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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

MARTIN REINER, Plaintiff and Appellant, v. GREYHOUND LINES INC. et al., Defendants and Respondents.	B265943 c/w B269440 (Los Angeles County Super. Ct. No. BC564127)

APPEAL from a judgment and order awarding attorney fees of the Superior Court of Los Angeles County. Michelle Rosenblatt, Judge. Affirmed.

Martin Reiner in pro per for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Kenneth C. Feldman, Caroline E. Chan and David D. Samani for Defendants and Respondents Greyhound Lines Inc., FirstGroup America, Inc., and Tricia Martinez.

Squire Patton Boggs, Stephen T. Owens and Emily L. Wallerstein for Defendants and Respondents Littler Mendelson, P.C. and Ian Wade.

Martin Reiner appeals from the trial court's orders granting respondents' special motions to strike his complaint pursuant to Code of Civil Procedure section 425.16, California's anti-SLAPP statute.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2014, Reiner acted as counsel for two defendant employees of Greyhound Lines Inc. in *Yennisen de Santiago v. Greyhound Lines Inc.* Greyhound was represented by Ian Wade for Littler Mendelson, P.C.

In September 2014, Reiner sent a series of emails to Wade and Greyhound's in-house counsel, Tricia Martinez, purporting to represent another individual who had claims against Greyhound and knew facts that could be used against Greyhound in the *Santiago* litigation. Reiner suggested that Greyhound "resolve" the situation "quietly" by paying $10,000 to Reiner's client and $7,500 in attorney fees. The suggested settlement amount rose in successive emails.

On September 30, 2014, Reiner emailed Martinez, "In exchange for my not sharing with [counsel for the *Santiago* plaintiff] Greyhound's indication of its willingness to engage in an adoptive admission of Yenissen [sic] De Santiago's July 1, 2013 deposition testimony as being the truth, Greyhound . . . will (1) email to my attention . . . a stipulated award in [my client's] workers' compensation case which resolves . . . with Greyhound paying $15,000 to [my client], and with Greyhound paying an additional $10,000.00 to me in attorney fees . . . . You can cooperate and save Greyhound significantly, or you can be uncooperative and cause Greyhound significant harm."

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

On October 1, 2014, Martinez sent an email to Wade and Reiner saying, "Please provide me with the proper 'authorities' to whom I should address a compliant [sic] against Reiner. I'm also going to tell him myself not to communicate with me. When does his suspension start again?"[2] Reiner replied, "it is a crime in California, extortion[,] to communicate a threat to report an attorney to the State Bar . . . ." Martinez responded, "Martin, I have been trying desperately to refrain from reporting you to every court, bar association and any other entity that has responsibility over attorneys in California. I have lost patience. You can expect to be responding to (additional) professional violations. Also, you are being blocked from sending emails to Greyhound or any related entity. You should be more careful about accusing others about not fulfilling their professional responsibilities. It is precisely people like you who give our profession a bad reputation."

In November 2014, Reiner filed a complaint against Greyhound, Martinez, Wade, Littler Mendelson, and First Group America (FGA).[3] The complaint alleged that Greyhound and FGA were the same corporation, and that Martinez was a managing agent for FGA. The complaint pled a single cause of action for intentional infliction of emotional distress based on Martinez's "threat" to report Reiner to "governmental authorities" in the two emails she sent him. Martinez had

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[2] It is unclear whether this email was intended to be sent to Reiner. Reiner was suspended from the practice of law on October 10, 2014.

[3] Two additional defendants were named but are not at issue in this appeal.

allegedly sent the emails with the "willful encouragement" of the other defendants.

Respondents moved to strike the operative complaint pursuant to section 425.16.[4] They argued that the subject emails were protected activity because they were made in anticipation of bringing an action or official proceeding. Reiner argued the emails were not protected activity because they amounted to criminal extortion. Respondents further argued that Reiner could not prevail on his claim.

The court found that a "reading of the emails suggests [Reiner] was trying to get Greyhound to pay 'hush' money to 'quietly' resolve the issues relating to the De Santiago suit." The court further concluded there was no extortion because "Martinez was within her rights to send an email to [Reiner] given [his] odd behavior."

The court granted the motions and awarded attorney fees and costs to Greyhound, FGA, and Martinez in the amount of $17,610.[5] Reiner filed a motion to vacate the order granting Wade and Littler Mendelson's motion to strike, repeating the arguments from his prior opposition. The motion was denied. Reiner also moved to vacate the order granting Greyhound, FGA, and Martinez's motion to strike. The motion was placed off-calendar after Reiner added the Judge Rosenblatt as a defendant. Reiner timely appealed.

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[4] Wade and Littler Mendelson first filed an anti-SLAPP motion. Greyhound, FGA, and Martinez then filed their own special motion to strike.

[5] It does not appear that the other respondents moved for fees.

DISCUSSION

1. *The Law Governing Anti-SLAPP Motions*

Section 425.16 was enacted to address a sharp rise in the number of "[l]awsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).)

The trial court undertakes a two-step process when evaluating an anti-SLAPP motion. " ' "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. [Citation.] 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." [Citation.]' [Citation.] 'On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step. [Citation.]' [Citation.]" (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822.)

2. *The Subject Emails Were Protected Activity*

Reiner first argues that Martinez's emails did not constitute protected activity. A cause of action "arising from" an "act of that person in furtherance of the person's right to petition" is subject to anti-SLAPP procedures. (§ 425.16, subd. (b)(1).) " 'The constitutional right to petition . . . includes the basic act of

filing litigation or otherwise seeking administrative action.' [Citation.]" (*Dove Audio v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 (*Dove Audio*).) "[C]ommunications preparatory to or in anticipation of the bringing of an action or other official proceeding are . . . entitled to the benefits of section 425.16." (*Ibid.*)

Here, Reiner does not dispute that Martinez's emails threatening to report him to government authorities were "preparatory to or in anticipation of" initiating an action or official proceeding. (See *Dove Audio*, *supra*, 47 Cal.App.4th at pp. 783–784 [holding that a letter between private parties stating the defendant's intent to file a legal complaint against the plaintiff was protected activity].) Rather, Reiner argues that the emails were subject to an exception to the definition of protected conduct, namely when the underlying activity is illegal. Relying on *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), Reiner contends that Martinez's emails were an attempt at criminal extortion because Martinez intended to intimidate him into dropping his client's claims for monetary relief against Greyhound.[6] Under *Flatley*, when a "defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Id.* at p. 320.)

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[6] At oral argument, Reiner also argued the emails violated the Rules of Professional Conduct. This argument is unavailing as the *Flatley* rule applies only to criminal conduct not to conduct that violates any statute. (See *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654.)

Accordingly, in order for the *Flatley* exception to apply, a defendant must concede, or the evidence conclusively establish, that the targeted speech was illegal as a matter of law. Here, respondents did not concede, and the evidence did not conclusively establish, that Martinez had attempted to commit extortion. "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear. . . ." (Pen. Code, § 518.) "Property" as used in the Penal Code includes an action to recover money by a judicial proceeding. (*People v. Kozlowski* (2002) 96 Cal.App.4th 853, 867.) Accordingly, the wrongful use of force or fear for the purpose of inducing an individual to dismiss a claim constitutes extortion. (*People v. Baker* (1978) 88 Cal.App.3d 115, 119.)

Respondents did not concede that Martinez, as Greyhound's agent, had sent the subject emails to induce Reiner into abandoning his client's claims against Greyhound. However, Reiner argues that his declarations submitted in opposition to the motions to strike conclusively established the illegality of the emails. In response to each motion to strike, Reiner filed a declaration stating that Martinez's intent in sending the emails was to instill fear in him in order to induce him to abandon the pursuit of his client's claims.

Reiner contends the trial court was required to credit his statement regarding Martinez's intent because in ruling on an anti-SLAPP motion, the court must "accept as true the evidence favorable to the plaintiff." (*Flatley*, *supra*, 39 Cal.4th at p. 326.) Reiner is correct that, in general, we neither "weigh credibility [nor] compare the weight of the evidence" but rather "accept as true the evidence favorable to the plaintiff" when evaluating an anti-SLAPP. (*Ibid.*) However, when deciding whether the *Flatley*

exception applies, we must determine whether the alleged illegality is "conclusively established" by uncontroverted evidence. (*Id.* at p. 320.) The burden is on the party opposing the anti-SLAPP motion to show no factual dispute exists as to the illegality of the conduct underlying the complaint. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 965.)

Here, Wade and Littler Mendelson disputed whether Martinez's intent in sending the emails was to intimidate Reiner into abandoning his client's claim. They argued that Martinez did not intend to "extract anything of value from Reiner," and submitted evidence that Martinez's first email was inadvertently sent to him. Where there is a factual dispute about the illegality of the conduct at issue, the *Flatley* exception does not apply. (*Seltzer v. Barnes*, *supra*, 182 Cal.App.4th at pp. 965–967.)

As to Greyhound, FGA, and Martinez's motion, the trial court sustained an evidentiary objection to Reiner's statement regarding Martinez's intent. The court ruled the statement lacked foundation, was argumentative, conclusory and speculative, and constituted impermissible expert opinion. On appeal, Reiner only makes the argument that the court erroneously sustained the objection because his statement was based on personal knowledge, and nothing stated in his declaration was "argumentative, conclusory and speculative." Such conclusory arguments fail to establish trial court error. (See *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021 ["An appellate court is not required to consider alleged error where the appellant merely complains of it without pertinent argument."].) As the trial court struck Reiner's evidence that Martinez's emails had been sent

with the purpose of extorting him to drop his client's claims, he did not meet his burden of showing the *Flatley* exception applied.

In fact, the evidence—including a plain reading of the emails—suggested that the emails were sent in response to Reiner's demands for "hush money." Although it is theoretically possible that Martinez sent the emails with the intent to induce Reiner to drop his client's claims, respondents did not concede this and the evidence did not conclusively establish it. On these grounds, we conclude the underlying conduct involved speech in furtherance of Martinez's First Amendment rights.

3. *Reiner Did Not Demonstrate a Probability of Prevailing on His Claim*

Next, Reiner contends the trial court erred in granting the anti-SLAPP motions because he established a probability he would prevail on his claim. He does not make any specific arguments in his opening brief or cite to any law in support of this contention, but only points this Court to his filed declaration. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [It is well-settled law that " '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.]"].) He has not shown trial court error.

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) *extreme and outrageous conduct* by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 (emphasis added).)

Respondents argue that they have a complete defense to Reiner's cause of action in the form of the litigation privilege as respondents' emails were written in connection with underlying civil litigation. Respondents contend that their emails were sent in response to Reiner's emails seeking to settle his client's workers' compensation claims, and in anticipation of filing an administrative complaint with the State Bar. (See Civil Code, § 47, subd. (b)(2).)

Without deciding the question, we will assume for the purposes of the present appeal that the litigation privilege does not apply. As to Reiner's prima facie intentional infliction of emotional distress claim, we conclude that, in light of Reiner's provocative emails, Martinez's emails as a matter of law fall far short of conduct that is so "outrageous" that it " ' " 'exceed[s] all bounds of that usually tolerated in a civilized community.' " ' "[7] (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; cf. *State Rubbish Collectors Asso. v. Siliznoff* (1952) 38 Cal.2d 330, 335–337 [finding severe emotional distress where a representative of the cross-defendant made a threat to "beat [cross-complainant] up"].)

4. *Attorney Fees*

Reiner separately appealed from the order awarding attorney fees to Greyhound, FGA and Martinez. We consolidated the appeals. "The successful defendant on an anti-SLAPP motion is entitled to recover its attorney fees and costs as a matter of

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[7] Respondents' Request for Judicial Notice filed June 21, 2017 is denied. Reiner's Motion for Judicial Notice filed July 19, 2017 is denied. Reiner's Motion to Clarify Damages filed July 19, 2017 is denied. Greyhound, FGA, and Martinez's Motion for Sanctions filed July 31, 2017 is denied. Reiner's Motion for Sanctions filed August 8, 2017 is denied.

right. [Citations.]" (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1446 (*Morrow*).) Reiner did not oppose the motion for attorney fees below, and has not developed any argument as to the order awarding fees. He has not shown trial court error on this issue.

DISPOSITION

The trial court's orders granting respondents' anti-SLAPP motions and awarding attorney fees are affirmed. Reiner is ordered to pay respondents' costs on appeal. Respondents are also entitled to attorney fees in this appeal to be determined by the trial court. (*Morrow*, *supra*, 149 Cal.App.4th at p. 1446.)

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.