Filed 9/4/12 R.F.F. Family Partnership v. Michelman & Robinson 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

R.F.F. FAMILY PARTNERSHIP, LP, Plaintiff and Respondent, v. MICHELMAN & ROBINSON, LLP, et al., Defendants and Appellants.	B235519 (Los Angeles County Super. Ct. No.)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Johnson, Judge. Affirmed.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer, D. Wayne Jeffries for Defendants and Appellants.

Parcells Law Firm, Dayton B. Parcells III for Plaintiff and Respondent.

An attorney and his firm—sued for fraud and misrepresentation—seek to strike the pleading as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)[1] The attorney admittedly misrepresented to plaintiff that he was authorized to pursue debt settlement negotiations on behalf of a wealthy businessman. That was a lie: the attorney had no relationship with the "client" he purported to represent. The attorney intentionally deceived a party, a misdemeanor. Because this conduct was illegal as a matter of law, the defendants cannot invoke the protection of the anti-SLAPP statute.

FACTS

Allegations in the Third Amended Complaint

Respondent R.F.F. Family Partnership loaned $2.5 million to Christopher and Kristin Eberts, secured by a deed of trust on the Ebertses' residence in Bel Air. When the note matured, respondent demanded payment. The Ebertses sent $1.7 million in checks that were dishonored because their bank account lacked sufficient funds. In August 2008, respondent notified the Ebertses that it intended to take legal action to enforce the promissory note and trust deed, if the debt was not repaid.

In response to the foreclosure threat, Attorney Raphael Bernardino, Jr., from the firm of Michelman & Robinson (collectively, the Attorneys) communicated with respondent. Bernardino told respondent that he represented Ronald Tutor, a wealthy businessman who is Kristin Eberts's father. Bernardino claimed that the Ebertses were beneficiaries of a transaction involving Tutor, and that when the transaction was completed, Tutor would pay respondent directly for the Ebertses' debt.

Bernardino confirmed his statements in a letter dated August 11, 2008 (the Letter). The Letter begins, "The undersigned is retained by Mr. Ronald Tutor and he has authorized me to provide you with the following information. [¶] Christopher Eberts Productions, Inc. is the beneficiary in a transaction that, when concluded, will net . . . an

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[1] Undesignated statutory references in this opinion are to the Code of Civil Procedure.

amount in excess of the amount currently owed to your firm. I understand the amount currently owed to your firm is approximately $2,160,000." When the transaction closed, on August 25, 2008, Bernardino promised to wire money to respondent. Based on Bernardino's representations, respondent refrained from taking legal action.

After sending the Letter, Bernardino continued to assert that he represented Tutor in the resolution of the Ebertses' debt. Respondent filed suit on September 19, 2008, when the debt remained unpaid, but deferred prosecution after Bernardino gave assurances that Tutor would soon repay the debt. Bernardino offered further assurances that a Tutor-owned company would execute corporate guarantees of the Ebertses' debt. On November 4 and 5, 2008, Bernardino informed respondent orally and in writing that $2.5 million would be transferred to respondent immediately.

When the promised wire transfer did not materialize, Bernardino advised respondent that payment would be made by a Tutor-owned business called Capco, on condition that respondent terminate its lawsuit and forgo foreclosure proceedings on the Ebertses' home. Respondent accepted the offer and dismissed its lawsuit against the Ebertses. Capco sent respondent three checks in November 2008, but quickly issued "stop payment" orders and repudiated any responsibility for the Ebertses' debt.

Respondent filed this lawsuit against the Ebertses, Tutor, Capco, and the Attorneys. The claims against the Attorneys are for fraud and misrepresentation. The pleading alleges that the Attorneys claimed that they were retained by Ronald Tutor, who promised to pay the Ebertses' debt—through a transaction benefitting the Ebertses, by Tutor directly, or through companies owned or controlled by Tutor. None of this was true, because Bernardino admits that he was not retained by Tutor, never met Tutor, and never spoke to Tutor. The Attorneys' claims regarding repayment of the debt were false and they had no reasonable grounds for believing them true. The misrepresentations induced respondent to delay legal action on its note and forgo foreclosure proceedings on the Ebertses' property. Respondent would not have delayed in pursuing its remedies had it known that the Attorneys' representations were false.

The Attorneys' Motion to Strike

The Attorneys moved to strike the complaint. They argued that their communications with respondent are "statements and writings made in connection with litigation" and covered by the anti-SLAPP statute. The Attorneys maintained that respondent cannot prevail because its claims are barred by the litigation privilege, which applies to communications related to a judicial proceeding. Further, respondent is unlikely to succeed because the Attorneys' conduct is not the proximate cause of respondent's damages: the damage was caused by the Ebertses' failure to repay their debt, not by the Attorneys' assurances that Tutor would pay the debt.

In opposition, respondent contended that the Attorneys cannot invoke the anti-SLAPP statute because their conduct was illegal as a matter of law and is therefore not constitutionally protected speech or petitioning activity. The Attorneys concede that they purported to act on behalf of a "client" who did not retain them, never met them, and never spoke to them.[2] Tutor testified that "Bernardino was not my lawyer. He wasn't authorized by me. . . . No lawyer in his right mind would represent to somebody I was going to pay somebody off 2.5 million without written authorization . . . ." Tutor indicated that he knew nothing about the Attorneys' machinations and that Bernardino was lying "through his teeth" in the Letter. The Attorneys' false claim that they were

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[2] Bernardino admits that when he wrote the Letter, "I improperly used the term 'retained.' At that time, I had never met Mr. Tutor, nor had I ever spoken to him. . . . I had no agreement of any type with Mr. Tutor (oral or written) for anything, and there was no understanding between myself and Mr. Tutor for the payment of Christopher [Eberts]'s debts." Bernardino declares, "At no time did Mr. Tutor, nor anyone authorized to act on his behalf tell me that Mr. Tutor (or his company) was engaged in any transaction that would benefit Mr. Eberts or his company." Bernardino also states, "At no time did Mr. Tutor appoint me as his agent, or his attorney in fact. At no time did Mr. Tutor or anyone authorized to act on his behalf authorize or instruct me to pay Christopher[']s] debt to RFF Family Partnership on Mr. Tutor's behalf. Moreover, at no time did Mr. Tutor or anyone authorized to act on his behalf inform me that Mr. Tutor would be paying RFF Family Partnership any money whatsoever."

Tutor's authorized counsel constituted a misdemeanor under state law that prohibits an attorney from deceiving a party to litigation.

Respondent observes that when the Attorneys communicated with it, no litigation was contemplated or threatened against Ronald Tutor, the Attorneys' ostensible "client." As a result, this was not protected petitioning activity. Respondent is likely to prevail on the merits because the Attorneys admittedly committed fraud. Respondent relied on the misrepresentations, was damaged by the needless delay, and incurred additional attorney fees and court costs.

THE TRIAL COURT'S RULING

The trial court found that the Attorneys' conduct is not protected petitioning activity under the anti-SLAPP statute. Though the courts have given protection to the statements of attorneys who represent parties involved in litigation, those cases do not apply here. The Attorneys did not claim to represent the Ebertses in the litigation with respondent; rather, they purported to represent a nonparty, Ronald Tutor. The Attorneys falsely told respondent that Tutor authorized them to arrange payment for the Ebertses' debt. This was an elaborate show—the Attorneys pretended to be Tutor's attorneys while they were in fact acting for the Ebertses. The anti-SLAPP statute does not protect attorneys who violate a professional misconduct statute criminalizing deceit or collusion with the intent to deceive the court or any party. Because the Attorneys admit the truth of the allegations in respondent's complaint, this amounts to an admission of violating the professional misconduct statute.

DISCUSSION

1. Appeal and Review

Appeal lies from the order denying the Attorneys' motion to strike the complaint under the anti-SLAPP statute. (§§ 425.16, subd. (i), 904.1.) The court's ruling on the motion is subject to de novo review. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245.)

2. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss "'a meritless suit brought 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.) To protect constitutional rights, the anti-SLAPP statute must "be construed broadly." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) When resolving an anti-SLAPP motion, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Equilon Enterprises v. Consumer Cause, Inc.* (2002 29 Cal.4th 53, 67.)

There are two components to a motion to strike brought under section 425.16. First, the Attorneys must make a threshold showing that the lawsuit arises from an act in furtherance of their constitutional right to petition or to free speech. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) Second, if the lawsuit affects a protected right, the court decides whether there is a reasonable probability that plaintiff will prevail on 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.) Plaintiff has the burden of demonstrating that it will prevail on the merits. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.)

3. Application of the Anti-SLAPP Statute

a. Threshold Showing That The Lawsuit Arises From Protected Activity

The Attorneys contend that their communications with respondent related to litigation and, as such, is protected First Amendment petitioning activity. (§ 425.16, subd. (e)(2); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) They observe that settlement offers made by counsel on behalf of a client are an exercise of the right to petition. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963. See also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [protection extends to "qualifying acts committed by attorneys in representing clients in litigation"] and *Neville v.*

Chudacoff (2008) 160 Cal.App.4th 1255, 1262, fn. 6 ["An attorney has standing to bring a special motion to strike a cause of action arising from petitioning activity undertaken on behalf of the attorney's client"].)

The problem, of course, is that the Attorneys were not representing a "client" when they communicated with respondent. The Letter states that Bernardino was retained by Tutor, who authorized him to say that the Ebertses would soon be beneficiaries of a multi-million dollar transaction. This is false. Tutor testified that he never retained Bernardino, nor authorized any debt settlement offers. Bernardino admits that he was never retained by, or met, or spoke to Tutor, and was not authorized to negotiate a settlement on behalf of Tutor. Without an actual client, the Attorneys acted as officious intermeddlers when they communicated with respondent.

To connect himself with a client, Bernardino declares that he represented Christopher Eberts. This still makes the Letter untrue. Bernardino never told respondent that Christopher Eberts was his client. In fact, the Letter was a ploy to deceive respondent into thinking that Bernardino acted as an emissary from the deep-pocketed Tutor, and that Bernardino was independent from deadbeat debtor Eberts.

The parameters for petitioning activity are broad. There need only be "'a statement [made] "in connection with" litigation . . . if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.'" (*Seltzer v. Barnes*, *supra*, 182 Cal.App.4th at p. 962.) Although the parameters for section 425.16 are broad, they are not unlimited. Not all speech or petitioning activity is deserving of constitutional or anti-SLAPP protection. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 313.) At the far end of the spectrum, political protest that is violent (or threatens violence) is not protected by the First Amendment or section 425.16. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, *supra*, 129 Cal.App.4th at pp. 1250-1257.) Another example of unprotected speech or petitioning is a "demand letter" from a lawyer that amounts to extortion. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 325-330.) Some examples are more subtle. An attorney who illegally wiretaps a telephone to obtain confidential information for his

client cannot claim the protection of the anti-SLAPP statute. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 445-447.) While campaign contributions are a type of political speech, *illegal* campaign contributions that violate Government Code disclosure requirements are afforded no protection. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365-1366.)

Following the *Paul for Council* case, the Supreme Court devised a rule to address the intersection between the anti-SLAPP statute and statutory violations. "[S]ection 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 317.) The issue is whether "the defendant concedes, or the evidence conclusively establishes," that the speech or petition is illegal as a matter of law. (*Id*. at p. 320.) This determination may be made during the first step of the two-pronged anti-SLAPP analysis, unless a factual dispute exists about the legitimacy of the defendant's conduct. (*Id.* at pp 316-317.)

Respondent contended—and the trial court agreed—that the Attorneys' conduct is illegal as a matter of law because it violated Business and Professions Code section 6128.[3] The statute allows for criminal prosecution of lawyers who intentionally deceive the court or any party. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 219; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 919.) A disputed factual issue is created under the statute if the attorney avers "that he never misrepresented facts to respondent [nor] concealed any evidence . . . ." (*Seltzer v. Barnes*, *supra*, 182 Cal.App.4th at p. 965.)

In this case, unlike *Seltzer*, the Attorneys do not aver that they never misrepresented facts to respondent. The Letter is a fabrication claiming an existence of an attorney-client relationship between Bernardino and Tutor. Bernardino now admits

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[3] The statute reads: "Every attorney is guilty of a misdemeanor who either: (a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party. . . . [¶] Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both."

that he was not retained by Tutor, and admits that he was not authorized to tell respondent that the Ebertses were going to receive a large sum of money from Tutor. When the $2 million promised by Bernardino in the Letter failed to materialize, respondent filed suit.

Instead of stopping with the initial lie, Bernardino continued to feign authorization and concoct assurances that Tutor would personally repay the Ebertses' debt, causing respondent to defer prosecution, then dismiss its lawsuit, thereby losing an opportunity to foreclose on the property securing its promissory note before the Ebertses declared bankruptcy. Bernardino admits under penalty of perjury that he never met, spoke to, or had any type of agreement or understanding with Ronald Tutor for the payment of the Ebertses' debt. The practice of law cannot endure as a profession if attorneys misrepresent their authority to act, then renege on their agreements. (*Caro v. Smith* (1997) 59 Cal.App.4th 725, 739.)

Given the undisputed facts of this case, we find that Bernardino's conduct was illegal as a matter of law.[4] Bernardino could not have believed that he was retained by (or authorized to negotiate for) someone he never met and had no agreement with. In the Letter—and in later communications aimed at thwarting respondent's effort to collect its debt from the Ebertses—Bernardino intentionally deceived a party, an offense subject to criminal prosecution. (Bus. & Prof. Code, § 6128.) The First Amendment does not protect unethical and duplicitous conduct by lawyers. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 825.) As a result, the Attorneys cannot invoke the protection of the anti-SLAPP statute. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 317.)

The Attorneys cite the litigation privilege in defense of their conduct. The privilege applies to communications made by litigants in judicial proceedings, to achieve the objects of the litigation, and have a connection or logical relation to the action. (Civ. Code, § 47, subd. (b); *Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174

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[4] In their motion to strike, the Attorneys agreed that the facts alleged in the pleading "are assumed true for purposes of this special motion to strike only."

Cal.App.4th 1534, 1550.) The communications must be made "in good faith" and "for legitimate purposes" to be protected by the privilege, a triable factual issue. (*Herzog v. "A" Company, Inc.* (1982) 138 Cal.App.3d 656, 660-662; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251-1252.) While the privilege may potentially limit the liability of a party who sends an illegal letter offering to settle proposed litigation, it does not make the letter a constitutionally protected communication under section 425.16. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 325.)

b. Probability of Prevailing

The Attorneys did not establish the threshold issue of demonstrating that they engaged in protected petitioning or speech activity. Accordingly, we do not address whether respondent established a probability of prevailing on its claims. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 80-81; *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 582.)

4. Attorney Fees and Costs

The prevailing party on a motion to strike is entitled to recover attorney fees and costs incurred in the trial court and on appeal. (§ 425.16, subd. (c); *Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 933.) Respondent may bring a motion in the trial court to recover the attorney fees and costs it incurred in this appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.