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FRED ANDY IVEY etc. et al., Plaintiffs and Respondents, v. 370 EMBARCADERO W LLC, Defendant and Appellant.

A119942

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

2009 Cal. App. Unpub. LEXIS 684

January 27, 2009, Filed

PRIOR HISTORY: [*1]
Alameda County Super. Ct. No. RG07320746.

CORE TERMS: causes of action, nuisance, notice, protected activity, lease, inspections, unlawful detainer action, petitioning, gravamen, reopen, right of petition, free speech, equal protection, administrative appeal, probability, incidental, breached, lawsuit, pleaded, caption, zoning, chill, music, color of law, right to petition, public issue, constitutional rights, covenant of good faith, pertinent part, nonprotected

JUDGES: Ruvolo, P.J.; Reardon, J., Rivera, J. concurred.

OPINION BY: Ruvolo

OPINION

I. INTRODUCTION

Defendant 370 Embarcadero W LLC appeals from the trial court's denial of its anti-SLAPP motion brought under Code of Civil Procedure section 425.16 (section 425.16). [1] Defendant contends the trial court erred in concluding that the gravamen of the claims brought against it by plaintiffs Fred Andy Ivey doing business as AFI Marketing and John Ivey did not arise out of the exercise of defendant's right to petition.

1 "A SLAPP suit--a strategic lawsuit against public participation--seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16--known as the anti-SLAPP statute--to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

We agree with the trial court, and affirm the ruling denying the anti-SLAPP motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a complaint against defendant, **[*2]** the City of Oakland (City) and others on April 13, 2007, stating six separate causes of action comprised of three causes of action under title 42 United States Code section 1983 alleging that the City, acting under color of law, denied plaintiffs their rights to free speech, due process and equal protection, as guaranteed by the First and Fourteenth Amendments to the federal Constitution. A fourth cause of action alleged inverse condemnation by the City. The complaint also included a cause of action alleged specifically against defendant (Sixth Cause of Action) contending that defendant breached a duty of good faith and fair dealing owed to plaintiffs by virtue of a lease and their relationship as landlord and tenant. [2]

2 The complaint also included a cause of action for libel against Tom Berlin, a City employee.

The general allegations of the complaint asserted that defendant was formed to develop a high-rise condominium project in the City, and in furtherance of this purpose, applied for preapproval of zoning for a "95 unit mixed use building." At the time, plaintiffs were the operators of a popular night club called Mingles, which offered live music and other entertainment under a **[*3]** lease with the then-owner of the property, Marilyn Cohn (Cohn). On May 11, 2006, the City sent a letter to Cohn declaring the use of the property by Mingles to be a nuisance. Upon learning of the notice, plaintiffs offered to indemnify and defend Cohn in any proceedings and attempted to file an "Administrative Appeal Declaration of Nuisance" with the City, which the City rejected.

Thereafter, the property was purchased by defendant, to whom the lease was assigned as part of the transaction. In the early morning hours of November 11, 2006, a person was shot in the vicinity of Mingles. Mingles was then shut down while plaintiffs investigated whether the shooting was related to Mingles's operation. Plaintiffs determined that there was no relationship and met with City representatives seeking to reinstate its cabaret permit. [3] The City refused to reinstate the permit, and plaintiffs expressed their intention at that point to reopen for the sale of alcohol, but without music.

3 The complaint asserted that a cabaret permit was needed to offer live music in Oakland.

Plaintiffs hired an individual to perform some general repairs needed in order to reopen. However, the work was stopped by Oakland **[*4]** police who informed the repairman that no work could continue unless permission was obtained from the property owner and a permit obtained from the City. Plaintiffs' efforts to obtain a permit without defendant's consent were unsuccessful.

On January 6, 2007, an official nuisance notice was sent to defendant by the City. No notice was sent directly to plaintiffs. The complaint alleged that, despite receipt of this notice, defendant failed to inform plaintiffs that the City was claiming Mingles constituted a nuisance, that defendant failed to investigate the allegations of nuisance specified in the notice, and that defendant failed to appeal, challenge or rebut the claim, "and allowed a thirty day appeal period to expire." When plaintiffs learned of the nuisance notice, they inquired how they might appeal and were "told by City [o]fficials that they had no standing and could not appeal."

Thereafter, plaintiffs made repeated efforts to learn from the City how they might go about having the inspections

completed that were a prerequisite to reopening Mingles; all to no avail. Finally, on January 24, 2007, defendant filed an unlawful detainer action against plaintiffs.

In the complaint that **[*5]** was the subject of defendant's anti-SLAPP motion, plaintiffs alleged six separate causes of action, captioning five of them as applying to "all defendants." However, only the Sixth Cause of Action for "Breach of Covenant of Good Faith A [*sic*] Fair Dealing," actually pleaded and alleged chargeable misconduct against defendant. As to this cause of action, plaintiffs alleged that defendant breached the covenant of good faith that made performance of the lease impossible. In this regard, the complaint alleged that defendant breached the covenant "[i]n failing to allow for inspections, to cooperate with obtaining a permit, not informing Plaintiff [*sic*] that it had received a Notice of Nuisance and with not allowing Plaintiff [*sic*] to challenge or appeal a Notice of Nuisance."

On May 21, 2007, defendant filed a special motion to strike pursuant to section 425.16, known colloquially as an "anti-SLAPP motion." The motion claimed defendant was entitled to a dismissal because the complaint implicated defendant's right to petition, or more correctly in this case, not to petition, the City to abate the nuisance, and as such, fell within the protection of the anti-SLAPP statute. Defendant contended **[*6]** further that the complaint also alleged the "filing and prosecution of an unlawful detainer action as an actionable element," which is "classic SLAPP-triggering conduct."

The motion was opposed by plaintiffs, vigorously litigated, and was heard on September 14, 2007. [4] The motion was taken under submission, and the court issued its written order denying the motion on September 24, 2007. In denying the motion as to the Sixth Cause of Action, the court concluded that the "principal thrust" or "gravamen" of the claim related to defendant's failure to "allow inspections, to apprise Plaintiffs of the Notice of Nuisance, and to otherwise cooperate with Plaintiffs with respect to their attempts to put the nightclub back in operation, and that the allegations regarding the unlawful detainer action and zoning application are 'merely incidental' to the cause of action." Thus, defendant had failed in its burden to show that this cause of action arose from petitioning activity protected by the anti-SLAPP statute.

4 Much of the delay in having the matter heard resulted from the short-lived removal of the action to federal district court, and its ultimate remand to the Alameda County Superior Court.

The **[*7]** court also concluded that defendant had failed to separately address the remaining causes of action in the complaint, although it noted that the allegations against defendant as to those remaining causes of action were "far from clear." Nevertheless, the court denied the motion to strike on this ground as well, because the remaining claims did not appear to be grounded in any petitioning activity by defendant, and because defendant had failed to address them.

III. LEGAL DISCUSSION

Section 425.16 provides in pertinent part: "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).)

Resolution of a special motion to strike requires a two-step process. First, the defendant must make a threshold showing that the challenged cause of action arises from constitutionally protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) **[*8]** If the defendant satisfies this prong, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits of the action. (*Ibid.*) We review a trial court's ruling on a special motion to strike under a de novo standard of review, "conducting an independent review of the entire record. [Citations.]" (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

We begin by disagreeing with the trial court's conclusion that the civil rights causes of action (Causes of Action One through Four) needed to be addressed separately by defendant in its motion to strike. Although all four causes of action purport to be alleged against "all defendants," a simple reading of the charging allegations in each cause of action makes it clear that the allegations are made only against the City.

For example, while the First Cause of Action makes reference to defendant colluding with the City to shut down Mingles to further its own financial interest, the fundamental claim is that the City denied plaintiffs equal protection of the law by its selective enforcement of the nuisance ordinance. The allegation reads, in pertinent part, "The City's selective enforcement of nuisance **[*9]** laws and wrongful application of the nuisances [*sic*] laws as to the Mingles business denies and denies [*sic*] the plaintiffs their right to Equal Protection of the law . . . ."

Similarly, the Second Cause of Action charged only that the City's refusal to allow plaintiffs to challenge or appeal the notice of nuisance or to allow inspections was a denial of due process. The same is true for the Third Cause of Action ("City of Oakland is acting under the color of law to deprive Plaintiffs of their Freedom of Speech . . ."), and for the Fourth Cause of Action ("The actions taken by the City of Oakland constitute a taking of an interest in real property . . . in violation of the Fifth Amendment . . . .").

As a matter of law, it is the allegations in the body of the complaint, not the case caption, which constitute the causes of action against the defendant. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829 [adding a defendant's name to the complaint's caption did not help state a cause of action because the caption of the complaint constitutes no part of the statement of the cause of action].) Because these causes of action were not adequately pleaded against defendant, there was no obligation **[*10]** for appellant to address them in order to have its motion to strike granted. The focus of the motion was properly on the Sixth Cause of Action for breach of the implied covenant of good faith, the claim we turn to now.

We agree with the trial court's denial of defendant's motion to strike as it relates to the Sixth Cause of Action. In making this ruling, the trial court was correct that it is "the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188, italics omitted.)

However, a plaintiff cannot avoid the operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden-variety tort or contract claim when in fact the liability claim is predicated on protected conduct. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-92.) Thus, "a **[*11]** plaintiff cannot frustrate the purposes of the [anti-]SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308, fn. omitted.) Nevertheless, "[t]he [anti-SLAPP] statute's definitional focus is not on the form of the plaintiff's cause of action but rather the defendant's activity giving rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning. [Citation.]" (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232.)

Here, the complaint charges that defendant, who purchased the property housing Mingles, wanted the nightclub out so defendant could pursue the more lucrative activity of converting the property to high-rise residential use. However, by its own terms, the lease for Mingles was not set to terminate until June 30, 2009. Therefore, the trouble plaintiffs encountered with the City was a fortunate turn of events. Once a legal path presented itself by which Mingles's lease could be terminated, plaintiffs allege that defendant **[*12]** took it. The allegations of bad faith centered around defendant's failure to notify plaintiffs of the City's nuisance notice, defendant's failure to appeal the notice, and defendant's noncooperation with plaintiffs in securing the permits, repairs, and inspections required by the City in order to reopen the business. Among these claims, defendant identifies only its decision not to seek an administrative appeal as protected activity.

Defendant contends that a decision *not* to pursue petitioning activity is protected activity under the anti-SLAPP statute because "if the choice to engage in litigation is an exercise of the right of petition, then the choice not to engage in litigation, particularly in order to avoid advocating a particular viewpoint on a public issue, must also be correlative of the right of petition. This contention appears to fly in the face of the purpose of section 425.16, which is designed specifically to discourage litigation that chills the *exercise* of the right to speak or petition. (§ 425, subd. (a).) But we need not decide that issue because defendant's failure to seek an administrative appeal of the nuisance declaration was incidental to and, at best, only a **[*13]** small part of defendant's conduct challenged by plaintiffs' lawsuit. [5] Plaintiffs' reference to defendant's general application for a residential zoning permit or the fact that an unlawful detainer action was brought against plaintiffs when it became apparent that Mingles would not reopen, are mere "collateral allusions to protected activity," and as such, take plaintiffs' claims outside the gambit of the anti-SLAPP statute. (*Martinez v. Metabolife Internat., Inc.*, *supra*, 113 Cal.App.4th at p. 188.)

5 Plaintiffs argue on appeal that the late notice prevented them from taking effective action to meet the City's concerns, including allowing plaintiffs themselves to appeal the nuisance notice. While plaintiffs pleaded that the City stated that plaintiffs themselves had no standing to appeal, plaintiffs contend the City's municipal code provides otherwise.

Therefore, we agree that the gravamen of the complaint against defendant was not based on, and did not arise from, protected activity as defined by section 425.16. Accordingly, the burden never shifted to plaintiffs to demonstrate a probability they would prevail in their complaint against defendant.

IV. DISPOSITION

The ruling denying defendant's **[*14]** special motion to strike is affirmed. Plaintiffs are awarded their costs on appeal.

Ruvolo, P.J.

We concur:

Reardon, J.

Rivera, J.