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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SOLOMON TESHFAMICHAEL,

Plaintiff, Cross-defendant
and Appellant,

v.

PMB STOCK CO., INC.,

Defendant, Cross-
complainant and Respondent.

2d Civil No. B279056
(Super. Ct. No. 15CV01126)
(Santa Barbara County)

Solomon Tesfamichael appeals the trial court's order denying his special motion to strike PMB Stock Co., Inc.'s cross-complaint as a strategic lawsuit against public participation (SLAPP). (Code Civ. Proc.,¹ §§ 425.16, subd. (i), 904.1, subd. (a)(13) [order denying an anti-SLAPP motion is appealable].) He contends: (1) the litigation privilege (Civ. Code, § 47, subd. (b)) prevents PMB from showing a probability of success on its cross-

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

complaint, and (2) PMB has neither stated nor substantiated a legally sufficient claim. We agree with his first contention, and reverse.

BACKGROUND

In 2013, Tesfamichael applied to rent a horse from PMB for a trail ride. The application required him to indicate whether he was a novice, good, or excellent rider. He checked the box marked “Good Rider.” He also told PMB’s foreman he was a good rider. PMB then rented him a horse suitable for a rider of any ability.

During his trail ride, Tesfamichael sustained injuries when he fell to the ground after his horse jumped. He sued PMB for negligence and gross negligence. In his complaint, he alleges he “was not an experienced rider” and “had only ridden a few times in the past.” He also alleges he told his trail guide about his lack of experience.

PMB filed a cross-complaint against Tesfamichael for intentional misrepresentation. PMB alleges Tesfamichael misrepresented his riding ability when he stated he was a good rider. PMB alleges that, but for this misrepresentation, it would have treated him as a novice rider and taken precautions to prevent his injuries. Tesfamichael’s misrepresentation thus damaged PMB because it has to defend itself against his lawsuit and pay any resulting judgment.

Tesfamichael filed an anti-SLAPP motion in response to PMB’s cross-complaint. He moved to strike the portions of PMB’s cross-complaint that reference his lack of experience as alleged in his complaint and the damages PMB will allegedly suffer as a result of defending against his lawsuit. He claims that the statements in his complaint are privileged and that PMB

failed to substantiate its cause of action with admissible evidence.

The trial court denied Tesfamichael's anti-SLAPP motion. It found that PMB showed a probability of success on its misrepresentation cause of action because the litigation privilege: (1) did not bar PMB from using the statements in Tesfamichael's complaint for evidentiary purposes, and (2) did not apply to PMB's claim of damages because the privilege applies to communications in a lawsuit, not its effects. The court also determined that PMB substantiated a legally sufficient claim.

DISCUSSION

Tesfamichael contends: (1) the litigation privilege (Civ. Code, § 47, subd. (b)) prevents PMB from showing a probability of prevailing on its intentional misrepresentation cause of action because the cause of action arises out of the filing of his complaint, and (2) PMB has not stated or substantiated a legally sufficient claim regardless of whether the privilege applies. We agree with Tesfamichael's first contention, and do not reach his second.

We review the denial of an anti-SLAPP motion de novo, applying a two-prong inquiry. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Under the first prong, Tesfamichael must show that PMB's cause of action "aris[es] from any act . . . in furtherance of [his] right of petition or free speech." (§ 425.16, subd. (b)(1).) Under the second prong, PMB must "establish[] that there is a probability that [it] will prevail on [its] claim." (*Ibid.*) That requires PMB to establish: (1) Tesfamichael made a misrepresentation, (2) Tesfamichael knew his misrepresentation was false, (3) Tesfamichael intended to induce PMB to rely on his misrepresentation, (4) PMB justifiably relied on the

misrepresentation, and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

“Only a [claim] that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, original italics.) Here, PMB does not contest whether Tesfamichael has satisfied the first prong, so we address only the second prong.

Tesfamichael contends PMB cannot show a probability of success because the litigation privilege bars its claim. The litigation privilege “immuniz[es] participants from liability for torts arising from communications made during judicial proceedings.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.) It “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 ha[s] some connection or logical relation to the action. [Citations.]” (*Id.* at p. 212.) The privilege is “relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense [the nonmoving party] must overcome to demonstrate a probability of prevailing.” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 (*Flatley*).) Whether the privilege applies is a question of law subject to our independent review. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 915.)

The litigation privilege does not bar PMB’s use of the allegation in Tesfamichael’s complaint that he was not an experienced rider because PMB uses that statement for evidentiary purposes. (*Flatley, supra*, 39 Cal.4th at p. 325.) The statement supports the inference that Tesfamichael made a

knowing misrepresentation when he checked “Good Rider”—rather than “Novice Rider”—on his rental application. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168 [“when allegations of misconduct properly put an individual’s intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent”].)

But the litigation privilege does bar PMB from claiming that Tesfamichael’s lawsuit caused PMB’s damages because the filing of a complaint is a protected communication. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1249.) *Navellier v. Sletten* (2003) 106 Cal.App.4th 763 (*Navellier*) is instructive. In *Navellier*, Navellier settled a federal lawsuit in exchange for Sletten’s release of all claims against Navellier. (*Id.* at p. 767) Navellier then brought a separate lawsuit against Sletten alleging various tort claims. (*Ibid.*) Sletten counterclaimed, alleging the same claims he had released previously. (*Id.* at p. 768.) The court found that the counterclaims were barred by the release and granted Navellier’s motion for summary judgment. (*Ibid.*)

Navellier then sought damages in yet another lawsuit, alleging that Sletten had a fraudulent intent when signing the release. (*Navellier, supra*, 106 Cal.App.4th at p. 768.) The Court of Appeal held that the litigation privilege barred Navellier’s cause of action because it was based on the contents of Sletten’s counterclaims (i.e., asserting the released claims). (*Id.* at p. 771.) And while “the alleged fraud occurred before the counterclaims were filed, . . . damages from the fraud were caused by the counterclaims’ assertion.” (*Id.* at p. 772.) Because

that element of Navellier's cause of action was based on the privileged counterclaims, Navellier could not prevail on the fraud claim. (*Ibid.*; see also *Ribas v. Clark* (1985) 38 Cal.3d 355, 364-365 [privilege barred the plaintiff from recovering actual damages for the defendant's violation of Penal Code section 637.2 because injury resulted from the defendant's testimony at an arbitration hearing].)

As in *Navellier*, the fraud alleged here occurred prior to this litigation. And as in *Navellier*, PMB suffered no damages until Tesfamichael filed his complaint. Thus as in *Navellier*, PMB's intentional misrepresentation cause of action is based, at least in part, on a privileged communication. "Since the fraud claim is predicated, at least in part, on privileged counterclaims and, as has been noted, the privilege bars all tort causes of action other than malicious prosecution [citations], [PMB] cannot prevail on the fraud claim and the motion to strike should have been granted as to that cause of action." (*Navellier, supra*, 106 Cal.App.4th at p. 772.)

DISPOSITION

The trial court's order is reversed with directions to grant Tesfamichael's anti-SLAPP motion. Tesfamichael shall recover costs on appeal. (Code Civ. Proc., § 425.16, subd. (c)(1); see *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287-288.)

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TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Thomas Pearce Anderle, Judge
Superior Court County of Santa Barbara

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