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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

COSTCO WHOLESALE CORPORATION,

Plaintiff and Respondent,

v.

WILLIAM POWERS,

Defendant and Appellant.

2d Civil No. B236997
(Super. Ct. No. CV110123A)
(Santa Barbara County)

William Powers, proceeding in propria persona, appeals from the order denying his motion to strike causes of action under the anti-SLAPP statute, Code of Civil Procedure section 425.16.¹ The causes of action are alleged in a complaint filed by Costco Wholesale Corporation, respondent. We affirm.

Factual and Procedural Background

In February 2011 respondent filed a complaint alleging that appellant had trespassed upon its property at its warehouse store in San Luis Obispo. Appellant had engaged in "picketing at its gas station area while handing out leaflets to [respondent's] members." In addition, appellant had "disrupted store operations by intimidating members and employees and by interfering with vehicular traffic into and out of the gas

¹ All statutory references are to the Code of Civil Procedure.

station area." When respondent's employees informed appellant that "its policy prohibits persons . . . from soliciting on property owned or operated by [respondent]," appellant "refused to leave."

The complaint consisted of three causes of action. The first was for declaratory relief. It sought "a judicial declaration that [respondent] may prohibit groups or individuals from using its private property for expressive activity." The second cause of action was for trespass. It sought damages for "lost substantial customer goodwill." The third cause of action sought to enjoin appellant from trespassing upon respondent's property.

Respondent applied for a temporary restraining order (TRO). In support of the application, respondent submitted the declaration of Jay Doughty, the general manager of respondent's San Luis Obispo store. Doughty declared: The San Luis Obispo store "is a stand-alone store surrounded by a parking area. The [store] has a gas station area towards the rear of the parking area. [Respondent] has exclusive control over this structure, its entrance/exit ways, the surrounding sidewalk/apron areas, and the gas station area." Respondent "has a policy prohibiting all solicitors from engaging in any expressive activities on store premises."

Starting in January 2011, appellant had "hostile" encounters with store employees concerning respondent's gas prices. After appellant said that Doughty and the assistant store manager might " 'turn up dead,' " respondent canceled his membership. In a letter to appellant, respondent wrote, "We will deem your presence on any Costco Wholesale property . . . to be trespass" Since the cancellation, appellant "has been picketing with a sign nearly every day near the gas station area The sign states that [respondent] does not have the lowest gas prices in town." Appellant's "standard practice is to stand at the gas station with his sign and engage in conversation with [respondent's] members regarding [appellant's] complaints about [respondent's] prices." "I have observed [appellant] standing directly in the flow of traffic into and out of the gas station area, including in the only lane that leads into the gas station area."

On February 24, 2011, appellant stipulated to the issuance of a TRO prohibiting him from protesting on respondent's property, including "anywhere within the sidewalks, interior, gas station area, and parking lots" of the store. In April 2011 the court reissued the TRO as a preliminary injunction.

In May 2011 appellant filed an anti-SLAPP motion to dismiss all of the causes of action. In opposition to the motion, respondent submitted the declaration of Ronnie De Brum, an assistant manager of respondent's San Luis Obispo store. De Brum declared: Since the issuance of the TRO, appellant "has returned to protest near the Costco warehouse's gas station area nearly every day. [¶] . . . I have personally seen [appellant] w[a]nder onto [respondent's] private property while he is protesting." Appellant "has used a loud bullhorn to communicate with [respondent's] members at the gas station." "Many customers ask store management why [respondent] allows [appellant] to yell at them through the bullhorn while they wait for gas. Customers complain every day that [appellant] is standing in or blocking traffic into the gas station area. Some have said that they fear they will run over [him] with their car." Appellant "brings a sign that says 'Costco gas is a Rip Off' and passes out flyers to [respondent's] customers while they sit in their cars waiting for gas." As an exhibit to his declaration, De Brum attached a photograph "showing [appellant] interacting with a . . . member in the gas station waiting area and handing him a flyer."

Respondent also submitted the declaration of Anthony Sa, the supervisor of the gas station at the San Luis Obispo store. Sa declared: In July 2011 appellant blocked a car from entering the gas station. The female driver motioned to appellant to get out of the way. "At this point, [appellant] approached her car, stuck his bullhorn in the . . . car and continued to talk through it. Based on my knowledge of [respondent's] property line, [appellant] was clearly on [respondent's] property during this exchange."

Anti-Slapp Statute

"SLAPP" is an acronym for 'strategic lawsuit against public participation.' [Citation.] (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.) "A SLAPP suit . . . seeks to chill or punish a party's exercise of constitutional rights to free

speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

"A defendant opposing a SLAPP claim may bring a special motion to strike any cause of action '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 California Constitution in connection with a public issue.' (§ 425.16, subd. (b)(1).)" . . . [¶] An anti-SLAPP motion involves a two-step process." (*Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387.) First, "[t]he defendant has the burden of making a prima facie showing that one or more causes of action arise from an act in furtherance of the constitutional right of petition or free speech in connection with a public issue. [Citation.] . . . The motion must be denied if the required prima facie showing is not made by the moving defendant. [Citation.]" (*Id.*, at p. 1388.)

If the trial court finds that the defendant has made the requisite prima facie showing, it then proceeds to the second step, which is to determine " 'whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action 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.' [Citation.]" (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.)

"In the second prong of the anti-SLAPP analysis the plaintiff's burden of demonstrating a probability of prevailing is subject to a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. [Citation.] The court determines only whether the plaintiff has made a prima facie showing of facts that would support a judgment if proved at trial. [Citation.] We grant the motion if the plaintiff fails to produce evidence to substantiate his claim or if the defendant has shown

that the plaintiff cannot prevail as a matter of law. [Citation.]" (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.)

Trial Court's Ruling

The trial court issued a written ruling. It noted that respondent "does not dispute [appellant's] . . . argument that he is exercising his constitutional right of free speech in connection with an issue of public interest." Accordingly, the trial court proceeded to the second step of the anti-SLAPP analysis: whether respondent had demonstrated a probability of prevailing on the merits. The court concluded that respondent had satisfied its burden. The court found that respondent had "present[ed] credible evidence that [appellant] had been picketing on its private property." In addition, respondent had "present[ed] credible evidence that [appellant] continues to picket and approach vehicles that are waiting in line at [respondent's] gas station."

Standard of Review

"[W]e independently determine whether the . . . plaintiff has demonstrated a probability of prevailing on the merits of the claim. [Citations.] 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).) 'However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" '[Citations.]" (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573-574.)

Discussion

Since we must accept as true the evidence favorable to respondent, we accept as true evidence that appellant regularly came onto respondent's property to protest against its gas prices. Appellant insists that he "was picketing on public streets not controlled by [respondent]." But he has not referred us to any evidence in the record that, as a matter of law, defeats respondent's evidence to the contrary. (*Robles v. Chalilpoyil, supra*, 181 Cal.App.4th at pp. 573-574.)

Respondent has made a prima facie showing of the elements of a cause of action for trespass. Those elements are (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) actual harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.) Although appellant knew that he did not have permission to enter respondent's property, it is reasonable to infer that he intentionally entered the property to protest against respondent's gas prices. Appellant's protest activity on respondent's property harmed respondent by harassing and intimidating its customers and by obstructing the flow of traffic into and out of the gas station. Even if respondent were unable to establish actual harm, it would still be entitled to nominal damages: "[A]n action for trespass will support an award of nominal damages where actual damages are not shown. [Citation.]" (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406.)

"As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership. [Citation.] An injunction is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390.) Thus, exercising our independent review, we conclude that respondent has demonstrated a probability of prevailing on the merits on its causes of action for trespass and injunctive relief.

Respondent has also demonstrated a probability of prevailing on the merits on its cause of action for declaratory relief. Respondent has the right to prohibit all expressive activity, including appellant's protests against its gas prices, at its stand-alone stores. (*Costco Companies, Inc. v. Gallant* (2002) 96 Cal.App.4th 740, 754-755.) Such "stand-alone stores, while popular and open to the public, are not public forums which require that their owners permit expressive activity." (*Id.*, at p. 754.) We reject appellant's argument that respondent is not entitled to declaratory relief because there is no "current controversy" concerning this issue. The trial court, therefore, did not err in denying appellant's anti-SLAPP motion.

Disposition

The order denying appellant's anti-SLAPP motion is affirmed. Respondent shall recover its costs on appeal.

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YEGAN, Acting P.J.

We concur:

PERREN, J.

HOFFSTADT, J.*

*Judge of the Superior Court for the L. A. Judicial District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

Dodie A. Harman, Judge
Superior Court County of San Luis Obispo

William Powers, in pro per, Appellant.

Miriam A. Vogel, David F. McDowell, Hailly T. Korman; Morrison &
Foerster, for Respondent.