Filed 5/25/06 Harrington v. Hovanec CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

COLLEEN HARRINGTON, Plaintiff, Cross-defendant and Appellant, v. DAVID HOVANEC, Defendant, Cross-complainant and Appellant.	C050249 (Super. Ct. No. SCV14342)

Defendant and cross-complainant David Hovanec appeals from the trial court's order granting plaintiff and cross-defendant Colleen Harrington's motion to strike Hovanec's cross-complaint pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 906-907 ["An order granting a motion to strike under section 425.16 is an appealable order"].)

Hovanec contends the court erred because his cross-complaint against Harrington is not a SLAPP suit. We disagree and shall affirm the judgment. Therefore, we need not address the arguments raised by Harrington in her cross-appeal.

FACTS

In May 2004, Hovanec fatally shot Harrington's dog 13 times while it was on his property. Hovanec pled guilty to animal cruelty (Pen. Code, § 597, subd. (a)).

On February 3, 2005, Harrington filed a complaint against Hovanec, seeking damages for gross negligence, trespass to chattel, conversion, and the intentional infliction of emotional distress. The complaint also sought exemplary damages pursuant to Civil Code section 3340, which states: "For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given."

Hovanec then filed a cross-complaint against Harrington for damages arising out of her alleged posting of information on the Internet about Hovanec and the shooting incident, before he was charged and convicted. The information asked readers to contact Deputy District Attorney Jeff Wilson and urge him to prosecute the criminal case against Hovanec; it also requested them to forward the message to other people and the news media because "[n]ational attention could make a difference on how seriously cases like this are prosecuted everywhere."

The message stated in part: "Although Placer County Deputy District Attorney Jeff Wilson agreed to investigate for possible misdemeanor prosecution, he does not appear to be moving forward

with the case. Deputy D.A. Wilson needs to know how serious animal abuse is, that it is linked to other crimes, and that laws protecting animals must be enforced." The posting gave Wilson's phone number and e-mail address, and urged readers to "[p]lease voice your concern that proper attention and priority be given to this matter." Hovanec's address and phone number were listed elsewhere in the message; however, they were removed by people forwarding the message on to others.

Hovanec's cross-complaint sought damages for intentional or negligent infliction of emotional distress caused by the Internet posting that, he claimed, led people to contact him in a threatening fashion. Hovanec also alleged that Harrington's conduct amounted to a criminal threat in violation of 18 U.S.C. § 875[1] and Penal Code section 422[2] because she posted Hovanec's address and phone number

---

[1] Title 18 United States Code section 875 states in part: "(c) Whoever transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

[2] Penal Code section 422 states in part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the

on the Internet which, the cross-complaint alleged, is available to "violent animal rights groups, anti-hunters, anti-gun owners and others that would do physical harm to Hovanec" and his family. The third cause of action alleged that Harrington permitted her dog to trespass on Hovanec's property, which led to the shooting he claimed was justifiable but exposed him to criminal and civil liability. Hovanec asserted that as a proximate result of the trespass and Harrington's Internet postings, he has received hate mail and hateful phone calls from throughout the United States, "has lost the use and enjoyment of his firearms," cannot pursue his hobby of hunting, and "has suffered considerable economic loss."

Harrington moved to strike Hovanec's cross-complaint in its entirety pursuant to Code of Civil Procedure section 425.16, subdivision (b)(1), which states in pertinent part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Further section references are to this code unless otherwise specified.) Harrington asserted that all of Hovanec's causes of action were premised on Harrington's alleged posting of information on the Internet urging individuals to contact the deputy district

---

county jail not to exceed one year, or by imprisonment in the state prison."

attorney, which was an act in furtherance of her rights of petition or free speech.

Hovanec opposed the motion to strike, submitting copies of the Internet postings and the letters his family received as a result. He asserted that Harrington's conduct did not involve protected speech because she threatened him with violence.

In response, Harrington argued that Hovanec failed to establish the requisite probability of prevailing on the merits because he did not present any argument or authority showing he adequately pleaded the elements of any specific cause of action. She also asserted that because Hovanec's proffered evidence was inadmissible hearsay and lacked foundation, he failed to establish that Harrington was the one who divulged his address and phone number.

The trial court granted the motion to strike, ruling (1) the message posted on the Internet--the publication referred to in the cross-complaint--was made in furtherance of Harrington's right of free speech, and (2) Hovanec had not shown a probability he would prevail on his claims; although overruling Harrington's objections to Hovanec's evidence, the court concluded that the publication of Hovanec's address and phone number did not rise to the level of a threat which would serve as a basis for the causes of actions alleged in the complaint.

DISCUSSION

I

Hovanec contends his cross-complaint against Harrington was not a SLAPP suit and, therefore, the trial court erred in granting her

section 425.16 motion to strike the cross-complaint. We disagree for reasons that follow.

Section 425.16 was enacted to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. It is a response to the problems created by meritless lawsuits brought to harass those who have exercised these rights. The statute provides a procedural remedy to expeditiously resolve such suits. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 339-340.)

In order to "encourage continued participation in matters of public significance," section 425.16 "shall be construed broadly." (§ 425.16, subd. (a).) It applies to any cause of action against a person "arising from any act . . . 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 . . . ." (§ 425.16, subds. (b)(1), (e).) Such a claim "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).)

Navellier v. Sletten (2002) 29 Cal.4th 82 (hereafter *Navellier*) explains the two-step process for determining whether an action is a SLAPP suit within the meaning of section 425.16. First, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike. (*Id*. at p. 88.) "'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16,

subdivision (e)' [citation]." (*Id.* at p. 88.)[3] If such a showing has been made, the burden shifts to the plaintiff to provide the court with sufficient admissible evidence demonstrating "there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

Here, Hovanec's three causes of action against Harrington in the cross-complaint are based upon Internet postings that Harrington allegedly made urging people to contact the Placer County deputy district attorney who was investigating the dog shooting incident and who would decide whether to prosecute the matter. Therefore, Hovanec's cross-complaint is a SLAPP suit because it arises from written statements Harrington "made in connection with an issue under consideration or review by a legislative, executive, or judicial body . . . ." (§ 425.16, subd. (e)(2); *Dove Audio, Inc.*

---

[3] Section 425.16, subdivision (e) states: "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; (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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

v. Rosenfeld, Meyer & Susman (1996) 47 Cal.App.4th 777, 784 [proposed complaint to the Attorney General seeking an investigation was protected as a communication made in connection with an official proceeding].) The constitutional right to petition includes the basic act of seeking administrative action. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra,* 47 Cal.App.4th at p. 784.)

Hovanec argues that because his cross-complaint is a compulsory one under section 426.30,[4] it does not qualify as a SLAPP action. Relying on *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, he contends that a compulsory cross-complaint--which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action the plaintiff alleges in the complaint (§§ 426.10, subd. (c), 426.30, subd. (a))--rarely qualifies as a SLAPP suit arising from petitioning activity.

We agree that a cross-complaint filed in response to pending litigation is not necessarily a SLAPP suit merely because it can be viewed as burdening the opposing party's right to seek judicial redress. However, we reject Hovanec's implication that as a matter of law, compulsory cross-claims are never subject to the anti-SLAPP statute. Although some courts have said that a compulsory cross-

---

[4] Section 426.30 states in part: "(a) Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded."

complaint "'would rarely, if ever, qualify as a SLAPP suit'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 934, quoting *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at p. 651), compulsory cross-claims cannot be universally excluded from the purview of the anti-SLAPP statute.

The critical question is whether the challenged cross-claims arose out of acts in furtherance of the cross-defendant's right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) This analysis focuses on the cross-defendant's alleged conduct giving rise to the asserted liability and whether that conduct involved protected speech or petitioning activity. (*Navellier, supra,* 29 Cal.4th at p. 92.)

Harrington allegedly posted information on the Internet asking people to contact the deputy district attorney who was investigating the shooting, and to urge him to prosecute Hovanec. In so doing, Harrington also allegedly posted Hovanec's phone number and home address, which, according to Hovanec, caused him to be threatened and to suffer emotional distress. Therefore, Harrington's conduct arises from a written statement made in furtherance of her rights to free speech and to petition the government with respect to an issue under consideration or review by an executive body, i.e., the district attorney's office. (§ 425.16, subd. (e)(2).)

Hovanec counters that threats of violence are not protected speech and that Harrington implicitly threatened him by posting his address and phone number on the Internet. Thus, he argues, because Harrington's alleged conduct did not occur in furtherance

of her valid right to petition or free speech rights, she failed to establish that his cross-complaint was a SLAPP suit.

Hovanec misunderstands the applicable burden of proof in anti-SLAPP motions. The defendant who brings the motion does not have to establish that the challenged cause of action is constitutionally protected as a matter of law; the defendant need prove only that the cause of action arose from acts done in furtherance of an exercise of free speech. (*Navellier, supra,* 29 Cal.4th at pp. 94-95; *Lieberman v. KCOP Television, Inc*. (2003) 110 Cal.App.4th 156, 165.) Once the defendant meets this burden, the plaintiff opposing an anti-SLAPP motion must establish the acts are not protected by the First Amendment. (*Navellier, supra,* 29 Cal.4th at p. 94; *Lieberman v. KCOP Television, Inc., supra,* 110 Cal.App.4th at p. 165.)

"The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous." (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) "[A]ny 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' [Citation]." (*Navellier, supra*, 29 Cal.4th at p. 94, original italics; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 621.)

In other words, Harrington did not need to prove that all of her statements were constitutionally protected; she was required only to make a prima facie showing that Hovanec's claims against her arose from an act taken to further her rights of petition or free speech as set forth in section 425.16, subdivision (e). (*Navellier, supra,* 29 Cal.4th at pp. 88, 94-95.) Harrington established that her statements were in furtherance of her right to petition the deputy district attorney to prosecute Hovanec's criminal conduct in shooting her dog. Consequently, Hovanec, as part of his burden of proving that he had a probability of prevailing on the merits, had to show that Harrington's statements were not protected speech. As we will explain, he failed to meet his burden.

II

To establish the requisite probability of prevailing on his claim (§ 425.16, subd. (b)(1)), Hovanec must demonstrate his cross-complaint was (1) legally sufficient and (2) supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence he submitted is credited. (*Navellier, supra,* 29 Cal.4th at pp. 88-89; *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123; *DuPont Merck Pharmaceutical Co. v. Superior Court, supra,* 78 Cal.App.4th at p. 568.)

On appeal, it is incumbent upon Hovanec to present factual analysis and legal authority on each point made, and to support any argument with appropriate citations to the material facts in the record; otherwise, this court can deem Hovanec's appellate contentions to be forfeited. (*Duarte v. Chino Community Hospital*

(1999) 72 Cal.App.4th 849, 856; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) He may not simply rely on the arguments he made in papers filed in the trial court; rather, he must brief them on appeal. (*Garrick Development Co. v. Hayward Unified School Dist*. (1992) 3 Cal.App.4th 320, 334.) And it is his responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on his behalf. (*Estate of Hoffman* (1963) 213 Cal.App.2d 635, 639; accord, *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

Hovanec did not meet his burden in the trial court, and fails to meet his burden on appeal, of demonstrating that his cross-complaint is legally sufficient. This is so because he does not provide any argument or authority showing that he pleaded the requisite elements of the three causes of action that he is pursuing against Harrington. He also does not show that if the evidence he submitted is credited, he has demonstrated a sufficient prima facie showing of facts to sustain a favorable judgment. He simply contends the First Amendment did not protect Harrington's conduct because it involved threats of violence.

Relying on *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058 (hereafter *Planned Parenthood*), Hovanec challenges the trial court's finding that posting his address and phone number on the Internet was not an actionable threat.

In *Planned Parenthood*, physicians and health care clinics that provided women's health care services, including abortions, brought

suit under the Freedom of Access to Clinic Entrances Act (FACE) (18 U.S.C. § 248), claiming that the American Coalition of Life Activists (ACLA) targeted them with threats by placing pictures of the doctors on "wanted" posters. (*Planned Parenthood, supra,* 290 F.3d at p. 1062.) A "Deadly Dozen 'GUILTY' poster" identified three plaintiff physicians among ten others; a "'GUILTY'" poster contained one physician's name, address, and photograph; and the "Nuremburg Files" was "a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity." (*Ibid*.) "The 'GUILTY' posters identifying specific physicians were circulated in the wake of a series of 'WANTED' and 'unWANTED' posters that had identified other doctors who performed abortions before they were murdered." (*Ibid*.)

Planned Parenthood held a "'threat of force'" is made within the meaning of FACE if it is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." (*Planned Parenthood, supra,* 290 F.3d at p. 1077.) Thus, the court found the "wanted" posters constituted a threat within the meaning of FACE, even though the posters contained no express threats themselves, because the threatening nature of the posters became evident in the context of the "poster pattern" used by ACLA. (*Id.* at pp. 1085–1086.)

The court explained: "ACLA was aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services

community who was identified on one, given the previous pattern of 'WANTED' posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the 'Nuremberg Files' where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded." (*Planned Parenthood, supra,* 290 F.3d at p. 1063.) Thus, the posters were true threats of force because they connoted something they did not literally say and both the actor and the recipient got the message. (*Id.* at pp. 1085-1086.)

Here, there is no similar pattern of conduct demonstrating that an otherwise innocuous act was implicitly a threat. Hovanec merely alleged that Harrington posted Hovanec's address and phone number on the Internet and that Hovanec thereafter received threats from third parties. In support of this allegation, he presented evidence that after the information was posted, his wife received five telephone calls from persons who were critical of Hovanec, and one telephone call asking whether she knew the whereabouts of her children. Hovanec's wife also received a letter denigrating her husband's behavior and questioning how she could be married to someone so "hate filled." In addition, Hovanec received a postcard accusing him of being a "sick bastard."

Assuming Harrington is the person who actually posted Hovanec's personal information on the Internet, the substance of her posting was to ask people to contact the deputy district attorney to urge him to prosecute the criminal case against Hovanec. In other words, she sought recourse against Hovanec through legal and legitimate means.

Internet postings at websites such as www.furryfriendsfoundation.com, www.ParenthoodPlace.com, and www.NoPuppyMills.com do not explicitly or implicitly urge anyone to harm Hovanec. Nor would Harrington have reason to believe that Hovanec could interpret the disclosure of his address and phone number as a threat of violence. Posting Hovanec's personal information, without more, is not "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." (*Planned Parenthood, supra,* 290 F.3d at p. 1077.)

Relying on *M.G. v. Time Warner, Inc*. (2001) 89 Cal.App.4th 623 (hereafter *M.G.*), Hovanec also contends that Harrington's invasion of his privacy was sufficient to overcome her anti-SLAPP motion. We disagree.

In *M.G.,* a magazine and a television program ran a story about child molesters involved in youth sports, and reported that one California Little League coach had a history of molesting children, many of whom he met through Little League. The article named the convicted coach and included a team photograph partially revealing the name of the team and showing the faces of the boys, many of whom were victims. Individuals who appeared in the photograph sued for invasion of privacy and infliction of emotional distress arising out of the invasion of privacy. (*Id*. at pp. 626-627, 637.) *M.G.* affirmed the denial of defendants' anti-SLAPP motion, holding that plaintiffs demonstrated a probability of prevailing on the merits because state laws and general public policy concerns prohibited disclosure of the identities of juvenile molestation victims, and

showing the boys' faces unnecessarily intruded on their privacy interests more than journalistic interest justified. (*Id.* at pp. 635-636.)

M.G. is of no assistance to Hovanec because he must show a probability of prevailing on the causes of action he actually alleged in his cross-complaint, none of which are for invasion of privacy. The pleadings frame the issues to be decided in a motion under section 425.16. (*Church of Scientology v. Wollersheim, supra,* (1996) 42 Cal.App.4th at p. 655, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

In addition, Hovanec does not provide any argument or authority demonstrating that he could allege the requisite elements for an invasion of privacy cause of action or that he is entitled to change his theory of Harrington's liability for the first time on appeal.

Furthermore, Hovanec is an *adult perpetrator* of a crime, while plaintiffs in *M.G*. were *juvenile victims* of crime, whose identities were subject to protection in accordance with various statutes and public policy concerns. Hovanec makes no attempt to demonstrate that despite this significant factual distinction, he is entitled to the same protection of his privacy rights. Accordingly, Hovanec's reliance on *M.G.* is misplaced.

Because Hovanec fails to establish that the trial court erred in granting Harrington's motion to strike Hovanec's cross-complaint in its entirety, we need not address Harrington's appeal regarding the rulings on her evidentiary objections to Hovanec's evidence submitted in opposition to her motion.

III

Section 425.16, subdivision (c) provides that a defendant prevailing on a motion to strike is entitled to recover his or her attorney fees and costs.[5] The trial court ruled that the amount of fees awarded to Harrington "shall be determined upon properly noticed motion" by Harrington.

Hovanec disputes Harrington's entitlement to an award of attorney fees, but his argument is not persuasive.

He acknowledges that a defendant prevailing on a motion to strike is entitled to attorney fees and that a prevailing plaintiff may recover attorney fees if the motion to strike is frivolous. Hovanec asserts, however: "What is not addressed by the statute is what if the plaintiff brings a good faith cross-complaint, based on established law and based on facts that have been found sufficient to state a cause of action in other courts, but the trial court nevertheless grants the motion to strike brought by a cross-defendant? Equal protection of the law requires that CCP section 425.16(c) state that if the court finds that either party has acted frivolously or solely intended to cause unnecessary delay, the court

---

[5] Section 425.16, subdivision (c) states: "(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

shall award costs and reasonable attorney's fees." This is the sum total of his challenge to the attorney fee award.

By neglecting to provide any legal authority or reasoned analysis in support of his contention, Hovanec has forfeited his equal protection of law challenge. (*Duarte v. Chino Community Hospital, supra,* 72 Cal.App.4th at p. 856; *In re Marriage of Nichols, supra,* 27 Cal.App.4th at pp. 672-673, fn. 3; *Kim v. Sumitomo Bank, supra,* 17 Cal.App.4th at p. 979.)

Furthermore, he fails to establish the factual predicates underlying his claim, i.e., that (1) he alleged facts sufficient to state a cause of action, and (2) Harrington acted frivolously or solely to cause unnecessary delay.

DISPOSITION

The order striking the cross-complaint is affirmed. Hovanec shall reimburse Harrington for her costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

SCOTLAND, P.J.

We concur:

DAVIS, J.

RAYE, J.