Filed 3/28/13 Kenne v. Stennis CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KATHLEEN A. KENNE, Plaintiff and Appellant, v. ZELMA R. STENNIS et al., Defendants and Appellants.	B234919 (Los Angeles County Super. Ct. No. SC100219)

APPEAL from an order of the Superior Court of Los Angeles County. John H. Reid, Judge. Affirmed in part and reversed in part.

Schomer Law, Scott Schomer; Law Offices of Helaine Hatter, Helaine Hatter for Defendants and Appellants.

Kathleen A. Kenne, in pro. per., for Plaintiff and Appellant.

This is the second appeal in this case. In November 2010, we issued an opinion affirming the trial court's denial of defendants' special motion to strike the original complaint as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)[1] This appeal, and the cross-appeal, are taken from the trial court's order denying in part and granting in part defendants' special motion to strike the first amended complaint.

We affirm the trial court's order as to all causes of action except one. The final cause of action in the first amended complaint is a "mixed" claim based on both protected and nonprotected activity. As such, it is subject to the anti-SLAPP statute, and should have been stricken.

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Complaint

Kathleen Kenne, an attorney acting in propria persona, filed her first amended complaint on February 18, 2009. The first amended complaint alleged as follows:

Kenne represented Zelma Stennis (Zelma) in 2004 and 2005 in several real estate and business-related matters. Zelma agreed that Kenne's fees and costs would be paid from the proceeds of the sale of properties Zelma owned in Los Angeles, or if such proceeds were not available, Kenne would be paid from "any other source."

In December 2006, Zelma and her son, Attorney Kevin Stennis (Kevin), secretly agreed to sell the subject properties without informing Kenne. Based on Zelma's apparent intention to disregard her agreement to pay Kenne, Kenne filed a lawsuit against Zelma and Kevin (the first action). In September 2007, Kenne and Zelma signed a "Conditional Settlement Agreement and General Release" (settlement agreement) to settle the first action. The settlement agreement provided that the subject properties were in escrow and would soon be sold, and that Kenne would be paid from the proceeds of the sale.

---

[1] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

After the settlement agreement was signed, Kevin, his wife Helaine Hatter (who is also an attorney), and his son Kevin Pierre Stennis, Jr. (Pierre) conspired to interfere with the settlement agreement. Kevin and Hatter also successfully pressured Zelma to fraudulently convey other real property assets to Kevin in order to protect assets from Kenne as a creditor. Moreover, in March 2008, Hatter filed or caused to be filed a fraudulent and false complaint with Los Angeles County Adult Protective Services (LACAPS), alleging that Kenne committed financial elder abuse against then-86-year-old Zelma; the elder abuse complaint and subsequent case were closed as the allegations were determined to be unfounded.

Kenne's first amended complaint contained 12 causes of action. The first eight—(1) breach of accord and satisfaction; (2) breach of the covenant of good faith and fair dealing; (3) specific performance of accord and satisfaction; (4) intentional interference with contractual relations; (5) intentional interference with prospective economic advantage; (6) set aside of fraudulent conveyances; (7) civil conspiracy based upon fraudulent conveyances; (8) common counts—revolved around the failed settlement agreement and the defendants' avoidance of Kenne's collection attempts. The ninth through eleventh causes of action—(9) abuse of process; (10) libel per se; (11) slander per se—related to the filing of the LACAPS complaint. The twelfth cause of action (intentional infliction of emotional distress) relied on allegations relevant to both the attorney fees dispute and the LACAPS complaint.

The Instant Anti-SLAPP Motion

Not long after the first amended complaint was filed, defendants filed an appeal of the trial court's denial of their anti-SLAPP motion relating to Kenne's original complaint in this action. We issued our opinion in November 2010, affirming the denial.

Following remand, defendants (Zelma, Kevin, Hatter, and Pierre) filed an anti-SLAPP motion to strike the first amended complaint. With respect to the claims relating to the settlement agreement and collection attempts (the first through eighth causes of action, and partially the twelfth), defendants made arguments essentially identical to those that had already failed on appeal—that their actions were in furtherance of their

right to petition and free speech. Defendants characterized Kenne's claims as arising directly from communications, advice, and counsel by attorneys (Kevin and Hatter) with their client (Zelma). As for the claims relating to the LACAPS complaint, defendants argued that any filing with LACAPS was protected.

The trial court heard the anti-SLAPP motion in July 2011. In regard to causes of action 1 through 8 and 12, the court found that defendants failed to meet their initial burden of showing their conduct was protected by the anti-SLAPP statute. The court granted the anti-SLAPP motion on the other three causes of action. It found that the filing of a complaint with LACAPS was protected activity. The court also sustained defendants' objections to evidence presented by Kenne, and found that Kenne did not meet her burden of showing a probability of prevailing on the merits on these three causes of action.

Defendants timely appealed the order denying the anti-SLAPP motion as to certain causes of action.[2] Kenne timely filed a cross-appeal relating to the three causes of action for which the anti-SLAPP motion was granted.

---

[2] Pierre was listed as a defendant on the fourth, fifth, and twelfth causes of action. In her respondent's brief, Kenne claims that Pierre never made an appearance in the case. She also claims he never filed a notice of appeal. A review of the record shows she is wrong. Pierre was a moving party on the anti-SLAPP motion, the filing of which constitutes an appearance. (§ 1014.) Further, defendants' notice of appeal was filed by Hatter, listed as the attorney for "all defendants." Construing the notice of appeal liberally, as we must (see *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20), Pierre is an appellant in this matter.

DISCUSSION

I. Appeal and Review

Appeal lies from the order denying in part and granting in part defendants' motion to strike under the anti-SLAPP statute. (§ 425.16, subd. (i).) The trial court's ruling on whether causes of action are subject to the anti-SLAPP statute is reviewed de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 670; § 425.16, subd. (a); *Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) There are two components to a motion to strike brought under section 425.16. First, the defendant must show that the challenged cause of action is one arising from protected activity; i.e., from the defendant's exercise of the right to petition or free speech in connection with a public issue.[3] (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects constitutional rights, the plaintiff must establish a reasonable probability that it will prevail on the merits of its claims. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) To protect First Amendment rights, the anti-SLAPP statute must "be construed

---

[3] Under the statute, an act in furtherance of the right of petition or free speech includes: "(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).)

broadly." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

III. Defendants' Appeal

Before we turn to the merits of defendants' appeal, we first note that their appellate briefs (and particularly their opening brief) are woefully deficient. First, defendants' opening brief omits a table of contents and table of authorities. (See Cal. Rules of Court, rule 8.204(1)(A) [brief must "[b]egin with a table of contents and a table of authorities"].) Second, defendants requested a record comprised of 12 volumes, the majority of which consists of documents not from this action, but instead from the parties' first action. Then, after submitting such a voluminous, largely irrelevant record, defendants failed to cite nearly any portion of the record whatsoever in their opening brief, despite extensively arguing the state of the evidence. (See *id.*, at rule 8.204(1)(C) [brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].)

But perhaps even worse than these errors is the fact that defendants' arguments in this appeal are functionally identical to their failed arguments from their prior appeal. "'The doctrine of "law of the case" deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the **same** case.'" (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491, bold emphasis added.)[4]

Our prior decision found that none of Kenne's claims arose from protected activities. None of the three causes of action at issue was based on defendants' prior litigation or petitioning activities. (*Kenne v. Stennis* (Nov. 2, 2010, B215859) [nonpub.

---

[4] Although there is a new defendant to this appeal, Pierre, he is listed as a defendant on only three causes of action. Furthermore, defendants make no attempt to argue how his inclusion in this appeal may lead to a different result this time around.

opn.].) Rather, the contract-related causes of action arose "from the alleged failure of Zelma to perform under the terms of the parties' written settlement agreement," and the fraud-related claim was "based on allegedly fraudulent transfers of real property for improper purposes." Defendants have still failed to provide any authority that could find this sort of activity protected under the anti-SLAPP statute.

In an attempt to avoid the confines of our prior decision, defendants state that this present appeal only relates to the fourth through seventh and the twelfth causes of action in the first amended complaint.[5] Technically, the fourth and fifth causes of action (for intentional interference with contractual relations and intentional interference with prospective economic advantage) as well as the seventh (for civil conspiracy based on fraudulent conveyances) were not pled in the original complaint. The sixth cause of action (for set aside of fraudulent conveyances) was. Defendants' claim that the sixth cause of action is now "fair game" for re-appeal because Kenne added four additional lines of allegations to the cause of action is absurd.

Defendants' appeal as to the other new causes of action fails because the gravamen of these causes of action is the same as those pled in the original complaint. "The principal thrust or gravamen of the claim determines whether section 425.16 applies." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472.) The new intentional interference claims are not "*based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) Rather, similar to the contract claims, they are based on defendants' alleged concerted attempt to sabotage the settlement agreement by preventing Zelma from signing relevant documents and communicating with necessary parties. Likewise, the conspiracy to commit fraudulent transfers cause of action is based on an alleged plan to fraudulently transfer property in order to prevent Kenne from effectively enforcing the settlement agreement.

---

5 We address the twelfth cause of action later in this opinion.

Actions, such as Kenne's, which are intended to enforce settlement agreements do not "come within the first prong of the SLAPP statute." (*Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 949.) An alleged breach of a settlement agreement "is not protected activity because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant's right of petition or free speech, as those rights are defined in section 425.16." (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118.) Defendants' argument that Hatter and Kevin were acting in their scope as lawyers and protected by the litigation privilege, Civil Code section 47, also fails. Activity that may be subject to the litigation privilege often is not protected by the anti-SLAPP statute "because the litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322.)

Because we find that defendants failed to carry their initial burden of showing that the claims at issue arose from an act in furtherance of the right of petition or free speech, we have no occasion to determine whether Kenne can make a prima facie showing of evidence sufficient to prevail on her claims. Defendants argue that Kenne attempted to enforce the settlement agreement in the first action, but the trial court found the settlement agreement ineffective. They also argue that, by pursuing her claims until judgment in the first action, Kenne sought and recovered all amounts she was entitled to receive for her representation of Zelma, and so the settlement agreement (even if possibly effective) became moot. Although these contentions, if true, may have validity, they are irrelevant to the first prong of the anti-SLAPP analysis (and, in any event, are not supported by an adequate presentation of evidence with proper citations). There are other sorts of motions that likely would have been better suited to making such arguments, but defendants chose to file an anti-SLAPP motion, which was properly denied.

IV. Kenne's Cross-Appeal

Kenne filed a cross-appeal of the trial court's order striking her claims relating to Hatter and Kevin's' alleged filing of an elder abuse complaint with LACAPS. The trial

court granted defendants' anti-SLAPP motion with respect to three causes of action: (9) abuse of process; (10) libel per se; (11) slander per se.

Kenne spends a significant portion of her appellate briefs complaining about the conduct of defendants and the state of their briefs. While we agree with her that defendants' briefs leave much to be desired, she overlooks the deficiencies of her own papers. Although she does cite to the record more frequently than defendants, much of her summary of relevant evidence is not supported by citations. Furthermore, when she does provide citations, the citations are often incorrect, or she cites to evidence that does not support the point she is trying to make. Moreover, Kenne's briefs are long—excessively so. Kenne's respondent's brief/cross-appellant's opening brief runs to 130 pages. It is filled with repetitive and disorganized content, much of which gets lost in a muddle due to Kenne's reluctance to state her points in clear and concise terms. Her cross-appellant's reply brief is 67 pages long, in response to a *four*-page cross-respondent's brief. Of course, there is nothing wrong with diligently explaining an issue of law, and we do appreciate zealous advocacy, but we fail to see how one gains an advantage by exhausting the word limit[6] through multiple repetitions of the same arguments and through continual complaints about the conduct of opposing parties.[7]

In any event, we discern no error in granting the anti-SLAPP motion as to the ninth through eleventh causes of action. The gravamen of these causes of action was clearly based on protected activity—the filing of a complaint with LACAPS alleging elder abuse. This conduct was protected by section 425.16, subdivision (e)(1) (which covers "any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law") and subdivision (e)(2) (applying to "any written or oral statement or writing made in connection with an issue under

---

6 California Rules of Court, rule 8.204(c) limits briefs to 14,000 words, or double that length for combined briefs.

7 We deny Kenne's request for sanctions.

consideration or review by a . . . judicial body, or any other official proceeding authorized by law").

Kenne argues that the anti-SLAPP statute was not implicated because defendants' alleged filing of the LACAPS complaint was illegal and extortionate. She cites to *Flatley v. Mauro*, *supra*, 39 Cal.4th 299, 305, in which our Supreme Court held that "a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint." However, *Flatley v. Mauro* sharply circumscribed the conditions under which such a rule can apply to "a narrow circumstance, where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence . . . . If, however, a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Id.* at p. 316.) Unlike in *Flatley v. Mauro*, where the defendant conceded that he sent a letter that conclusively amounted to criminal extortion (see *id.* at pp. 328-330), Kenne points to no part of the record where Hatter or Kevin concedes that they committed an illegal act or where the evidence conclusively shows they committed an illegal act. Kenne instead cites to the transcript from a hearing on a motion to compel where Hatter vaguely alludes to the filing of the LACAPS complaint but does not concede that she or Kevin participated in the filing or that the filing was illegal. Kenne also cites to her own statements from hearings and a declaration pertaining to her own understanding of what occurred.

Thus, Kenne failed to show that the first prong of the anti-SLAPP analysis did not apply to the LACAPS-related causes of action. Kenne still had the ability to meet her burden on the second prong, however, by demonstrating that the causes of action were legally sufficient and by making a prima facie showing of evidence sufficient to sustain a favorable judgment. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) In order to make this showing, Kenne had to present evidence that would be admissible at trial. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

This she failed to do. Defendants objected to the evidence Kenne submitted in connection with her opposition to the anti-SLAPP motion, and the trial court sustained all of defendants' objections. The trial court's evidentiary rulings are reviewed for abuse of discretion. (*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1407; *In re S.A.* (2010) 182 Cal.App.4th 1128, 1135; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140, fn. 3.) We are not authorized to substitute our judgment of the correct result for the decision of the lower court. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.) "[A]s long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action.' [Citation.]" (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.) We examine whether the trial court abused its discretion in light of the circumstances before it. (*Ibid.*) The trial court's decision will be disturbed only if "'no judge could have reasonably reached the challenged result. [Citation.]'" (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 696.)

Although her appellate briefs are a combined 197 pages long, Kenne does not substantively address the propriety of the trial court's evidentiary rulings. It is the appellant's "burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and demonstrate the court's error." (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) The appellant must "identify the court's evidentiary ruling as a distinct assignment of error" and provide a separate argument heading and analysis of the issue. (*Ibid.*) Kenne did not demonstrate how each evidentiary ruling was incorrect. (See *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1075.) Her briefs did not contain "argument and citations to authority as to why the trial court's evidentiary rulings were wrong." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198.) Accordingly, Kenne has forfeited her right to argue that the trial court abused its discretion by excluding evidence. (*Salas*, at p. 1075.)

Since she failed to submit admissible evidence, Kenne could not meet her burden on the second prong of the anti-SLAPP analysis. The anti-SLAPP motion was therefore properly granted as to the ninth through eleventh causes of action.

V. <u>The Twelfth Cause of Action</u>.

The first amended complaint's twelfth cause of action is for intentional infliction of emotional distress. The cause of action expressly incorporates all prior causes of action. It further alleges that Hatter, Kevin, and Pierre "devised a conspiracy to, inter alia, defraud, abuse, interfere with, and defame plaintiff," and did so by interfering with and causing the breach of the settlement agreement, orchestrating fraudulent real estate transfers, and "engaging in libel per se, and slander per se for an improper and ulterior purpose to defame plaintiff as an attorney against her former elderly client and abuse the legal process . . . ." Kenne alleges that she suffered "severe emotional distress in the form of, inter alia, damage to her business reputation as a fiduciary and duly licensed attorney at law, humiliation, mental anguish, anxiety, shame, embarrassment, and alienation."

The trial court correctly recognized that this is a "mixed" claim, i.e., the claim is based on both nonprotected and protected activity. In denying the anti-SLAPP motion as to this cause of action, however, the trial court misapplied the relevant law, focusing on whether unprotected activity was "incidental" to the claim.

In the case of a "mixed" claim, the proper focus is whether the claim is partially based on protected activity, or whether the protected activity is merely incidental. (See, e.g., *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551, fn. 7 ["where the defendant shows that the gravamen of a cause of action is based on nonincidental protected activity as well as nonprotected activity, it has satisfied the first prong of the SLAPP analysis"]; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287 ["mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity"]; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 ["where a cause of action alleges both

protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct . . .].)

The protected activity—the alleged filing of the complaint with LACAPS—is not a merely incidental component of the twelfth cause of action. The only manner in which defendants are alleged to have abused the legal process and defamed Kenne is by filing the LACAPS complaint. This cause of action, therefore, was clearly subject to the first prong of the anti-SLAPP analysis.

As with the claims above, Kenne had the opportunity to validate this cause of action by making a prima facie showing of evidence supporting it. But since there is no supporting evidence to consider—the trial court excluded it and Kenne did not properly argue the soundness of the evidentiary rulings—Kenne cannot meet her burden on the second prong.

Thus, we find that the trial court incorrectly denied the anti-SLAPP motion as to the twelfth cause of action, and we reverse only as to this cause of action.

DISPOSITION

The order granting in part and denying in part the anti-SLAPP motion is affirmed, except as to the twelfth cause of action, which is dismissed without leave to amend pursuant to section 425.16. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

FERNS, J.*

---

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