Filed 3/8/12 Reinger v. Kegel, Tobin et al. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MARTIN REINER, Plaintiff and Appellant, v. KEGEL, TOBIN & TRUCE et al., Defendants and Respondents.	B234815 (Los Angeles County Super. Ct. No. BC445995)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rex Heeseman, Judge. Affirmed.

Martin Reiner, in pro. per., for Defendant and Appellant.

Berger Kahn, and Steven H. Gentry for Defendants and Respondents Kegel, Tobin & Truce and Sheila Kashani.

Gordon & Rees, Peter Schwartz and Christopher R. Wagner for Defendant and Respondent Commerce and Industry Insurance Company.

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Martin Reiner appeals from the trial court's order striking his defamation and fraud complaint under California's anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Reiner is an attorney who represented Pelican Products, Inc. (Pelican) in a workers' compensation action brought by Rosa Palafox. Sheila Kashani represented Palafox's former employer, Exact Staff, Inc., and its insurer, Commerce and Industry Insurance Company, in a separate workers' compensation action brought by Palafox. Although he initially suggested she attend, Reiner objected to Kashani's participation at a number of hearings in Palafox's action against his client and sought to exclude her from the proceedings. His conduct led to sanctions in the amount of $2,500 against him by the Workers Compensation Appeals Board.[2]

After the workers' compensation judge permitted Kashani to be heard in the matter, Reiner sought to disqualify the judge[3] because he "demonstrated a lack of impartiality, violation of Cannon 3B in the form of allowing the rights of Pelican Products to be interfered with by a non-party and non-party attorney entering into this matter and interfering with [Pelican's] rights, a faint ignorance of what the issues are for today's trial, misstatements of the law including but not limited to what constitutes waiver of the attorney/client privilege." Reiner also asserted that Kashani made improper contact with his client in the courtroom before the hearing began on September 22, 2009, and attempted to steal his client. He "want[ed] the record to reflect that there will be a lawsuit against Ms. Kashani for tortuous interference with the business relationship, and

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[1] All further section references are to the Code of Civil Procedure unless otherwise specified.

[2] Reiner's subsequent petition for writ of review of the board's decision was denied.

[3] The petition for disqualification was denied by the Workers' Compensation Appeals Board on January 5, 2010.

that will include a lawsuit against her law firm and her clients Exact Staff and AIG as well."

True to his word, Reiner brought suit against Kashani and her law firm, Kegel, Tobin & Truce (Kegel), as well as their client, Commerce and Industry Insurance (Commerce) on September 21, 2010 for defamation and fraud. He alleged that Kashani told Oscar Hernandez, a Pelican representative, that Reiner was "unprofessional," "unethical" and that "Reiner's efforts as an attorney on behalf of Pelican Products, Inc. were an utter waste of the resources of Pelican Products, Inc." Reiner also alleged that the defendants committed fraud when they promised him that they would not attempt to contact Pelican Products if Reiner in turn refrained from contacting their client.

Kashani and Kegel filed a special motion to strike under section 425.16 (Anti-SLAPP motion). In a sworn declaration, Kashani denied making those statements to anyone from Pelican, much less someone named Oscar Hernandez. Kashani stated that the Pelican representative who appeared at the hearing on the day in question was a woman and she did not speak to her. Kashani also denied trying to steal Pelican from Reiner. Commerce joined in Kashani and Kegel's special motion to strike.

Reiner opposed the motion on the ground that the alleged defamatory statements did not constitute protected activity subject to section 425.16 because they were part of a private conversation and not comments made on the record during the workers' compensation proceedings. The trial court granted the defendants' anti-SLAPP motion on April 20, 2011, and denied Reiner's motion for reconsideration on June 16, 2011. It also awarded attorney fees of $9,765 and $830 in costs. The order dismissing the action against all the defendants was entered on June 30, 2011. Reiner timely appealed.

DISCUSSION

On appeal, Reiner challenges the trial court's orders granting the anti-SLAPP motion and denying Reiner the right of discovery with regard to the attorney fee and costs award. Neither challenge has merit.

I. Anti-SLAPP Motion

The Legislature enacted the anti-SLAPP statute to address the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Therefore, a cause of action which chills a defendant's right to free speech may be stricken if the "challenged cause of action is one arising from protected activity" and the plaintiff lacks a probability of prevailing on his claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) A cause of action in connection with litigation activity may appropriately be considered protected activity under the anti-SLAPP statute. (*Ibid.*; § 425.16, subd. (e)(2).) After a defendant demonstrates that the cause of action arises from protected activity, the burden shifts to the plaintiff to show "both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) The evidence presented to establish a prima facie case must be admissible and may not simply rest on the allegations in the complaint. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654, disapproved on other grounds in *Equilon Enterprises v. Common Cause* (2002) 29 Cal.4th 53, 68, fn. 5.) Our review of the trial court's order is de novo and entails an independent assessment of the entire record. (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 214.)

A. Protected Activity

With these guidelines in mind, we first consider whether the allegedly defamatory remarks by Kashani to Pelican's representative arose from protected activity. Reiner contends they do not because they were not made on the record in the workers' compensation proceedings, but were instead made during a private conversation. Further, the remarks were not "made in connection with an issue under consideration or review by a . . . judicial body" and thus did not arise from litigation activity. (§ 425.16, subd. (e)(2).) Reiner relies on *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122 (*Weinberg*) and *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032

(*California Back Specialists*) to support his contentions. We find these two cases to be distinguishable from the facts in this case.

In *Weinberg*, the defendant was a collector of tokens who accused the plaintiff of stealing one of his tokens. (*Weinberg, supra,* at pp. 1127-1128.) The defendant then began a campaign to discredit the plaintiff, accusing him of theft to other token collectors. No criminal charges were ever filed, nor did the defendant intend his actions to result in a criminal investigation or prosecution. (*Id.* at pp. 1129-1130.) The trial court's denial of the defendant's special motion to strike was upheld. The appellate court held that the anti-SLAPP statute did not apply to causes of action arising out of private communications about private matters between private parties. (*Id.* at p. 1132.) The defendant's accusations were not protected under section 425.16(e) as statements made in connection with an official proceeding, in a public forum, or in the exercise of the constitutional right of free speech in connection with an issue of public interest. A matter of concern to the speaker made to a relatively small, specific audience was not a matter of public interest. (*Id.* at pp. 1132-1133.)

In *California Back Specialists,* the defendant was an attorney who represented two individuals who had been injured in car accidents. (*California Back Specialists, supra,* 160 Cal.App.4th at p. 1035.) The plaintiff medical group provided medical care to his clients subject to liens on their personal injury actions. When the attorney settled the personal injury cases, he disbursed the funds without paying the liens or telling the medical group about the settlements. The medical group brought suit for breach of contract, breach of fiduciary duty, conversion, money had and received and unjust enrichment. (*Ibid.*)

The attorney filed a special motion to strike, contending that he questioned the reasonableness and necessity of the medical care and that the treating physician was under investigation by the medical board. Neither the attorney nor his clients participated in that investigation. The trial court found that the complaint did not arise from protected activity. The reviewing court found no error, stating that the complaint was based on a controversy between private parties about the validity and satisfaction of the liens. These

issues were never under consideration in any court or official proceedings until the medical providers filed the suit against the attorney. (*California Back Specialists, supra,* at p. 1037.) The court noted that not all attorney conduct in connection with litigation, or in the course of representing clients, was protected by section 425.16. (*Ibid.*)

Aside from the fact that both *Weinberg* and *California Back Specialists* address the issue of what is considered protected activity, neither is particularly relevant to this case. *California Back Specialist*, in particular, did not appear to implicate anyone's right of petition or free speech. In addition, *Weinberg* did not relate to any litigation since the defendant's actions in that case never resulted in an official proceeding.

Instead, we agree with the trial court that *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 (*Taheri*) is the more factually similar and persuasive case. In *Taheri,* the court held that a lawsuit brought by a law firm alleging that another attorney improperly solicited its client was subject to the anti-SLAPP statute. (*Id.* at p. 485.) The law firm alleged that the attorney knew the client had been represented by the firm but promised " 'unobtainable and ethically improper litigation objectives' " in order to disrupt its relationship with the client. (*Id.* at pp. 485-486.) The attorney filed a special motion to strike and submitted the client's declaration which stated, in relevant part, that the client approached the attorney and that the client decided to replace the firm. (*Ibid.*) Nevertheless, the law firm insisted that the improper solicitation of its client was not subject to the protections of the anti-SLAPP statute. The court disagreed, holding that the "causes of action arise directly from communications between [the client] and [the attorney] about the pending lawsuits . . . In short, it is difficult to conjure a clearer scenario than the case before us of a lawsuit arising from protected activity." (*Id.* at pp. 489-490.)

As in *Taheri*, Reiner's complaint stems solely from the alleged statements made by Kashani to Oscar Hernandez about the workers' compensation proceedings. At the time Kashani allegedly made those comments, she had attended several hearings in the workers' compensation case and her criticism related directly to Reiner's representation of Pelican in the workers' compensation case. There is no indication Kashani had any

experience with Reiner other than the workers' compensation case. As a result, those comments were made in connection with an issue under consideration by a judicial body. (§ 425.16, subd. (e)(2).)

B. Probability of Prevailing

We next address whether Reiner met his burden to show he had a probability of prevailing on his claim. A plaintiff cannot simply rely on the allegations in an unverified complaint but must provide sufficient evidence to permit the court to determine whether there is a reasonable probability that the plaintiff will prevail on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) "In making its determination, the court shall 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, the court does not weigh the credibility or comparative probative strength of the competing evidence. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 342.) In short, the plaintiff " 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " (*Ibid.*) We must determine whether the evidence relied upon by Reiner satisfies this standard. We find it does not.

In his opposition to the anti-SLAPP motion, Reiner requested that judicial notice be taken of the first two pages of the minutes of the hearing in Palafox's workers' compensation case which identify five issues for determination. According to Reiner, none of the comments made by Kashani bore any relation to the five issues for determination and thus, Kashani's criticisms did not arise from protected activity. Reiner also submitted a letter to plaintiffs' counsel which requested the anti-SLAPP motion be withdrawn as it did not arise from protected activity. Neither address Reiner's probability of prevailing and Reiner does not contend they do.

In support of the anti-SLAPP motion, however, Kashani submitted a letter from Reiner which attached a declaration from Oscar Hernandez. The declaration identified Hernandez as "employed with Pelican." It also described the alleged defamatory

comments by Kashani as follows: "During lunch, I Oscar Hernandez, informed Reiner that during the morning portion of the 9/22/09 trial session, Kashani had approached and spoked to my [*sic*], outside of my Reiner's [*sic*] and that of Shapiro [the workers compensation judge], in an apparent attempt to steal Pelican as a client from Reiner, and instead for Kashani and her law firm, by Kashani trying to so convince me, by telling me, Oscar Hernandez, to the effect that Reiner was unprofessional and that Reiner's defense strategy for Pelican in the subject case was a waste of Pelican's money." Reiner relies on this paragraph alone to meet his burden to show a probability of prevailing under the anti-SLAPP statute.

The tort of defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. (Civ. Code, § 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Statements that do not imply a provably false factual assertion cannot form the basis of a defamation claim. (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1403.) In evaluating whether language used is defamatory, courts look " 'not so much [to the allegedly defamatory statement's] effect when subjected to the critical analysis of a mind trained in the law, but [to] the natural and probable effect upon the mind of the average reader.' " (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.) California courts apply the totality of the circumstances test to determine whether an allegedly defamatory statement is actionable. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.)

In *Ferlauto v. Hamsher*, *supra*, 74 Cal.App.4th at page 1403, the court found an author's criticism of an attorney was not actionable though she described the attorney's legal strategy as "a joke," "spurious," "frivolous," "stupid," and "laughed at." *Ferlauto* relied on *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, which provides a well-reasoned analysis of when criticism of an attorney's conduct is actionable. There, the court discussed comments made in attorney Vincent Bugliosi's book about another attorney's unsuccessful representation of a defendant in a murder case; Bugliosi had obtained an acquittal for the codefendant in a separate trial. Since Bugliosi was a

participant and was providing his personal account of the litigation, "a reader would be likely to recognize that the critiques of the judges, witnesses, and other participants in the [litigation]— and particularly of the other counsel—generally represent the highly subjective opinions of the author rather than assertions of verifiable, objective facts." (*Id*. at p. 1154.) Although Bugliosi clearly implied that the second attorney had inadequately represented his client (*id*. at p. 1157), "[c]ritiques of a lawyer's performance in a particular case generally cannot be proved true or false and, consequently, cannot ordinarily serve as the basis of a defamation claim. . . . [¶] . . . [¶] . . . [C]ourts should be reluctant to hold comments concerning the professional abilities of an individual actionable." (*Id*. at pp. 1158-1159, fn. omitted; see also *James v. San Jose Mercury News, Inc*. (1993) 17 Cal.App.4th 1, 7-8, 14-15 [statements that an attorney used " 'sleazy tactic[s]' " and engaged in a " ' "fishing expedition," ' " and supposition that the judge had a " 'dim view of the defense tactics' " qualify as opinion].)

The statements allegedly made by Kashani to Hernandez were similarly not actionable. The purported statement that Reiner was unprofessional and that Pelican was wasting its money were critiques of Reiner's performance in the workers' compensation case. As in *Partington*, such comments, even if made, would be difficult to prove true or false. Indeed, it is unclear what the allegedly defamatory statements meant. The comment that Reiner was unprofessional, for example, could have been a review of his abilities as an attorney or his behavior before the judge during the proceeding. Given the context in which they were allegedly made, an average individual would understand, as Hernandez appeared to, that the comments were the opinion of Kashani who was trying to solicit a new client by disparaging his attorney.

As to his fraud claim, Reiner has provided no evidence to support a finding that he had a probability of prevailing. Even if we assumed that improper solicitation of an attorney's clients constituted fraud, there is no evidence any agreement between Reiner and Kegel not to steal one another's clients existed. Nor is there any evidence that Reiner was damaged thereby. Indeed, Hernandez's declaration, if it is to be believed, indicates that Reiner did not lose Pelican as a client as a result of Kashani's comments. Reiner has

failed to demonstrate a probability of prevailing on either the defamation or the fraud claim.

II. Attorney Fees

Reiner also contends the trial court erred when it denied his request to verify the accuracy of the amounts sought for attorney fees by counsel for Kegel and Kashani. However, Reiner provides no legal authority to support a contention that he is entitled to discovery on the issue. Neither does he argue that the amount of attorney fees awarded was an abuse of discretion by the trial court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094–1095 [trial court has broad discretion to determine attorney fee award].) Accordingly, we summarily reject his argument. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523 [appellants must support argument by citation to authority].)

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.