Filed 11/22/19 Tabares v. Apartment Rental Assistance II, Inc. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KINGA TABARES, Plaintiff, Cross-defendant, and Respondent, v. APARTMENT RENTAL ASSISTANCE II, INC., et al., Defendants, Cross-complainants, and Appellants.	B295613 (Los Angeles County Super. Ct. No. BC711381)

APPEAL from an order of the Superior Court of Los Angeles, Michael L. Stern, Judge. Reversed.

Chase Law & Associates and Kenneth E. Chase; Law Office of Aryeh Kaufman and Aryeh Kaufman for Defendants, Cross-complainants, and Appellants.

Remedy Law Group, Andranik Tsarukyan and Armen Zenjiryan for Plaintiff, Cross-defendant, and Respondent.

Plaintiff, cross-defendant, and respondent Kinga Tabares (Tabares) sued her former employers, defendants, cross-complainants, and appellants Apartment Rental Assistance II, Inc. (Apartment Rental) and Marc Menowitz (Menowitz), alleging employment discrimination claims under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.), wage and hour claims under the Labor Code, wrongful termination in violation of public policy, and intentional infliction of emotional distress. Defendants later filed a cross-complaint alleging only a claim for tortious interference with prospective economic advantage.

Defendants aver Tabares falsely told other employees that Menowitz intended to fire them, and one of those employees quit in response to that alleged misinformation. The cross-complaint also includes allegations ostensibly referencing facts asserted in plaintiff's first amended complaint (FAC); for example, Tabares "participated in [a] conversation just enough to gin up a comment that she deemed to be 'offensive.' "

Tabares filed a special motion to strike the cross-complaint under Code of Civil Procedure, section 425.16,[1] the Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. She contends the cross-complaint arose from protected conduct because defendants filed it in retaliation for Tabares's First Amendment right to petition the trial court. The trial court granted the motion.

We reverse. Tabares has failed to demonstrate that the cross-complaint's tortious interference cause of action arises from conduct protected by the anti-SLAPP statute.

---

[1] Undesignated statutory citations are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Menowitz is the president of Apartment Rental, a real estate business. In 2016, Menowitz hired Tabares as an executive assistant.

On June 25, 2018, Tabares filed a complaint against defendants alleging the following causes of action: (1) discrimination in violation of FEHA; (2) harassment in violation of FEHA; (3) retaliation in violation of FEHA; (5) failure to pay minimum wages, in violation of Labor Code section 1197 et seq.; (6) failure to compensate for all hours worked, in violation of Labor Code section 1198 et seq.; (7) failure to pay overtime wages, in violation of Labor Code section 1198 et seq.; (8) failure to provide meal periods, in violation of Labor Code section 226.7; (9) failure to provide rest periods, in violation of Labor Code section 226.7; (10) failure to provide accurate wage statements, in violation of Labor Code section 226; and (11) failure to reimburse work-related expenses, in violation of Labor Code section 2802.

Plaintiff also averred that Menowitz made "sexually suggestive comments" to her and retaliated against her for rebuffing his sexual advances by, inter alia, suspending her from work. Additionally, she alleged Apartment Rental's wage statements did not include rent payments that Menowitz made directly to her landlord.

On July 9, 2018, Tabares filed the FAC, wherein she added three causes of action: (1) wrongful termination in violation of public policy; (2) waiting time penalties, in violation of Labor Code sections 201 and 203; and (3) intentional infliction of emotional distress. Plaintiff further alleged in the FAC that Menowitz telephoned her on July 3, 2018 and stated, " '[W]e are at war.' " Later that day, she allegedly received a letter from

defendants' counsel, which stated that she " 'ha[d] been terminated for cause.' "

On August 29, 2018, defendants filed an answer that denied the allegations of the FAC and asserted certain affirmative defenses. Concurrent with the filing of their answer, defendants filed a cross-complaint alleging a single cause of action for tortious interference with prospective economic advantage. More specifically, they assert that on "multiple occasions in June and/or July 2018," Tabares "texted and called other . . . employees and falsely told those persons that Menowitz was going to fire them." An employee in Louisiana allegedly left work "upon receiving th[is] false 'inside' information." Defendants further allege that Tabares intentionally disrupted an economic relationship between them and "an . . . employee in Louisiana, and real estate brokers," a relationship that offered "the probability of future economic advantage" to defendants.

In addition, defendants allege in their cross-complaint "[s]ome of the misconduct on the part of [Tabares] necessitated a cease and desist letter from" defendants' counsel; this letter is attached to the cross-complaint. The letter recites that Tabares had "spread[ ] false rumors about future personnel decisions, tr[ied] to undermine [defendants'] business, attempt[ed] to persuade other people to participate in frivolous legal action against [defendants] and deliberately tr[ied] to slander and sully [defendants'] reputation." Defendants' counsel further characterized this conduct as "illegal" and stated that defendants "will be filing multiple counterclaims as a result of this misconduct."

The cross-complaint contains other facts that arguably are responsive to averments in the original complaint and/or the

FAC. These allegations include: Tabares "secretly filed" the underlying lawsuit and served it "without warning" while Menowitz was at work; Tabares falsely claimed on her resume that she has a bachelor's degree from New York University; her landlord requested that defendants make rent payments to the landlord because she had "problems paying [her] rent"; Tabares "routinely disappeared during the day without notice for various claimed beauty appointments for her hair and nail treatments during business hours"; she "seemed to engage in social collegiality only with the purpose of trying to draw an off-color remark or even a purported 'look' or so-called 'stare' from co-workers"; and she threatened to "sue and drag the names of [defendants] into the mud with scandalous and scurrilous allegations" if they terminated her employment.

On October 23, 2018, Tabares filed a special motion to strike the cross-complaint pursuant to section 425.16, arguing the anti-SLAPP statute applied because defendants filed their cross-complaint "in direct response to [her] First Amendment right to petition" the court. Defendants opposed the motion, contending their cause of action was based on the cross-complaint's allegation that Tabares contacted other employees and falsely claimed Menowitz intended to fire them.

On December 4, 2018, the trial court held a hearing on the motion, and issued a minute order granting the motion. Specifically, the minute order provides: "The Cross Defendant's Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion) filed by Kinga Tabares on 10/24/2018 is Granted." No supporting analysis for that ruling is included in the order. The trial court later denied defendants' request for a statement of

decision. On February 1, 2019, defendants filed a notice of appeal pursuant to section 904.1, subdivision (a)(13).

DISCUSSION

A. Legal Principles Governing Anti-SLAPP Motions Generally

The anti-SLAPP statute provides that "[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."[2] (§ 425.16, subd. (b)(1).)

The term " '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' " includes "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "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." (§ 425.16, subd. (e)(1)–(2).) A cross-defendant may file an anti-SLAPP motion to challenge a claim asserted by a cross-complainant. (See *id.*, subd. (h)

---

[2] To avoid any confusion occasioned by the statute's interchangeable use of the terms "cause of action" and "claim," the remainder of this opinion refers to the proper subject of a special motion to strike as a "claim." (E.g., *Baral v. Schnitt* (2016) 1 Cal.5th 376, 382 (*Baral*) [utilizing this approach].)

[providing, for the purposes of the anti-SLAPP statute, a " 'cross-complainant' " is a " 'plaintiff' " and a " 'defendant' " is a " 'cross-defendant' "].)

Resolution of an anti-SLAPP motion involves a two-step procedure. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).) "First, the [movant] must establish that the challenged claim arises from activity protected by section 425.16." (*Baral*, *supra*, 1 Cal.5th at pp. 376, 384.) At that stage, the movant "bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (See *id.* at p. 396.) If the movant discharges that obligation, then "the burden shifts to the [non-movant] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (See *ibid.*) On the other hand, the court should deny the motion without addressing that second step if the movant fails to demonstrate that the claim arises from protected activity. (*Symmonds v. Mahoney* (2019) 31 Cal.App.5th 1096, 1103–1104.)

" 'The only means specified in section 425.16 by which a [movant] can satisfy the ["arising from"] requirement is to demonstrate that *the [movant's] conduct by which [the non-movant] claims to have been injured* falls within one of the . . . categories described in subdivision (e) . . . .' " of the statute. (*Park*, *supra*, 2 Cal.5th at p. 1063, first and third bracketed insertions added, first ellipses added; see also *id.* at p. 1060.) Put differently, "[t]o determine whether a claim arises from protected activity, courts must 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.' "

(*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884; *Baral*, *supra*, 1 Cal.5th at p. 396.) " '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' " (*Park*, at p. 1063.)

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based." (*Park*, *supra*, 2 Cal.5th at p. 1067.)

B. Tabares Fails to Satisfy the First Step of the Anti-SLAPP Procedure

The parties dispute whether Tabares satisfied her burden as to the first prong of the anti-SLAPP analysis. Tabares contends "the Cross-Complaint filed by [defendants] arises from [her] conduct—filing the Complaint (and FAC)." Although defendants do not contest that Tabares's filing of her complaints constitutes protected activity, they argue that their sole claim for relief does not "arise from" that conduct. For the reasons stated below, we agree.[3]

The elements of a claim for intentional interference with prospective economic advantage claim are: "(1) the existence, between the [defendants] and some third party, of an economic relationship that contains the probability of future economic benefit to the [defendants]; (2) [Tabares's] knowledge of the

---

[3] Accordingly, we do not address whether defendants carried their burden as to prong 2 of the anti-SLAPP analysis.

relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the [Tabares's] action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

Defendants contend "the allegations comprising the tortious interference claim are [Tabares's] calls and text messages to third-parties which conveyed 'false inside information' that the person 'was to be fired imminently by [defendants].' " Although we express no opinion on the merits of such a claim, we acknowledge that defendants have identified "injury-producing conduct" that may give rise to a claim of tortious interference with prospective economic advantage, to wit, calls and text messages interrupting business relationships in Louisiana. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 593 (*Okorie*) [noting that the "injury-producing conduct" must be identified at the first step of the anti-SLAPP analysis]; 40 Cal.Jur.3d (2019) Interference with Economic Advantage, § 22, p. 46, fn. omitted ["An action will lie for intentional interference by a third person with . . . a prospective economic advantage if the interference is accomplished . . . by unlawful means . . . . Unlawful means include defamation and other forms of tortious conduct, such as fraud"].)

Tabares does not contend these telephone calls and text messages constitute protected activity, nor does she argue her filing of the original complaint or the FAC supplies any of the elements of defendants' tortious interference claim. Rather, she argues defendants filed their cross-complaint to "intimidate and retaliate against [her] for exercising her constitutional right to

petition by asserting credible sexual harassment, discrimination and wage and hour claims."

Specifically, she contends: (1) shortly after Tabares initiated the lawsuit, (a) Menowitz told her they were " 'at war' " and (b) defendants terminated her; (2) several days after she filed the FAC, defendants sent her the cease and desist letter; and (3) the cross-complaint contains "numerous allegations" that "respond directly" to allegations in her operative complaint that "are irrelevant to an economic advantage claim. As an example, Tabares cites defendants' allegation that she "only engaged socially at work to try and 'draw an off-color remark' or a look or stare from co-workers."

Tabares's argument misses the mark. Our Supreme Court has squarely held that the non-movant's subjective intent is not relevant under step one of the anti-SLAPP analysis. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "As a corollary, a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic." (*Ibid.*; see also *id.* at p. 77 ["To construe 'arising from' . . . as meaning 'in response to,' . . . would in effect render all cross-actions potential SLAPP's. We presume the Legislature did not intend such an absurd result"].) The statute's applicability instead turns on whether " 'the claim is *based on* conduct in exercise of' " rights protected thereunder. (*Id.* at p. 77.) Thus, whether defendants filed the cross-complaint to intimidate and retaliate against Tabares has no bearing on whether their claim "aris[es] from" her protected activity. (§ 425.16, subd. (b)(1).)

Tabares nonetheless insists that defendants' "economic advantage claim expressly incorporates" allegations that directly

refer or respond to the complaint or the FAC. These allegations in the cross-complaint include Tabares's filing of the complaint without advance notice, her fabrication of her employment qualifications, the landlord's request that defendants make payments directly to her landlord, "allegations challenging [her] social skills at work" and her work ethic, Tabares's solicitation of inappropriate remarks from Menowitz, and her attempts to extort defendants by threatening to bring suit.

Once again, the problem with Tabares's argument is that she has not demonstrated that the tortious interference claim arises from those allegations. In fact, she explicitly concedes that most of these allegations "are ***utterly irrelevant*** to [defendants'] economic advantage claim." Tabares makes no showing that the tortious interference claim depends on these allegations, nor is it apparent that these allegations have any relevance to that claim.[4]

This is no trivial oversight because allegations that are " 'merely incidental' or 'collateral' " to a claim for relief "are not subject to section 425.16." (See *Baral*, *supra*, 1 Cal.5th at p. 394.) For that reason, the mere fact that defendants generally incorporate allegations from earlier pages in the cross-complaint does not supply the link missing from her anti-SLAPP analysis, to wit, that the tortious interference claim is based on those allegations. (Cf. *Olivares v. Pineda* (2019) 40 Cal.App.5th 343, 352 ["Although the fourth cause of action incorporates all prior paragraphs of the first amended complaint, the incorporated

---

[4] Nothing in our opinion prohibits Tabares from moving to strike these allegations under section 436, which authorizes a trial court to "[s]trike out any irrelevant, false, or improper matter inserted in any pleading." (§ 436, subd. (a).)

allegations of protected activity merely provide context and are not the basis for plaintiffs' claim for recovery"].)

Admittedly, one could argue that the cross-complaint's reference to the cease and desist letter could indirectly reference protected activity. In their cross-complaint, defendants allege that "[s]ome of the misconduct on the part of [Tabares] necessitated" the letter. This letter, which is attached to that pleading, recites that defendants "will be filing multiple counterclaims as a result of," inter alia, Tabares's attempts to "persuade other people to participate in frivolous legal action" against defendants. Nonetheless, Tabares does not argue that the cross-complaint's passing reference to the letter establishes that defendants' interference claim arises from her purported efforts to enlist others to participate in this lawsuit. She appears not to have raised this argument below either.[5] Instead, Tabares asserts the letter *itself* is "***directly related*** to the Complaint (and FAC)." Thus, we do not address an argument Tabares has not made below or on appeal. (See *Baral*, *supra*, 1 Cal.5th at p. 396 [holding that the movant "bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them"].)

For all these reasons, we conclude Tabares has failed to establish that defendants' cross-complaint for interference with prospective economic advantage arises from protected activity.[6]

---

[5] The appellate record does not include a transcript of the hearing on Tabares's motion because it was not transcribed.

[6] Tabares claims that under *Okorie*, she is entitled to an order striking the entirety of the cross-complaint. We reject this argument because she fails to demonstrate that the tortious interference claim is based on *any* allegations of protected

Accordingly, the trial court erred in granting her anti-SLAPP motion.[7]

DISPOSITION

The trial court's order granting Tabares's special motion to strike is reversed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

---

activity. (See *Okorie*, *supra*, 14 Cal.App.5th at p. 588 [" 'If liability is not based on protected activity, the cause of action does not target the protected activity and is therefore not subject to the SLAPP statute' "].)

[7] Because we reverse the trial court's ruling, we deny Tabares's request for her appellate attorneys' fees and costs. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 [noting that a *prevailing* anti-SLAPP movant may obtain an award of attorneys' fees and costs incurred on appeal].)

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