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Court of Appeal, First District, Division 3, California.

Regina BIRKNER et al.,
Plaintiffs and Appellants,
v.
KWAI HO LAM, Defendant and Respondent.

No. A121981.
|
(City & County of San Francisco Super. Ct. No. 453066).
|
March 30, 2009.

Attorneys and Law Firms

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Opinion

POLLAK, Acting P.J.

***1** Plaintiffs Regina Birkner, Nyri Scanlon, Charles Birkner and William Rogers Burton brought this action to recover damages from their landlord, defendant Kwai Ho Lam, based on his service of, and refusal to rescind, a notice to terminate plaintiffs' tenancy. Lam moved to strike the complaint as a strategic lawsuit against public participation pursuant to Code of Civil Procedure[1] section 425.16 (the anti-SLAPP statute). On a prior appeal, this court concluded that Lam had met his prima facie burden of showing that his service and refusal to rescind the termination notice was in furtherance of his constitutionally protected right to petition. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281-285 (*Birkner I*).) Because the trial court had not ruled on whether plaintiffs had met their burden of showing the likelihood of prevailing on their claims, we remanded the matter for a determination of that issue. (*Id.* at p. 286.)

On remand, the trial court granted the anti-SLAPP motion after determining that Lam's conduct fell within the litigation privilege codified in Civil Code section 47, subdivision (b), and that plaintiffs did not meet their burden of demonstrating their ability to prevail. Plaintiffs now challenge the trial court ruling. We shall affirm.[2]

FACTUAL AND PROCEDURAL BACKGROUND

We recount only those facts necessary to resolve the issues raised on this appeal relating to whether plaintiffs met their burden of demonstrating their ability to prevail on the causes of actions in their complaint.

A. ***Prior Appeal***

Plaintiffs' four causes of action-wrongful eviction in violation of chapter 37 of the San Francisco Administrative Code, the San Francisco Residential Rent Stabilization and Arbitration Ordinance (the Rent Ordinance), negligence, breach of covenant of quiet enjoyment, and intentional infliction of emotional distress-are all based on Lam's service of and refusal to rescind a 60-day notice to terminate plaintiffs' tenancies to effect the move-in of Lam's elderly disabled mother. Upon the death of Lam's mother, the termination notice subsequently was rescinded and no unlawful detainer action was filed.

Lam filed a special motion to strike the complaint pursuant to section 425.16. In his initial moving papers, Lam argued that serving and refusing to rescind the termination notice was activity in furtherance of his constitutionally protected right to petition. He also argued that plaintiffs would be unable to make a prima facie showing that they would prevail because each cause of action was barred by the litigation privilege codified in Civil Code, section 47, subdivision (b). Accompanying Lam's initial moving papers was a copy of the termination notice served on plaintiffs, Lam's declaration, and a declaration by Lam's attorney, Denise Leadbetter.

The termination notice set forth the reason Lam was seeking to recover possession of the unit, the Rent Ordinance's requirements for such repossession, and plaintiffs' rights as tenants under that law. The notice further provided: "If you fail or refuse to vacate and surrender the possession of the premises, legal action will be instituted, against you to recover possession. In that event, you could be subjected to an award of damages, costs and attorney's fees, in addition to any other relief the court deems necessary and appropriate."

***2** In his declaration, Lam asserted that in August 2005, he had moved into unit # 4 at the subject property with the intent to live there indefinitely. Further, "On December 8, 2005, when the RMI [relative move in] termination notice was served, units # 2, 3, and 4 were occupied by [his] co-owners." Lam "decided to move [his] 82-year-old and infirm mother ... into the Premises (unit # 1) because she suffered from health problems such as asthma and arthritis. She used a walker and was given a disabled person placard she could use when being driven. At the time of the termination notice, she had to climb 38 stairs to get to her unit; however, unit # 1 is on the ground floor.... However, [Lam's] mother died of cardiopulmonary arrest at St. Mary's Hospital on February 2, 2006." Leadbetter's declaration asserted that on December 8, 2005 on behalf of Lam she initiated a relative move-in eviction for unit # 1 by arranging for service on plaintiffs of a 60-day notice to terminate their tenancies. However, by letter dated February 13, 2006, Leadbetter notified plaintiffs' counsel that Lam was withdrawing the termination notice because his mother had died.

In opposing Lam's motion, plaintiffs argued that the service of the termination notice was not protected by the litigation privilege and that their declarations demonstrated the requisite minimal merit to support their causes of action.

In a reply declaration, Lam asserted: "I did not have a relative move-in termination notice served in order to retaliate against Plaintiffs for anything they said or did. My sole intent in serving it was to provide a place for my mother to live that would accommodate her inability to walk up and down stairs without great difficulty. If she had not died, I certainly would have filed an unlawful detainer in order to accomplish the purpose of the termination notice. It was my intent to file an unlawful detainer, if necessary, when I retained counsel and when I authorized service of the [termination notice]. At no time until my mother's death did I ever consider not filing it. I was hoping to settle the dispute." In another reply declaration, Leadbetter asserted that had Lam's mother not died, an unlawful detainer action would have been filed.[3]

The trial court initially denied the motion to strike, concluding that the complaint was not based on protected activity because Lam's conduct was not in furtherance of his right to petition within the meaning of section 425.16. The court therefore did not address whether plaintiffs had made a prima facie showing they were likely to prevail. On Lam's appeal, this court held that the service of the termination notice, which (along with Lam's initial refusal to rescind the notice) was the sole basis for plaintiffs' claim, "indisputably arose from 'activity protected under the anti-SLAPP statute.' " (*Birkner I, supra,* 156 Cal.App.4th at p. 283.) We remanded the matter so that the trial court could address in the first instance whether plaintiffs had made a prima facie showing of their right to prevail and their ability to overcome the litigation privilege defense. (*Id.* at p. 286.)

2. This Appeal

***3** When the case returned to the trial court, plaintiffs moved for an order allowing discovery, limited to the issues to be resolved on the anti-SLAPP motion. (§ 425.16, subd. (g).) Although Lam agreed to provide the requested discovery, he reserved the right to oppose the introduction of the discovery materials in opposition to the anti-SLAPP motion.

The parties simultaneously submitted supplemental memoranda addressing the second prong of the anti-SLAPP motion. Plaintiffs asked the court to consider additional evidence obtained after the matter had been remanded, including excerpts of deposition testimony of Lam, Leadbetter, and Lam's sister Karen Lum, and certain documents produced in discovery. Lam opposed the request but alternatively argued that if the court granted the request, the court should also consider supplemental declarations from him and his attorney.

After considering the pleadings and the original evidentiary submissions of the parties, the court granted the anti-SLAPP motion, determining that plaintiffs had failed either to show that the litigation privilege did not apply or to present evidence of facts that would negate the privilege. The court alternatively ruled that plaintiffs had not presented sufficient evidence to overcome the litigation privilege, even if it considered the supplemental evidence submitted after remand. Plaintiffs' timely appeal ensued.[4]

DISCUSSION

A special motion to strike pursuant to section 425.16 "involves a two-part inquiry. First, the defendant must make a prima facie showing that a cause of action arises from an act in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue. [Citations.] If such a showing has been made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. [Citation.] If the plaintiff fails to carry that burden, the cause of action is 'subject to be stricken under the statute.' [Citation.] We review the trial court's decisions de novo." (*Birkner I, supra,* 156 Cal.App.4th at pp. 280-281.)

If applicable, the litigation privilege bars all the causes of action in plaintiffs' complaint. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1492, 1498 (*Feldman*) [litigation privilege applies to all tort causes of action and breach of covenant of quiet enjoyment based upon the assertedly tortious service of a notice to quit].)[5] As explained by the Supreme Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323: "The litigation privilege is ... relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. (See, e.g., *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927 ... [where the plaintiff's defamation action was barred by Civil Code section 47, subdivision (b), the plaintiff cannot demonstrate a probability of prevailing under the anti-SLAPP statute]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-785 ... [the defendant's prelitigation communication was privileged and trial court therefore did not err in granting motion to strike under the anti-SLAPP statute].)"

***4** As codified in Civil Code section 47, subdivision (b), 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.) "The Supreme Court has characterized the third prong of the foregoing test, the requirement that a communication be in furtherance of the objects of the litigation, as being 'simply part of' the fourth, the requirement that the communication be connected with, or have some logical relation to, the action. ([*Id.*] at pp. 219-220)." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1141.) Additionally, it is now well settled that " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b).' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) As explained by the Supreme Court: "To be protected by the litigation privilege, a communication must be 'in furtherance of the objects of the litigation.' [Citation.] This is 'part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.' [Citation.] A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*).)

Plaintiffs contend that although under the second prong of the section 425.16 analysis it is their burden to make a prima facie showing of their ability to prevail, since the litigation privilege asserted by Lam is an affirmative defense it is his burden to establish that the privilege applies. (*U.S. Western Falun Dafa Assn. v. Chinese Chamber of Commerce* (2008) 163 Cal.App.4th 590, 599; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) That may be, but Lam has made such a showing. The termination notice, like a prelitigation demand letter, arguably is absolutely privileged under Civil Code section 47, subdivision (b). (See *Rothman v. Jackson, supra,* 49 Cal.App.4th at p. 1148; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577-578 (*Lerette*).) The termination notice was sent to plaintiffs by counsel for Lam, it set out the statutory authority and reason for the termination of the tenancy, it made a specific demand (that plaintiffs vacate the premises within 60 days), and it threatened legal action if the demand was not met. (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 270 (*Aronson*).) Indeed, the termination notice is more closely related to judicial proceedings than a classic prelitigation demand letter because it is a "legal prerequisite for bringing an unlawful detainer action." (*Birkner I, supra,* 156 Cal.App.4th at p. 282; see *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 25 [filing of purportedly invalid mechanic's lien is absolutely privileged because the claim of lien is authorized by law and related to an action to foreclose].) The termination notice in this case "is precisely the type of statement that the litigation privilege is intended to protect since it represents the first step toward litigation and the

purpose of the litigation privilege is to provide 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' " (*Aronson, supra,* 58 Cal.App.4th at p. 270.)

***5** Even assuming, as plaintiffs contend, that the termination notice is within the litigation privilege only if litigation was "contemplated in good faith and under serious consideration" (*Action Apartment, supra,* 41 Cal.4th at pp. 1250-1252; *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1128), the declarations of Lam and Leadbetter submitted in reply to plaintiffs' opposition to the motion to strike, asserting their intention to have filed suit if plaintiffs did not vacate the premises, while "self-serving," nonetheless provide competent evidence that the notice was served in serious contemplation of litigation. Plaintiffs argue at length that Lam was not entitled to prevail in a wrongful detainer action, therefore presumably showing that the termination notice was not served with a good faith belief in the viability of his claim. The fact that Lam's claim was not meritorious, if one accepts this debatable premise, does not necessarily negate Lam's good faith belief in its merit and in all events that is not the relevant issue. Even if Lam did not believe he was entitled to prevail in the threatened unlawful detainer action, the termination notice was privileged so long as he actually intended to file that action. " 'It is important to distinguish between the lack of a good faith intention to bring a suit and publications which are made without a good faith belief in their truth, i.e., malicious publications. The latter, when made in good faith anticipation of litigation, are protected as part of the price paid for affording litigants the utmost freedom of access to the courts.' " (*Action Apartment,* 41 Cal.4th at p. 1251.) " '[T]he litigation privilege applies without regard to [a proponent's] 'motives, morals, ethics, or intent.' (*Silberg v. Anderson, supra,* 50 Cal.3d at p. 220.) The litigation privilege is simply a test of connectedness or logical relationship to litigation." (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922 (*Blanchard*).)

When the trial court initially ruled on the motion to strike, plaintiffs admittedly had submitted no evidence to contradict the declarations of Lam and Leadbetter. On remand, the trial court indicated its view that in ruling on the second prong of the section 425.16 analysis, its consideration was limited to the evidence that was before the court when the motion was first heard. Plaintiffs argue persuasively that since those declarations were submitted with Lam's reply papers, to which they had no opportunity to respond, they were entitled to submit additional evidence on remand to contradict Lam's evidence. We need not decide this question, however, since the trial court also denied plaintiff's motion on the alternative ground that the additional evidence plaintiffs submitted failed to make a prima facie showing that Lam did not genuinely intend to file suit when he caused the termination notice to be served. We agree with this alternative rationale.

***6** As just noted, and contrary to plaintiffs' contention, no inference that Lam did not have a good faith and serious intent to litigate can be drawn from evidence that Lam assertedly did not have a good faith understanding of the merits of his claim. (*Feldman, supra,* 160 Cal.App.4th at p. 1489.) Nor can any such inference be drawn from the fact that Lam left the repossession to his sister Karen Lum, who hired counsel to accomplish their objective, nor from Lam's and his sister's lack of understanding of the legal requirements to regain possession. Plaintiffs presented no evidence that Lam or his sister ever questioned, much less repudiated, their attorney's actions in serving the termination notice and refusing to rescind it prior to the death of their mother. Nor do the excerpts of deposition testimony cited by plaintiffs create a reasonable inference that Lam would have abandoned the attempt to secure the unit through litigation if his mother had lived and plaintiffs refused to move out. Certainly no such inference can be drawn from the fact that Lam did not proceed with an unlawful detainer action after his mother's death which eliminated the very reason for seeking possession of the unit. (Cf. *Aronson, supra,* 58 Cal.App .4th at pp. 271-272 [failure to file lawsuit did not raise triable issue of whether litigation was seriously contemplated where demands in prelitigation letter were substantially met and eliminated primary basis for litigation].)

Contrary to plaintiffs' further argument, the litigation privilege was not lost because Lam's attorney failed to respond to plaintiffs' claim that they were protected tenants under the Rent Ordinance. Plaintiffs' reliance on the attorney's failure to explicitly threaten litigation in the settlement letter she sent after service of the termination notice is similarly misplaced. The settlement letter asserted that "Kwai Ho Lam is proceeding with a relative move-in eviction," it set forth the basis for the eviction, and it then stated: "Although my client is proceeding ... with a lawful eviction, given the circumstances of [Birkner and Scanlon], please be advised" of the terms of Lam's settlement offer, which included plaintiffs' stipulation to entry of judgment and mutual releases. The letter concluded with the following sentence: "Be advised that this offer shall not serve[ ] to retract or waive the

effectiveness of the Termination Notice served on your clients and/or occupants of the property." This letter to "potential adversar[ies], setting out the claims made [against them], urging settlement and warning of the alternative of judicial action," although containing no explicit threat of litigation, clearly " 'pointed to incipient litigation.' " (*Lerette, supra,* 60 Cal.App.3d at p. 577.) To hold that the litigation privilege was defeated because the settlement letter did not contain an explicit threat of litigation "would defeat" the purpose of the letter, which was "to avoid litigation." (*Blanchard, supra,* 123 Cal.App.4th at p. 920.) "As any competent attorney is aware, access to the courts is not an end in itself but only one means to achieve satisfaction for a client. If this can be obtained without resort to the courts-even without the filing of a lawsuit-it is incumbent upon the attorney to pursue such a course of action first." (*Lerette, supra,* 60 Cal.App.3d at p. 577.) That Lam's attorney did so hardly supports the inference that Lam did not intend to pursue his claim if settlement efforts failed.

***7** We conclude that "[t]o allow [plaintiffs] to proceed with [their] cause [s] of action would substantially defeat the purpose of the [litigation] privilege enunciated in [Civil Code] section 47, [subdivision (b)]." (*Lerette, supra,* 60 Cal.App.3d at p. 579.) In furtherance of the public policy purposes that underlie the litigation privilege, the privilege is given "broad application." (*Silberg v. Anderson, supra,* 50 Cal.3d at p. 211.) If plaintiffs' disagreement with the merits of Lam's claim, or Lam's unquestioning reliance on his sister and the attorney she selected to pursue their common objective were sufficient to support an inference that Lam did not intend to litigate the matter, the purpose of the privilege would be severely undermined. Any demand letter that an attorney might write on behalf of a client threatening litigation would carry the potential for tort claims and the need for a trial to overcome an inference that there was no serious intention to litigate because of an asserted lack of merit to the claim or reliance on counsel. Lam has shown that the termination notice comes within the scope of the litigation privilege and that when the notice was sent he intended to pursue an unlawful detainer action if plaintiffs did not vacate the premises. The trial court properly ruled that plaintiffs failed to make a prima facie showing of their ability to overcome the privilege and did not err in granting the special motion to strike.[6]

DISPOSITION

The judgment is affirmed. Defendant shall recover his costs on appeal.

We concur: SIGGINS and JENKINS, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2009 WL 807566

Footnotes

1 All statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Plaintiffs also appeal from a postjudgment order awarding Lam $62,087.50 of attorney fees. Plaintiffs argue only that the fee award should be reversed if we reverse the order granting the anti-SLAPP motion. Because we affirm, the attorney fee order also must be affirmed. In light of this determination, we deny as unnecessary plaintiffs' request to strike Lam's appendix containing the motion papers relating to the request for attorney fees.

3 On remand, the trial court overruled plaintiffs' objection to Leadbetter's reply declaration.

4 In addition to the parties' briefs, we have considered a brief filed by Bet Tzedek, Inner City Law Center, Legal Aid Foundation of Los Angeles, and AIDS Legal Referral Panel as amici curiae in support of plaintiffs.

5 Plaintiffs' argument that the litigation privilege does not provide immunity for defendant's notice to evict allegedly in violation of the federal Fair Housing Act is based upon a subsequent Ellis Act notice of eviction that resulted in additional litigation between the parties. We do not consider the issue because in the present action plaintiffs did not allege discrimination or retaliation in violation of the federal Fair Housing Act, nor did plaintiffs seek to amend their complaint to include such allegations. We express no opinion as to whether plaintiffs can allege a federal Fair Housing Act cause of action against Lam.

6 In light of this determination, we need not address the validity of Lam's defenses of res judicata, or the asserted unconstitutionality of certain relative move-in provisions of the Rent Ordinance, or the effect of the safe harbor provisions

of the ordinance. Lam requests that we take judicial notice of the nonpublished decision in *Chen v. Rivera* (Aug. 4, 2005, A109285), but that decision is not necessary to resolve the appeal before us, and we therefore deny the request as moot.

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