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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

DARREN MICHAEL RICHIE,

Cross-complainant and
Respondent,

v.

KEITH D. KASSAN,

Cross-defendant and
Appellant.

B289608

Los Angeles County
Super. Ct. No. BC683108

APPEAL from an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

Law Office of Frank J. Broccolo and Frank J. Broccolo for Cross-defendant and Appellant.

Brown, Neri, Smith & Kahn, Ethan J. Brown, Rowennakete P. Barnes and James F. Warren IV for Cross-complainant and Respondent.

INTRODUCTION

Code of Civil Procedure section 425.16¹ (anti-SLAPP statute) provides a mechanism to resolve, at an early stage of litigation, lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The anti-SLAPP statute allows a defendant to bring a special motion to strike a cause of action, or portions of a cause of action, targeted at protected speech or conduct. Once the defendant shows its actions are protected under the anti-SLAPP statute, the plaintiff must then produce prima facie evidence supporting its claim, i.e., must demonstrate a reasonable probability of success. If the plaintiff fails to do so, the claim will be stricken.

O’Gara Coach Company, LLC (O’Gara) sued its former employee, respondent Darren Michael Richie, alleging Richie misappropriated O’Gara’s trade secrets and breached his employment severance agreement. In response, Richie filed a cross-complaint against O’Gara, appellant Keith D. Kassan, and others, asserting (as pertinent here) a cause of action for defamation and alleging Kassan made a number of untrue and disparaging statements about Richie to their mutual professional contacts (statements to colleagues) and to the Los Angeles Police Department (statements to law enforcement).

Kassan brought a special motion to strike the defamation cause of action under the anti-SLAPP statute. The trial court granted the motion in part and struck the allegations relating to Kassan’s statements to law enforcement—conduct that is

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

generally protected under the anti-SLAPP statute. As to the alleged statements to colleagues, the court denied the motion in part after reaching the second prong of the anti-SLAPP analysis and concluding Richie had produced admissible evidence to support the defamation claim as to those statements. Kassan appeals, arguing the court should have stricken the defamation cause of action in its entirety because the claim related to the alleged statements to colleagues was improperly pleaded and not supported by admissible evidence.

Although we affirm the trial court's ruling, we disagree with the court's reasoning. As alleged, the statements to colleagues made by Kassan do not fall within the scope of conduct protected under the anti-SLAPP statute. Accordingly, the court should have denied the anti-SLAPP motion as to those allegations without reaching the second prong of the analysis.

FACTS AND PROCEDURAL BACKGROUND

1. The Complaint

According to the operative complaint, O'Gara sells high-end luxury vehicles and has several dealership locations in Southern California. During the course of Richie's employment with O'Gara, he had access to confidential information maintained by O'Gara regarding its customers, potential customers, business plans, marketing and sales techniques, and other proprietary information (trade secrets). When Richie joined O'Gara, he signed a confidentiality agreement that prohibited him from disclosing any of O'Gara's trade secrets. Further, upon his employment termination, he signed a severance agreement in which he pledged to return all trade secret information in his possession to O'Gara and agreed not to disclose or use any such information

going forward. O’Gara’s complaint asserted causes of action for misappropriation of trade secrets and breach of contract against Richie, stemming from Richie’s alleged retention and use of O’Gara’s trade secrets.

2. The Cross-complaint

Richie filed a cross-complaint against O’Gara asserting causes of action for wrongful employment termination, negligence, fraud, breach of contract, defamation, and intentional infliction of emotional distress. He named additional individuals and entities as cross-defendants, including O’Gara’s outside counsel, Kassan.

Richie asserted two causes of action—breach of contract and defamation—against Kassan.² With respect to the defamation cause of action, Richie alleged that the defendants made false and disparaging statements about him to professional colleagues. Those statements included:

- Richie was arrested and jailed in April 2016;
- Richie embezzled money from O’Gara and stole \$25 million from it, which led to O’Gara’s serious financial problems;
- Richie manipulated internal financial data to enable his theft from O’Gara;

² The trial court struck the breach of contract cause of action in its entirety. Although Richie argues that ruling was erroneous, the issue is not properly before us because Richie did not appeal (or cross appeal) from the court’s anti-SLAPP order.

- Richie falsified sales reports to the Department of Motor Vehicles;
- Richie took unauthorized private charter jet flights at O’Gara’s expense; and
- Richie stole money out of the O’Gara bonus pool, thereby depriving other employees of their holiday bonuses.

The cross-complaint also alleged that Kassan spread a rumor that Richie duped customers with leases on high-end vehicles in an unlawful and fraudulent manner and that Kassan reported that conduct to law enforcement.

3. Kassan’s Anti-SLAPP Motion

Kassan filed a special motion to strike under the anti-SLAPP statute attacking the defamation cause of action. Kassan argued that any statements he may have made to law enforcement were plainly protected under the anti-SLAPP statute. Further, Civil Code section 47, subdivision (b),³ provided a complete defense and, therefore, Richie would be unable to prevail on the claim. As to the alleged statements to colleagues, Kassan argued Richie’s cross-complaint was not properly pleaded in that it failed to state with particularity exactly what

³ That section provides that subject to certain exceptions not relevant here, a statement made “[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure” is privileged.

statements Richie made, to whom they were made, and when they were made.

Richie opposed Kassan's anti-SLAPP motion, arguing that Kassan mischaracterized the allegations of the cross-complaint. Richie asserted that the cross-complaint adequately identified statements made by Kassan: "Richie (1) was arrested and sent to jail, (2) embezzled money from [O'Gara], resulting in Thomas O'Gara's financial downfall, (3) manipulated [O'Gara]'s advertising expenses to further steal from [O'Gara], (4) falsified [O'Gara]'s DMV reports of sales, (5) took authorized [*sic*] private charter jet flights at the expense[] of [O'Gara], and (6) stole money from [O'Gara]'s company bonus-pool depriving other employees of their holiday bonuses." Further, Richie submitted a declaration in which he denied the truth of the statements and averred that four professional colleagues told him that Kassan made those false statements to them recently. As to the alleged statements to law enforcement, Richie stated Kassan had previously bragged about his relationship with detectives at the Los Angeles Police Department Taskforce for Regional Autotheft Prevention and stated he had been recently visited by detectives from that task force.

Kassan objected on hearsay grounds to the portion of Richie's declaration in which Richie stated that other people told him Kassan had made disparaging statements about Richie.

4. The Court's Ruling and the Appeal

After summarizing the relevant legal standards, the court rejected Kassan's narrow reading of the cross-complaint and denied the anti-SLAPP motion in part. With respect to Kassan's alleged statements to colleagues, the court concluded those statements were not protected under the anti-SLAPP statute.

But the court continued to the second prong of the analysis and, after denying Kassan's hearsay objections, concluded Richie produced sufficient evidence to demonstrate a reasonable probability of prevailing on the defamation claim.

As to the alleged statements to law enforcement, the court concluded that those were protected under the anti-SLAPP statute and were privileged under Civil Code section 47, subdivision (b). The court also noted that Richie had not come forward with any evidence that Kassan made any specific statements to law enforcement. Accordingly, the court granted the anti-SLAPP motion in part and struck those specific allegations from the cross-complaint.

Kassan timely appeals.

DISCUSSION

Kassan contends the court erroneously denied his special motion to strike in part, leaving intact Richie's defamation claim relating to statements allegedly made by Kassan to their mutual professional colleagues. We disagree.

1. Standard of Review

In an appeal from an order granting or denying a motion to strike under section 425.16, the standard of review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

2. Legal Principles Regarding the Anti-SLAPP Statute

“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.” (§ 425.16, subd. (b)(1).)

Our Supreme Court has clarified the scope of the anti-SLAPP statute: “The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [The Supreme Court has] described this second step as a ‘summary-judgment-like procedure.’ [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff’s evidence as true, and evaluates the defendant’s showing only to determine if it defeats the plaintiff’s claim as a matter of law. [Citation.] ‘[C]laims with the requisite minimal merit may proceed.’ [Citation.]” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted (*Baral*).)

3. The trial court properly denied Kassan's special motion to strike regarding the portions of Richie's defamation claim predicated on conduct not protected under the anti-SLAPP statute.

As noted, Kassan's initial burden in bringing an anti-SLAPP motion is to identify the conduct targeted in the operative pleading that falls within the scope of the anti-SLAPP statute. Under section 425.16, protected activity 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).)

Here, as noted, Richie alleged that Kassan made disparaging statements about him to professional colleagues. Those statements included:

- Richie was arrested and jailed in April 2016;
- Richie embezzled money from O'Gara and stole \$25 million from it, which led to O'Gara's serious financial problems;
- Richie manipulated internal financial data to enable his theft from O'Gara;

- Richie falsified sales reports to the Department of Motor Vehicles;
- Richie took unauthorized private charter jet flights at O’Gara’s expense; and
- Richie stole money out of the O’Gara bonus pool, thereby depriving other employees of their holiday bonuses.

On the record before us, we see no indication that these alleged statements to colleagues should be protected under the anti-SLAPP statute. There is no evidence, for example, that the alleged statements were made in a public forum and in relation to a matter of public concern. (§ 425.16, subd. (e)(3).) We agree, therefore, with the trial court’s conclusion on the first prong of the analysis.

Because Kassan concedes the point, our analysis should end here. The anti-SLAPP statute simply has no application to conduct that does not fall within its scope. (See, e.g., *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 139 (*FilmOn*) [“This anti-SLAPP statute makes available a special motion to strike meritless claims early in litigation—but only if the claims arise from acts in furtherance of a person’s ‘right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.’ ”]; *Baral, supra*, 1 Cal.5th at p. 396 [“When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each

challenged claim *based on protected activity* is legally sufficient and factually substantiated.” (Italics added.)) But Kassan argues that the court should have granted the anti-SLAPP motion in its entirety because the defamation claim, insofar as it relates to the *unprotected* statements to colleagues, is “not competently pleaded.”

In support of this novel contention, Kassan cites a handful of cases which note that, in the second prong of the anti-SLAPP analysis, the plaintiff (or cross-complainant) must demonstrate that the challenged claim is both legally sufficient and supported by admissible evidence. This point is well established. (See *Baral, supra*, 1 Cal.5th at pp. 384–385 [noting that the second prong requires the court to determine “whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment”].) It does not, however, support Kassan’s argument here.

Focusing on the “legally sufficient” requirement, Kassan insists that when a court is presented with a mixed claim (one that contains allegations of both protected and unprotected activity) the unprotected activity is disregarded *only during the first stage of the analysis*. At the second stage, Kassan urges, the court is authorized to examine—and dismiss on any legitimate basis—a claim based on either protected or unprotected conduct. Nonsense. The anti-SLAPP statute, by its own terms, applies only to claims “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” (§ 425.16, subd. (b)(1).) And as noted, our Supreme Court has consistently held that the scope of the anti-SLAPP statute applies “*only* if the claims arise from acts in

furtherance of a person's 'right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.' ” (*FilmOn, supra*, 7 Cal.5th at p. 139, italics added.)

Typically, a party would address a pleading defect, such as the one asserted by Kassan here, in a demurrer. (§ 430.10 [defendant or cross-defendant may object by demurrer if “[t]he pleading does not state facts sufficient to constitute a cause of action”].) And it is commonplace for counsel to file a demurrer concurrently with a motion to strike (§ 435 et seq.) and/or a special motion to strike (§ 425.16). It appears, however, that Kassan failed to file a demurrer.

We conclude by noting that the legal sufficiency of a claim is relevant in the second prong of the anti-SLAPP analysis. As one court explained, “Although the cause of action was found to be insufficient as a matter of law (because it pled conversion of real property), which is a ruling the court might have made in sustaining a demurrer, the ruling was made in the context of assessing [the cross-complainant]’s probability of success under the second prong of section 425.16 analysis. That the analysis was similar to an analysis required for ruling on a demurrer does not convert the court’s dismissal under section 425.16 to a ruling sustaining a demurrer.” (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1294–1295.) By the same token, the similarity in the required analysis does not convert an anti-SLAPP motion into a demurrer.

DISPOSITION

The order granting in part and denying in part Kassan's special motion to strike under the anti-SLAPP statute is affirmed. Richie shall recover his costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.