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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RONALD A. NEFF,

Plaintiff and Respondent,

v.

DOUGLAS J. DENOCE,

Defendant and Appellant.

B230064

(Los Angeles County
Super. Ct. No. LS020957)

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

Donald Dunham for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Douglas DeNoce appeals from an order denying his special motion to strike under Code of Civil Procedure section 425.16¹ as untimely. We conclude that the trial court abused its discretion in denying the motion as untimely. Nonetheless, our independent review of the motion to strike leads us to conclude that the anti-SLAPP motion was properly denied because appellant has failed to meet his burden of showing that the challenged cause of action arises from protected activity. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2010, plaintiff and respondent Ronald Neff filed a request for an order to stop civil harassment by appellant pursuant to section 527.6, and an application for a temporary restraining order (TRO). Respondent contended that appellant had stalked and harassed him through such conduct as aggressive driving, minor verbal threats, obscene hand gestures, and leaving notes about where to park his car. Respondent also attached a declaration by Sandra York, who described herself as a friend and said she saw appellant use his car to block her friend in his car momentarily. The court granted the TRO on December 13, 2010.

Appellant opposed the TRO and injunction, asserting that respondent's allegations of harassment were made to thwart appellant's civil actions against respondent. Appellant, a former dental patient of respondent's, had sued respondent in 2008 for dental malpractice after a series of dental implants failed

¹ Such a motion is "commonly known as an anti-SLAPP (strategic lawsuit against public participation) motion." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 280 (*Olsen*)). All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

and became infected. Respondent filed for bankruptcy in March 2010 and, according to appellant, fraudulently transferred real property to a trust in order to protect the property through the bankruptcy proceedings. Appellant therefore filed an action to set aside the conveyance as a fraudulent transfer and filed a motion for relief from the stay in bankruptcy court.

Appellant filed an emergency ex parte application to vacate or stay the TRO. The court modified the TRO to permit mail contact for litigation purposes. Appellant then filed an ex parte emergency application to reconsider the TRO, which the court denied.

On December 22, 2010, appellant filed a cross-complaint for civil harassment by respondent. The court consolidated the matters for an evidentiary hearing. The court explained that the hearing on respondent's petition was scheduled for December 28, 2010, and the hearing on appellant's petition was scheduled for January 5, 2011. The court thus consolidated the cases and ordered the parties to appear on December 28, 2010, "when the court intends to Order that the [initial matter] be continued to January 5, 2011, the date of hearing on the [second] matter."

Also on December 22, appellant filed a special motion to strike respondent's petition for civil harassment pursuant to section 425.16. The anti-SLAPP motion was served by overnight delivery. The court denied appellant's anti-SLAPP motion as untimely, pursuant to section 1005, subdivision (b).

On December 28, 2010, appellant filed an ex parte motion, asking the court to continue the January 5 hearing on the TRO in order to have the anti-SLAPP motion heard, or to hear the anti-SLAPP motion at an earlier time. He argued that courts have recognized that the filing of an anti-SLAPP motion may require the

continuance of the injunction hearing, citing *Thomas v. Quintero* (2005) 126 Cal.App.4th 635 (*Thomas*).

The court denied the request to continue the January 5 hearing or to advance the anti-SLAPP hearing. The court explained, first, that a TRO is required by statute to be heard and ruled upon within a limited period of time. The court reasoned that, if the TRO were to be dissolved at the January 5 hearing, the anti-SLAPP motion would be rendered moot. If, on the other hand, a permanent restraining order was issued, it would confirm that the TRO was warranted, and the anti-SLAPP motion would be denied. The court further noted that, although it did not disagree with appellant's contention that a civil harassment restraining order may be subject to the provisions of the anti-SLAPP statute, continuing the hearing would conflict with the parties' goal of having the issue of the TRO decided as soon as possible. Appellant timely appealed the denial of the anti-SLAPP motion and the denial of his ex parte motion to set a hearing on the anti-SLAPP motion.

DISCUSSION

Appellant contends that the trial court erred in summarily denying his anti-SLAPP motion as untimely and denying his request to continue the hearing in order to address the motion on the merits. He further contends that his anti-SLAPP motion is meritorious. We conclude that the trial court abused its discretion in denying appellant's motion as untimely, but that appellant has failed to meet his burden of demonstrating that the challenged cause of action arises from protected activity.

The anti-SLAPP statute, "[s]ection 425.16 provides, in pertinent part, that '[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.’ [Citation.] The purpose of the statute is ‘to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.’ [Citation.]” (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1025-1026 (*No Doubt*).)

“A petition for injunctive relief against civil harassment pursuant to section 527.6 is subject to a special motion to strike under the anti-SLAPP statute. [Citation.]” (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 617, citing *Thomas, supra*, 126 Cal.App.4th at p. 652.) In *Thomas*, the court held that “anti-SLAPP motions may be filed challenging petitions for injunctive relief brought under section 527.6, because they constitute ‘causes of action’ under the anti-SLAPP law, and there is nothing in section 425.16 which would exempt such petitions from the broad reach of this remedial statute. However, the anti-SLAPP statute does not apply to a proceeding under section 527.6, subdivision (c), which is limited to determining whether an interim temporary restraining order (TRO) should be issued as a prelude to a hearing on the petition for injunctive relief.” (*Thomas, supra*, 126 Cal.App.4th at p. 642.)

I. Was the motion untimely?

“A special motion to strike must be filed within 60 days after service of the complaint on the defendant, unless the trial court exercises its discretion to consider a later-filed motion. (§ 425.16, subd. (f).) The clerk must schedule the motion for a hearing within 30 days after the motion is filed, if possible given the court’s docket conditions. (*Ibid.*) Section 425.16, subdivision (f) states: ‘The

special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.' The purpose of these timing requirements is to facilitate the dismissal of an action subject to a special motion to strike early in the litigation so as to minimize the cost to the defendant. [Citations.]" (*Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 682 (*Chitsazzadeh*).)

"Clearly, the 60-day time period set forth in subdivision (f) of section 425.16 is not jurisdictional. The trial court has the legal authority to allow the filing of an anti-SLAPP suit motion to strike 'at any later time [after '60 days of the service of the complaint'] upon terms it deems proper.' The nonjurisdictional nature of the time limit is also emphasized by the permissive 'may' in the setting forth of the time limit ('The special motion may be filed')." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840 (*Lam*).) Thus, although there is no right to file an untimely anti-SLAPP motion, the trial court has discretion to allow an untimely filing. (*Lam, supra*, 91 Cal.App.4th at p. 840; *Chitsazzadeh, supra*, 199 Cal.App.4th at p. 682.) The trial court has abused its discretion if "(1) the grounds given by the court for finding the anti-SLAPP motion untimely are inconsistent with the substantive law of section 425.16, or (2) the application to the facts of this case is outside the range of discretion conferred upon the trial court under that statute, read in light of its purposes and policy. [Citation.]" (*Olsen, supra*, 134 Cal.App.4th at p. 285.)

Appellant's motion was not untimely pursuant to the anti-SLAPP statute, which requires the motion to be filed within 60 days of the service of the complaint. (§ 425.16, subd. (f).) Appellant's motion was filed on December 22,

only nine days after respondent filed his civil harassment petition, and thus well within the 60-day deadline. The motion accordingly was timely under the plain language of the anti-SLAPP statute.

The trial court found the anti-SLAPP motion untimely under section 1005, subdivision (b). Section 1005 requires written notice to be given in accordance with the statute's provisions for certain enumerated motions, as well as for "[a]ny other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge." (§ 1005, subd. (a)(13).) Subdivision (b) provides, in part, as follows: "Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. . . . However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, . . . and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days."

Under section 1005, the anti-SLAPP motion would have been due at the latest by December 13, 2010, which was the date the initial petition was filed. (§§ 12c, 135.) The anti-SLAPP motion, therefore, could not have been filed in compliance with section 1005.

"The principal purpose of the requirement to file and serve a notice of motion a specified number of days before the hearing ([Code Civ. Proc.], § 1005, subd. (b)) is to provide the opposing party adequate time to prepare an opposition.'" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 828.) Thus, "[t]he focus of section 1005 is minimum notice of one's papers before

any hearing.” (*Lam, supra*, 91 Cal.App.4th at p. 843.) It does not establish a deadline for filing an anti-SLAPP motion. The anti-SLAPP statute provides its own deadlines for the filing of a motion pursuant to its provisions, and appellant’s motion complied with those deadlines. The trial court thus abused its discretion in dismissing the anti-SLAPP motion as untimely.

In *Thomas*, the court addressed the time line specified by statute for determining a civil harassment petition and found “no reason that the special motion to strike procedure will interrupt the time line established for determining a civil harassment petition’s merits.” (*Thomas, supra*, 126 Cal.App.4th at p. 649.) The court reviewed the statute, which required a hearing on a civil harassment petition to be held within 15 days or, if good cause appears, 22 days from the date of the TRO.² The court concluded: “despite the short time line specified in the statute for a hearing on the merits of a petition (nominally 22 days from the date a TRO is granted ex parte), that time can be extended by a request for a continuance unrelated to a defendant’s desire to challenge the petition via a special motion to strike under the anti-SLAPP statute.” (*Ibid.*)

Appellant argues that his situation is indistinguishable from that presented in *Thomas* and that the trial court thus should have addressed the merits of his anti-SLAPP motion.³ Although we conclude that the anti-SLAPP motion was not untimely, we disagree with appellant’s argument that his motion was meritorious.

² The timing was changed slightly in an amendment that became operative on January 1, 2012. (Stats. 2010, ch. 572, §§ 1, 28.)

³ The decision to deny a continuance generally is within the “the sound discretion of the trial court. [Citation.] The trial court’s exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.]” (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) In light of our conclusion that the anti-SLAPP motion was not

II. Did appellant make a threshold showing that the challenged cause of action arises from protected activity?

“[S]ection 425.16 applies if the cause of action ‘arises from’ any one of four types of activities, all of which are ‘protected’ by the section: ‘(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; (4) or 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, subds. (e)(1)-(4).)” (*Thomas, supra*, 126 Cal.App.4th at p. 653.)

“A special motion to strike under section 425.16 entails a two-step process. [Citation.] First, the defendant must make a threshold showing that the challenged cause of action arises from protected activity. [Citation.] If the defendant makes this showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits of the claim. [Citation.] . . . [¶] ‘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 being stricken under the statute.’ [Citation.] We review de novo whether the trial court

untimely, we will not address whether the trial court abused its discretion in denying appellant’s ex parte motion and instead proceed to appellant’s argument that his motion was meritorious.

should have granted [a] special motion to strike, conducting an independent review of the entire record. [Citation.]” (*No Doubt, supra*, 192 Cal.App.4th at p. 1026.)

In reviewing the trial court’s grant or denial of an anti-SLAPP motion, “we consider “‘the pleadings, and supporting and opposing affidavits . . . 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.]” [Citation.]’ [Citation.]” (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478.)

According to appellant’s anti-SLAPP motion, respondent’s motivation for seeking a restraining order was solely to thwart appellant’s litigation against him. Appellant stated that respondent had made a similar request for a restraining order against him in the bankruptcy court, which the bankruptcy court denied. Appellant explained that respondent had attempted to prevent appellant from asking questions and obtaining evidence in the bankruptcy proceedings, and that appellant was merely trying to serve respondent with papers related to the bankruptcy proceedings, not harassing respondent.

“‘The constitutional right to petition . . . includes the basic act of filing litigation’ [Citations.]” (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281.) Appellant’s conduct of litigation against respondent does constitute protected activity. Thus, if appellant can make a threshold showing that respondent’s civil harassment petition is based on appellant’s litigation activity, he has made a prima facie case, and the burden shifts to respondent to demonstrate a probability of prevailing on the merits of the claim.

Respondent's petition alleged that appellant had engaged in threatening behavior unrelated to appellant's conduct in the bankruptcy proceedings. For example, respondent alleged that appellant blocked him in with his car, drove aggressively toward him, and used obscene gestures toward him. Respondent stated in his petition, "[Appellant] lives a few doors down from my residence, but I am willing to agree the orders should not stop him from going, peacefully, and without harassing me, to and from his home, and to and from any and all legal proceedings, but without harassing me. otherwise stay away. [sic.]" The petition accordingly was not based on appellant's litigation conduct, but on appellant's allegedly threatening behavior outside the litigation context.

"A cause of action is subject to a motion to strike under the anti-SLAPP statute even if it is based only in part on allegations regarding protected activity. [Citation.] However, 'it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' [Citation.]" (*Thomas, supra*, 126 Cal.App.4th at p. 653.) Despite appellant's contention that respondent filed the civil harassment petition solely to thwart his litigation against him, the principal thrust of respondent's civil harassment petition is not to enjoin appellant from engaging in litigation conduct, but from engaging in conduct that is irrelevant to the litigation, such as driving in a threatening manner. Appellant did not address the allegations of respondent's civil harassment petition in his motion to strike, other than to state that "[t]he conduct alleged (even if true – denied) is of little moment."

Appellant argued in his special motion to strike that respondent's civil harassment petition was based on appellant's protected activity, citing two examples: appellant served respondent with a subpoena in the bankruptcy case, and he served respondent directly with a TRO. However, as appellant even states, these two allegations were in respondent's opposition to appellant's request for a TRO, not in the civil harassment petition. Respondent's civil harassment petition was not based on this conduct. Appellant has failed to make a prima facie showing that the challenged cause of action arises from protected activity. We therefore conclude that the anti-SLAPP motion was properly denied.

DISPOSITION

The judgment is affirmed. Each party shall bear his own costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.