Filed 1/11/05 Kibler v. Northern Inyo County Local Hosp. Dist. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GEORGE KIBLER, Plaintiff and Appellant, v. NORTHERN INYO COUNTY LOCAL HOSPITAL DISTRICT et al., Defendants and Respondents.	E035085 (Super.Ct.No. CVCV02-32216) OPINION

APPEAL from the Superior Court of Inyo County. Edward Forstenzer, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Donald W. Odell for Plaintiff and Appellant.

DiCaro, Coppo & Popcke, Carlo Coppo; and Douglas Buchanan for Defendants and Respondents.

1. Introduction

Plaintiff George Kibler is a physician affiliated with Northern Inyo County Hospital. Throughout 2001, a troubled relationship existed between him, the hospital,

and defendants. Kibler was critical of the hospital and its nursing staff. The hospital accused Kibler of acting violently and aggressively toward hospital employees, including making threats with a gun.

On December 20, 2001, the hospital's Medical Staff Executive Committee, acting according to Business and Professions Code section 809 et seq. and the hospital's medical staff by-laws, voted summarily to suspend Kibler's medical staff privileges. The hospital also filed petitions in superior court seeking two "workplace violence" injunctions against Kibler.

The summary suspension and the injunctions were resolved in January 2002 by the execution of a release agreement between Kibler and the hospital. Kibler also agreed to stipulate to the entry of a permanent injunction.

In spite of the apparent resolution of the dispute, in December 2002, Kibler filed the instant lawsuit against defendants, claiming tortious interference with his right to practice medicine.

After some procedural delays, the trial court finally granted defendants' special motion to strike, brought pursuant to Code of Civil Procedure section 425.16 (hereafter section 425.16), the anti-SLAPP, Strategic Lawsuit Against Public Participation, statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 71-72.) The court also awarded attorney's fees to defendants. Kibler appeals.

Based on our de novo review of the record, we affirm the judgment. (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1017.)

2. Factual and Procedural Background

The notice of suspension stated it "was based on written and oral reports reviewed at the meeting regarding Doctor Kibler's continuing and recently escalating unprofessional conduct of extremely hostile and threatening verbal assaults, threats of physical violence, including assault with a gun, and related erratic actions of a hostile nature toward nursing and administrative personnel . . . ." It cited various provisions of the medical staff by-laws and Business and Professions Code section 805.

Kibler has worked at the hospital since 1979. Kibler's complaint alleges defendants suspended his medical staff privileges in retaliation for his purported misconduct. In particular, the hospital's board of directors was antagonistic toward Kibler for raising issues of inadequate medical services and the hospital's prospective insolvency. Additionally, Kibler had refused to participate in a joint effort to ostracize another doctor, Jon McLennan, and had complained about the obstetrics nursing staff, who allegedly violated his orders regarding infant care and gastric suctioning. Defendants falsely accused him of mishandling a crib containing a newborn baby. In addition to seeking injunctions, the hospital threatened to report Kibler to the Medical Board of California and to the National Practitioner Data Bank. Kibler contends that, due to his suspension, his permit to carry a firearm was revoked.

The seven causes of action asserted by Kibler included: intentional interference with right to practice profession; abuse of process; defamation; violation of constitutional rights; restraint of trade; extortion; and conspiracy.

In response, the hospital filed a motion to strike, contending that Kibler's lawsuit constituted an effort to chill defendants' exercise of free speech as related to an official proceeding authorized by law. Additionally, the hospital cited the release executed by Kibler on January 3, 2002, which fully resolved the dispute between Kibler and the hospital almost a year before he filed his lawsuit. Jan Almquist, general counsel for the hospital, stated in his declaration that he had consulted with Kibler about preparation of the release agreement.

In opposition, Kibler argued that section 425.16 did not apply when considered in conjunction with Evidence Code section 1157, providing confidentiality for the proceedings of hospital medical and peer review committees. On the merits of his claim, he further argued that his alleged misconduct did not involve medical treatment of a patient, the suspension violated Business and Professions Code sections 809, 809.05, 809.4, 809.5, and 2056, and the release was against public policy.

Kibler submitted his declaration, stating he had no notice of his summary suspension; that he did not know of any complaints about his conduct, except for some use of profanity; that the only threats he had made were of legal action, never physical violence; that his only grievances concerned the nurses' failure to follow procedure and their harassment of his fiancée, Diana. He was never accused of mistreating patients. He repeated his claim that the obstetrics nurses were untrustworthy and not following orders regarding "performing gastric suctioning and removal of a newborn from its mother . . . ." He disputed any charge that he had roughly handled a crib containing a newborn. He

complained that he was not able to disqualify biased persons, defendants Greene and Hathaway, from participating in the suspension proceedings.

Kibler also claimed that he signed the release under duress because he feared his medical license was threatened but that Almquist assured him the release would not impair his ability to file a lawsuit. He was concerned he might be forced to be a witness in a lawsuit by Dr. McLennan against defendants. He detailed his efforts to improve the hospital's finances and administration. Because he could not return to the hospital until April 2002, he was financially damaged and he continues to be shunned by the hospital staff.

Kibler's wife, Diana, submitted a declaration stating she is a nurse and was a hospital employee since January 2000. In May 2001, Kibler separated from his previous wife, Ingrid, also a nurse at the hospital, and became involved with Diana. The other nurses became critical and hostile. Diana was subjected to rude language and physical attacks. The hospital refused to consider Diana's grievance. She left the hospital in November 2001.

Diana described Kibler as careful, quiet, consistent, and "respectful of the nurses." The nurses, however, became hostile to him. Diana said defendant Greene, another doctor, was "belligerent," "violent," "verbally abusive and threw things while on duty but was never reprimanded." He also swore and "said inappropriate things to nurses." Diana's car was vandalized several times and she suspected Ingrid.

In reply to Kibler's opposition, defendants provided the court with two letters Kibler wrote, one dated December 26, 2001, the other, January 2, 2002. In both, he

admits to having an "abrasive" and "overbearing personality" but denies having threatened anyone except with legal action. He offers to obtain counseling, make apologies, limit his time in the hospital to necessary activities, refrain from profanity, and cease carrying a weapon. About future legal action, he states, "I am certainly willing to withdraw these proceedings, with a guarantee that I will take no further action in the future."

Defendant Greene submitted a declaration, disputing Diana's characterization of him and contradicting Kibler's version of events, especially the details of the suspension proceedings. Other hospital declarants contradicted Kibler and Diana at every point, as well as accusing them of other kinds of misconduct. Almquist's supplemental declaration asserted that the release was intended to cover all claims, including this lawsuit. Almquist had explained to Kibler that the release would not affect Diana's independent grievance. Kibler had participated in negotiating the release and Kibler was repeatedly advised to obtain independent legal counsel and declined. Kibler promised Almquist he was obtaining counseling.

The court decided that section 425.16 applied because Kibler's complaint concerned either an official proceeding authorized by law *or* other conduct involving free speech or the right of petition, and a public issue or issue of public interest. The court also found the release executed by Kibler precluded him from establishing the probability of prevailing. After granting defendants' anti-SLAPP motion and hearing defendants' motion for attorney's fees and Kibler's motion to strike costs, the court awarded defendants fees of $67,591.70.

3. Applicability of Section 425.16

In its statement of decision in favor of defendants, the trial court found that all of Kibler's causes of action are subject to the anti-SLAPP statute. The court reasoned that, because Kibler's suspension was based on a legally-mandated hospital peer review process, his claims concern an "'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' includ[ing]: . . . (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; . . . (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." (Code Civ. Proc., § 425.16, subd. (e).) The trial court also found Kibler had not established a "probability" of prevailing because the release agreement barred all his claims. (Code Civ. Proc., § 425.16, subd. (b).)

The threshold issue is whether section 425.16 applied in these circumstances. The paradigmatic "'. . . 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.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1125, citing *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53.) Section 425.16, however, has been applied in a wide range of other contexts. (*Briggs, supra,* 19 Cal.4th 1106; *Colt v. Freedom*

Communications, Inc. (2003) 109 Cal.App.4th 1551; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175.) The statute must be construed broadly. (*Briggs, supra,* 19 Cal.4th at p. 1119.)

To prevail on an anti-SLAPP motion, the moving party must make a prima facie showing that the activity forming the basis for the plaintiff's cause of action falls within one of the four categories of protected speech and petitioning activity described in subdivision (e) of section 425.16. The burden then shifts to plaintiff to make a prima facie showing of the probability of prevailing. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646.)

On the issue of whether his complaint chills defendants' free speech or petitioning activities, Kibler argues it is not defendants' but his free speech and petitioning activities being suppressed. He cites the public policy supporting Business and Professions Code section 2056, prohibiting retaliation by termination against physicians who advocate for medically appropriate health care. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 51-52.) He relies on the peer review provisions of Business and Professions Code section 809 et seq. and Business and Professions Code section 2282, interpreting the statutes to mean that suspension proceedings could not be based on Kibler's conduct toward hospital employees rather than patients. He also relies on Evidence Code section 1157, providing for the confidentiality of medical review and peer review proceedings. He contends that an action concerning such proceedings cannot be "determined to be connected with a public issue or of public interest."

Here all of plaintiff's causes of action stem from his summary suspension and from the hospital seeking injunctions against him. (*Martinez v. Metabolife*, *Internat., Inc.* (2003) 113 Cal.App.4th 181, 187.) His whole complaint is subject to section 425.16.

The petitions for injunctions are expressly subject to section 425.16, subdivision (a)(1), as judicial proceedings and official proceedings; "[F]iling a lawsuit is an exercise of a party's constitutional right of petition." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) Additionally, the peer review proceeding that culminated in his suspension was an official proceeding required by law and by the medical staff by-laws. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 538; *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 867; Bus. & Prof. Code, §§ 809 et seq. & 2282.) Because the suspension occurred as part of an official proceeding authorized by law, it is subject to section 425.16. (Code Civ. Proc., § 425.16, subd. (e)(2); *Briggs, supra,* 19 Cal.4th at p. 1116.)

Kibler cannot easily dispute the foregoing although he attempts to argue that the confidentiality of the suspension proceeding, even if it was an official proceeding, renders it exempt from the reach of section 425.16. But the confidentiality accorded to medical and peer review proceedings is not irreconcilable with their status as official proceedings. Although Kibler's conduct as a doctor in a public hospital certainly might be considered to be a public matter, an official proceeding need not involve a public issue to be considered subject to section 425.16. (*Briggs, supra,* 19 Cal.4th at p. 1118.) Therefore, the confidentiality of this official proceeding did not exempt it from section 425.16.

Additionally, it needs no citation to acknowledge that an issue concerning public health care has public significance. Even if Kibler's misconduct was aimed at hospital staff and not patients, his conflicts with the staff were related to his performance as a physician. The two are intertwined, as recognized by the medical staff by-laws, requiring that a practitioner: "Be able to, and in fact, conduct himself or herself within the hospital setting in a professional and cooperative manner that does not, and is not likely to, adversely affect the health and well-being of *any person in the hospital* or any other aspect of patient care. [Emphasis added.]" Therefore, even if the suspension proceeding against Kibler was confidential, it was also a matter of public interest, making section 425.16 applicable. (*Briggs, supra,* 19 Cal.4th at p. 1118; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 897; *Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628.)

4. Probability of Success

Kibler's remaining arguments are not expressly about the applicability of section 425.16. Instead, he contends his suspension violated Business and Professions Code sections 809 et seq. and 2056. He also attacks the validity of the release, arguing it is not enforceable because it purports to bar a claim based on intentional wrongdoing of the defendants. (Civ. Code, § 1668.) As such, Kibler is asserting the probability of the success of his claims. On this point, he argues the evidence should be interpreted entirely in his favor with little regard for defendants' contrary showing, citing two cases that do not involve section 425.16. (*Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1266; *Khajavi v. Feather River Anesthesia Medical Group, supra,* 84 Cal.App.4th at p. 43.)

The proper standard of review to evaluate the probability of success under section 425.16 is not to "weigh the evidence or make credibility determinations; doing either would violate plaintiff's right to a jury trial. [Citation.] . . . [T]he court may . . . consider the opposing evidence 'to determine if it defeats the plaintiff's showing as a matter of law. [Citation.]' (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)" (*Colt v. Freedom Communications, Inc., supra,* 109 Cal.App.4th at p. 1557.) Here defendants' evidence positively prohibits any probability of success by Kibler.

Foremost is Kibler's failure to exhaust the administrative and judicial remedies he should have pursued to challenge his suspension's propriety before filing the instant action. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469, 476-478, 482-484; *City of Fresno v. Superior Court* (1987) 188 Cal.App.3d 1484, 1489; *McNair v. Pasadena Hospital Assn., Ltd.* (1980) 111 Cal.App.3d 841, 845-846.) Kibler did not challenge his suspension by means of the procedural rights of a hearing and appeal permitted to him by the medical staff by-laws. The by-laws require such exhaustion before proceeding civilly. Furthermore, even if an administrative hearing would have been an idle act or ineffectual as a post-suspension proceeding, Kibler could have pursued a mandamus action before suing the hospital and defendants. (*Westlake, supra,* 17 Cal.3d at pp. 469, 483-484; *Johnson, supra,* 24 Cal.4th at pp. 69-70.)

Kibler's primary response to this point is to mischaracterize *Westlake*'s reference to *Willis v. Santa Ana etc. Hospital Assn.* (1962) 58 Cal.2d 808, 810, overruled in *Cianci v. Superior Court* (1985) 40 Cal.3d 903. Neither *Westlake* nor *Willis* affords the right of

an immediate tort suit for damages unless there is no other procedure available. That is not the situation here in which Kibler should have sought administrative and judicial redress before attempting a civil suit.

Nor do we find any evidence the hospital violated the Business and Professions Code or its own by-laws by suspending Kibler summarily. The by-laws and Business and Professions Code section 809.5 both allow a summary suspension to be imposed. The hospital followed the correct procedure in doing so. If the suspension was improper, Kibler should have asserted that contention according to proper procedures.

The second roadblock thrown up to Kibler showing probability of success is the release agreement. Kibler admitted he agreed to the release because he wanted to resolve the suspension in the 15 days before the hospital had to report it to the state medical board and national data bank. But, in doing so, he agreed to withdraw his request for a hearing. He expressly waived all claims relating to the suspension and agreed not to sue. He also consented in court to a stipulated injunction.

Kibler's reliance on Civil Code section 1668 is not appropriate. Section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." The code section applies to clauses that are exculpatory of *future* conduct. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 94, 104.) Civil Code section 1668 does not govern a settlement agreement concerning a present liability. As common

sense indicates, following Kibler's proposed interpretation means there could never be an effective settlement agreement.

We conclude that because Kibler did not exhaust his remedies and because he agreed to a release, he cannot show the probability of success of his claims.

5. Attorney's Fees

Kibler protests the award of attorney's fees to defendants of about 72 percent of what they requested. Kibler contends defendants should be limited to the fees incurred only for the motion to strike, not the whole action, citing *Lafayette Morehouse, Inc. v Chronicle Publishing Co*. (1995) 39 Cal.App.4th 1379, 1383. As we review the record, however, we conclude the trial court correctly estimated the fees broadly attributable to the special motion to strike and limited the award accordingly. (*Metabolife International, Inc. v. Wornick* (S.D. Cal. 2002) 213 F.Supp.2d 1220, 1223-1225.) Therefore, we affirm the trial court's exercise of its discretion.

6. Disposition

We affirm the judgment and order defendants to recover their costs on appeal.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.