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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT H. McCUTCHEON, JR., Plaintiff and Respondent, v. DAVID COURY, Defendant and Appellant.	B270279 (Los Angeles County Super. Ct. No. BC570522)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed and remanded with directions.

Haworth Law Office and James W. Haworth for Defendant and Appellant.

Law Office of Robert L. Risley and Robert L. Risley for Plaintiff and Respondent.

David Coury appeals from the order denying his motion to strike respondent Robert McCutcheon's malicious prosecution cause of action under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) The cause of action is based on Coury's earlier unsuccessful petition to probate what was found to be a forged will. Coury argues that McCutcheon failed to make the requisite showing of probability of prevailing on the merits because he improperly relied on speculation, hearsay, and a request for judicial notice of the contents of court records from the earlier probate case. We agree and reverse.

FACTUAL AND PROCEDURAL SUMMARY

McCutcheon is a first cousin once removed on the paternal side of decedent Alexander White, III. Coury is a second cousin of White on the maternal side. McCutcheon, as the administrator of White's estate, sued Coury in January 2015. The operative second amended complaint included eight counts, the first four of which asserted in the alternative two breach of contract and two common count claims, based on alleged loans from White to Coury. The fifth count, for malicious prosecution, was based on Coury's alleged filing of a fraudulent petition to probate a forged will in order to obtain the assets of White's estate. Counts six through eight asserted claims for conversion of White's coin collection, financial elder abuse for using White's credit and debit cards, and breach of fiduciary duty based on Coury's status as White's financial advisor and caregiver.

In August 2015, Coury filed an anti-SLAPP motion to strike the malicious prosecution claim, which he incorrectly identified as the fourth cause of action in the second amended

complaint.[1] In opposition to the motion, McCutcheon asked the court to take judicial notice of court records in the earlier probate case. These records included Coury's July 2013 petition for letters of administration of White's estate, in which Coury stated he was White's cousin and "on information and belief" his sole heir; the August 2013 order appointing McCutcheon special administrator and directing Coury to stop using White's property and turn it over to McCutcheon; Coury's September 2013 petition to probate a 2012 will purportedly signed by White and witnessed by White's caregiver Kathleen Armstrong and another individual; the October 2013 will contest filed by McCutcheon and other first cousins and first cousins once removed; the probate court's August 2014 decision denying probate of the will with prejudice on the ground that the signatures of White and the second witness on the will were forged; the September 2014 judgment for the contestants, denying probate of the will and granting McCutcheon's petition for letters of administration; and the September 2015 order dismissing Coury's appeal.

McCutcheon also sought judicial notice of the trial testimony of several witnesses in the probate case, and the deposition testimony of White's friend Rick Tuttle, which was read at the trial in that case.[2] He lodged the clerk's and

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[1] Contrary to McCutcheon's representation on appeal, Coury's motion was not directed at a common count.

[2] Tuttle testified he and Coury discussed that White should leave his assets to Coury, whom Tuttle would advise. According to Tuttle, Coury memorialized the idea in a typed document, "but there was never an appropriate time to talk to [White] about it." Another witness, Anthony Reese, testified that, on July 17, 2013, the day of White's death, Coury told Reese about the idea to

reporter's transcripts from the probate case with the trial court in this case.

Besides the request for judicial notice, McCutcheon submitted his declaration, along with the declaration of Jennifer MacDonald, another first cousin once removed. In their declarations, both McCutcheon and MacDonald acknowledged that some of their statements were based "on information and belief." McCutcheon declared that he had found a folder marked "David Coury" among White's papers. The folder contained two e-mails from 1999, which stated that the sender, "Dog 112" (a name McCutcheon "was aware" Coury used), was spending Thanksgiving with his family in Albuquerque: "Aunt Mary, Donna, Cousins Bob & Jeff, Krista and Casey." The e-mails were addressed to White and the Fagleys, who according to McCutcheon were cousins of Coury and White.

MacDonald stated that, based on information from Ancestry.com, Archives.com, and other publicly available records, she had compiled a family tree for the maternal side of White's family, which showed that White had a second cousin, Robert (Bob) Fagley, who lived in New Mexico, and was Coury's first cousin. She "surmised" that Bob Fagley was married to Donna Fagley and had two children Casey and Krista, and that those were the persons named in the e-mails McCutcheon had found.

Based on the request for judicial notice and the two declarations, McCutcheon argued he could prove Coury had filed

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dispose of White's assets in consultation with Tuttle, and of the unsuccessful attempt to get White to sign a will. The purported 2012 will Coury offered for probate included a provision that Coury "will consult closely with . . . Tuttle to determine the appropriate ultimate disposition of these assets."

knowingly false petitions for letters of administration and for probate of a will.

In reply, Coury argued McCutcheon had produced no admissible evidence since the court could not take judicial notice of hearsay statements in prior trial testimony and the probate court's statement of decision. He filed evidentiary objections to the McCutcheon and MacDonald declarations, based on their lack of personal knowledge, speculation, and reliance on inadmissible hearsay. Coury also presented an advice of counsel defense based on his own declaration; the declaration of attorney Matthew Kanin, who stated he advised Coury to pursue the will contest; and the declaration and report of the handwriting expert retained by Kanin in the probate case.

McCutcheon filed a "response to the reply," in which he argued that sworn trial testimony is "more reliable than a declaration," but if the court preferred declarations, McCutcheon asked for an opportunity to provide them to the court. The court took the matter under submission after a hearing.[3]
Subsequently, Coury filed an ex-parte application requesting additional oral argument, in which he argued that, as pled, the malicious prosecution claim was not based on the earlier filed petition for letters of administration, and that McCutcheon should not be allowed to amend the operative complaint to defeat the anti-SLAPP motion. After a hearing, the court denied the ex-parte application.

In a December 2015 minute order, the court denied Coury's

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[3] Because the record on appeal does not contain a reporter's transcript or settled statement of any of the oral proceedings in this case, we cannot determine what was said during those proceedings.

anti-SLAPP motion. The court found that the malicious prosecution cause of action was within the anti-SLAPP statute, and that McCutcheon had demonstrated a probability of prevailing on the merits. The court took judicial notice of the record in the probate case, which showed the probate court had found the will was forged, and concluded that the probate case had terminated favorably to McCutcheon. The court also found sufficient evidence on the elements of lack of probable cause and malice based on Coury's representations in the petition for letters of administration, which were knowingly false at the time they were made.

This appeal followed.

DISCUSSION

Under the anti-SLAPP statute, a cause of action arising from a defendant's act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).) A malicious prosecution action falls within the purview of the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) To prevail on the merits of such an action, the plaintiff must demonstrate that the underlying case "(1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.)

In ruling on an anti-SLAPP motion, the court must consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

(Code Civ. Proc., § 425.16, subd. (b)(2).) The proffered evidence must be competent and admissible. (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 714.) We review an order denying an anti-SLAPP motion de novo. (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 269, fn. 3.) We accept as true the evidence that favors the plaintiff and evaluate the defendant's evidence "'only to determine if it has defeated that submitted by [the plaintiff] as a matter of law.' [Citation.]" (*Ibid.*)

I

The trial court's written ruling indicates that the court relied on declarations lacking personal knowledge and based on hearsay genealogical evidence to find sufficient proof of a theory not alleged in the operative pleading: that in filing a petition for letters of administration in the probate case, Coury knowingly misrepresented he was the decedent's only heir.

While a plaintiff cannot use an "eleventh-hour amendment" to plead around an anti-SLAPP motion (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772–773), an amendment may be allowed to add an essential element missing from a malicious prosecution cause of action that is shown to exist by the evidence submitted in connection with the motion. (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 872.) However, affidavits or declarations that are not based on personal knowledge, that contain hearsay or impermissible opinions, or that are argumentative, speculative, or conclusory are insufficient for purposes of such a motion. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)

Coury made various evidentiary objections to the declarations of McCutcheon and MacDonald, the only evidence presented in support of the theory that Coury had knowingly

misrepresented himself as White's only heir in the petition for letters of administration. The objections were based on the declarants' lack of personal knowledge, speculation, and reliance on inadmissible hearsay. The court did not rule on Coury's objections and expressly accepted the theory advanced by the declarants. McCutcheon agrees we should consider Coury's objections overruled (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 534), but argues we should apply a deferential abuse of discretion standard to the evidentiary issues. Some courts review de novo questions of law, such as whether the proffered evidence is hearsay. (See, e.g., *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.) But since an evidentiary ruling based on a misunderstanding of the law is an abuse of discretion, it makes no difference which standard of review we apply. (See, e.g., *Brown v. County of Los Angeles* (2012) 203 Cal.App.4th 1529, 1535.)

The proponent of hearsay evidence bears the burden of showing it falls within a hearsay exception. (*Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 693.) McCutcheon did not cite to a hearsay exception in the trial court. On appeal, he seeks to justify the admissibility of MacDonald's declaration regarding her research of the family relations on the mother's side of White's family, of which she admittedly has no personal knowledge, as a business record (Evid. Code, § 1271) or as a statement concerning the family history of another (*id.*, § 1311). Neither exception to the hearsay rule applies. MacDonald did not compile the family history "in the regular course of a business" (*id.*, § 1271, subd. (a)); nor is her research of online sources and unidentified public records based on statements of an unavailable witness with a blood relation to White. (*Id.*, § 1311,

subd. (a)(1).) The point is not whether MacDonald herself is related to White or unavailable as a witness, but that her research is based on hearsay sources, such as Ancestry.com, that are not blood relatives of White's and hence not within the exception.

To the extent McCutcheon's declaration is dependent on MacDonald's research, it is inadmissible for the same reason. Thus, there is no admissible evidence that Coury knew of the existence of another second cousin of White's, and the court erred in denying Coury's motion on the ground that he lied in the petition for letters of administration.

II

To prove the malicious prosecution claim as to the September 2013 petition to probate the will that was found to have been forged, McCutcheon had to show that Coury "offered the forged [will] with knowledge of its falsity." (See *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639, 645.) The court's ruling does not indicate that the court considered whether McCutcheon could prevail on that theory. As a general rule, an order or judgment is presumed correct, and all presumptions are indulged to support it on matters as to which the record is silent. (See *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.) Even were the court's finding of lack of probable cause and malice with regard to the earlier petition for letters of administration sufficient to support a similar inference as to the latter petition to probate a will, we cannot draw that inference since, as we have explained, the finding was based on inadmissible hearsay.

The only other offer McCutcheon made in the trial court was through a request for judicial notice of probate court records, to which Coury objected. The parties disagree whether the

contents of the probate records were a proper subject of judicial notice.

"'Under the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required. Judicial notice is thus a substitute for formal proof. [Citation.]' [Citation.]" (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.) McCutcheon relied on the rule that the court may take judicial notice of any court record. (See Evid. Code, § 452, subd. (d).) "This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. [Citation.]" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) It follows that reliance on a request for judicial notice to prove disputed facts based on court records is improper because judicial notice, by definition, applies solely to undisputed facts. "[O]nly where the order or judgment establishes a fact for purposes of . . . res judicata or collateral estoppel . . . would the fact so determined be a proper subject of judicial notice." (*Kilroy v. State* (2004) 119 Cal.App.4th 140, 147; see also *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90 (*Rodgers*), and cases cited in it.)

Coury argues that collateral estoppel is waived because it was not raised in the trial court, and McCutcheon did not address the issue in his respondent's brief. "Issue preclusion by collateral estoppel 'prevents "relitigation of issues argued and decided in prior proceedings." [Citation.]' [Citations.] The doctrine 'rests

upon the ground that the party to be affected . . . has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. . . .' [Citations.]" (*Rodgers*, *supra*, 136 Cal.App.4th at pp. 89–90.) Collateral estoppel need not be raised by the pleadings so long as it is raised by the evidence, and it does not arise until the former action is finally resolved. (*Id*. at p. 89.)

Although McCutcheon did not expressly invoke collateral estoppel, the doctrine was raised by the evidence, at least with regard to whether the will was forged. McCutcheon relied exclusively on his request for judicial notice based on the record in the probate case, in which Coury was a party, rather than on new evidence. Under those circumstances, McCutcheon cannot be said to have waived the doctrine by reopening the issue to investigation. (See *Rodgers*, *supra*, 136 Cal.App.4th at p. 89.) The judgment in the probate case includes a finding that the will was forged. The finding was issued after trial and was necessary to the decision to deny Coury's petition to probate the will. Coury's appeal from the probate court's judgment (case No. B260364) was dismissed on his request in September 2015. On our own motion, we take judicial notice that the remittitur in case No. B260364 issued in November 2015. (See Evid. Code, § 459 [reviewing court may take judicial notice as allowed in § 452].) Thus, the judgment in the probate case had become final by the time the trial court issued its order in this case in December 2015. (See *McClain v. Rush* (1989) 216 Cal.App.3d 18, 26 [remittitur after appeal renders judgment final for all purposes, including collateral estoppel]; see also *Wood v. Herson* (1974) 39 Cal.App.3d 737, 748 [excusing technical lack of finality

where prior appeal was abandoned but not dismissed].) The trial court did not err in taking judicial notice of the judgment in the probate case, which was based on a finding that the will was forged.

However, the record does not indicate that collateral estoppel applies to the additional issue relevant to the malicious prosecution cause of action—whether Coury offered the will to probate knowing it was forged. The judgment in the probate case did not need to resolve that issue, and the probate court made no finding with respect to it. Nor did the trial court in this case purport to take judicial notice of any such finding.

In the trial court, McCutcheon argued that judicial notice of the testimony offered in the probate case was proper because such testimony was not hearsay. That was incorrect. Former testimony is hearsay, admissible under specific exceptions. (See Evid. Code, §§ 1291 [former testimony offered against party to former proceeding], 1292 [former testimony offered against nonparty to former proceeding].)

McCutcheon's argument on appeal that the recorded testimony of witnesses in the probate case should be treated the same as a declaration for purposes of the anti-SLAPP motion is not persuasive. McCutcheon relies on *Sweetwater Union School District v. Gilbane Building Company* (2016) 245 Cal.App.4th 19, review granted June 8, 2016, S233526. The case is noncitable under California Rules of Court, rule 8.1115, because the amendment of that rule, allowing citation of cases in which review has been granted, did not become effective until July 1, 2016. (See *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109 [grant of review nullifies opinion, and unless

further approved or adopted by Supreme Court, it is of no precedential effect].)

McCutcheon also relies on *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, which in a footnote equated testimony from another action to a declaration for purposes of summary judgment. (*Id.* at p. 149, fn. 3.) The footnote in *Williams* has been rightly criticized as allowing an end run around the hearsay exception for former testimony. (See *Gatton v. A.P. Green Services, Inc.*, *supra*, 64 Cal.App.4th at pp. 696–697; accord *L & B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1348.)

Nothing in the anti-SLAPP statute suggests the Legislature intended to treat former testimony as an affidavit and thus suspend the foundational requirements for its admissibility under the former testimony exception. The requirement of witness unavailability under that exception is meant to ensure the necessity of admitting testimony from another proceeding in the first place. (*Gatton v. A.P. Green Services, Inc.*, *supra*, 64 Cal.App.4th at p. 694.) McCutcheon has not shown that the witnesses on whose testimony he intended to rely were unavailable. While the anti-SLAPP statute creates a "short time frame for anti-SLAPP filings and hearings" and stays discovery, the stay is not absolute as the court may order discovery "on noticed motion and for good cause shown." (*Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65–66, citing Code Civ. Proc., § 425.16, subds. (f) & (g).) McCutcheon has not shown that witness affidavits could not be obtained without additional discovery.

Without admissible evidence supporting an inference that Coury knew the will was forged when he presented it for probate,

McCutcheon cannot make a prima facie case of malicious prosecution. Because the anti-SLAPP motion should have been granted for lack of admissible evidence, we need not consider Coury's advice of counsel defense.

The order denying the motion is reversed. The anti-SLAPP statute provides for an award of attorney fees and costs to a prevailing defendant. (Code Civ. Proc., § 425.16, subd. (c).) On remand, the trial court must determine the amount of such fees and costs to be awarded to Coury, including those incurred on appeal. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.)

DISPOSITION

The order denying the anti-SLAPP motion is reversed and the matter is remanded with directions to enter a new order granting the anti-SLAPP motion, striking the cause of action for malicious prosecution, and determining the amount of costs and attorney fees due to Coury.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.