Filed 9/13/18 Ahn v. Cha 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

CHANG KOK AHN et al., Plaintiffs and Respondents, v. ALEX CHA, Defendant and Appellant.	B281482 (Los Angeles County Super. Ct. No. BC609271)

APPEAL from an order of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Affirmed.

Law Offices of Gerald S. Ohn and Gerald S. Ohn for Defendant and Appellant.

Henry M. Lee for Plaintiffs and Respondents.

Plaintiffs Chang Kok Ahn, Jeong Kang, Brando Jeong, and Olive Rhee (plaintiffs) filed a complaint alleging wage and hour, employment discrimination, and related claims against their alleged employers Hollywood Enterprises, Inc. (Hollywood Enterprises) and Mina Lim. They later added Song Hwan Hong, Edward Koo, and appellant Alex Cha as DOE defendants. Cha was an attorney representing defendants Hollywood Enterprises, Lim, and Hong in this case, and plaintiffs added him on the theory that he had also been acting as their employer or a joint employer. They did not otherwise amend their factual allegations or claims.

Cha moved to strike the claims against him pursuant to the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] The trial court denied the motion because the claims against Cha did not arise from any protected activity Cha undertook in his role as an attorney related to this or any other proceeding. We agree and affirm.

BACKGROUND

On February 3, 2016, plaintiffs filed an initial complaint against Hollywood Enterprises, Lim, and DOES 1 through 100 alleging 10 claims for wage and hour violations, unfair business practices, conversion, age discrimination, failure to prevent age discrimination, and wrongful termination. The wage and hour, unfair business practices, and conversion claims were based on allegations that Hollywood Enterprises and Lim failed to pay plaintiffs for hours worked, failed to pay minimum wage, failed to

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[1] SLAPP is an acronym for " 'strategic lawsuit against public participation.' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).) All undesignated statutory citations refer to the Code of Civil Procedure.

provide meal and rest breaks, failed to provide accurate accounting of wages and maintain records, and failed to pay wages owed at the time of termination. The discrimination-related claims were based on allegations that Hollywood Enterprises and Lim terminated or constructively terminated plaintiffs in order to hire younger workers.

The complaint alleged that Hollywood Enterprises, Lim, and the DOE defendants "directly or indirectly controlled or affected the working conditions of Plaintiffs so as to make each of said Defendants employers and liable as employers under the statutory provisions set forth herein." It further alleged that "[e]ach DOE defendant[] co-conspired with or is otherwise legally responsible in some manner for the acts, omissions, events and happenings which proximately caused damages to Plaintiffs, as herein alleged."

Acting as an attorney for Hollywood Enterprises and Lim, Cha filed an answer to the complaint.

In a series of form DOE amendments to the complaint, plaintiffs added Hong, Koo, and Cha as defendants. The form adding Cha replaced DOE 3 with Cha but did not otherwise amend any of the allegations or claims in the complaint.[2]

Cha filed an anti-SLAPP motion, arguing the claims against him were "based entirely on [his] litigation[-]related activities on behalf of clients who are defendants in this action." His argument was based on a letter plaintiffs sent to him when he was added to the complaint, which stated: "You are being personally sued for your personal and direct involvement in the day-to-day operations, management, and control of Hollywood

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[2] In a motion to set aside default filed by Hong, Cha indicated he was representing Hong as well.

Enterprises, Inc., dba Karnak, ('Defendant'), business operations. Our office has direct evidence that you actually instructed that Defendant's staff violate the Labor Code and that per your instructions, our clients were improperly paid and their rights violated. [¶] Also, please advise whether you will stipulate to amend the complaint to include causes of action for negligence, breach of fiduciary duty, and fraud causes of action which include you. As an attorney, you had a fiduciary duty to act in the interests of the corporate employees to avoid advising violations of the law. In fact, many of your instructions constituted criminal violations of the Labor Code and impose direct liability upon you for directly instructing such criminal violations."

Cha also argued plaintiffs could not establish a probability of prevailing for a variety of reasons. Cha filed a declaration denying he was an officer, director, or manager of Hollywood Enterprises, or an employer of plaintiffs.

Plaintiffs opposed the motion, arguing that Cha was being sued as "an employer, owner, partner, [and] managing agent, for his direct, personal misconduct during the employment of Plaintiffs—in the exact manner and reasons as the other named Defendants. All of his misconduct occurred BEFORE the filing of this lawsuit, and had NO RELATION to the preparation, filing or prosecution of this lawsuit. Cha is being sued because during the Plaintiffs' employment, Cha personally controlled the day-to-day operations, controlled wages, controlled working conditions, controlled the employees, and in all ways possible acted as the employer or at least a joint employer." Plaintiffs submitted a declaration from an employee of defendants, along with text messages dated June 30, 2016 from "Alex Lawyer," purporting to instruct the employee on payroll matters. Plaintiffs requested

attorney's fees on the ground that the motion was frivolous pursuant to section 425.16, subdivision (c)(1).

In reply, Cha reiterated his arguments and objected to plaintiffs' evidence.

The trial court overruled Cha's objections and denied the motion. The court held that the claims against Cha did not arise from protected activity because Cha was sued as an employer for failing to pay wages and failing to follow California law, not for any activity undertaken in a legal capacity. Cha appealed. According to the superior court docket, the court thereafter denied plaintiffs' request for attorney's fees.

DISCUSSION

A SLAPP suit is an 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, [which] shall be subject to a special motion to strike" unless the plaintiff establishes a probability of prevailing. (§ 425.16, subd. (b)(1).) Section 425.16, subdivision (e) sets forth four categories of protected activity: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of

free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

We review an order denying an anti-SLAPP motion de novo, independently reviewing the record to determine whether the defendant has shown that "the challenged claims arise from protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) In making this determination, 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).) If the defendant carries this burden, then the burden shifts to the plaintiff to "demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) 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, supra,* 29 Cal.4th at p. 89.)

We focus only on the first prong in this case because Cha has not met his burden to show plaintiffs' claims arise from protected activity. (See *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1185 (*Nam*).) "A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[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.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted

liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park, supra,* 2 Cal.5th at pp. 1062–1063.)

Even a cursory review of plaintiffs' claims against Cha reveals that they do not arise from any category of protected speech or petitioning activity in section 425.16. None of the acts forming the basis of plaintiffs' claims—failure to pay wages, failure to provide meal and rest breaks, and discriminating in favor of younger workers—bore any connection whatsoever to this or any other litigation or to Cha's acts in his role as an attorney. Plaintiffs' theory is precisely the opposite—they added Cha as a defendant because he was *not* acting as an attorney, but as an employer or joint employer violating their employment and labor law rights. Although Cha is correct that "[n]othing in the statute itself categorically excludes any particular type of action from its operation" (*Navellier, supra,* 29 Cal.4th at p. 92), he still must show that plaintiffs' claims arose from protected activity in order to fall within section 425.16. He has not carried that burden.

In an effort to sweep plaintiffs' claims within section 425.16, Cha relies on the letter plaintiffs sent to him when they added him to the complaint. Yet, the letter did not purport to amend the factual allegations in the complaint or change the acts

underlying plaintiffs' claims. Instead, the letter *reinforced* that Cha was not being sued for any acts as an attorney related to this litigation, but his acts as an alleged joint employer. On this point, it could not have been clearer: "You are being personally sued for your personal and direct involvement in the day-to-day operations, management, and control of Hollywood Enterprises, Inc., dba Karnak, ("Defendant"), business operations. Our office has direct evidence that you actually instructed that Defendant's staff violate the Labor Code and that per your instructions, our clients were improperly paid and their rights violated."

Cha is correct that the second paragraph of this letter contemplated that plaintiffs might add claims touching on Cha's role as an attorney for Hollywood Enterprises and Lim. Yet, that paragraph did not suggest any of Cha's alleged acts related to this lawsuit or any other protected petitioning activity. (See *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113 (*Optional*) [noting that " ' "*all* communicative acts performed by attorneys as part of their representation of a client *in a judicial proceeding or other petitioning context* are per se protected as petitioning activity by the anti-SLAPP statute," ' " second italics added].) In any case, plaintiffs did not amend the complaint to add those claims. The claims *as pled* did not arise from any protected activity.

Cha also points to plaintiffs' reliance on text messages from "Alex Lawyer" to an employee of Hollywood Enterprises, which were sent on June 30, 2016, after this lawsuit had been filed, purporting to instruct the employee on payroll matters. Cha argues that they show "the only basis for Plaintiffs' claims against Attorney Cha appears to be privileged communications during a litigation." In support, he cites cases espousing a

"fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908; see *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5 ["Both section 425.16 and Civil Code section 47 are construed broadly, to protect the right of litigants to ' "the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions." ' "].) Like plaintiffs' letter, however, these text messages had no apparent relationship to the pending case or any other proceeding, so they did not fall within any of the categories in section 425.16, subdivision (e). (See *Optional, supra,* 18 Cal.App.5th at p. 113.)

Even assuming these text messages constituted protected litigation activity, plaintiffs' claims did not arise from Cha's act of sending them. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479 [first prong of anti-SLAPP motion requires two-step inquiry into "whether the plaintiff's cause of action actually *arose from* the assertedly protected activity, and if so, . . . whether the activity *was in fact* protected"]; see also *Optional, supra,* 18 Cal.App.5th at p. 114 [" '[C]onduct is not automatically protected merely because it is related to pending litigation; the conduct must arise from the litigation.' "].) Again, Cha was added to the lawsuit as a joint employer for the failure to pay wages, failure to provide meal and rest breaks, and for discriminating based on age. These text messages might provide *evidence* of Cha's liability, but they were not the *basis* for any of plaintiffs' claims. (See *Park, supra,* 2 Cal.5th at p. 1065 [" 'In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning

activity. . . . An anti-SLAPP motion should be granted if liability is based on speech or petitioning activity itself.' "].) They do not bring plaintiffs' complaint within section 425.16.[3]

DISPOSITION

The order is affirmed. Plaintiffs are awarded costs on appeal. Plaintiffs' request for attorney's fees on appeal is denied.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.

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[3] Because Cha failed to carry his burden to show plaintiffs' claims arose out of protected activity, we need not address the probability that plaintiffs will prevail on their claims. (See *Nam, supra,* 1 Cal.App.5th at p. 1185.) For that reason, we need not decide whether the trial court abused its discretion in overruling Cha's evidentiary objections to plaintiffs' evidence that he was actually a joint employer. We also need not address Cha's objections to the statements in plaintiffs' attorney's declaration that plaintiffs' claims did not arise from protected activity, given we have reached the same conclusion.