KATHLEEN MARY JONES, Plaintiff and Respondent, v. RICHARD E. BECKMAN et al., Defendants and Appellants.

A114974

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

2007 Cal. App. Unpub. LEXIS 8326

October 16, 2007, Filed

PRIOR HISTORY: [*1]
San Francisco County Super. Ct. No. CGC06-0451362.

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

OPINION BY: Reardon

OPINION

Appellants, an attorney and his law firm, recorded a lis pendens after initiating a quiet title action against respondent. [1] Respondent in turn sued appellants and others on a slander of title theory and succeeded in defeating appellants' motion to strike under the anti-SLAPP statute, *Code of Civil Procedure section 425.16*. [2] The trial court correctly determined that appellants satisfied their burden under the first prong of the anti-SLAPP statute but, since the litigation privilege affords immunity to the underlying activity of recording the lis pendens, it erred in concluding that respondent had shown a probability of prevailing on the merits of her claim. Accordingly, we reverse the order denying appellants' *section 425.16* motion to strike.

1 Appellants are Richard E. Beckman (Beckman) and the law firm Beckman Marquez LLP. Respondent is Kathleen Mary Jones.

2 SLAPP is the acronym for strategic lawsuits against public participation.

Unless otherwise specified, all statutory references are to the Code of Civil Procedure.

I. FACTUAL BACKGROUND

This case concerns real property commonly [*2] known as 595 Dalewood Drive in Orinda. In March 2005 a grant deed was filed in the Contra Costa County Recorder's Office in which Plusfive Holdings, L.P. (Plusfive), a limited partnership and grantor, granted the above property to "KMD Jones, a single woman." The deed was signed by "Sandra D. Marin, Managing Member, NorCal Interests, LLC [hereafter NorCal] General Partner" of Plusfive.

That June, Beckman filed a complaint to quiet title to the Orinda property on behalf of Plusfive. The complaint

was verified for Plusfive by "Sharrie Cutshall, General Partner." Shortly thereafter, Beckman filed a lis pendens referencing the pendency of the lawsuit alleging a real property claim affecting 595 Dalewood Drive, Orinda. A first amended complaint, again verified by Sharrie Cutshall, was filed in October. That complaint alleged an oral agreement pursuant to which Jones lent money to Plusfive and promised to assist with a mortgage refinance. In return, Plusfive provided Jones the deed "solely as security" for her obligations.

In November 2005 the Bledsoe Law Firm substituted in as counsel for Plusfive. The Bledsoe firm dismissed the quiet title action without prejudice in December 2005, but did [*3] not immediately withdraw the lis pendens. [3]

> 3 Apparently Jones moved to expunge the lis pendens but before the motion was heard, the Bledsoe firm recorded a notice of withdrawal and then filed a second lis pendens. Once a lis pendens has been expunged, section 405.36 requires leave of court before a second notice can be filed with respect to the affected property.

In April 2006 Jones pursued a slander of title action against Beckman, his law firm and others. As to appellants, the gist of Jones's first amended complaint was that the lis pendens lacked "any legal privilege or justification" and caused her pecuniary loss and lost opportunity to sell the property. Jones also asserted that the transaction by which she acquired nominal title to the property was illegal. Further, the personal verification in the quiet title action was unauthorized and without legal effect.

Appellants moved unsuccessfully to strike the complaint, asserting that Jones could not establish a probability of prevailing on her slander of title claim because, among other points, the litigation privilege afforded absolute immunity to the recording of the lis pendens. Opposing the motion, Jones argued that the underlying [*4] quiet title action was not properly verified or authorized, and consequently the lawsuit did not allege a real property claim and could not satisfy the requirements of the litigation privilege as detailed in *Civil Code section 47, subdivision (b)(4)*. [4] Jones submitted a certificate of limited partnership for Plusfive listing NorCal as the sole general partner for the limited partnership; NorCal's articles of organization as a limited liability corporation (LLC), indicating that the LLC would be managed by one manager, but not identifying the manager; and the grant deed executed by Sandra Marin as managing member of NorCal, for Plusfive.

> 4 This statute provides: "A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law."

Denying the motion, the trial court found that the filing of the lis pendens in connection with the quiet title action was constitutionally protected, but there was a probability Jones would prevail in her slander of title action based on evidence that appellants did not obtain a proper client [*5] verification. This appeal followed.

II. DISCUSSION

A. *Introduction*

Resolving the merits of a *section 425.16* motion entails a two-part analysis, concentrating initially on whether the challenged cause of action arises from protected activity within the meaning of the statute and, if so, proceeding next to whether the plaintiff can establish a probability of prevailing on the merits. (*Ampex Corp. v. Cargle (2005) 128 Cal.App.4th 1569, 1576*.) Our review of the trial court's ruling on an anti-SLAPP motion is de novo. [5] (*Carver v. Bonds (2005) 135 Cal.App.4th 328, 342*.)

> 5 The anti-SLAPP statute provides in part: "(b)(1) 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. [P] (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." [*6] (*§ 425.16, subd. (b)(1), (2)*.)

Although the filing of a notice of motion under the anti-SLAPP statute generally stays all discovery (*§ 425.16, subd. (g)*), a plaintiff opposing such a motion cannot rely on allegations in the complaint, but must

bring forth evidence that would be admissible at trial (*Ampex Corp. v. Cargle, supra, 128 Cal.App.4th at p. 1576*). However, the plaintiff's burden of establishing a probability of prevailing on the merits is not high: We do not weigh credibility or evaluate the weight of the evidence. Rather, we accept as true all evidence in the plaintiff's favor and assess the defendant's evidence only to determine if it defeats the plaintiff's proffer as a matter of law. (*Ibid.*)

B. *Analysis*

1. *Quiet Title*

Because the technicalities of the statutory provisions governing quiet title actions and lis pendens are at issue, we first review the pertinent legalities. An action to quiet title is commenced by filing a complaint, which must be verified. (§§ 761.010, subd. (a), 761.020.) Immediately upon the commencement of a quiet title action, the plaintiff must file a notice of pendency of the action in the appropriate county recorder's office(s). (§ 761.010, subd. (b).) [*7] The notice must contain the names of all parties to the action and a description of the affected property and, except for eminent domain actions, must be signed by the attorney of record or approved by a judge. (§§ 405.6, 405.20, 405.21.)

2. *Threshold Matters*

At the outset we address Jones's assertion that appellants did not represent Plusfive in the quiet title action and lis pendens, and without a client, they had no standing to strike Jones's action as a SLAPP suit. [6] As a corollary matter, Jones argues that in any event standing is not conferred on an attorney under *section 425.16* unless he or she exercised a personal, independent constitutional right.

> 6 Lack of standing may be raised at any time during the proceedings. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal.4th 352, 361*.)

Jones's first argument fails because nothing on the face of the quiet title complaint and companion lis pendens indicates that Sharrie Cutshall's verification was perjured or otherwise unauthorized, and nothing in the moving and opposing papers show that appellants had reason to mistrust Sharrie Cutshall. [7] Indeed, appellants' papers show that Plusfive was the client, [*8] that Sharrie Cutshall verified the pleadings under penalty of perjury, declaring she was the general partner of Plusfive with authority to make the verification on behalf of Plusfive. Further, Beckman declared that he relied on the verified allegations of Cutshall in filing the lis pendens, a document he was obligated to file and sign in connection with the quiet title action. Although Jones's evidence raises a question about the correct identity of the individual with authority to verify a complaint on behalf of Plusfive, the evidence is inconclusive.

> 7 Jones contends that because the deed was signed by Sandra Marin, the managing member of NorCal, as general partner for Plusfive, and Beckman relied on the deed, as a reasonable attorney he should have asked "Who is Norcal?" By implication, Jones suggests he should have investigated Sharrie Cutshall's representations. This argument is based on speculation. Jones does not know how Cutshall demonstrated to Beckman her authority to act on behalf of Plusfive. Moreover, the deed itself does not establish that NorCal had only one manager (as indicated in NorCal's articles of organization), let alone only one member. An LLC can have one or more [*9] members (*Corp. Code, § 17050, subd. (b)*) and can be managed by one manager, by more than one manager, or by all its members (*id*., §§ 17051, subd. (a)(5), 17151). A manager may, but need not be, a member. (*Id*., § 17151, subd. (a).) A written operating agreement may provide for appointment of officers who in turn will have the powers and duties specified therein or in the articles of organization. An officer may, but need not be, a member or manager of the LLC. (*Id*., § 17154, subd. (a).) Thus for all we know, Sharrie Cutshall was a member and an officer of NorCal, with authority to sign written instruments, although she was not NorCal's manager.

More to the point, when initially evaluating a client's case and assessing its tenability, an attorney may rely on information provided by the client unless the attorney is on notice of specific facts which, if true, would negate the client's version of events. (*Morrison v. Rudolph (2002) 103 Cal.App.4th 506, 512-513*, disapproved on other grounds in *Zamos v. Stroud (2004) 32 Cal.4th 958, 973*.) As explained by a commentator: "Usually, the client provides information upon which the attorney relies in determining whether probable cause exists for [*10]

initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false." (1 Mallen & Smith, Legal Malpractice (2007 ed.) § 6.19, p. 744, fn. omitted.)

As to Jones's second argument that Beckman lacked standing because he was not exercising his own constitutional rights in filing the lis pendens, this is not a standing issue. Rather, it is an attack on the trial court's decision that Beckman had satisfied the requirements of the first prong of the anti-SLAPP statute. We reject this argument outright. Jones has not filed a cross-appeal and has not shown that review of this issue is necessary to decide whether any error asserted by appellants was prejudicial to them. Such a showing is required to bring her within the exception to the general rule that a respondent cannot obtain affirmative relief unless he or she files a cross-appeal. (§ 906; *Building Industry Assn. v. City of Oceanside (1994) 27 Cal.App.4th 744, 758, fn. 9.*)

In any event, the merits of the argument do not favor Jones. The gravaman of Jones's slander of title action against appellants is that Beckman [*11] recorded a lis pendens against her property without justification or legal privilege. Under the anti-SLAPP statute, the predicate "act" required by subdivision (b)(1) that enables a person to prosecute a motion to strike includes "any . . . writing made in connection with an issue under consideration or review by a . . . judicial body. . . ." (*§ 425.16, subd. (e)(2).*) A lis pendens is required or permitted by law " 'in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked.' [Citation.]" (*Jacob B. v. County of Shasta (2007) 40 Cal.4th 948, 958.*) Stated more broadly, "any act" of a person in furtherance of petition or free speech rights which triggers a lawsuit subject to an anti-SLAPP motion embraces "communicative conduct such as the filing, funding, and prosecution of a civil action" and "qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen v. Cohen (2006) 37 Cal.4th 1048, 1056).* Beckman was required to sign the lis pendens and the recording of the lis pendens was a necessary part of commencing the quiet title [*12] action. (§§ 405.21, 761.010.) These were qualifying acts within the anti-SLAPP statute which satisfied his threshold burden in prosecuting the motion. Moreover, the protected statements or writings upon which the validity of a *section 425.16* motion depend need not be made on the defendant's own behalf. They can be made, for example, on behalf of an attorney's clients or the general public. (*Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1116.*)

We similarly reject Jones's assertion that Beckman cannot establish the first prong of *section 425.16* because the conduct giving rise to Jones's action was illegal, and thus not constitutionally protected. Again, Jones has not cross-appealed or made the showing required by *Building Industry Assn. v. City of Oceanside, supra, 27 Cal.App.4th at page 758, footnote 9.* And again, the merits are against Jones.

Relying primarily on *Flatley v. Mauro (2006) 39 Cal.4th 299,* Jones maintains that Sharrie Cutshall committed perjury in verifying the quiet title complaint, perjury is not constitutionally protected activity, and thus appellants cannot establish a constitutionally protected right as required by *section 425.16.* First, Cutshall's [*13] verifying statement that she was a general partner of Plusfive, while technically incorrect, does not, without further proof of willfulness and knowledge, constitute perjury as a matter of law. (See *Pen. Code, § 118.*) And, as appellants point out, her statement is capable of innocent meaning, namely a shortcut for "I am a member of the general partner of Plusfive." Further, Cutshall's declaration that she had authority to make the verification is not defeated by the fact that she was not *the* general partner of Plusfive.

Second, *Flatley* does not help Jones. In *Flatley,* defendant attorney's actions--a demand letter on behalf of a client who contended a well-known entertainer raped her, as well as subsequent telephone calls to the entertainer's attorneys--spurred a suit for civil extortion and other torts. Our Supreme Court concluded that these actions, which were not controverted, constituted criminal extortion as a matter of law. (*Flatley v. Mauro, supra, 39 Cal.4th at pp. 328-329.*) The court went on to explain that a defendant pursuing an anti-SLAPP motion need not establish that its actions are constitutionally protected as a matter of law. Rather, the defendant must preliminarily [*14] make a prima facie showing that the plaintiff's cause of action arose from acts of the defendant in furtherance of free speech or petition rights in connection with a public issue. (*Id. at pp. 314, 319.*) However, if the defendant concedes, or the evidence establishes conclusively, that the assertedly protected

petition or speech activities were illegal as a matter of law, the defendant cannot use the anti-SLAPP statute to strike the plaintiff's complaint. (*Id. at pp. 320, 333*.) *Flatley* does not apply to the instant matter for the simple reason that *appellants*--the defendants in Jones's slander of title action--did not engage in any illegal conduct, let alone conduct that was illegal as a matter of law.

Jones also suggests that Beckman misled the court in violation of *Business and Professions Code section 6068, subdivision (d)*, which charges an attorney with the duty to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by artifice or false statement of fact or law." Again, there is no evidence that Beckman deliberately misled the court. Further, as stated [*15] above, Beckman could rely on Cutshall's representations absent knowledge of facts to the contrary. And finally, Cutshall's lack of authority and perjury have not been established as a matter of law.

3. *No Probability of Prevailing on the Merits*

To recover on the tort of slander of title a plaintiff must show: (1) a false publication that is disparaging of another's property; (2) lack of privilege or justification in making the publication (thus exhibiting malice, express or implied); and (3) causation, i.e., direct and immediate pecuniary loss. (*Howard v. Schaniel (1980) 113 Cal.App.3d 256, 263-264*.) Here the trial court believed that Jones would probably be able to show that Cutshall was not authorized to verify the complaint. Without proper client verification, the court reasoned that the lis pendens was a publication "without privilege or justification" and thus malice could be implied as required by the tort of slander of title. By the same token, it reasoned that the litigation privilege was not absolute under *Civil Code section 47, subdivision (b)(4)*. (See fn. 4, *ante*.) The trial court's reasoning was flawed.

Civil Code section 47, subdivision (b)(4), added by amendment in 1992 [*16] (Stats. 1992, ch. 615, § 1, pp. 2739-2740), altered slightly the absolute privilege afforded lis pendens under this statute. As this court has explained, now a lis pendens is "protected only when the party using this remedy has filed an action affecting title or possession to the property with a court of competent jurisdiction." (*Wilton v. Mountain Wood Homeowners Assn. (1993) 18 Cal.App.4th 565, 569, fn. 1*.) In other words, the litigation privilege applies if the lis pendens was authorized by law, i.e., it (1) identifies an action on file in a court of competent jurisdiction that (2) affects title or right to possession of real property. Thus, with this amendment, a groundless lis pendens not tied to a lawsuit and not affecting real property could not cloud title by finding shelter under the litigation privilege.

For example, in *Palmer v. Zaklama (2003) 109 Cal.App.4th 1367, 1381*, the defendants filed lis pendens in underlying collection and bankruptcy actions. These actions would not support a lis pendens because they did not concern title to or possession of real property. Consequently, the privilege did not attach. Unfortunately, the *Palmer* court made an erroneous, more sweeping [*17] statement in dicta which Jones and, most likely, the court below, relied on: "[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, *or the alleged claim lacks evidentiary merit*, the lis pendens, in addition to being subject to expungement, is not privileged." (*Id. at p. 1380*, italics added.) Contrary to the implication of the above dicta, allegations in the complaint determine whether a real property claim is involved. Independent evidence is not required. Section 405.4 defines "real property claim" for purposes of the lis pendens statutes as "the *cause or causes of action in a pleading* which would, if meritorious, affect (a) title to, or the right to possession of, specific real property . . . ." (Italics added; see also *Urez Corp. v. Superior Court (1987) 190 Cal.App.3d 1141, 1149*.)

Here, Beckman satisfied the requirements of *Civil Code section 47, subdivision (b)(4)* and the privilege attached to the filing of the lis pendens. The notice referenced a duly filed lawsuit. The complaint alleged an action to quiet title and specifically described the real property at issue. The recording of the lis pendens was "authorized or required by [*18] law," specifically the lis pendens and quiet title statutes. (§§ 405.20, 761.010.) Immunity was conferred on Beckman, thus defeating an element of Jones' slander of title action.

Nonetheless, Jones insists she will probably prevail in her action, relying first on the above-quoted dicta from *Palmer*. Specifically, she asserts that "Beckman's filing of a suit against her when he had no actual client was thus an action without evidentiary merit" and was unprivileged under *Palmer*. [8] First, this language from *Palmer* is contrary to *Civil Code section 47, subdivision (b)(4)* because it adds a requirement not reflected in the

statute. We will not rewrite a statute to make express an intention that was not expressed in the language of the provision in question. (*Lazar v. Hertz Corp. (1999) 69 Cal.App.4th 1494, 1503*.) Second, although Jones raised an issue about Cutshall's authority to verify the complaint, she has not established that there was no client. The four corners of the complaint and lis pendens do not show that the action was without evidentiary merit. Nor did further investigation rule out her authority.

8 Jones also claims that the quiet title action lacked evidentiary merit because [*19] the transaction on which it was based was legally unenforceable. She claims the transaction was an "illegal" hidden mortgage. Again, we do not assess evidentiary merit. The nature of the underlying transaction has not been adjudicated. In any event, *Hainey v. Narigon (1966) 247 Cal.App.2d 528, 531-532*, upon which Jones relies, does not assist her. There, the reviewing court held that it was against public policy to use a veteran as a straw man to obtain favorable GI financing. Here the quiet title complaint alleged that Plusfive executed and delivered the grant deed to Jones, to be held solely as security for Plusfive's obligations to repay funds lent to Jones to refinance the property. These allegations are more in the nature of a deed absolute in form, in which it can be shown that the deed was intended as a mere security device for an obligation. (See *Wilcox v. Salomone (1953) 118 Cal.App.2d 704, 709-710*.)

Third, as recently reiterated in *Jacob B.*, the litigation privilege extends *even to perjury*. (*Jacob B. v. County of Shasta, supra, 40 Cal.4th at p. 958*.) And, more specifically, for purposes of the protection of the litigation privilege, "[a] notice of lis pendens, as a category, [*20] is permitted by law and, hence, is privileged, even if a specific notice, being perjurious, might be considered not permitted by law." (*Id. at p. 959*.) We question how the *evidentiary* merit of the quiet title action, or the related recordation of the lis pendens, could be relevant to the question of whether the litigation privilege applies. Even a publication or republication [9] of a pleading that is based on perjury, and hence by definition lacking in merit, is covered.

9 The recording of a notice of lis pendens "is in effect a republication of the pleadings." (*Albertson v. Raboff (1956) 46 Cal.2d 375, 379*.)

III. DISPOSITION

The trial court's order denying appellant's motion to strike is reversed. Jones to bear costs on appeal.

Reardon, J.

We concur:

Ruvolo, P.J.

Sepulveda, J.