Filed 2/1/18 McLaughlin v. Becerra CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MATTHEW GREGORY MCLAUGHLIN, Plaintiff and Appellant, v. XAVIER BECERRA, as Attorney General, etc., et. al., Defendants and Respondents.	B280529 (Los Angeles County Super. Ct. No. BC622687)

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

Matthew Gregory McLaughlin, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Jonathan L. Wolff, Chief Assistant Attorney General, Kristin G. Hogue, Assistant

Attorney General, Richard J. Rojo and Mark A. Brown, Deputy Attorneys General, for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Matthew McLaughlin, in propria persona, appeals from the trial court's order granting defendant and respondent Kamala Harris's[1] special motion to strike the complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[2] As Attorney General, Harris refused to process two proposed ballot initiatives submitted by McLaughlin because the proposed initiatives were facially unconstitutional. McLaughlin alleged that by doing so, Harris violated his right to petition. We conclude that because McLaughlin's complaint was based on decisions and statements made by Harris in connection with issues of public interest, and McLaughlin failed to demonstrate a probability of prevailing, his complaint was properly stricken under section 425.16, subdivision(e) (section 425.16(e)). We therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

The instant case stems from two successive ballot measures submitted by McLaughlin, a California attorney, to Harris as the Attorney General. In both measures, McLaughlin sought to penalize what he termed as "sodomistic" behavior among individuals of the same gender.

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[1] Former Attorney General Kamala Harris was sued individually and in her official capacity. The current Attorney General is Xavier Becerra.

[2] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. All further statutory references are to the Code of Civil Procedure unless stated otherwise.

A. *First proposal and subsequent litigation*

1. *The Act*

In February 2005, McLaughlin submitted to Harris a proposed ballot measure titled the "Sodomite Suppression Act" (the Act), along with a request that Harris prepare a circulating title and summary. The Act sought to amend Penal Code section 39 in several ways, including as follows: "that any person who willingly touches another person of the same gender for purposes of sexual gratification be put to death by bullets to the head or by any other convenient method." The Act also sought to bar from public office or "public employment" any person "who is a sodomite or who espouses sodomistic propaganda or who belongs to any group that does." In addition, the Act imposed an "affirmative duty" on the state "to defend and enforce this law as written"; should the state fail in such duty after one year, "the general public is empowered and deputized to execute all the provisions hereunder extra-judicially, immune from any charge and indemnified by the state against any and all liability."

2. *Declaratory action*

Harris filed a complaint for declaratory relief against McLaughlin in Sacramento Superior Court in March 2015 (the declaratory action). She alleged that based on a review of the Act "and relevant legal authorities, the Attorney General has determined that the proposed ballot measure is patently unconstitutional on its face." The complaint therefore sought a judicial declaration that the Act was unconstitutional; that any preparation and official issuance of a circulating title and summary for the Act "would be inappropriate, waste public resources, generate unnecessary divisions among the public, and

tend to mislead the electorate"; and, therefore, that Harris was relieved of any obligation to issue a title and summary.

McLaughlin acknowledged receipt of service of the summons and complaint, but indicated that he did not intend to appear in the case. Consistent with this representation, McLaughlin did not file any response to the complaint. Harris thereafter filed a request for entry of default judgment. The court entered default judgment in favor of Harris on June 22, 2015. The court further found that: (1) The Act "is patently unconstitutional on its face"; (2) Any preparation and official issuance of a circulating title and summary for the Act by the Attorney General "would be inappropriate, waste public resources, generate unnecessary divisions among the public, and tend to mislead the electorate"; and (3) Harris was "relieved of any obligation to issue a title and summary for the Act." McLaughlin did not appeal.

B. *Second proposal and instant litigation*

1. *Mandate*

On June 24, 2015, two days after the entry of judgment in the declaratory action, McLaughlin submitted a second proposed initiative to the Attorney General's office. This initiative, titled "The Sodomite Suppression Mandate" (the Mandate), purported to amend the state Constitution. The provisions of the Mandate were largely identical to the Act, including those regarding criminalizing certain acts between "sodomite[s]" and circulation of "sodomistic propaganda," as well as barring service in public office and allowing the public to act "extra-judicially." Indeed, the Act and the Mandate differed only in the following ways: first, the Act sought to amend Penal Code section 39, while the Mandate was a proposed addition to the California Constitution;

second, the Act was to be "effective immediately" and could only be invalidated if "heard by a quorum of the Supreme Court of California consisting only of judges who are neither sodomites nor subject to disqualification hereunder," while the Mandate required the courts to "enforce this law as written and according to its goals."

By letter dated July 1, 2015, Harris informed McLaughlin that the Attorney General's office would not process his request to prepare a title and summary for the Mandate and returned his check for the filing fee. The letter explained that in the prior action, "the Sacramento Superior Court concluded that the language of the 'Sodomite Supression Act' . . . was unconstitutional and that any issuance of a title and summary for that initiative would be inappropriate, waste public resources, general unnecessary division among the public, and tend to mislead the electorate." Further, because "the language of the previous initiative" and the Mandate were "substantively identical," issuance of the title and summary requested "would be inconsistent with the Court's judgment."

2. *Writ Petition*

On July 15, 2015, McLaughlin filed a petition for peremptory writ of mandate with the California Supreme Court. He requested that the court order Harris to "perform the ministerial task of issuing a title and summary" for the Mandate. McLaughlin also discussed his decision not to respond to the declaratory action, stating that he "came to the conclusion that rather than litigate to defend a mere statutory proposal, I would let that one go and seek instead a new Constitutional amendment. . . ."

The Supreme Court ordered the matter transferred to the Court of Appeal, Third District. On September 15, 2015, that court denied McLaughlin's petition. The court held that McLaughlin failed to appeal from the judgment in the declaratory action and "allowed that judgment to become final. Petitioner is bound by the judgment in that case. [Citations.]"

3. *Complaint*

McLaughlin filed the complaint in the instant action in June 2016 against Harris, both individually and in her capacity as then-attorney general. He alleged a single cause of action for "INTENTIONAL TORT: Violation of Citizen's Right to Petition, Illegal Anti[-]Christian Discrimination."

Specifically, McLaughlin alleged that once he submitted the Mandate in June 2015, Harris had an official duty to process it "by giving it a title and summary for circulation," as well as a duty to treat him "equally under the law and not use her personal animosity toward plaintiffs' [*sic*] religion of Bible Christianity to deprive plaintiff of his rights to circulate a petition that expressed traditional American values." McLaughlin further alleged that Harris breached these duties by rejecting the mandate and refusing to process it, as well as by "falsely claim[ing] that the [Mandate] was identical" to the Act he had previously submitted. McLaughlin further claimed Harris was "motivated by her own personal animosity toward the plaintiff's historic American religious beliefs as demonstrated by her publicly [*sic*] denigration of the plaintiff at an event for sodomite activists and through press releases."

4. *Anti-SLAPP motion*

Harris filed a special motion to strike McLaughlin's complaint pursuant to section 425.16. She argued that the

complaint arose out of statements protected under section 425.16(e) because they were made in connection with an issue of public interest. Further, Harris asserted that McLaughlin could not establish a probability of success on his claim because it was barred by res judicata, by McLaughlin's failure to file a timely government claim, and by governmental immunity for discretionary decisions; Harris also argued that the complaint failed to allege facts sufficient to constitute any cause of action.

Harris also filed a request for judicial notice in support of her motion to strike. She asked the court to take judicial notice, among other things, of certain pleadings and orders filed in the declaratory action. [3]

McLaughlin opposed the motion to strike. He argued that the anti-SLAPP procedure could not be used against him because he was "the person trying to petition," and that the default judgment obtained in the declaratory action applied only to the Act, not the subsequently-proposed Mandate.

Following a hearing on the matter, the trial court ordered supplemental briefing on the issue of res judicata. Both parties submitted supplemental briefs. McLaughlin also filed a request for judicial notice of materials related to his petition to the Supreme Court. Harris filed objections to the request for judicial notice.

After taking the matter under submission, the court issued a written ruling on January 9, 2017, granting Harris's motion to strike and dismissing the action. The court found that "Harris's decision that the second ballot initiative was identical to the first and that she was relieved from her obligation to circulate a title

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[3] Harris filed a similar request for judicial notice on appeal, which we granted.

and summary for this measure is clearly made in connection with an issue under consideration or review by an executive body or other official proceeding authorized by law." As such, McLaughlin's complaint arose out of Harris's protected activity. Moreover, the court concluded that McLaughlin failed to establish a probability of success on the merits of his claim. Specifically, the court found that McLaughlin's complaint was barred by res judicata based on the rulings by the trial court in the declaratory action and the Court of Appeal on his writ petition. Noting that McLaughlin admitted he had "consciously decided not to contest" the judgment in the declaratory action, the court found that "he must now live with the consequences of his decision."

The court also granted Harris's unopposed request for judicial notice and McLaughlin's request for judicial notice. With respect to the latter, the court overruled Harris's objections, but limited notice of several documents only to the "fact of filing, but not the truth of the contents thereof."

McLaughlin timely appealed the order granting the motion to strike.[4]

DISCUSSION

I. *Section 425.16 and Standard of Review*

"A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. '"While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by

[4] An order granting a section 425.16 motion is immediately appealable. (§ 425.16, subd. (i); § 904.1, subd. (a)(13).)

the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.'" [Citations.]" (*Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).)

The Legislature has declared that "it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) To this end, the Legislature enacted section 425.16, subdivision (b)(1), which authorizes the filing of a special motion to strike "[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." The Legislature expressly provided that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*Simpson, supra*, 49 Cal.4th at p. 21; see also *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.' [Citations.]"].)

Analysis of a motion to strike pursuant to section 425.16 involves a two-step process. (*Simpson, supra*, 49 Cal.4th at p. 21.) "First, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.' (§ 425.16, subd. (b)(1).) If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish 'a

probability that the plaintiff will prevail on the claim.' [*Ibid*.]" (*Simpson, supra*, 49 Cal.4th at p. 21, fn. omitted.) "Only a cause of action 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 be stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We review the ruling on a special motion to strike de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) In engaging in the two-step process, 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).) "However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. *McLaughlin's Claim Arises From Protected Activity*

Under the first prong of a motion to strike under section 425.16, the moving party has the burden of showing that the cause of action arises from an act in furtherance of the right of free speech or petition—i.e., that it arises from a protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Thus, the moving party must establish both (1) that its act constituted protected activity; and (2) the opposing party's cause of action arose from that protected activity.

First, we determine whether Harris's acts were in fact protected conduct. To meet this burden, Harris must demonstrate that her conduct "'fits one of the categories spelled out in section 425.16, subdivision (e). . . .' [Citations.]" (*City of*

Cotati v. Cashman (2002) 29 Cal.4th 69, 78.) As pertinent here, section 425.16(e)(2) protects "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"; section 425.16(e)(4) protects "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."

Here, Harris has demonstrated that her alleged conduct was protected under the statute. As an initial matter, Harris may invoke the anti-SLAPP statute to protect her conduct as Attorney General. Our Supreme Court has affirmed the "long and uniform line of California Court of Appeal decisions explicitly hold[ing] that governmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the public entity or its public officials in their official capacity. [Citations.]" (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.) "It can no longer be questioned that section 425.16 extends to government entities and employees that issue reports and take positions on issues of public interest relating to their official duties." (*Santa Barbara County Coalition Against Auto Subsidies v. Santa Barbara County Ass'n of Governments* (2008) 167 Cal.App.4th 1229, 1237–1238.)

As Attorney General, Harris was responsible for preparing a circulating title and summary for a proposed initiative. (Cal. Const. Art. II, § 10(d); Elec. Code, § 9002.) However, the Attorney General may commence a timely and appropriate legal action seeking to be relieved of that duty based on a judicial

determination that the measure is invalid. (See *Schmitz v. Younger* (1978) 21 Cal.3d 90, 93; *Widders v. Furchtenicht* (2008) 167 Cal.App. 4th 769, 780.) Courts have allowed such relief, for example, based on a finding that a proposed initiative is unconstitutional on its face. (*Id*. at p. 785.)

Harris sought such relief upon receipt of McLaughlin's initial proposed initiative, the Act. She then relied on the Sacramento Superior Court's June 2015 judgment in rejecting McLaughlin's second proposal, the Mandate. In other words, according to McLaughlin's complaint, Harris falsely claimed that the Mandate was substantively identical to the previously-proposed Act and that she was therefore relieved of her obligation to circulate a title and summary for the Mandate; Harris also purportedly made written and oral statements related to that determination and publicly denigrated McLaughlin. Further, McLaughlin provides no authority or argument to dispute that Harris's statements were made in connection with official government proceedings and that they concerned issues of public interest. (§ 425.16(e).) As such, Harris's conduct was protected, at a minimum, under section 425.16(e)(2) and (e)(4).

We also find that McLaughlin's claim arose out of this protected activity. In considering whether a complaint arises from protected activity, "we disregard the labeling of the claim and instead 'examine the principal thrust or gravamen of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'" (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 522.) We assess the principal thrust by identifying "[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim."

(*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 189.)

Here, McLaughlin argues, without analysis or authority, that his complaint was "actually about [Harris's] failure to perform a mandatory duty, not about her free speech." From our examination of the complaint, we conclude that the gravamen of McLaughlin's single cause of action is that he was injured when Harris "falsely" claimed that the Mandate was identical to the previously-submitted Act and then refused to process the Mandate on that basis, and moreover when she made this determination based on her "own personal animosity toward [McLaughlin's] historic American religious beliefs as demonstrated by her publicly [*sic*] denigration of the plaintiff" at an event and through press releases. Thus, McLaughlin's lawsuit arose out of Harris's protected activity.

In sum, we agree with the trial court's conclusion that Harris met her burden on the first prong of the anti-SLAPP motion to strike. We next examine the second prong, i.e., whether McLaughlin met his burden to demonstrate a probability of prevailing on his claim.

III. *McLaughlin Did Not Demonstrate a Probability of Prevailing*

Once defendant satisfies the first prong of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) "The

showing must be made through 'competent and admissible evidence' [citations]." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.) A plaintiff ""cannot simply rely on the allegations in the complaint" [citation]' [citation]." (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.)

Harris contends, and the trial court found, that McLaughlin could not meet his burden on this prong because his claim was barred by res judicata. We agree.

As our Supreme Court explained in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*): "The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" [Citation.]"

The elements for applying the doctrine are the same for either claim preclusion or collateral estoppel (also called "issue preclusion"): ""(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a

party or in privity with a party to the prior proceeding. [Citations.]'" [Citation.]" (*Boeken, supra*, 48 Cal.4th at p. 797.)

Here, all three elements of res judicata are met. First, in both proceedings, the issue raised was whether the proposed initiative was unconstitutional on its face, thus enabling the Attorney General to refuse to process it. McLaughlin attempts to avoid res judicata by claiming that the Mandate contained "several differences" from the Act. He does not articulate those differences or explain how they would alter the court's conclusion regarding the constitutionality of his proposed initiatives. To the contrary, the initiatives were substantively identical—both sought to criminalize homosexual activity, legalize capital punishment for such activity, and legitimize other forms of discrimination against individuals based on their use of "sodomistic propaganda." McLaughlin does not suggest how the court erred in concluding that his proposal was patently unconstitutional. (See, e.g., *Lawrence v. Texas* (2003) 539 U.S. 558, 578; *Kennedy v. Louisiana* (2008) 554 U.S. 407, 421.)

Second, the judgment issued in the declaratory action was a final judgment on the merits. The fact that the court issued a default judgment does not change this conclusion. "A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. [Citations.] Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint. [Citations.]" (*Martin v. General Finance Co.* (1966) 239 Cal.App.2d 438, 443]; see also *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869 ["'[I]t is the opportunity to litigate that

is important in these cases, not whether the litigant availed himself or herself of the opportunity.'"]; *English v. English* (1937) 9 Cal.2d 358, 363 ["'The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues. . . .'"].)

Finally, McLaughlin does not dispute that he was a party to the declaratory action. Thus, res judicata applies and he is barred from relitigating the constitutionality of his proposed initiatives. Further, because he has no basis to challenge Harris's refusal to process the Mandate as unconstitutional, he cannot demonstrate a probability of prevailing on his claim.[5]

DISPOSITION

The order granting Harris's motion to strike pursuant to section 425.16 is affirmed. Harris is awarded costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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[5] We need not reach the other bases on which Harris contends McLaughlin fails to meet the second prong of the anti-SLAPP analysis.