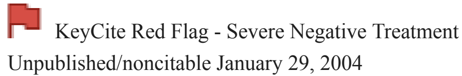
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Court of Appeal, First District, Division 2, California.

Luis Walters CAMACHO, et al., Plaintiffs and Respondents,
v.
Robert MELLETT, Defendant and Appellant.

No. A101762.
|
(San Francisco County Super. Ct. No. 410317).
|
Jan. 29, 2004.
|
As Modified on Denial of Rehearing March 1, 2004.

Attorneys and Law Firms

John Charles Riccio, San Francisco, CA, for Plaintiff-Respondent.

Andrew Mayer Zacks, San Francisco, CA, for Defendant-Appellant.

RUVOLO, J.

I. INTRODUCTION

***1** This case arises out of a landlord-tenant dispute. The landlord took several actions aimed at evicting the tenants, including filing and then dismissing an unlawful detainer action. The tenants sued, alleging that the landlord's conduct violated his agreement to waive rent as partial consideration for a buyout of the end portion of their lease term. The landlord filed a motion to strike the complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] The trial court denied the motion in its entirety.

On the landlord's appeal, we conclude that the landlord met his initial burden of establishing that the tenants' suit arose out of protected activity. Nonetheless, the tenants made the necessary prima facie showing of the strength of their claim to require denial of the motion as to some, though not all, of the causes of action pleaded in their complaint. Accordingly, we affirm in part and reverse in part.

II. Factual and Procedural Background

Respondents Luis Camacho and Nicholas Monsour (Tenants) operated an antique store in a building that was sold to appellant Robert Mellett (Landlord) in April 2000, during the term of Tenants' lease.[2] Shortly after acquiring the building, Landlord told Tenants he wanted to regain possession of their premises in order to demolish the building. Allegedly in furtherance of this goal, Landlord filed a declaratory relief action against Tenants in October 2000, which Landlord ultimately dismissed. Landlord then sent Tenants two eviction notices in June and July 2001, both of which Tenants contend were groundless. Eventually, in February 2002, Landlord agreed to buy out the remaining term of Tenants' lease, including their option to renew. Part of the buyout price was to be paid in cash, and the remainder in waived rent.

In March 2002, after the deadline for the exercise of Tenants' option to renew their lease had expired, Landlord told Tenants he could not pay them the cash portion of the buyout price, but he still wanted them to leave the premises before the end of the lease term. Tenants responded that they wanted to enforce the buyout agreement. Shortly thereafter, Landlord sent Tenants a third eviction notice based on their failure to pay the rent that Landlord had agreed to waive as part of the buyout agreement. Landlord then filed an unlawful detainer action, which he later dismissed without prejudice. Landlord never paid Tenants the cash portion of the consideration due to them under the buyout agreement in exchange for their relinquishing their option to renew.

In July 2002, Tenants filed the instant action against Landlord, pleading eight causes of action: negligence in managing the property; breach of contract, based on Landlord's failure to honor the buyout agreement; intentional infliction of emotional distress; negligent infliction of emotional distress; breach of the warranty of quiet possession breach of the covenant of good faith and fair dealing; private nuisance; and fraud. The pleading included factual allegations, which were incorporated by reference into each cause of action, that Landlord had filed actions for declaratory relief and unlawful detainer, and had sent eviction notices, without legal cause and for an improper and illegal motive.

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***2** Landlord responded to the complaint by filing a special motion to strike under the anti-SLAPP statute. The motion argued that the complaint arose from protected activity-specifically, Landlord's exercise of his right to petition by sending eviction notices and filing legal actions-and that Tenants could not establish a likelihood of success on the merits on any of their causes of action. By the time the motion was heard, Tenants had vacated the premises. The trial court denied the motion in its entirety, and Landlord now appeals. (§ 425.16, subd. (j).)

III. Discussion

The anti-SLAPP statute 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." (§ 425.16, subd. (b)(1).) The statute posits "a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation] ... If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier, supra,* 29 Cal.4th at p. 88, 124 Cal.Rptr.2d 530, 52 P.3d 703.)

The trial court ruled against Landlord as to both steps in the analysis. We review the order independently, as the issues raised are purely ones of law that we consider de novo. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929, 116 Cal.Rptr.2d 187 (*Kajima*).)

A. Complaint Arising from Protected Activity

A cause of action is subject to a motion to strike under the anti-SLAPP statute even if it is based only in part on allegations regarding protected activity. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308, 106 Cal.Rptr.2d 906.[3]) Tenants alleged, as part of the basis for *each* cause of action in their complaint, that Landlord had filed actions for declaratory relief and unlawful detainer against them (the landlord-tenant actions). Thus, assuming the act of filing the landlord-tenant actions was protected by the anti-SLAPP statute, *every* cause of action in Tenants' complaint was properly subject to scrutiny for lack of merit via a special motion to strike.[4]

Generally speaking, filing lawsuits-even improper ones-constitutes an exercise of the right of petition. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 316, 126 Cal.Rptr.2d 516.) Tenants contend that this rule does not apply here, because Landlord had already dismissed the landlord-tenant actions before Tenants sued him (thus, as they put it, chilling his own free speech rights). Tenants argue that because the landlord-tenant actions were no longer pending when they filed this lawsuit, they "cannot constitute a written statement before a judicial body in connection with an issue under consideration or review" within the meaning of the anti-SLAPP statute. Tenants cite no authority for this proposition, and we find no support for it in the language or purpose of the anti-SLAPP statute.

***3** On the contrary, as the Supreme Court held in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67-68, 124 Cal.Rptr.2d 507, 52 P.3d 685 (*Equilon*), a defendant filing an anti-SLAPP motion does not have to show that plaintiff filed the action with the *intent* to chill the defendant's protected activity, but only that the action *arose from* the protected activity. Thus, the fact that the protected activity ceased before the present suit was filed is irrelevant to the applicability of the anti-SLAPP statute. Indeed, it would defeat the purpose of the anti-SLAPP statute to hold that it does not apply to a suit arising from protected activity that had already been discontinued before the challenged suit was filed. Such a result would encourage the opponents of protected activity to use extralegal means to force a halt to the protected activity, because if they succeeded in doing so, they could then file a SLAPP suit, aimed at retaliating against the activity or preventing it from recurring, without fear of incurring a motion to strike under section 425.16.

Concededly, "the mere fact that an action was filed after protected activity took place does not mean it *arose from* that activity. [Citation.]" (*Equilon, supra,* 29 Cal.4th at p. 66, 124 Cal.Rptr.2d 507, 52 P.3d 685, italics added, citing *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002, 113 Cal.Rptr.2d 625; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79-80, 124 Cal.Rptr.2d 519, 52 P.3d 695 [lawsuit based on controversy underlying earlier-filed litigation, rather than on filing of litigation itself, does not arise out of filing of litigation and therefore is not a SLAPP suit]; *Gallimore v. State Farm Fire & Casualty Ins. Co.* . (2002) 102 Cal.App.4th 1388, 1397-1400, 126 Cal.Rptr.2d

560 [same].) In the present case, for example, Tenants might have been able to frame at least some of their causes of action against Landlord in a way that avoided basing them on allegations of protected activity. (Cf. *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1317-1318, 135 Cal.Rptr.2d 903 [suit by rent control board against landlord alleging illegal rent increase was not subject to anti-SLAPP motion, because it arose from act of charging unlawful rent, not from protected activity of filing documentation with board].) Tenants chose, however, to allege the filing of the landlord-tenant actions as part of the factual basis for all of their claims. Section 425.16, subdivision (b)(2) requires us to consider those allegations in resolving the question whether this suit meets the "arising from" requirement. (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 79, 124 Cal.Rptr.2d 519, 52 P.3d 695; but see *Martinez v. Metabolife, supra,* 113 Cal.App.4th at p. 188, 6 Cal.Rptr.3d 494.)

Tenants also contend that the anti-SLAPP statute does not apply because this case involves only a private landlord-tenant dispute, and does not implicate any issue of public significance or concern. We agree that Tenants' case against Landlord is not a paradigm SLAPP suit.[5] Nonetheless, the anti-SLAPP statute applies, both by its terms and under the established case law. As the California Supreme Court held in *Briggs, supra,* 19 Cal.4th at pp. 1116-1118, 81 Cal.Rptr.2d 471, 969 P.2d 564, a defendant making a motion to strike based on *petitioning* activity as defined in section 425.16, subdivision (e)(1) or (e)(2),[6] need not demonstrate that the activity concerned an issue of public significance.[7] (Cf. *Mattel v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188, 121 Cal.Rptr.2d 794 [filing a lawsuit satisfies the "in connection with a public issue" component of the anti-SLAPP statute because it pertains to an official proceeding].)

***4** In short, we conclude that the trial court erred in holding that Tenants' suit did not arise from protected activity within the meaning of the anti-SLAPP statute. We must therefore proceed to the second step in the anti-SLAPP analysis, which is to analyze whether Tenants made a sufficient showing of likely success on the merits to survive Landlord's special motion to strike.

B. Likelihood of Success on the Merits

"[T]he anti-SLAPP statute does not provide immunity. Instead, it places the burden on a plaintiff to establish 'that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) In order to do so, 'plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.]' [Citations.] To determine whether plaintiff has met this burden, the test is the same as for a motion for summary judgment. The court may not weigh the evidence or make credibility determinations; doing either would violate plaintiff's right to a jury trial. [Citation.] Further, the court may only consider the opposing evidence 'to determine if it defeats the plaintiff's showing as a matter of law. [Citation.]' [Citation.]." (*Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1557, 1 Cal.Rptr.3d 245; see also *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733.)

Because a special motion to strike usually comes relatively early in the life of a case, the quantum of evidence that Tenants must adduce in order to satisfy the burden of proving a likelihood of prevailing on the merits is less than that needed to succeed at trial; rather, it is akin to the prima facie showing required to survive a motion for summary judgment, or a motion for nonsuit or directed verdict. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809, 119 Cal.Rptr.2d 108; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496 & fn. 1, 45 Cal.Rptr.2d 624; *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at pp. 823-825, 33 Cal.Rptr.2d 446.) The causes of action need only be shown to have "minimal merit." (*Navellier, supra,* 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703.)

We review de novo the trial court's determination that in this case, Tenants made a sufficient showing of probability that they would prevail on their claims. (*Colt v. Freedom Communications, Inc., supra,* 109 Cal.App.4th at p. 1557, 1 Cal.Rptr.3d 245; *Kajima, supra,* 95 Cal.App.4th at p. 929, 116 Cal.Rptr.2d 187.) At the outset, we note that at the hearing on the motion, the trial court indicated an intent to grant the motion as to some of Tenants' causes of action and deny it as to others. For reasons that are not clear from the record, however, the court's written order (which was drafted by Tenants' counsel, and not signed and filed by the court until some three months after the hearing) denied the motion in its entirety, ruling simply "Plaintiffs have demonstrated a probability of prevailing on their claim."

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***5** The trial judge appears to have been unsure whether it was legally permissible to grant an anti-SLAPP motion as to some causes of action and deny it as to others. The judge need not have been troubled by this issue, because "[t]he express language of section 425.16, subdivision (b)(1) allows a single cause of action to be stricken. The fact that other claims remain does not bar a trial judge from granting a section 425.16 special motion to strike." (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150, 106 Cal.Rptr.2d 843; *Kajima, supra,* 95 Cal.App.4th at pp. 924 & fn. 2, 928, 116 Cal.Rptr.2d 187.) We will accordingly consider Tenants' probability of success as to each of their causes of action individually, though organizing our discussion by related groups of claims.

1. Negligence and Intentional or Negligent Infliction of Emotional Distress

In support of their tort claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress,[8] Tenants alleged only that Landlord served them with allegedly groundless eviction notices; filed the landlord-tenant actions described above; and breached the lease buyout agreement. Landlord does not deny that in their opposition to the anti-SLAPP motion, Tenants made an adequate factual showing that Landlord committed these acts. Rather, Landlord contends that as a matter of law, his conduct did not amount to the commission of any of these torts. (See *Seelig v. Infinity Broadcasting Corp., supra,* 97 Cal.App.4th at p. 809, 119 Cal.Rptr.2d 108 ["The motion to strike should be granted if, as a matter of law, 'the properly pleaded facts do not support a claim for relief. [Citation.]' [Citation.]"].)

The act of filing a lawsuit is protected from forming the basis for Tenants' causes of action in tort by the absolute privilege for litigation-related communications afforded by Civil Code section 47, subdivision (b).[9] "Although originally enacted with reference to defamation actions alone [citation], the privilege has been extended to *any* communication, whether or not it is a publication, and to *all* torts other than malicious prosecution. [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29, 61 Cal.Rptr.2d 518, italics in original; accord, *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830, 135 Cal.Rptr.2d 1, 69 P.3d 927.) The litigation privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 810, 266 Cal.Rptr. 360.) Thus, Landlord's argument is well taken that his filing of the landlord-tenant actions cannot form the basis of liability for any tort other than malicious prosecution, which Tenants' complaint did not allege.

Moreover, because Landlord's eviction notices were prerequisites to his filing an unlawful detainer action (§ 1161; see generally *Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513, 65 Cal.Rptr.2d 457), his service of such notices also lies within the ambit of the same absolute privilege. (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194, 17 Cal.Rptr.2d 828, 847 P.2d 1044; *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 81 Cal.Rptr.2d 392.) Accordingly, no viable claim for the torts described in this section can be founded on Landlord's service of eviction notices on Tenants, even if the notices were groundless.

***6** Tenants also alleged, and substantiated, that Landlord breached the lease buyout agreement by failing to pay the $50,000 due to them in cash.[10] Failure to pay money due under a contract is, of course, noncommunicative conduct rather than a communicative act, and therefore is not covered by the Civil Code section 47 privilege. (Cf. *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-212, 271 Cal.Rptr. 191, 793 P.2d 524 [act of illegally tape recording conversations was noncommunicative conduct not protected by litigation privilege, even though recordings were made in order to use their content in litigation, and such use would be privileged].) To the extent, however, that Landlord's failure to abide by the terms of the lease buyout agreement affords a basis for liability sounding in tort rather than contract, it would be for fraud, as discussed *post,* rather than for negligence or infliction of emotional distress. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 87 Cal.Rptr.2d 886, 981 P.2d 978 [damages for emotional distress not available in action for negligent breach of contract in absence of physical injury or breach of duty amounting to independent tort]; *Potter v. Firestone Tire & Rubber Co., supra,* 6 Cal.4th at pp. 984-985, 25 Cal.Rptr.2d 550, 863 P.2d 795 [to recover emotional distress damages for negligent tort, plaintiff must show that defendant breached a legal duty in a way that threatened physical injury, not simply damage to property or financial interests].)

Moreover, as to intentional infliction of emotional distress, Tenants did not even plead, much less introduce evidence of, any conduct by Landlord amounting to the kind of extreme and outrageous behavior required to establish that tort. (See *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494, 76 Cal.Rptr.2d 540 [affirming order sustaining demurrer without

leave to amend, on ground that complaint pleading intentional infliction of emotional distress did not allege conduct so extreme as to exceed all bounds of behavior usually tolerated in civilized community].) Accordingly, Tenants have not established a probability of success on the merits as to that cause of action.

2. Breach of Contract; Breach of Covenant of Good Faith and Fair Dealing; Fraud

Tenants alleged, and adduced evidence substantiating, that in exchange for their agreement to vacate the premises before the end of the lease term and to waive their option to renew, Landlord promised to pay Tenants $50,000 in cash in addition to waiving a portion of their rent, and then failed to do so. These facts, on their face, establish a likelihood of success on Tenants' cause of action for damages for breach of the buyout agreement.

Landlord argues that Tenants did not plead or prove these facts sufficiently explicitly to establish a prima facie case of breach of contract. We disagree. To paraphrase the analysis of the Second District Court of Appeal in an opinion filed on the very day this case was argued, "[Landlord's] characterization of such [protected] activity as the basis for [Tenants'] cause of action depends solely upon their narrow construction of the complaint, while ignoring other facts in the record that show what conduct underlies [Tenants'] cause of action. [¶] Granted, the complaint is not a model pleading.... [¶] We need not, however, wear the blinders that [Landlord] ha[s] fashioned for us." (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630, 7 Cal.Rptr.3d 715.) As the Second District did in *Jespersen* regarding a cause of action for legal malpractice, we conclude that the *gravamen* of the cause of action for breach of contract in this case "did not consist of any act in furtherance of anyone's right of petition or free speech" (*id.* at p. 631, 7 Cal.Rptr.3d 715), but rather in Landlord's *failure* to pay the money due under the lease buyout agreement. It cannot seriously be contended that Landlord's conduct in this regard did not establish a prima facie case of breach of contract.

***7** Landlord also contends that Tenants did not establish that they complied with all of the conditions of the contract, including vacating the premises by August 31, 2002, and that they repudiated the contract by attempting to exercise their option to renew the lease after it had expired. But in order to survive an anti-SLAPP motion, Tenants need not negate every potential defense Landlord might have against enforcement of the buyout agreement. They need only make a prima facie showing sufficient to establish that their cause of action is not one that "lacks even minimal merit." (*Navellier, supra,* 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703; see also *Schoendorf v.. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 238, 118 Cal.Rptr.2d 313 [requirement in anti-SLAPP statute that plaintiff show probability of prevailing refers to reasonable probability, and requires only that plaintiff make a prima facie showing of facts which would, if proved at trial, support judgment in plaintiff's favor].) This they have done. Accordingly, the trial court correctly denied the motion to strike as to the breach of contract cause of action.

With respect to breach of the implied covenant of good faith and fair dealing, liability on this cause of action, outside the insurance context, sounds solely in contract, not in tort. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684, 254 Cal.Rptr. 211, 765 P.2d 373; see also *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 44 Cal.Rptr.2d 420, 900 P.2d 669.) This limits the measure of plaintiffs' damages to those available for breach of contract, but does not vitiate their cause of action. Thus, while this cause of action is somewhat duplicative of Tenants' breach of contract claim, Tenants did show a reasonable probability of success in establishing it.

Entering into a contract with no intention of performing constitutes fraud. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981; see generally 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 685, pp. 786-787.) Fairly construed, Tenants' evidence establishes a likelihood of success on their cause of action for fraud, by providing a basis from which a trier of fact could infer that Landlord entered into the lease buyout agreement with no intention of performing it, for the purpose of lulling Tenants into refraining from exercising their option to renew until after the deadline to do so had expired. (Cf. *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 52-55, 134 Cal.Rptr.2d 420 [drawing reasonable inferences from plaintiff's evidence to support showing of reasonable probability of success justifying denial of anti-SLAPP motion].) As the court pointed out in *Jespersen v. Zubiate-Beauchamp, supra,* 114 Cal.App.4th at pp. 631-632, 7 Cal.Rptr.3d 715, when a cause of action arises from unprotected conduct, the fact that protected conduct may form part of the evidence in support of that cause of action does not suffice to vitiate its viability under the anti-SLAPP statute. Similarly, in this case, where the essential elements of Tenants' cause of action for fraud arise from unprotected conduct, Tenants are not precluded from relying

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on Landlord's protected petitioning conduct as part of their additional supporting evidence.

***8** Landlord argues, however, that in order to establish damages in this cause of action, Tenants must demonstrate that if Landlord had not defrauded them, they would have been in a position to exercise the option prior to the deadline. Landlord introduced no evidence in the trial court, however, that Tenants could not have exercised the option. In the absence of any such evidence, Tenants' evidence, including the inferences fairly drawn therefrom, is sufficient to establish the "minimal merit" to survive Landlord's special motion to strike.

3. Breach of Covenant of Quiet Enjoyment

It is undisputed that Tenants were still in possession when the complaint was filed. Based on that fact, Landlord argues that Tenants did not show a substantial probability of success on the merits of their cause of action alleging breach of the covenant of quiet enjoyment,[11] because they did not establish that an actual or constructive eviction had taken place, citing *Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 848, 122 Cal.Rptr. 114 (*Petroleum Collections*), and *Groh v. Kover's Bull Pen, Inc.* (1963) 221 Cal.App.2d 611, 614, 34 Cal.Rptr. 637.[12]

The cases Landlord cites undercut his position rather than supporting it, however. Although *Petroleum Collections* does hold that "the covenant of quiet enjoyment is not broken until there has been an actual or constructive eviction" (*Petroleum Collections, supra,* 48 Cal.App.3d at p. 847, 122 Cal.Rptr. 114), the opinion goes on as follows. "[A] constructive eviction occurs when the act of molestation [i.e., interference with the tenant's possession] merely affects the beneficial use of the property, causing the tenant to vacate the premises. If the tenant is evicted *or if he surrenders possession of the premises within a reasonable time* after the act of molestation has occurred, he is relieved of his obligation to pay rent accruing as of the date he surrendered; *he also may sue for his damages* or plead damages by way of offset in an action brought against him by the landlord to recover any unpaid rent that accrued prior to the surrender of the premises. [Citations.] If, in the case of an interference with the tenant's beneficial enjoyment of the premises, the tenant does not surrender the premises within a reasonable time after the date of the interference, he is deemed to have waived his right to abandon; *what constitutes a reasonable period of time is a question of fact to be determined by the trier of fact* after considering all of the circumstances. [Citation.]" (*Id.* at pp. 847-848, 122 Cal.Rptr. 114, italics added.)

In *Petroleum Collections, supra,* the tenant, a service station operator, claimed constructive eviction as a defense to an action for unpaid rent, based on the landlord's failure to replace an identifying sign, taken down as a fire hazard, with one equally visible from the nearby freeway. (48 Cal.App.3d at pp. 844-845, 122 Cal.Rptr. 114.) The tenant remained in possession through a sublessee, without paying rent, for 11 months after the sign was removed. The trial court did not make a finding as to whether this time period was reasonable. (*Id.* at p. 848, 122 Cal.Rptr. 114.) The court of appeal held that even if it was, the tenant was still obligated to pay rent, but also noted that the tenant would have been entitled to offset his damages from the missing sign against the unpaid rent claimed by the lessor. (*Ibid.*)

***9** In *Groh v. Kover's Bull Pen, Inc., supra,* 221 Cal.App.2d 611, 34 Cal.Rptr. 637, the tenant had occupied the premises for four years before moving out, even though the roof leaked the entire time. The issue of whether the tenant surrendered possession within a reasonable time was not addressed as such. The court did hold, however, that neither waiver nor estoppel barred the tenant from claiming constructive eviction on account of the landlords' failure to repair the roof, because the tenants were justified in relying on the landlords' continued promises and partial efforts to repair the roof.

In this case, Landlord's alleged interference with Tenants' quiet possession culminated with his service of an eviction notice in early April 2002. Tenants vacated the premises shortly before the hearing on the motion to strike, which was held some seven months later on November 4, 2002. Given the case law discussed above, we decline to hold *as a matter of law* that, under all the circumstances, Tenants' surrender of the premises did not occur within a reasonable time after the acts allegedly constituting a breach of the covenant of quiet enjoyment. Accordingly, Tenants have shown that this cause of action has at least minimal merit, and the anti-SLAPP motion was properly denied as to this claim.

4. Private Nuisance

"[T]he essence of a private nuisance is its interference with the use and enjoyment of land. [Citations.] The activity in issue must 'disturb or prevent the comfortable enjoyment of property' [citation], such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery. [Citation.]

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[¶].... A diminution in value does not interfere with the present use of property and cannot alone constitute a nuisance. [Citation.]" (*Oliver v. AT & T Wireless Services* (1999) 76 Cal.App.4th 521, 534, 90 Cal.Rptr.2d 491.)

A cause of action for nuisance is normally founded upon a *physical* condition or activity that results in the tangible or intangible invasion of the plaintiff's property, such as encroachment of a structure across a boundary line; pollution or odors; noise; or illegal activities such as drug dealing or the exhibition of obscene material. (*Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550, 561, 123 Cal.Rptr.2d 479 [" '[t]he typical and familiar nuisance claim involves an activity or condition which causes damage or other interference with the enjoyment of adjoining or neighboring land.' [Citation.] Witkin recognizes that '[a]ctual physical interference with land use constitutes the most obvious and common type of nuisance.' [Citation.]"]; see generally 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, §§ 126-128, pp. 523-525.) The case law requires that the invasion be of a sufficient nature, duration, or amount as to *substantially* and *unreasonably* interfere with the plaintiffs' use and enjoyment of their property. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, 55 Cal.Rptr.2d 724, 920 P.2d 669.)

***10** In this case, Tenants have not alleged or shown that Landlord committed or caused any physical invasion of, or damage to, the leased premises, or that Landlord did anything during Tenants' occupancy that substantially interfered with their present (as opposed to potential future) use and enjoyment of the property. Rather, Tenants allege only that Landlord interfered with their right to renew their lease by taking groundless legal actions and breaching a contract. Accordingly, as a matter of law, Landlord's alleged conduct does not constitute a private nuisance. (Cf. *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041-1043, 29 Cal.Rptr.2d 664 [presence of potentially explosive jet fuel storage tanks near plaintiffs' property did not constitute private nuisance, as a matter of law, because nuisance claim cannot be founded solely on alleged diminution in property value and fear of future injury].)

Moreover, even if it did, the cause of action for nuisance sounds in tort (see generally *Van Zyl v. Spiegelberg* (1969) 2 Cal.App.3d 367, 372-373, 82 Cal.Rptr. 689), so to the extent that it is based on Landlord's service of eviction notices and filing of the landlord-tenant actions, it is barred by the litigation privilege, as discussed *ante.* And to the extent that the claim is based on Landlord's alleged breach of contract, it is duplicative of the causes of action for breach of the covenant of quiet enjoyment and fraud, particularly inasmuch as Tenants' complaint sought only damages, not injunctive relief. For all of the foregoing reasons, Tenants have not shown a probability of prevailing on the merits of their nuisance claim, and the special motion to strike should have been granted as to this cause of action.

IV. Disposition

The trial court's order denying Landlord's special motion to strike in its entirety is vacated, and the case is remanded to the trial court with instructions to enter an order denying Landlord's special motion to strike only with respect to Tenants' causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and breach of the covenant of quiet enjoyment (breach of warranty of quiet possession), and granting it with respect to all of the remaining causes of action. The trial court shall determine the amount of attorney fees and costs incurred by Landlord in making the motion that is reasonably attributable to those causes of action on which Landlord prevailed, and shall award such fees and costs to Landlord under section 425.16, subdivision (c). (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1382-1384, 46 Cal.Rptr.2d 542 [prevailing defendant on motion to strike entitled to attorney fees and costs only on motion to strike, not on entire suit].) The trial court shall also determine the amount of attorney fees incurred by Landlord on this appeal that is reasonably attributable to the causes of action on which Landlord prevailed, and shall also award such fees to Landlord under section 425.16, subdivision (c). (See *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at pp. 1016-1020.) In the interests of justice, the parties shall each bear their own costs on appeal.

We concur: KLINE, P.J., and LAMBDEN, J.

All Citations

Not Reported in Cal.Rptr.3d, 2004 WL 171667

Footnotes

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1 The anti-SLAPP statute provides for the early dismissal of "strategic lawsuits against public participation." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, 124 Cal.Rptr.2d 530, 52 P.3d 703 (*Navellier*).) All further unspecified statutory references are to the Code of Civil Procedure.

2 Our recitation of the facts is based on the declarations and exhibits Tenants submitted in opposition to Landlord's anti-SLAPP motion. Tenants' complaint also names Stephen M. Ryan as a defendant, alleging that he was their landlord along with Mellett. Ryan did not join in Mellett's anti-SLAPP motion, however, and is not a party to this appeal.

3 In *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 6 Cal.Rptr.3d 494 (*Martinez v. Metabolife*), decided after the close of briefing but before oral argument in this case, the court characterized this aspect of *Fox Searchlight Pictures, Inc. v. Paladino, supra,* 89 Cal.App.4th 294, 106 Cal.Rptr.2d 906, as dictum. (*Martinez v. Metabolife, supra,* 113 Cal.App.4th at p. 188, 6 Cal.Rptr.3d 494.) The *Martinez v. Metabolife* court adopted an alternative approach, concluding 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." (*Ibid.,* italics in original.) Because the allegations of protected activity in the complaint in this case are closely intertwined with the allegations of non-protected activity, we have applied the *Fox Searchlight* approach, treating all of the causes of action as triggering the protection of the anti-SLAPP statute, and proceeding to the second step of the anti-SLAPP analysis as to each cause of action. We note, however, that the outcome would be the same if we applied the *Martinez v. Metabolife* approach. Focusing on the gravamen of each cause of action would lead to the conclusion that the same causes of action that we find have minimal merit, and thus should survive an anti-SLAPP challenge, are not subject to such a challenge in the first place.

4 The complaint further alleged that Landlord repeatedly served Tenants with groundless eviction notices. Landlord argues that the service of those notices also constituted protected activity. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564 (*Briggs*); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784, 54 Cal.Rptr.2d 830 ["communications preparatory to or in anticipation of the bringing of an action or other official proceeding are ... entitled to the benefits of section 425.16. [Citation.]"].) Because we conclude that the allegations regarding the filing of the landlord-tenant actions were sufficient to subject the entire complaint to the scrutiny of the anti-SLAPP statute, we need not resolve this question.

5 As the trial court pithily characterized it, a paradigm SLAPP suit would be "the lumb[e]r company versus the tree huggers." (Cf. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, 33 Cal.Rptr.2d 446, overruled on other grounds in *Equilon, supra,* 29 Cal.4th at p. 68, 124 Cal.Rptr.2d 507, 52 P.3d 685 ["The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. [Citations.]"].)

6 These subdivisions read as follows: "(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [or] (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...."

7 Just prior to oral argument in this case, Tenants' counsel called to our attention *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 6 Cal.Rptr.3d 675, which was decided after the close of briefing. *Jewett* held that allegedly misleading credit card solicitations did not constitute acts of free speech in connection with a public issue, and thus were not subject to the anti-SLAPP statute. Because petitioning activity need not involve a public issue or an issue of public interest in order to come within the ambit of the anti-SLAPP statute, cases such as *Jewett* are not relevant to our analysis here.

8 In addition to the problems discussed in the rest of this section, it is doubtful that Tenants can show a probability of success on the merits of their cause of action for negligent infliction of emotional distress for the simple reason that such a cause of action, standing alone, is of dubious validity. "[T]here is no independent tort of negligent infliction of emotional distress. [Citation.] The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.] That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. [Citation.] [¶] ... [U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object,

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recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. [Citations.]" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984-985, 25 Cal.Rptr.2d 550, 863 P.2d 795.)

9 Section 47, subdivision (b), provides in relevant part that "A privileged publication or broadcast is one made: [¶] ... [¶] ... [i]n any ... judicial proceeding." In the landmark case of *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365, the California Supreme Court described the privilege conferred by this subdivision, commonly known as the litigation privilege, as follows: "[T]he 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." The Supreme Court in *Silberg v. Anderson* also expressly disapproved cases such as *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 231 Cal.Rptr. 113 and *McKnight v. Faber* (1986) 185 Cal.App.3d 639, 230 Cal.Rptr. 57, on which Tenants rely, to the extent they hold the litigation privilege applies only to communications that are made to promote the interest of justice. (*Silberg v. Anderson, supra,* 50 Cal.3d at pp. 212-213, 266 Cal.Rptr. 638, 786 P.2d 365.)

10 Technically, this fact was not alleged in support of Tenants' cause of action for negligence, because it is stated for the first time in connection with the second cause of action alleging breach of contract. It was, however, incorporated by reference into the subsequent causes of action for intentional and negligent infliction of emotional distress.

11 Tenants' complaint refers to this as "breach of the warranty of quiet possession," which is the term used in Civil Code section 1927. We refer to it by the term more commonly used in the literature. (See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 573, pp. 747-748 ["In every lease, there is an implied covenant by the lessor of *quiet enjoyment* and possession during the term. [Citations.]" (Italics in original.)].)

12 Landlord also argues that inducing a tenant to waive the right to exercise an option does not constitute actual or constructive eviction. This contention is made for the first time in his reply brief, and is not supported by any citation of authority or detailed argument. Accordingly, we decline to address it.

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