis-á-vis the defendant.

Notwithstanding these criticisms, the record below does demonstrate a triable issue of fact as to whether defendant has, for a number of years, chronically harassed plaintiff and other members of the neighborhood. This type of ongoing harassment, we believe, relates to and supports a finding that a triable issue of fact remains as to whether plaintiff suffered the type of emotional distress required to maintain his cause of action for intentional infliction of emotional distress. The relevant portions of the record are summarized below.

Plaintiff offered excerpts of testimony from another resident of the neighborhood, Connolly Oyler, obtained during what appears to be a September 2010 restraining order hearing brought by Kronick against defendant. (Case No. SS019839.) In it, Oyler describes two incidents, both of which occurred roughly in 2008, wherein defendant raised his fists at Oyler after Oyler criticized defendant for publicly disciplining his child and later angrily accused Oyler's dog of biting one of his children.

Plaintiff also submitted excerpts of his own testimony from that hearing. In it, he contends that on some unstated date prior to the hearing, defendant threatened to kick his dog if he did not put the dog on a leash. He then states that on June 28, 2009, after a confrontation in the neighborhood dog park, defendant called him a "son of a bitch," raised his fist, and threatened to "kick [his] ass." Around the same time, defendant drove by plaintiff's house, gave him "the finger," and called him a "son of a bitch." Another time, defendant came out of his house while plaintiff and Kronick were walking by, cursed at plaintiff and

told him he would "kick his ass." Finally, in December 2009, defendant drove by as plaintiff and Kronick walked their dog off-leash, veered towards them, and then "smiled, or frowned, or smirked."

This testimony thus describes incidents that significantly predate the operative time frame of the third amended complaint. We consider it, therefore, only on the limited issue of plaintiff's state of mind during the operative time frame of the complaint, and the extent to which it inferentially supports a finding that a triable issue of fact also remains as to the level of emotional distress suffered by plaintiff as a result of defendant's conduct towards him during the operative time frame of the complaint.

In the trial court, plaintiff also submitted declarations describing defendant's harassment of other residents of the neighborhood, including Lisa Gray, Michele Manzella, Beth Thomas-Kim, Elizabeth Ramsey, Roderick Stouch, Parker Bartlett, and plaintiff's adult stepson, Max Kronick. Most of these incidents involve conduct occurring at or near the neighborhood dog park, which is across the street from defendant's home. Again, since none of these incidents involve plaintiff, they cannot be considered conduct directed against him. We do, however, consider the extent to which plaintiff's knowledge of and belief in these events might contribute to his state of mind and the level of anxiety and distress he experienced as a result of defendant's conduct toward him.

Gray describes three incidents, all in 2011, during which defendant followed her in his car in an attempt, she alleges, to intimidate her. During the first incident, as she entered her car from the dog park, defendant also entered his car. Gray drove a circuitous route home, driving away from the direction defendant

faced, and making multiple turns in an attempt to make sure defendant did not follow her. At some point during this route, she observed defendant, apparently behind her, speeding through the residential neighborhood to catch and eventually pass her. In the second incident, as Gray drove away from the dog park, she observed defendant start his parked car, make a U-turn, and begin to follow her to her home. In the third incident, Gray walked to her car from the Palisades Park area. She stopped to talk to some friends. Defendant pulled up in his car, parked a few car spaces behind her car, and watched her. Gray eventually got into her car. As she drove away, defendant followed her in his car. Rather than drive home, Gray decided to drive to a local supermarket because of its public parking lot. Once there, she parked and watched defendant drive past her. He parked his car, got out, and "glar[ed]" at her as he walked towards the store.

Manzella and Thomas-Kim describe an incident during which defendant approached Thomas-Kim as she entered her car from the dog park. At her driver's side window, defendant screamed at Thomas-Kim with raised fists, called her a "bitch," and threatened to throw her dog over the cliff.

In her declaration, Ramsey states that on "several" occasions, defendant drove past her while she was running in the neighborhood and called her a "cunt." Sometime in 2010, he "swerved" his car into a driveway at the same time she approached it, which caused her to have to "jump out of the way."

Stouch is a dog walker for clients who live in plaintiff's neighborhood. On several occasions, while Stouch walked clients' dogs in the dog park, defendant approached him, told him he could not be in the dog park because he was not a resident, and took photos of him with his cell phone. On one occasion,

defendant approached Stouch, called him a loser, and added that he was going to sue him and take everything that he owned.

Bartlett is also a dog walker with clients in plaintiff's neighborhood. On numerous occasions, he observed defendant confronting people in the dog park, demanding identification, and calling security to remove them from the park. On one occasion, Bartlett watched defendant angrily threaten, with raised clenched fists, a 14-year-old boy who was walking his dog and a friend's dog in the park.

In his declaration, Max Kronick describes an incident that occurred on July 20, 2013, during which defendant "stalked" him: defendant tailgated him for approximately four miles as both drove along a winding portion of Sunset Boulevard to Pacific Coast Highway.

In his own declaration, plaintiff describes some specific instances of defendant's conduct toward him. On the evening of September 30, 2012, defendant returned a letter from plaintiff by entering plaintiff's property and placing the letter in plaintiff's mailbox. In the course of doing so, defendant allegedly damaged plaintiff's flagstone walkway with his foot, which plaintiff supports with his assertion that the damage had not been there the day before. In June 2013, defendant followed plaintiff and Kronick to a park near Noah's Bagels and sat on his motorcycle, approximately 30 feet away, for about 15 minutes and stared at them.

Plaintiff makes several more general allegations in his opposing declaration. Defendant "stalk[ed]" plaintiff, "frequently driving by [plaintiff's] house," and making obscene statements and gestures. Defendant surreptitiously videotaped plaintiff while he was in the dog park. Defendant was in court on the

same day plaintiff was in court on an unrelated matter, and he taunted plaintiff by repeatedly muttering "disbarred" to him.[2] From inside his garage, defendant held up a large sign that said "DISBARRED" when plaintiff walked by.[3]

The documents submitted in opposition to the motion for summary judgment also contain a declaration from Kronick. On August 6, 2013, defendant approached Kronick while she sat in

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[2] Plaintiff is a disbarred attorney. (*In re Joseph Leib Shalant* on Discipline (2005) case No. 01-O-4627.)

[3] In his declaration, plaintiff makes a number of other assertions about defendant which we do not consider because they are not competent evidence suitable to oppose a motion for summary judgment. Plaintiff states that defendant has a "heavy dependence on vicodin," is "unstable," and owns "at least one Glock gun." Plaintiff does not establish anywhere in the record how he knows these things. We therefore reject these allegations as speculation without any factual basis. We reach a similar conclusion regarding plaintiff's bald assertion, without foundation, that defendant planted poison on seven occasions in the neighborhood dog park. Finally, we do not consider plaintiff's assertion that defendant surreptitiously recorded him and Kronick by placing a listening device on the dog park bench they used. Although a listening device was recovered at the bench by other homeowners in the neighborhood, the evidence allegedly connecting it to defendant is an unsworn report from a nominal DNA analyst of unknown qualifications, which says that DNA from some listening device, not specifically identified as the one found by the bench, contained defendant's DNA. (See *Brown, supra,* 171 Cal.App.4th at p. 525 [to create a triable issue of fact, opposing party cannot rely on conclusions and general assertions, but must present specific facts established by competent, admissible, evidence]; accord, *Christina C., supra,* 220 Cal.App.4th at p. 1378.)

the dog park with her Dalmatian puppy. Defendant walked behind plaintiff and "kicked the daylights out of [the dog] as hard as he could." After kicking the dog, defendant raised his fist and "threatened to hurt [Kronick]."

As a result of this described conduct, both against him and others, plaintiff contends he has feared for his safety, as well as the safety of Kronick, and the safety of his stepson, Max. Defendant's conduct, according to plaintiff, has been "extremely disturbing," and plaintiff "constantly [has] a high degree of anxiety about what [defendant] might do to [plaintiff] and his family." The incidents, considered together, have been "greatly disturbing to [plaintiff] and have caused [him] to suffer emotional distress that on occasion has been severe." Finally, plaintiff states "[t]he needless unpleasantness and constant feeling of anxiety and concern for my safety and the safety of my family when we are outside in our own community has created a pall over my enjoyment of being a resident homeowner in this otherwise wonderful community. It is indeed very grating and disturbing."

c. The element of "severe" emotional distress

The elements of a claim for intentional infliction of emotional distress are (1) outrageous conduct by the defendant, (2) intention to cause, or reckless disregard of the probability of causing, emotional distress, (3) severe emotional suffering, and (4) actual and proximate causation. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

With respect to element No. 3, severe emotional distress, the Supreme Court has set a "high bar." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 (*Hughes*).) " 'Severe emotional distress means " 'emotional distress of such substantial quality or

enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " ' [Citation.]" (*Ibid.*)

In *Hughes,* the defendant, a trustee of a $350 million trust, allegedly complemented the plaintiff, the mother of the trust's minor and sole beneficiary, on her great beauty. During the conversation, the defendant further suggested that he might change his vote on an earlier decision denying the plaintiff's request for a disbursement on the minor's behalf if the plaintiff would agree to a sexual liaison. (*Hughes, supra,* 46 Cal.4th at p. 1040.) That evening, during a face-to-face encounter at a private showing of the King Tut exhibit at the Los Angeles County Art Museum, the defendant allegedly told the plaintiff, in the presence of her minor son, "I'll get you on your knees eventually. I'm going to fuck you one way or another." (*Ibid.*) In her complaint against the defendant, the plaintiff alleged a cause of action for intentional infliction of emotional distress, based upon these two incidents. (*Id.* at p. 1050.)

The Supreme Court affirmed the trial court's grant of summary judgment on the emotional distress claim finding the plaintiff failed to raise a triable issue of fact as to the existence of severe emotional distress. "[P]laintiff's assertions that she suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as a result of defendant's comments to her . . . do not comprise ' " 'emotional distress of such substantial or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " ' [Citation.]" (*Hughes, supra,* 46 Cal.4th at p. 1051.)

In *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1361 (*Wong*), the defendant posted an allegedly defamatory and highly critical review of the plaintiff's dental practice on the review website,

Yelp. The plaintiff's complaint alleged, among others, a cause of action for intentional infliction of emotional distress. The plaintiff contended that as a result of the negative online review, she suffered " 'severe emotional damage,' " including lost sleep, stomach upset, and generalized anxiety. (*Id.* at p. 1377.) The Court of Appeal upheld a grant of summary judgment against the plaintiff, finding that such allegations, even though contained in a declaration, "do not constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. [Citation.]" (*Ibid.*)

We acknowledge that plaintiff's assertions of emotional distress are similar in nature to those found insufficient in *Hughes* and *Wong*. Nevertheless, we believe those cases are distinguishable. Both *Hughes* and *Wong* involve solitary or at most, isolated, instances of conduct between the defendant and the plaintiff. In the immediate case, however, the proof described above creates triable issues of fact as to whether or not defendant has harassed and, essentially, terrorized, not only plaintiff, but other members of the community repeatedly over a multi-year time frame. This kind of chronic, aggressive, and frankly anti-social behavior, to the extent proven at trial, and whether directed against plaintiff or, to the extent plaintiff is aware of it, at others, is the kind of behavior that by its nature would logically cause the kind of severe emotional distress required by *Hughes* and *Wong*. The quality and nature of defendant's behavior established below, in conjunction with plaintiff's more general assertions of anxiety and emotional distress, are

sufficient to raise a triable issue of fact as to whether or not plaintiff suffered severe emotional distress.[4]

DISPOSITION

The judgment entered in favor of defendant and respondent Robert Mackston and against plaintiff and appellant Joseph Shalant is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

This opinion, for the reasons stated earlier, does not in any way affect the judgment previously entered against Kronick.

Appellant and respondent to bear their own costs.

SORTINO, J.[*]

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.

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[4] In the course of this opinion, we have considered the various items of evidence for the purposes indicated. Our reasoning, however, should not be construed to bind the trial court on evidentiary rulings it will necessarily have to make during a trial. The trial court will have to make the rulings it sees fit at the time such rulings become necessary and based upon the context present at the relevant time.

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.