Filed 7/14/05 Gall v. King & Hanagami CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VELDA ADELE GALL et al., Plaintiffs and Appellants, v. KING & HANAGAMI et al., Defendants and Respondents.	B174410 (Los Angeles County Super. Ct. No. SC075588)

APPEAL from the judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

Law Offices of Robert N. Pafundi, Robert N. Pafundi, and Darryl O. Dickey; Law Offices of Debra L. Koven and Debra L. Koven for Plaintiffs and Appellants.

Law Office of Bruce Adelstein and Bruce Adelstein for Defendants and Respondents.

Velda Adele Gall and Linda Esperanza Ornelas appeal from the judgment of dismissal entered after the trial court granted the special motion to strike (Code Civ. Proc., § 425.16) of defendants Michael P. King, William K. Hanagami, Nyanza Shaw, and the law corporation King & Hanagami. For the reasons set forth below, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Velda Adele Gall and Esperanza Ornelas (appellants) were injured on the job when toxic fumes drifted into their office from the next-door business operated by Consolidated Computer Training, Inc. (CCT). Appellants received payment for their injuries and related medical expenses from their employer's workers' compensation carrier, American Manufacturers Mutual Insurance Company (the carrier). When appellants sued CCT for their damages, the carrier filed a lien on any recovery they might obtain. (Lab. Code, §§ 3852, 3856, subd. (b).)

In August 2002, the carrier assigned its lien rights to CCT (the assignment). In September 2002, appellants settled with CCT. Sometime later, appellants learned that the carrier had not assigned its right to future credits, a workers' compensation rule that appellants alleged would require them to exhaust any recovery in their action before the carrier became obligated to cover appellants' future medical expenses. Appellants then sued CCT and its counsel--the law firm of King & Hanagami, and lawyers Michael P. King, William K. Hanagami, and Nyanza Shaw--for fraud, negligent misrepresentation, and declaratory relief.[1] Appellants alleged that they needed extensive future medical care and were concerned that the carrier's right to future credits would consume any settlement. After nearing an agreement with CCT, appellants said they would not accept CCT's offer unless the assignment included the carrier's right to future credits. According to the complaint, Shaw concealed the fact that the assignment did not include

---

[1] We will sometimes refer to these parties collectively as "respondents." The complaint also included a cause of action against only CCT.

those credits. Based on those allegations, appellants sought damages and a declaration that they were entitled to reimbursement for any payments to the carrier as a result of the carrier's future credits rights.[2]

Respondents moved to strike the complaint on the ground that it was based on conduct related to the right to petition the government under the First Amendment, qualifying the complaint as a SLAPP[3] action. (Code Civ. Proc., § 425.16.)[4] In order to grant that motion, the trial court had to find that respondents' alleged misconduct bore the requisite relation to the First Amendment and that appellants would probably not prevail on the merits.[5] According to respondents, their conduct qualified for SLAPP protection because it occurred during settlement negotiations as part of a pending action.

---

2 Under the workers' compensation laws, when an employee injured by the acts of a third party sues for damages and recovers by way of verdict or settlement, the employer's workers' compensation carrier is entitled to reimbursement from that recovery of sums already paid to the injured worker. (Lab. Code, §§ 3852, 3853, 3856, subd. (b); *Bailey v. Reliance Ins. Co.* (2000) 79 Cal.App.4th 449, 455 (*Bailey*).) The carrier also has the right to obtain a credit toward its future liability for workers' compensation equal to the amount of the employee's recovery that has not been applied previously to the payment of litigation expenses or attorney's fees. (Lab. Code, § 3861; *Bailey*, at p. 455.)

We admit to no small degree of confusion concerning the effect of the assignment on appellants' right to future workers' compensation benefits. If the assignment to CCT had included the carrier's right to future credits, then CCT would have been able to assert those rights against any future benefits claimed by appellants, thereby still leading to a drain on their settlement funds. If so, the settlement would have to address that issue, perhaps by way of mutual releases, in order to achieve appellants' desired aim of preventing any further claim by anyone on their settlement funds to offset the cost of future workers compensation benefits. The settlement agreement is not in the record and the parties have not addressed this issue. Because the effect of the assignment on appellants' settlement funds is not an issue on appeal, we express no opinion on the matter.

3 Strategic Litigation Against Public Participation.

4 All further undesignated section references are to the Code of Civil Procedure.

5 We discuss these requirements in greater detail, *post.*

Respondents also contended that appellants would probably not prevail on the merits because respondents' alleged misdeeds were absolutely privileged as comments made during a judicial proceeding. (Civ. Code, § 47, subd. (b)(2).)

In opposition, appellants tried to distinguish the cases upon which respondents relied. They also supplied a declaration from their lawyer, Darryl O. Dickey. According to Dickey, he did not learn about the assignment until one day before the deadline ran on CCT's settlement offer, and only then because the mediator revealed its existence. In order to make that offer feasible, Dickey insisted on knowing whether the carrier had assigned or retained its right to future credits. Dickey stated that Shaw told him the carrier had assigned those rights. Shaw also faxed him one page of the assignment, which indicated that this was so. Shaw's fax did not include another page, which stated that the carrier had in fact reserved the right to assert a claim for future credits. That declaration was the only evidence submitted by appellants in opposition to the motion. In reply, respondents asked the trial court to take judicial notice of the fact that they had filed the full text of the assignment with the court and had served that document on appellants' lawyers a month before the settlement was reached. In their reply papers, they argued that service of the assignment on appellants raised an additional ground for finding that appellants were not likely to prevail on the merits--the absence of justifiable reliance due to their lawyer's earlier receipt of a copy of the assignment.

The trial court denied respondents' request for judicial notice, finding that the document and the reliance argument should have been made as part of their moving papers.[6] On its own motion, the court struck Dickey's declaration because it had been

---

[6] Respondents ask us to hold that the trial court erred by denying their request for judicial notice, contending that under the applicable burden of proof, they were not obligated to present the documents as part of their moving papers. Assuming for discussion's sake only that respondents are correct, it appears from the record and the parties' briefs that the reliance issue was first raised below in respondents' reply papers, and that the trial court's ruling came on its own motion at the start of the hearing, thus precluding appellants from arguing the issue below. Because we affirm on other grounds, we prefer not to consider an issue when there are unanswered questions about appellants' ability to fully address it in the trial court.

signed by someone else. (§ 2015.5.)[7] Relying on applicable case authority, the trial court found that the alleged misrepresentations qualified for SLAPP protection because they occurred during settlement discussions arising from a pending action. The court also found that this setting qualified the alleged misconduct for protection by the absolute litigation privilege. (Civ. Code, § 47, subd. (b)(2).) A judgment dismissing respondents from the action was entered on March 1, 2004. Appellants contend that the trial court erred.

DISCUSSION

1. Standards Governing SLAPP Motions

Section 425.16, subdivision (b)(1) provides that "[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." The statute defines an act in furtherance of the rights of free speech or petition to include, among others, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [and] (2) any written or oral statement or writing made in connection with an

---

[7] In their opening brief, appellants included a new declaration from Dickey, certifying that the declaration from him submitted in opposition to the SLAPP motion was true and correct. Appellants did not, however, ask us to reverse the trial court's ruling that struck Dickey's declaration. In appellants' reply brief, they asked us to "reassess" the declaration because it was signed by Dickey's co-counsel, who was presumably knowledgeable about the truth of the declaration. We decline to do so. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) Furthermore, as we discuss below, the presence of that declaration actually weakens appellants' position because it makes clear that their claims are based, at least in part, on affirmative misstatements allegedly made by respondents. Although appellants and respondents both rely on portions of Dickey's declaration throughout their briefs, we have disregarded the declaration entirely.

issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).)

Evaluating a SLAPP motion is a two-step process. First, the trial court decides whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. A defendant meets this burden by showing that the conduct upon which the plaintiff's claim is based fits one of the categories spelled out in section 425.16, subdivision (e). The defendant does not have to show that the plaintiff subjectively intended to chill the defendant's protected rights or that the action has any chilling effect. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) If the court finds that the defendant's alleged conduct qualifies for SLAPP protection, it proceeds to the second step: determining whether the plaintiff has demonstrated a probability of prevailing on the claim. In order to do so, the plaintiff need only show that his complaint is legally sufficient and is supported by a prima facie showing of facts which, if believed by a trier of fact, would be enough to sustain a judgment in his favor. (*Id.* at pp. 88-89.) A plaintiff's burden on the second prong of a SLAPP motion is therefore similar to that of a party opposing summary judgment. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.) We review the trial court's ruling de novo. (*Ibid.*)

2. Appellants' Claims Arose from Protected Activity

Causes of action based on allegations that the defendant committed fraud when negotiating a settlement fall within section 425.16, subdivision (e)(2). (*Navellier*, *supra*, 29 Cal.4th at pp. 89-90 [plaintiffs claimed defendant committed fraud when negotiating release in connection with earlier federal action brought by plaintiffs because defendant never intended to honor that agreement; defendant's negotiation and execution of the release involved statements or writings made in connection with an issue under consideration by a judicial body]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420 (*Dowling*) [plaintiff alleged that defendant, a lawyer, committed fraud when negotiating a settlement between plaintiff and defendant's client by making false representations and concealing certain facts; defendant's acts of negotiating the

settlement arose from statements made in connection with an issue under review by a judicial body].)

Based on *Navellier* and *Dowling*, it seems apparent that respondents' liability, which rests on allegations that they committed fraud in connection with negotiating appellants' settlement with CCT, is also covered by section 425.16, subdivision (e)(2).[8] Appellants contend that this subdivision is not applicable because they have alleged fraud by conduct--the concealment by respondents of facts relating to the carrier's retention of its lien rights to future credits. Because subdivision (e)(2) is specifically aimed at oral or written statements, they argue that the section does not apply. We disagree.

When ruling on the first prong of a SLAPP motion, we consider the pleadings and the evidence offered by both parties. In this case, because the court struck the declaration of Dickey, there is no evidence to consider. When reviewing an order sustaining a demurrer, we must give the complaint a reasonable interpretation, placing all the parts in context and reading the complaint as a whole. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 807.) The court will accept as true not just all facts alleged, but those that can reasonably be inferred as well. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We see no reason why these well-accepted rules of construction should not apply in this context. At paragraph 9 of their complaint, appellants alleged the existence of the assignment, contending that it occurred during settlement negotiations. At paragraph 10, they alleged that they were "concerned about future credits . . . being asserted by [the carrier] . . . [and] agreed to accept the settlement offer only on the condition that the assignment . . . included the . . . future credits." At paragraph 11, they alleged that the respondents, through Shaw, "knowing plaintiffs' concerns about future credits, concealed the fact that the assignment . . . did not include an assignment of the future credits . . . ." If appellants agreed to accept the settlement offer on the condition that the assignment included future credits, they must have communicated that fact to respondents. In effect, appellants said they would not accept

---

[8] We will refer to this section as subdivision (e)(2).

the settlement offer unless the assignment included the future credits. It defies logic to conclude that respondents said nothing in reply and that appellants took that silence to mean their concerns were unfounded, thus leading them to sign the settlement. The only reasonable inference to be drawn from these allegations is that respondents said something to make appellants believe the assignment included the future credits.[9] To the extent the allegations included both omissions by silence and affirmative misstatements, they fall within subdivision (e)(2). (*Navellier*, *supra*, 29 Cal.4th at pp. 89-90 [plaintiff alleged that defendant made both misrepresentations and omissions when negotiating release; each of defendant's acts or omissions fell within subdivision (e)(2)]; *Dowling*, *supra*, 85 Cal.App.4th at p. 1418 [plaintiff alleged both misrepresentations and fraudulent concealment].)

Appellants also contend that subdivision (e)(2) does not apply because the assignment of the carrier's right to future credits was not an issue in appellants' action against CCT and was therefore not under consideration by the court where their action against CCT was pending. The *Navellier* court rejected a similar contention, holding that the allegedly fraudulent release from the underlying federal action was designed to forestall further litigation, meaning that statements made by the defendant during negotiations for the release were made in connection with issues under consideration in the federal action. (*Navellier*, *supra*, 29 Cal.4th at p. 90, fn. 6.)

Finally, appellants contend we must reverse because respondents' statements in connection with the negotiated settlement of appellants' private claims against CCT were not connected to issues of public interest. They are wrong. The public interest issue requirement applies to only subdivisions (e)(3) and (4), not to subdivisions (e)(1) and (2). (*Dowling*, *supra*, 85 Cal.App.4th at p. 1416.)

3. Probability of Prevailing on the Merits

Statements made in any judicial proceeding are privileged, barring all causes of action based on those statements except for malicious prosecution. (Civ. Code, § 47,

---

9 Of course, if we were to consider Dickey's declaration, there would then be ample evidence that respondents allegedly made affirmative misrepresentations.

subd. (b)(2); *Dowling*, *supra*, 85 Cal.App.4th at p. 1423.) This absolute litigation privilege has been applied to allegedly fraudulent statements made during litigation settlement negotiations. (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 23-24 (*Home Ins.*); *Dowling*, *supra*, 85 Cal.App.4th at p. 1422.) Appellants attempt to avoid this rule on several grounds. First, they cite decisions such as *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54 (*Shafer*), which considered a lawyer's fraud liability through the prism of Insurance Code section 11580. Under Insurance Code section 11580, certain liability policies must include a provision that any judgment creditor of the insured may sue the insurer to enforce the policy terms. (Ins. Code, § 11580, subd. (b)(2).) Under that statute, the injured plaintiff becomes a third-party beneficiary of the insured defendant's liability policy. (*Shafer*, *supra*, 107 Cal.App.4th at p. 68.) Based on that provision, the *Shafer* court held that the litigation privilege did not apply to an insurance company lawyer who had misled the plaintiff, because the plaintiff stood in the insured's shoes. To hold otherwise, the *Shafer* court held, would undermine the policies behind Insurance Code section 11580. (*Id.* at pp. 77-78.)

As part of its discussion, the *Shafer* court distinguished itself from the situation present in *Home Ins.*, *supra*, 96 Cal.App.4th 17, because that case did not concern Insurance Code section 11580. (*Shafer*, *supra*, 107 Cal.App.4th at p. 82.) The reason this is so becomes apparent upon reading Insurance Code section 11580, which expressly states that its provisions do not apply to workers' compensation policies. (Ins. Code, § 11580, subd. (a)(1)(i).) Therefore, appellants' reliance on Insurance Code section 11580 or decisions applying that section is misplaced.

One requirement for application of the litigation privilege is that the statement being protected bore some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Appellants contend that respondents' actions did not meet this test because the workers' compensation issues were collateral to the subject matter of the action against CCT. Appellants rely on *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134 (*Rothman*) to support this contention. That court held that the

communicative act must "function as a necessary or useful step in the litigation process and must serve its purposes." (*Id.* at p. 1146.) At issue in *Rothman*, however, were slanderous statements made at a press conference, where the defendant accused his opponent's lawyer of attempted extortion. The appellate court refused to extend the litigation privilege to "litigating in the press." (*Id.* at p. 1149.) As respondents correctly point out, statements made during settlement negotiations are far different, because they were made to achieve an object of the litigation by settling the action. Accordingly, the *Home Ins.* court held that the logical relation/connection test is satisfied by statements made to induce a settlement. (*Home Ins.*, *supra*, 96 Cal.App.4th at p. 24.)

Appellants also contend that the litigation privilege does not apply because the complaint alleges fraudulent concealment, not fraudulent statements. Appellants made the same argument in connection with the initial applicability of section 425.16, and we reject it again for the same reasons.

Finally, appellants contend that the litigation privilege does not apply to extrinsic fraud. While that statement is correct, appellants' reliance upon it is not. Assuming for discussion's sake only that the alleged fraud is extrinsic, the doctrine applies to only equitable causes of action to set aside a fraudulently-induced settlement agreement.[10] Tort claims for damages are still not allowed. (*Home Ins.*, *supra*, 96 Cal.App.4th at p. 26.) Appellants have not brought an equitable cause of action to set aside the settlement. Instead, they have sought to enforce the settlement and recover damages. As a result, the extrinsic fraud doctrine does not apply.

---

10 The *Home Ins.* court held that fraud inducing a settlement is not extrinsic because it did not prevent the plaintiffs from learning the true facts. Instead, reasonable investigation and use of discovery would have uncovered the truth. (*Home Ins.*, *supra*, 96 Cal.App.4th at p. 27.) Although we do not reach respondents' request that we judicially notice their filing and service of the full text of the assignment, the existence of those documents suggests at least the possibility that extrinsic fraud did not exist here.

DISPOSITION

For the reasons set forth above, the judgment of dismissal under section 425.16 is affirmed. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.