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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RAFAEL OSEGUERA et al., Plaintiffs and Appellants, v. HARRY HENNIG, Defendant and Respondent.	B232805 (Los Angeles County Super. Ct. No. BC440694)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Affirmed.

Law Offices of William J. Houser and William J. Houser for Plaintiffs and Appellants.

Versus Law Group and Holly Walker for Defendant and Respondent.

Appellants Rafael and Carmina Salazar Oseguera appeal from the judgment of dismissal following a successful motion under Code of Civil Procedure section 425.16 by Respondent Harry Hennig. Finding no error, we affirm.

PROCEDURAL AND FACTUAL SUMMARY

Appellant Rafael Oseguera was sued in Los Angeles Superior Court in 2008 in a complaint arising out of a traffic accident. Default judgment was entered against him after he failed to file a responsive pleading in the matter. On November 8, 2010, he and Carmina Salazar Oseguera (collectively Oseguera) filed a complaint against Hennig, the process server in the prior action, alleging that Hennig had filed a false and perjurious proof of service in that action. According to the complaint, Hennig filed a proof of service asserting substituted service on a person at least 18 years of age when, in fact, he had served Oseguera's daughter, who was 14 years old at the time. As a result, Oseguera alleged, a default judgment was entered against him, funds were taken from his account, and he lost his commercial driver's license, causing him to lose his job and his home.

The complaint alleged three causes of action: abuse of process; unfair business practices (Bus. & Prof. Code, § 17200); and intentional and negligent infliction of emotional distress. Oseguera sought compensatory and punitive damages.

Hennig demurred to the complaint, and filed a special motion to strike pursuant to Code of Civil Procedure section 425.16.[1] Oseguera opposed the motion. The trial court heard the matter on March 4, 2011.

Initially, the court sustained the demurrers to all causes of action with leave to amend, but then it vacated the ruling and took the matter under submission. In a minute order dated March 7, 2011, the court granted the special motion to strike.[2]

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[1] Except as otherwise noted, all further statutory citations are to the Code of Civil Procedure.

[2] Oseguera argues, without authority, in his reply brief, that this action by the court deprived him of his right to oral argument. This assertion does not raise an issue for

The trial court entered judgment on March 22, 2011. Oseguera timely appealed.

DISCUSSION

Section 425.16 provides, "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 or 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." (§ 425**.**16, subd. (b)(1).) "In ruling on a defendant's motion under section 425.16, the trial court engages in a two-step process. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425**.**16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425**.**16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."' (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).)'" (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 615, 616 (*City of Los Angeles*).)

Our review of the trial court's ruling on a motion under 425.16 is de novo. (*City of Los Angeles, supra,* at p. 617; see also *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

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review: "Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078.)

Hennig argued, and the trial court found, that this action is governed by section 425.16, subdivision (e), which provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (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, or (4) 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." Specifically, the court relied on subdivision (e)(1). The court found that the filing of a false proof of service is communication within the scope of the statute, and protected by the litigation privilege.[3] As such, the court determined that Hennig had met his burden under the first prong of the statute, and found that Oseguera could not demonstrate a likelihood that he would prevail and thus could not satisfy his burden under the second prong. Oseguera argues that the execution of the false declaration was a criminal, non-communicative act, and as such not protected by either section 425.16 or the litigation privilege. The trial court did not err.

A. The Challenged Claims are Subject to Section 425.16

The preliminary question in addressing a motion under section 425.16 is whether the claims arise from protected activity. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.) If a cause of action arises from litigation activity, it is generally protected and properly subject to a motion to strike; for these purposes, an act "includes communicative conduct such as the filing, funding, and prosecution of a civil action. (*Ludwig v. Superior Court*

[3] Civil Code section 47, subdivision (b)(2).

(1995) 37 Cal.App.4th 8, 17-19.)" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).)

Oseguera asserts that Hennig, in filing a perjurious declaration, committed a criminal act. Because it was, in his view, neither communicative nor legal, he alleges the first prong of section 425.16 cannot be satisfied.

1. The Declaration Was Communication Within the Meaning of the Statute

The allegations of damage in the complaint assert financial and other consequences arising from the entry of the default judgment in the underlying case. Although Oseguera asserts that the complained of act is the falsification of the declaration, none of the damages alleged could have arisen without the filing of that declaration in the action. In *Rusheen, supra,* 37 Cal.4th 1048, the Supreme Court considered claims arising from the filing of false declarations of service and enforcement of the resulting judgment based on their use. As here, the plaintiff alleged that this was non-communicative behavior. The Court concluded that "the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Id*. at p. 1062.)

We reach no different result here. Even perjurious declarations, if made to further the purposes of litigation, are considered communicative. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 959 ["declarations of service to obtain a default judgment are a category of publication permitted by law."])

2. The Communication Was Neither Conceded, Nor Conclusively Established, To Be Illegal

Oseguera asserts that, even if the declaration of service could be viewed as a communication, the fact he alleges that Hennig committed perjury is sufficient to defeat the application of the statute. However, an allegation of illegality is not sufficient to remove an action from the motion to strike procedure. It is only in the "narrow

circumstance" in which the defendant concedes, or the evidence conclusively establishes, that the conduct for which the defendant seeks protection is illegal as a matter of law that the defendant is precluded from using section 425.16 to strike the plaintiff's action. (*Flatley v. Muro* (2006) 39 Cal.4th 299, 316 (*Flatley*); see also *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460 [where "the legality of [a defendant's] exercise of a constitutionally protected right [is] in dispute in the action, the threshold element in a section 425.16 inquiry has been established."])

Here, Hennig does not concede illegality, nor has it been conclusively established. The evidence submitted by Oseguera to the trial court demonstrated that his daughter was not in fact 18 at the time of service. It did not, however, demonstrate the willful and knowing falsification required to prove perjury. (Pen. Code, § 118.) Oseguera argues that Penal Code section 125, which provides that "[a]n unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," closes the evidentiary gap. It does not: "Section 125 has confused juries, attorneys and judges for more than 100 years, despite our Supreme Court's attempt to explain it." (*People v. Rutter* (2006) 143 Cal.App.4th 1349, 1355, fn. omitted.) Section 125 is not intended to eliminate the proof of criminal intent, central to proving the crime of perjury. It "does not apply to cases in which the defendant unqualifiedly asserts the truth of something as to which he has knowledge but is mistaken – this is clearly not perjury under Section 118." (*Id*. at p. 1357.)

On the record before us, appellant has shown nothing more than error. This is not sufficient to defeat the showing under the first prong of section 425.16, but instead left the issue of potential perjury to be established in the second prong – where appellant must establish the probability of prevailing. (See *Flatley, supra,* 39 Cal.4th at p. 319; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305 ["The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First

Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous."])

B. The Gravamen of the Action Was the Filing of the False Service of Process Which is Protected by the Litigation Privilege

"[T]he critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Stated differently, "it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies." (*Martinez v. Metabolife Internat., Inc*. (2003) 113 Cal.App.4th 181, 188.) As discussed above, claims concerning the falsification of declarations of service used to obtain a default judgment are within the scope of the statute because the gravamen of the action is the procurement of the judgment. (*Rusheen, supra*, 37 Cal.4th at p. 1062.)[4]

As a result, Hennig satisfied the first prong of the statute, placing on Oseguera the burden of demonstrating that his claims are likely to succeed on the merits.[5] The trial court found that he could not do so, as his claims are barred by the litigation privilege. We agree.

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[4] Oseguera concedes that the filing of the declaration cannot provide the basis for his claims because of the litigation privilege.

[5] Once the defendant establishes the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises, supra,* 29 Cal.4th at p. 67.) "[T]he plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Rusheen, supra,* 37 Cal.4th at p. 1056.)

We have already addressed the threshold question in determining whether the litigation privilege applies: whether the alleged injuries arise from a communicative act. (*Kimmel v. Golland* (1990) 51 Cal.3d 202, 211.) The remaining question is whether the claims asserted are subject to the privilege, precluding any showing of success on the merits.

"The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a "publication or broadcast" made as part of a "judicial proceeding" is privileged. This privilege is absolute in nature, applying "to *all* publications, irrespective of their maliciousness." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 (*Silberg*).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." (*Id.* at p. 212.) The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen, supra,* 37 Cal.4th at p. 1057.)

"'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' (*Silberg, supra,* 50 Cal.3d at p. 213.) In order to achieve this purpose of curtailing derivative lawsuits, we have given the litigation privilege a broad interpretation. The litigation privilege "derives from common law principles establishing a defense to the tort of defamation. [Citation.] Its placement in the Civil Code immediately following the statutory provisions defining the elements of the twin defamation torts of libel and slander [citations] makes clear that, at least historically, the section was primarily designed to limit an individual's potential liability for defamation." (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163.) Beginning with *Albertson v. Raboff,* which involved an action for defamation of title, we first extended the litigation privilege to apply to torts other than defamation. (*Albertson v. Raboff* (1956) 46 Cal.2d 375.) As we

observed in *Silberg*, the litigation privilege has since "been held to immunize defendants from tort liability based on theories of abuse of process [citations], intentional infliction of emotional distress [citations], intentional inducement of breach of contract [citations], intentional interference with prospective economic advantage [citation], negligent misrepresentation [citation], invasion of privacy [citation], negligence [citation] and fraud [citations]." (*Silberg, supra,* 50 Cal.3d at p. 215; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241-1242.)

Oseguera argues that the privilege should not apply because the settled policies that support it are not served by its application to the preparation of false declarations of service. He asserts that such conduct is not clearly within the scope of the privilege, relying primarily on *Drum v. Bleau Fox & Associates* (2003) 107 Cal.App.4th 1009 and *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457. In holding that the litigation privilege applies to claims based on the filing of allegedly false declarations of service, the Supreme Court disapproved *Drum* (*Rusheen, supra,* 37 Cal.4th at p. 1056.) The Court also distinguished *Kappel*, because it had not considered the applicability of the litigation privilege and thus was not authority for the question. (*Rusheen, supra,* at p. 1059.) *Rusheen* governs this analysis, and appellant's arguments must be resolved in Hennig's favor. All of the causes of action are subject to the privilege; Oseguera cannot prevail.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.