Filed 10/26/18 Fernandez v. Marston CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SHAWN FERNANDEZ et al., Plaintiffs and Appellants, v. LESTER MARSTON et al., Defendants and Respondents.	A149995 (Mendocino County Super Ct. No. SCUK-CV-PO-16-0067297)

Two unwitting pawns in a bitter, protracted leadership dispute between rival factions of an Indian tribe, appellants Shawn Fernandez and Brian Auchenbach, took part in a paramilitary raid of the tribe's casino offices in order to oust a competing tribal faction of possession. The two men believed they had been lawfully deputized as police officers for the tribe, had full legal authority to engage in the operation, and would not face any adverse legal consequences or criminal charges as a result. They believed this, because attorneys for the tribal faction that hired them as police officers assured them it was true.

It wasn't. Contrary to counsel's assurances, Fernandez and Auchenbach were arrested by the Madera County Sheriff's Department, along with the others who participated in the raid, and were charged with 29 felony counts. The two men then brought this lawsuit against the attorneys involved, alleging causes of action for attorney malpractice, negligence and fraud, premised on the attorneys' false assurances to them concerning the validity of the tribal police force that had hired them and the legality of the armed raid they took part in.

The trial court granted the attorneys' motion to strike their complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16[1]). We reverse, because this lawsuit does not arise from any activity protected by that statute.

BACKGROUND

I.

The Litigation and the Events That Precipitated It.

Fernandez and Auchenbach, each a military veteran with a background in law enforcement, were hired in October 2014 as police officers for a purportedly newly formed police department of the Tribe of the Picayune Rancheria of Chukchansi Indians. The tribe operates a hotel and casino in Madera County, California, and at the time rival members of the tribe were engaged in a dispute over the tribe's governance, with competing factions asserting they were the proper governing council for the tribe. One faction had control of the tribe's casino offices.

Shortly after Fernandez and Auchenbach were hired in October, the new ostensible tribal police department planned an operation to take possession of the casino offices which were being occupied by alleged trespassers. During several private planning meetings with the new ostensible police force, attorneys Lester Marston and Mark Levitan advised the group that the planned operation was legal and authorized by all pertinent governmental agencies. In particular, both lawyers repeatedly assured the police force that they had been deputized by "Special Law Enforcement Commission, Bureau of Indian Affairs, Office of Justice Services" as tribal police officers and were therefore authorized to enforce federal law on tribal property, all relevant law enforcement agencies had accepted their appointment as tribal police officers (including the Bureau of Indian Affairs and the Madera County Sheriff's Department), as officers of the newly formed police department they were properly and legally authorized to take possession of the casino office without interference from the Madera County Sheriff's

[1] All further statutory references are to the Code of Civil Procedure.

Department, and they would face no adverse legal consequences or charges as a result of carrying out the eviction operation.

Reassured by that legal advice, and in reliance on it, Fernandez and Auchenbach, along with seven other armed men in police uniform, took part in the operation on October 9, 2014, believing that there was no risk of criminal prosecution. Over the course of several hours that evening and into the night, weapons were drawn; the casino's security personnel were handcuffed and held against their will in a conference room; tasers were fired; the fire alarm went off; the Madera County Sheriff's Department freed the detainees and evacuated the entire casino and hotel; employees were sent home; confusion reigned. The Madera County Sheriff's Department arrested Fernandez, Auchenbach and the other purported tribal police members, and they were criminally charged. Had they known there was a risk of criminal prosecution they would not have participated in the raid, which humiliated and embarrassed them, put their careers in jeopardy and left them with a criminal record.

Fernandez and Auchenbach (plaintiffs) then initiated this litigation, filing a complaint against both attorneys and their law firm Rapport & Marston (defendants), alleging causes of action for legal malpractice, negligence and fraud. They alleged that, by means of the misrepresentations detailed above, defendants had misadvised them about the legality of the planned operation and failed to advise them of the risk they would be prosecuted.

II.

The Anti-SLAPP Motion

Defendant Levitan brought a special motion to strike the complaint, in which Marston later joined.

The defendants argued the complaint arose from protected activity in two ways. First, they argued the lawyers' communications were made in connection with an issue under review by both a judicial and an executive body (see § 416.25, subd. (e)(2) (subdivision (e) (2))), because their advice related to "ongoing judicial and administrative proceedings pertaining to the leadership of the Tribe." In court-ordered, supplemental

briefing, they specified two proceedings: administrative proceedings pending before the Bureau of Indian Affairs that supposedly pertained to the tribe's leadership dispute, and litigation pending in New York "involving the Tribe and the Casino." Second, the defendants argued the anti-SLAPP statute also applied because "the ongoing leadership dispute" was an issue of public interest (see *id.*, subd. (e)(4)).

The motion was supported principally by a declaration from attorney Levitan that referred vaguely to judicial and administrative proceedings, without any specifics. In relevant part, it stated that "As a result of the leadership dispute, the Tribe *had become ensnared in litigation relating to its hotel and casino* . . . . Further, *the tribal leadership dispute was the subject of ongoing administrative proceedings before the Bureau of Indian Affairs*, a federal agency. Indeed, I was retained to provide counsel regarding this leadership dispute and the related proceedings. [¶] During the course of my representation of the Tribe, one of the other tribal council's [*sic*] held possession of the Casino and its offices. During this time, the Tribe received audit requests, along with notices of non-compliance and threats of closure of the Casino, from the National Indian Gaming Commission ("NIGC"). As a result of these audit requests, as well as concerns of mismanagement and the potential for closure due to a failure to comply with the NIGC's requests, I provided advice to my client regarding the ongoing leadership dispute and my client's ability to take steps to protect the Tribe's interests vis-à-vis the Casino." (Italics added.)

Defendants also filed a compendium of exhibits in support of the motion, consisting in part of records from various judicial and administrative proceedings.

One was a proceeding before the Bureau of Indian Affairs, which concerned requests for a new tribal contract with the BIA for fiscal years 2013–2014. Three competing tribal factions had submitted contract requests to the BIA which the BIA's regional director consolidated into a single proceeding and, in a February 11, 2014 decision, rejected them all. The defendants submitted a copy of the regional director's February 11, 2014 decision, and a decision two years later by the United States Department of Interior, Board of Indian Appeals, on January 21, 2016, dismissing all of

the appeals that had been taken from that decision (principally, on the grounds of mootness and lack of standing). In its February 14, 2014 decision, which preceded the events at issue here by several months, the BIA regional director notified the warring factions in rejecting all three contract requests that the BIA could not decide which faction to recognize as the proper governing body, and did not have the authority to decide the tribe's permanent leadership because disputes concerning the tribe's leadership fall within the tribe's exclusive jurisdiction. But because the situation had deteriorated so badly in more than two years of tribal infighting, and it was essential for a government to be recognized, the BIA decided, on an interim basis, to conduct business with a tribal council comprised of the people elected to the tribal council in December 2010, which was the last uncontested election, until the leadership dispute could be resolved by the tribe itself in accordance with tribal law.

Defendants also submitted evidence of a lawsuit brought in June 2013 in New York state court against various tribal entities and individuals by Wells Fargo Bank, which was the trustee on a $250 million secured bond offering the tribe's economic redevelopment agency had issued in 2012 to refinance the casino's debt. Wells Fargo brought suit for breaches of the indenture agreement and related documents, seeking to protect the collateral. In support of their anti-SLAPP motion, defendants submitted a copy of a July 2, 2013 preliminary injunction issued by the New York court imposing various financial restrictions on the tribe and its entities pending resolution of the Wells Fargo case, restraining them from initiating any new litigation relating to the financing against the various interested stakeholders, and directing them to dismiss five other pending lawsuits within five days (four of them pending in tribal court, and one pending in federal district court in California). Defendants also submitted a subsequent decision by the New York lower court, on December 2, 2013, dismissing various claims and counterclaims in the Wells Fargo case that sought to determine which tribal faction(s) were legitimate tribal officials. The New York court ruled it lacked subject matter jurisdiction over issues pertaining to the internal tribal leadership dispute. The parties

have not cited to any evidence in the record as to whether the New York lawsuit was still pending when the events at issue here took place in October 2014.

A third proceeding of which defendants submitted evidence was an action brought by the State of California against the tribe in federal district court.[2] Defendants submitted a declaration by John Oliveira filed on October 24, 2014, in opposition to a request by the state for a preliminary injunction. Oliveira was the tribe's purported police chief, whom plaintiffs had regarded as their superior officer when they were hired. In his declaration, Oliveira described a "forcible takeover" of the casino offices by a rival tribe faction in September 2014, backed by a private security force of armed personnel, and provided details of the subsequent "law enforcement operation" he conducted on October 9 to regain possession of the casino offices. According to Oliveira, the purpose of the raid was "to assist in the discovery of financial audit documentation requested by the National Indian Gaming Commission ('NIGC') in two separate letters of warning for non-compliance with the National Indian Gaming Regulatory Act . . . that the NIGC issued over the past year."

After soliciting supplemental briefing from the parties concerning the evidence of any pending litigation and/or administrative proceeding, the trial court granted defendants' motion in full. It concluded that the complaint arose from protected activity because the gravamen of plaintiffs' claims was defendants' conduct in connection with "ongoing administrative proceedings before the BIA; and, the NIGC audit requests and threats of closure regarding the Casino." The court also concluded plaintiffs failed to

[2] Plaintiffs asked the trial court to take judicial notice of the December 2015 judgment and permanent injunction that was entered in the case, which reflects that the state filed suit against the tribe several days after the incident, alleging that the armed conflict breached the tribe's gaming compact with the state and posed an imminent threat to public health and safety. The state obtained a temporary restraining order shutting the casino down and enjoining any further takeover attempts. Eventually, in 2015, a new tribal council was elected and a settlement was reached that provided for the casino to reopen, subject to a permanent injunction barring the tribe from deploying any armed police force at the casino and establishing a 1000-yard weapons-free buffer zone around the property.

demonstrate a probability of prevailing on their claims, and accordingly struck the complaint in full.

This timely appeal followed. Plaintiffs subsequently settled with defendant Mark Levitan, and their appeal as to only him was dismissed.

DISCUSSION

Plaintiffs challenge the trial court's order striking their complaint on two grounds. They argue this lawsuit does not arise from protected activity and therefore the anti-SLAPP statute is inapplicable. And, they argue in any event that they demonstrated a probability of prevailing on their claims. We do not reach the latter issue because we agree that no protected activity is involved, and thus the trial court erred in striking their complaint.[3]

The standards governing the disposition of a special motion to strike under the anti-SLAPP statute are well settled. As we recently explained:

" 'Subdivision (b)(1) of section 425.16 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 Constitution or the 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." Subdivision (e) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP. . . .

[3] We do note, however, that defendants have argued they are protected from suit by tribal sovereign immunity, a contention they make in support of the assertion that plaintiffs cannot prevail on their claims. They raised the point again at oral argument. Defendants do not assert that tribal immunity precludes this court from entertaining the appeal. Moreover, defendants have not established that tribal immunity protects them as a matter of law. Assuming for argument's sake that attorneys for a federally recognized tribe may invoke tribal immunity, defendants have not shown that *the faction of people they represented* were ever recognized as an Indian tribe by the federal government or under federal law. On the contrary, as discussed, the record shows the B.I.A. declined to decide which competing faction was the lawful governing body for the tribe and instead, for purposes of conducting business, had recognized (on an interim basis) the members of the last duly elected tribal council.

" 'A two-step process is used 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, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.] [¶] . . . [¶]

" 'Finally, and as subdivision (a) of section 425.16 expressly mandates, the section "shall be construed broadly." ' " (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 216 (*Central Valley Hospitalists*).)

The dispositive question here is whether defendants met their burden below to demonstrate that plaintiffs' causes of action arise from protected activity, on either of the two grounds defendants asserted in the trial court. (See *Central Valley Hospitalists*, *supra*, 19 Cal.App.5th at p. 216; § 425.16, subd. (b).) That is, whether defendants demonstrated the plaintiffs' causes of action arose either from communications "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" (§ 425.16, subd. (e)(2)), or "in connection with a public issue or an issue of public interest" (*id.*, subd. (e)(4)). On de novo review of these issues (see *Central Valley Hospitalists*, at p. 216), we conclude defendants did not meet their burden.

A. Speech in Connection with Judicial, Executive or Official Proceedings (Section 425.16, Subdivision (e)(2))

" '[A] statement is "in connection with" litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.' " (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 373 (*City of Costa Mesa*).) Plaintiffs argue that the statements at issue in this lawsuit were not made in connection with any judicial or petitioning context as contemplated by the anti-SLAPP statute. The reason, they say, is because the statements that misled them into believing there was no risk of

criminal prosecution from the armed casino raid were not shown to be statements "in support of a petition or complaint to determine the faction was the valid Tribal Counsel [*sic*]." They argue "[t]here was no litigation or proceeding pending over which the right to appoint a tribal police force or the right [to] perform a self-help repossession was an issue," nor were the statements in furtherance of any litigation over the rightful tribal council. Simply put, they say "more than a loose connection to a pending proceeding is needed," and yet "there was no pending official proceeding" concerning the legality of the police force.

We agree. The "principal thrust or gravamen" of this lawsuit (see *Moriarty v. Laramar Management Corp*. (2014) 224 Cal.App.4th 125, 133–134) is defendants' alleged false assurances that plaintiffs had no risk of facing arrest or criminal prosecution as a result of participating in the armed casino raid. Those alleged assurances were not shown to have any connection to a substantive issue involved in any pending administrative or judicial proceeding. (See *City of Costa Mesa*, *supra*, 214 Cal.App.4th at p. 373.) The two proceedings defendants pointed to in the trial court concerned totally different issues. The BIA proceeding concerned the renewal of the tribe's contract with the federal government, and well before the events at issue here the BIA regional director expressly declined to decide the tribe's internal leadership dispute. And the New York state case brought by Wells Fargo Bank involved casino financing that was in turmoil, and again prior to the events at issue here the court expressly declined to wade into the leadership dispute.

Even if defendants had shown, moreover, that their alleged assurances about the legality of the casino raid related to a substantive issue under review in either of those proceedings (or in any other proceeding, for that matter), that alone would not have satisfied subdivision (e)(2) in any event, because defendants also were required to show their alleged statements were " 'directed to persons having some interest in' " the official proceedings. (*City of Costa Mesa, supra,* 214 Cal.App.4th at p. 373.) Defendants did not show this either. As far as we can tell, these plaintiffs were utterly indifferent to the

outcome of either the BIA proceedings or the New York casino financing case.[4] Defendants made no contrary argument below, nor do they now. (Compare, e.g., *id*. at p. 374 [subdivision (e)(2) held applicable to statements by government employee about illegal activity at private property to third parties wanting to obtain business licenses to operate there, where alleged illegal activity was the subject of pending review by both the judicial and executive branch].)

The fact that the tribe's leadership dispute itself might have ended up in the courts, or might have been the subject of administrative proceedings, or indeed might have been the focus of media attention, does not cloak every action undertaken as a result of that dispute with the veil of protected speech or petitioning activity. The fact "that protected activity may lurk in the background—and may explain why [a] rift . . . arose in the first place" does not by itself transform a dispute into a SLAPP suit. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 478.) Likewise, the mere existence of judicial or administrative proceedings by itself does not trigger anti-SLAPP protection. (See, e.g., *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1037 [action by medical provider against attorney who disbursed proceeds of personal injury action in violation of medical liens held not subject to anti-SLAPP suit; validity and satisfaction of liens "were never under consideration in any court or official proceeding"]; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 861–868 [anti-SLAPP statute held inapplicable to lawyer's allegedly harassing investigation undertaken in connection with securities arbitration]; see also *Moriarty v. Laramar Management Corp*., *supra*, 224 Cal.App.4th at pp. 133–140 [tenant's lawsuit against landlord not based on protected activity despite allegations relating to prior unlawful detainer action between the parties].) Simply put, "[n]ot all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16." (*California Back Specialists*, at p. 1037.) And "[t]he statute does not accord anti-SLAPP protection to

[4] There is no evidence that either Fernandez or Auchenbach was even a member of the tribe.

suits arising from any act having any connection, however remote, with an official proceeding." (*Paul*, at p. 866.) There must be "a connection to an issue under review in a proceeding, and not merely to a proceeding." (*Ibid.*) Here, defendants did not meet their burden to show that their allegedly false assurances that plaintiffs would have no legal exposure for taking part in the casino raid were connected with issues under consideration by any judicial or administrative body.

On appeal, defendants do not seriously contend otherwise. Instead, they change their theory. For the first time on appeal, they argue the action arose from protected activity under subdivision (e)(2) for one reason: because "[a] tribal leadership dispute constitutes an 'issue under consideration or review *by a legislative, executive or judicial body*.' " (Italics added.) But this issue has been waived because it was not raised below. (See *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1569 (*World Financial Group, Inc.*).) And were we to consider defendants' new theory, we would reject it. Defendants do not explain what duly constituted tribal body was supposedly presiding over this leadership dispute, much less point to any evidence of it in the record. Furthermore, the authorities they cite do not support the proposition that some or all participants in a tribal governance dispute themselves comprise a "legislative, executive or judicial body" for purposes of the anti-SLAPP statute. The cases they cite have nothing to do with that issue. (See *City of Costa Mesa*, *supra*, 214 Cal.App.4th 358; *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075.)

B. Speech in Connection with an Issue of Public Interest (Section 425.16, Subdivision (e)(4))

Defendants also did not meet their burden to show their allegedly false assurances to plaintiffs concerned an issue of any public interest. The tribe's governance itself may be of public concern (a question we need not resolve), and indeed the tribal dispute received media attention, but neither fact by itself triggers the protections of the anti-SLAPP statute. "[S]imply because a general topic is an issue of public interest, not every statement somewhat related to that subject is also a matter of public interest . . . ."

(*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1253.) As this court has recognized, matters of public interest may encompass activity between private people, but " ' " ' "[t]here should be some degree of closeness between the challenged statements and the asserted public interest." ' " ' " (*Cross v. Facebook* (2017) 14 Cal.App.5th 190, 199.) Here, however, there was no connection.

Defendants' alleged false representations to these plaintiffs concerned a subject that was purely private, of interest solely to the plaintiffs themselves: namely, whether plaintiffs would be risking criminal prosecution by carrying out their supposed job duties. That subject matter was not shown to be a subject of any interest to a broad segment of society. Any possible connection between those private assurances and the public's interest in either the tribe's governance and/or the tribal leadership dispute (the details of which defendants never explained) was highly attenuated, without any discernible "degree of closeness" between them. " '[A] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.' " (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 82.)

As has been said before, " 'The fact that "a broad and amorphous public interest" can be connected to a specific dispute is not sufficient to meet the statutory requirements' of the anti-SLAPP statute. [Citation.] By focusing on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based, defendants resort to the oft-rejected, so-called 'synecdoche theory of public issue in the anti-SLAPP statute,' where '[t]he part [is considered] synonymous with the greater whole.' [Citation.] In evaluating the first prong of the anti-SLAPP statute, we must focus on 'the *specific nature of the speech* rather than the generalities that might be abstracted from it.' " (*World Financial Group, Inc., supra*, 172 Cal.App.4th at p. 1570.) Here, defendants did not show the specific speech in question related to any issue in which the public was interested.

DISPOSITION

The order granting defendants' motion to strike the complaint is reversed. Appellants shall recover their costs on appeal.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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