Filed 9/13/18 Huang v. Sayer CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WANG SHIU HSIA HUANG et al., Plaintiffs and Respondents, v. MICHAEL SAYER, Defendant and Appellant.	B284322 (Los Angeles County Super. Ct. No. EC063849)

APPEAL from an order of the Superior Court of Los Angeles County. Ralph C. Hofer, Judge. Affirmed.

Michael Sayer, in pro. per.; Berman Berman Berman Schneider & Lowary and Howard Smith for Defendant and Appellant.

Mobley Law Offices, and Felicia A. Mobley for Plaintiffs and Respondents.

Defendant Michael Sayer appeals from an order denying his special motion to strike Wang Shiu Hsia Huang and Tuu Cherng Hwang's (together, Plaintiffs) complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16).[1] Sayer, who is an attorney, asserts the court erred in denying his motion because Plaintiffs' claims are premised on his protected activities of advising and instructing a client. He also contends Plaintiffs' conspiracy cause of action is moot. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the operative third amended complaint (TAC), as well as the declarations and evidence submitted in connection with Sayer's anti-SLAPP motion. (See § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

According to Plaintiffs, sometime around 2000, they entered into a joint venture with their daughter, Li-Ya Huang, with the goal of securing financial independence in their retirement. Over the next few years, Plaintiffs gave Li-Ya Huang over $2 million in real property and cash to invest on their behalves. Li-Ya Huang represented to Plaintiffs that she was increasing their investment and earning profits by buying and selling real properties. Plaintiffs subsequently discovered that Li-Ya Huang had secretly transferred nearly all of the properties—including properties previously held in Plaintiffs' names—into corporations and a trust that she owned or controlled. When Plaintiffs confronted their daughter about these transactions, she told them her purpose was to keep the

---

[1] All future unspecified statutory references are to the Code of Civil Procedure.

properties tied up in litigation until they died, thereby depriving them of the properties and any equity contained in them.

In 2011, Plaintiffs brought an action against Li-Ya Huang to recover their investment proceeds (*Huang I*). Plaintiffs generally alleged that Li-Ya Huang breached an oral contract regarding the joint venture and engaged in a series of fraudulent real estate transactions. Li-Ya Huang retained Sayer to represent her in the *Huang I* litigation.

On the eve of trial in *Huang I*, Li-Ya Huang filed a chapter 13 bankruptcy petition. According to Plaintiffs, shortly before filing the petition, Li-Ya Huang transferred several properties into the J.L. Supplemental Needs Trust (Trust), for which Sayer was the trustee. Within days after the bankruptcy case was dismissed, Sayer conveyed the properties to a corporation controlled by Li-Ya Huang. The corporation obtained a nearly $4 million loan secured by the properties, after which it conveyed the properties back to the Trust for no value. Plaintiffs maintain that Li-Ya Huang and Sayer initiated these transfers in order to conceal the properties from the bankruptcy court and creditors.

According to Plaintiffs, while *Huang I* was pending, Sayer also advised Li-Ya Huang to liquidate certain properties and transfer the cash out of the country to protect the assets in the event Plaintiffs prevailed in the litigation. Sayer also offered to assist Li-Ya Huang in the transactions by acting as a dual real estate agent/broker. Li-Ya Huang acted on Sayer's advice, and in May 2015, she sold three properties with his assistance.
The next month, Sayer instructed Li-Ya Huang to sell three additional properties. Sayer represented both Li-Ya Huang and the buyer in the sale of at least one of those properties, and facilitated the transfer of another property to one of Sayer's

personal friends. Sayer also agreed to represent two other purchasers in the event they faced lawsuits related to the transfers, for which he was paid by Li-Ya Huang. In addition, Sayer placed liens on several of the properties in order to encumber them and protect them from creditors.

Plaintiffs responded to this alleged conduct by initiating the present action against Li-Ya Huang, Sayer, and several other individuals and corporations involved in the transfers.[2] In the TAC, Plaintiffs named Sayer as a defendant in his individual capacity and as trustee of the Trust. Based on the allegations summarized above, Plaintiffs asserted causes of action against Sayer for fraudulent transfer of real property, conspiracy, aiding and abetting tort, and financial elder abuse.

Sayer responded to the TAC by filing a special motion to strike pursuant to the anti-SLAPP statute (§ 425.16). Sayer asserted Plaintiffs' claims arose from his use of the court system to assist Li-Ya Huang liquidate her assets, which constituted protected activity under the anti-SLAPP statute.[3] He further argued that Plaintiffs could not show a probability of success because he owed them no duty, they suffered no damages, and his conduct and communications were protected by the litigation privilege and attorney-client conspiracy statute (Civ. Code, §§ 47,

---

[2] After filing the complaint in this action, Plaintiffs obtained a judgment in *Huang I* against Li-Ya Huang for approximately $4 million.

[3] Sayer's arguments appear to have been based primarily on a prior version of the complaint, which contained allegations suggesting Sayer intentionally delayed the *Huang I* litigation while Li-Ya Huang took actions to protect her assets. Plaintiffs removed most of those allegations from the TAC.

subd. (b), 1714.10).

The court denied Sayer's motion. It determined the focus of the complaint was Sayer's alleged conduct related to transferring assets, rather than his litigation activities. The court noted that the transfers did not appear to have involved any judicial or quasi-judicial procedures, and Sayer allegedly facilitated the transfers in his capacities as trustee and a real estate agent/broker. Based on these findings, the court concluded the TAC did not arise from activity protected under the anti-SLAPP statute.

Sayer timely appealed.

DISCUSSION

I. The Court Properly Denied Sayer's Anti-SLAPP Motion

Sayer contends the trial court erred in denying his anti-SLAPP motion because Plaintiffs' claims arise from his advice and instructions to Li-Ya Huang, which constitute protected activities. We disagree.

A. The Anti-SLAPP Statute

The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits filed to chill the exercise of First Amendment rights. (§ 425.16, subd. (a).) The statute accomplishes this end by providing a special procedure for striking meritless, chilling claims at an early stage of litigation. (See § 425.16, subd. (b)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

The anti-SLAPP statute establishes a two-step procedure to determine whether a claim should be stricken. In the first step, the court decides whether the movant has made a threshold showing that a challenged claim arises from statutorily-defined

protected activity.[4] (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*).) In making this determination, the court focuses on the defendant's actions that give rise to his or her asserted liability, rather than the form of the claim. (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 407.) Accordingly, "courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park, supra,* 2 Cal.5th at p. 1063.) "Assertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394.)

If the court finds that protected activity forms the basis for the plaintiff's claim, it must then determine whether the party opposing the motion has shown a probability of prevailing.

---

[4] The anti-SLAPP statute specifies four categories of protected activity: "(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." (§ 425.16, subd. (e).)

(*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To show a probability of prevailing, the opposing party must demonstrate the claim is legally sufficient and supported by a sufficient prima facie showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

We review the denial of an anti-SLAPP motion de novo. (*Park, supra*, 2 Cal.5th at p. 1067.)

B. Plaintiffs' Claims Do Not Arise From Protected Activity

Sayer appears to concede that Plaintiffs' claims arise, in large part, from his unprotected activities as a trustee and real estate broker/agent. Nonetheless, he contends that each claim is also premised on allegations that he advised and instructed Li-Ya Huang to sell certain properties and transfer the cash overseas.[5] Sayer insists these are protected activities because he gave the advice and instructions while acting as Li-Ya Huang's attorney in the *Huang I* litigation.[6] We find no merit to these contentions.

---

[5] Sayer asserts his advisement and instructions are central to the conspiracy claim because they are the only allegations showing an agreement with Li-Ya Huang. (See *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1293 ["a civil conspiracy requires an express or tacit agreement . . . to commit a civil wrong or tort"].) He further contends such conduct is relevant to his alleged efforts to aid and abet Li-Ya Huang and commit elder abuse, but does not explain how.

[6] Sayer does not specify under which subdivision of section 425.16 his activities are protected. Because his advisement and instructions were not made before an official proceeding, (see § 425.16, subd. (e)(1)), and were not connected to a public issue or an issue of public interest, (see *id.*, subds. (e)(3), (e)(4)), we

"It is well established that the protection of the anti-SLAPP statute extends to lawyers and law firms engaged in litigation-related activity." (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113; see *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 409 [all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding are protected by the anti-SLAPP statute].) Section 425.16, subdivision (e)(2), in particular, protects "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e)(2).) Although courts have adopted an expansive view of what constitutes litigation-related activity, "[n]ot all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16." (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1037.) To fall within the scope of subdivision (e)(2), for example, the activity must also be connected to a substantive issue under consideration or review in the litigation and directed at persons having some interest in the litigation. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866 (*Paul*); see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670 ["garden variety transactional malpractice" typically does not trigger anti-SLAPP protections].)

Courts often look to the litigation privilege (Civ. Code, § 47, subd. (b)), as an aid in determining whether certain activity is protected under subdivision (e)(2) of the anti-SLAPP statute.

---

presume he is asserting his actions fall within the scope of section 425.16, subdivision (e)(2).

(See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322–323; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Neville v. Chudacoff, supra,* 160 Cal.App.4th at p. 1263.) The litigation 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 have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Reasoning by analogy, courts have stated that the anti-SLAPP statute protects conduct connected to a litigation only if it was aimed at achieving the objects of that litigation. (See *Anderson v. Geist* (2015) 236 Cal.App.4th 79, 89 ["The phrase 'in connection with' implies that the statement must be aimed at achieving the objects of the litigation."]; *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1480, fn. 5 [attorney's conduct protected unless record shows it was not made to achieve the objects of any litigation]; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 284 [same].)

In *Paul, supra*, 95 Cal.App.4th 853, the plaintiff brought an action against an attorney who represented adverse parties in an arbitration related to allegations of securities law violations, fraud, and negligence. The plaintiff alleged that, in connection with the arbitration, the attorney conducted an intrusive investigation into his personal life and made public disclosures of embarrassing private information about him. (*Id*. at pp. 857–858.) The attorney filed an anti-SLAPP motion, arguing the complaint was premised on his protected efforts to diligently pursue his clients' rights in the arbitration. (*Id*. at p. 858.)

The Court of Appeal held the plaintiff's claims were not subject to the anti-SLAPP statute. The court explained that the "statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding." (*Paul, supra*, 95 Cal.App.4th at p. 866.) Instead, the activities in question must be connected to some issue under review in that proceeding. (*Ibid*.) The court concluded that because the details of the plaintiff's personal life were not relevant to any issue under consideration in the arbitration, the attorney's activities were not protected under section 425.16, subdivision (e)(2). (*Paul,* at pp. 867–868.)

Rickley v. Goodfriend (2013) 212 Cal.App.4th 1136 (*Rickley*), which involved the application of the litigation privilege, is also instructive. In that case, the plaintiffs brought an action against attorneys who represented their neighbor in a prior lawsuit, in which the plaintiffs obtained a judgment requiring the neighbor to comply with a remediation plan. (*Id*. at pp. 1142–1144.) The plaintiffs alleged the attorneys had interfered with the remediation plan by sending unapproved emails to contractors, releasing remediation funds in an unfair manner, and performing unauthorized work on the plaintiffs' property. (*Id*. at pp. 1147, 1163.) The attorneys argued the allegations were improper because their actions were connected to the prior proceeding and therefore protected by the litigation privilege. (*Id*. at pp. 1147–1148.)

The appellate court held the attorneys' actions were not protected. The court reasoned that the alleged interference with the remediation plan did not serve the objects of the prior litigation, which were to resist a determination of liability and whatever assessment of damages, penalty, or other order the

plaintiffs sought. (*Rickley, supra*, 212 Cal.App.4th at p. 1163.) The court further explained that although the litigation privilege extends to certain post-judgment *enforcement* activities, it does not extend to post-judgment *obstructionist* activities. (*Id.* at p. 1162.)

Here, although Sayer's advice and instructions may have been prompted by the *Huang I* litigation, they were not related to a substantive issue under consideration or review in that proceeding. As best we can tell, the *Huang I* litigation concerned whether Li-Ya Huang breached a joint venture agreement and committed fraud in connection with real estate transactions. Sayer's alleged advice and instructions to sell certain properties and transfer the cash overseas had no relevance to Li-Ya Huang's liability for such conduct. Nor did his advice and instructions impact in any way the assessment of damages or other relief Plaintiffs sought in *Huang I*.

Rather, as alleged in the TAC, Sayer's actions were part of a fraudulent scheme to protect Li-Ya Huang's assets in the event of an adverse judgment against her. Like the attorneys' obstruction of the remediation plan in *Rickley*, Sayer's advice and instructions on ways to preemptively obstruct an anticipated judgment were not actions taken to achieve the objects of the *Huang I* litigation. Nor could they otherwise be construed as acts in furtherance of the constitutional rights of petition or free speech. Accordingly, Sayer has failed to meet his burden of showing Plaintiffs' claims arise from protected activity, and the trial court properly denied his anti-SLAPP motion.[7]

---

[7] Because we conclude Sayer's alleged advice and instructions did not constitute protected activities, we need not consider Plaintiffs' argument that such activities are merely

II. We Decline to Consider Sayer's Mootness Argument

Sayer filed a demurrer to the TAC around the time he filed his anti-SLAPP motion. The court sustained the demurrer as to Plaintiffs' cause of action for fraudulent conveyance, and overruled the demurrer as to the remaining causes of action. Sayer now insists the conspiracy cause of action is moot because it was premised on the fraudulent conveyance. He contends that he cannot be held liable for a conspiracy to commit an action for which he otherwise faces no liability.

Although Sayer frames his argument as one of mootness, he is essentially challenging the demurrer ruling by arguing that Plaintiffs failed to state a cause of action for conspiracy to commit a fraudulent conveyance. Sayer, however, did not appeal the demurrer ruling, nor could he have. (See *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912 ["an order overruling a demurrer is not directly appealable"].) As a result, the "mootness" issue is not properly before us, and we decline to consider it.

DISPOSITION

The order is affirmed. Plaintiffs shall recover their costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J. GRIMES, J.

---

incidental to their claims. We also need not determine whether Plaintiffs have established a probability of prevailing on their claims.