Filed 2/25/15 Cohen v. San Fernando Valley Hebrew High School 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MEIR COHEN, Plaintiff and Appellant, v. SAN FERNANDO VALLEY HEBREW HIGH SCHOOL et al., Defendants and Respondents.	B256429 (Los Angeles County Super. Ct. No. BC530874)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed as modified.

Schreiber & Schreiber, Inc., Edwin C. Schreiber, Eric A. Schreiber, and Ean M. Schreiber for Plaintiff and Appellant.

Blady Weinreb Law Group and Marnin Weinreb for Defendants and Respondents San Fernando Valley Hebrew High School and Avrohom Stulberger.

INTRODUCTION

Meir Cohen appeals from an order dismissing his entire first amended complaint (FAC) -- consisting of two causes of action -- with prejudice, following his failure to post a $50,000 bond ordered by the court. Appellant contends the trial court erred in requiring him to post a bond under Corporations Code section 5710.[1] He further contends that the first cause of action in his FAC was not subject to dismissal under section 5710. Finally, he contends that any dismissal should have been without prejudice. We find no error in the trial court's order imposing a bond requirement, but conclude that the dismissal of the second cause of action should have been without prejudice. As to the dismissal of appellant's first cause of action, we conclude that any error was harmless, as that cause of action is moot. Accordingly, we affirm in part, reverse in part, and remand with instructions.

PROCEDURAL HISTORY

On April 1, 2014, appellant filed an FAC, alleging two causes of action against respondents San Fernando Valley Hebrew High School, doing business as Valley Torah, and Rabbi Avrohom Stulberger: (1) injunctive relief for reinstatement as a director, and (2) derivative action for damage for the benefit of Valley Torah. As to the first cause of action for injunctive relief, the FAC alleged that appellant was elected for a one-year term to the board of directors of Valley Torah on December 18, 2012. It further alleged that on February 12, 2013, he was removed as a director in violation of Valley Torah's bylaws. As to the derivative action, the FAC alleged that Stulberger, the principal of Valley Torah, received

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[1] All further statutory citations are to the Corporations Code, unless otherwise stated.

monies in the form of loan proceeds and compensation that belonged to Valley Torah.

In response to appellant's complaint, respondents filed a motion pursuant to section 5710, subdivision (c), seeking an order requiring appellant to post a bond in the statutory maximum amount of $50,000. The motion was brought on the ground that there was no reasonable possibility that prosecution of the derivative action would benefit Valley Torah, economically or otherwise. In the motion, respondents contended that appellant failed to state any cause of action, that the derivative action was brought pursuant to the wrong statute, and that it was premature.

Appellant opposed the motion requiring him to post a bond. He argued that the derivative action was not premature, that there was a strong likelihood he would prevail on his claim because he could bring the derivative action under another statute, that the derivative action would benefit Valley Torah because Stulberger had been accepting "bribes and money laundering," and that the $50,000 bond amount was excessive.

Respondents filed a reply, arguing that appellant presented no evidence supporting his allegations against Stulberger and informing the court that a special committee investigation into appellant's claims had determined them to be meritless. The reply also presented evidence -- a declaration from an attorney -- in support of respondents' contention that $50,000 was a reasonable amount for the bond.

On April 9, 2014, after a hearing, the trial court granted the motion and ordered appellant to post a $50,000 bond by April 21.[2] The court found that

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[2] Appellant did not provide a copy of the hearing transcript as part of the record on appeal.

appellant's allegations in his FAC failed to state a claim. In light of the foregoing, the court found that respondents had established that "there is no reasonable probability that the prosecution of the purported derivative second cause of action will benefit the corporation or its members, economically or otherwise." The court further found that a bond in the amount of $50,000 was appropriate, as it represented an amount that respondents might incur for reasonable expenses in connection with defending the action.

Appellant failed to post the required bond. Thereafter, respondents filed a proposed order of dismissal, dismissing the entire FAC with prejudice. Appellant objected to the proposed order, arguing that the first cause of action for injunctive relief was not subject to dismissal under section 5710. The trial court overruled appellant's objection, and entered the order of dismissal as proposed.

Appellant timely appealed from the order.

DISCUSSION

Appellant contends the trial court erred in dismissing his FAC in its entirety with prejudice. He contends the trial court should not have granted respondents' motion pursuant to section 5710 to require the posting of a bond, as respondents failed to produce sufficient evidence to support the court's findings (1) that there was no reasonable possibility the second cause of action would benefit Valley Torah and (2) that $50,000 was a reasonable bond amount. He further contends that any dismissal of the derivative action should have been without prejudice. Finally, appellant contends that the trial court improperly dismissed the first cause of action, as that cause of action was not subject to section 5710.

A. *Order Requiring Posting of a Bond Under Section 5710*

Section 5710, subdivision (c) provides in relevant part that in any derivative action, at any time within 30 days after service of the summons, a corporate

defendant "may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish a bond . . . . The motion shall be based upon one or both of the following grounds: [¶] (1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its members, economically or otherwise. . . ."

Here, respondents moved within the allotted time for an order requiring appellant to furnish a bond. Their motion was based on the ground that there was no reasonable possibility that the prosecution of the derivative action would benefit Valley Torah or its members. Respondents argued that the FAC failed to state a cause of action, as it set forth no elements of any cause of action. They further argued that the derivative action was premature, as the FAC alleged appellant sent a written letter detailing his allegations to the board of directors but the board had not yet acted on appellant's claims. (See § 5710, subd. (b) [no derivative action may be maintained or instituted against nonprofit organization unless "[t]he plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file"]; cf. *Shen v. Miller* (2012) 212 Cal.App.4th 48, 58 [a shareholder may bring a derivative suit on behalf of the corporation only if the corporation has refused to pursue the claim].) On this record, respondents produced sufficient evidence for the trial court to consider the motion to require posting of a bond.

Additionally, there was substantial evidence set forth in the motion, the FAC and other attached documents to support the trial court's finding that prosecution

of the derivative claim would not benefit Valley Torah or its members, economically or otherwise. For example, substantial evidence supported the trial court's finding that appellant failed to inform the board in writing of the ultimate facts of each cause of action against each defendant or to deliver to the board a true copy of the complaint plaintiff proposed to file. (See § 5710, subd. (b.).) In light of the trial court's findings, appellant lacked standing to bring the derivative action and accordingly, prosecution of a meritless cause of action would not benefit Valley Torah or its members.[3]

Appellant contends the trial court improperly relied upon evidence submitted with the reply brief to make its determination that there was no reasonable possibility that prosecution of the derivative action would benefit the corporation or its members. Similarly, he argues the trial court improperly relied upon evidence submitted with the reply brief to support the amount of the bond. We discern no error.

Section 5710, subdivision (d) provides:

"At the hearing upon any motion pursuant to subdivision (c), the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground or grounds upon which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the corporation and the moving party which will be incurred in the defense of the action. If the court determines, after hearing the evidence adduced by the parties,

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[3] We note that an investigation into appellant's claims found them meritless. We also note that in his reply brief, appellant asserts that he is not challenging "the Trial Court's findings with respect to the bond motion. Rather, Appellant [is challenging] the propriety of the Trial Court deciding the motion at all, because the initial motion was filed without any evidence whatsoever." As discussed above, there was sufficient evidence presented with respondents' motion for the trial court to consider it.

that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the amount of the bond, not to exceed fifty thousand dollars ($50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation in connection with the action . . . ."

By its plain language, section 5710, subdivision (d) permits a trial court to consider evidence related to the ground upon which the motion is brought or the probable reasonable expenses at the hearing on the motion, which necessarily occurs after the initial moving papers, any opposition and any reply have been filed. Accordingly, a court may consider evidence submitted in a reply brief, so long as the opposing party has an opportunity to respond to the evidence. Appellant has neither claimed nor demonstrated he was denied such an opportunity.

Appellant's reliance on *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 is misplaced. That case involved a different statute which did not expressly permit a trial court to consider evidence at a hearing on the motion. (*Id*. at p. 1535 [appellants filed special motion to strike pursuant to Code of Civil Procedure section 425.16].) More important, the appellate court specifically held that the trial court had discretion to admit the evidence submitted with the reply or decline to do so. (*Id*. at p. 1537.) Here, the trial court exercised its discretion and admitted the evidence submitted with the reply. Appellant has not shown how the admission of the evidence constituted an abuse of discretion. Indeed, he has failed to produce a complete record showing whether he even objected to the evidence. Accordingly, appellant's claim of error is forfeited. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [appellant must produce adequate record to demonstrate error].)

Appellant also contends the trial court failed to segregate separate expenses associated with the first cause of action and with the derivative action when setting the amount of the bond. However, he cites nothing in the record to show the trial court failed to do so. Indeed, the court's statement of decision indicates that it considered only issues relating to the derivative action. Nor does appellant identify anywhere in the record where he objected to the evidence submitted relating to the reasonable expenses that would be incurred in connection with defending the derivative action. In the absence of a complete evidentiary record, we must presume that the evidence supports the trial court's determinations in the statement of decision, unless error appears on the face of the record. (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522; *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) Accordingly, appellant has forfeited any challenge to the amount of the bond. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court"].) In short, we find no error in the trial court's order requiring appellant to post a $50,000 bond.

B. *Dismissal with Prejudice for Failure to Post Required Bond*

Appellant concedes he did not post the required bond. Accordingly, under section 5710, subdivision (d), his derivative action was subject to dismissal. Appellant contends, however, that the dismissal should have been without prejudice. We agree.

Section 5710, subdivision (d) provides in relevant part that: "A ruling by the court on the motion [to require posting of a bond] shall not be a determination of any issue in the action or of the merits thereof." In interpreting similar language in an analogous statute, an appellate court held that the failure to post a surety bond did not preclude the plaintiff from bringing another action on the same cause of

action. (*Ensher v. Ensher, Alexander, & Barsoom, Inc*. (1960) 187 Cal.App.2d 407, 410-411.) We reach a similar result here. Accordingly, we conclude that the order of dismissal should be modified to strike the words "with prejudice." (See *id*. at p. 411 [modifying judgment of dismissal by striking "'with prejudice'"].)

C. *Individual Cause of Action for Reinstatement to Board of Directors*

Finally, appellant contends the trial court erred in dismissing his first cause of action for reinstatement as a director, because section 5710 does not apply to that cause of action. We agree, but find that the error was harmless, as the first cause of action is subject to dismissal for mootness.

It is undisputed that appellant's term as a director has expired. Thus, absent some exception, appellant's first cause of action is moot. (See, e.g., *Students for a Conservative America v. Greenwood* (9th Cir. 2004) 391 F.3d 978, 979 [holding that "prayer for injunctive relief with regard to the 2002 election is now moot, because the student leaders who were seated as a result of the challenged May 2002 election have already completed their one year terms"].) Appellant has not shown any exception is applicable. Appellant was not a duly elected member of a governmental entity or similar organization. Rather, he was elected to the board of a relatively small, private, nonprofit organization (a religious school). Appellant's service is not a matter of significant public interest to a large number of citizens. (Compare *Chantiles v. Lake Forest II Master Homeowners Assn*. (1995) 37 Cal.App.4th 914, 922 ["extent of an elected director's rights to inspect election ballots, is of significant public interest concerning a large number of citizens," as homeowners association is akin to a governmental entity for many California citizens] with *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500, [removal of director of private nonprofit organization generally not an issue of public interest for purposes of Code of Civil Procedure section 425.16].)

Accordingly, we decline to exercise our discretion to retain and decide this cause of action, which is now moot.

DISPOSITION

The order of dismissal is modified to strike the words "with prejudice." As modified, the order is affirmed. The parties are to bear their own costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.