Filed 11/27/18 Omidi v. Schunke CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHAEL OMIDI, M.D., Plaintiff and Appellant, v. KEVIN SCHUNKE et al., Defendants and Respondents.	B272406 (Los Angeles County Super. Ct. No. BC548750)

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Beaudet, Judge. Affirmed.

Law Office of Albert Garcia and Albert J. Garcia; Law Office of Francis J. Flynn, Jr. and Francis J. "Casey" Flynn, Jr.; Law Offices of Kamille Dean and Kamille Dean for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Zareh A. Jaltorossian, Stephanie B. Kantor and John J. Manier

for Defendants and Respondents The Regents of the University of California, Cindy Slaughter, Stephen Hayden, and Maria Savoia.

Xavier Becerra, Attorney General, Jonathan L. Wolff, Chief Assistant Attorney General, Kristin G. Hogue, Assistant Attorney General, Joel A. Davis and John B. Greene, Deputy Attorneys General, for Defendants and Respondents State of California, acting by and through the Medical Board of California and Kevin Schunke.

Plaintiff and appellant Michael Omidi (Omidi) appeals (1) an order of dismissal following the sustaining of a demurrer by defendants and respondents Regents of the University of California, Maria Savoia, Stephen Hayden, and Cindy Slaughter (collectively, the UC defendants) to his first amended complaint (FAC) without leave to amend, and (2) an order granting a special motion to strike brought by defendants and respondents State of California, acting by and through the Medical Board of California (Medical Board), and Kevin Schunke (Schunke) (collectively, the Medical Board defendants).

As discussed below, we perceive no error in the trial court's rulings and affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

National Resident Matching Program (NRMP), a nonprofit corporation, provides a service that matches applicants to medical residency and fellowship programs across the United States, pursuant to a Match Participation Agreement (Agreement) to which applicants and medical training programs agree to be bound.

On January 5, 2011, Omidi applied to the University of California at San Diego (UCSD) for a cardiothoracic fellowship. He registered with NRMP for the matching program, and was matched to UCSD on June 15, 2011, with the fellowship to commence the following summer.

On February 17, 2012, Schunke, a manager at the Medical Board,[1] sent an email to an employee at the UCSD School of Medicine that included a link to a January 17, 2012 article that had appeared in the Los Angeles Times Business section. The article was captioned "Plaintiffs allege 'gruesome conditions' at Lap-Band clinics," and described a lawsuit seeking damages from eight defendants, including brothers Michael and Julian Omidi, who allegedly ran the weight-loss business.

On February 23, 2012, Schunke sent another email to Cindy Slaughter at UCSD, with the notation "Just looking out for my friends." This email copied an article that had appeared in the Los Angeles Times the previous day, stating that Omidi, the owner of 1-800-GET-THIN and its affiliated surgery centers, had been named as a defendant in a lawsuit alleging identity theft for using a physician's name, without the physician's permission, to establish a corporation that billed insurers.

On February 28, 2012, UCSD sent a letter to NRMP requesting a waiver of its match commitment to Omidi, based on news reports that contained serious allegations against Omidi. NRMP notified Omidi of UCSD's waiver request and inquired if he wished to respond. Omidi responded in an April 23, 2012 email to NRMP stating he would not challenge UCSD's waiver

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[1] The Medical Board's responsibilities are set forth at footnote 8, *post*.

request. NRMP granted UCSD's waiver request, as it was unopposed.

NRMP then conducted its own investigation and determined that Omidi had violated the Agreement by failing to provide complete, timely, and accurate information to the program to which he sought to match. NRMP imposed sanctions barring Omidi from participating in NRMP matches for two years.

Under the terms of the Agreement, disputes relating to the match or the Agreement are subject to binding arbitration. Omidi demanded arbitration through the American Arbitration Association to contest NRMP's imposition of sanctions against him. The matter was arbitrated in Washington, D.C. before a retired justice of the Supreme Court of Virginia, who issued an award in favor of NRMP on February 26, 2014.

On June 16, 2014, Omidi commenced the instant action in the superior court against NRMP (not a party to this appeal), as well as the Medical Board defendants and the UC defendants.

Claims against the Medical Board defendants; grant of their special motion to strike. With respect to the Medical Board defendants, the original complaint is the operative pleading. Omidi pled causes of action against the Medical Board defendants for (1) violation of civil rights under 42 U.S.C. section 1983, (2) violation of the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 et seq.), (3) sexual harassment based on a hostile work environment, pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), (4) state civil rights violations (Civ. Code, §§ 51, 52.1), (5) intentional interference with prospective economic advantage, (6) negligent interference with prospective economic advantage, (7) intentional

infliction of emotional distress (IIED), and (8) negligent infliction of emotional distress (NIED).

The Medical Board defendants filed a special motion to strike the complaint under the anti-SLAPP[2] statute. (Code Civ. Proc., § 425.16.)[3] The trial court granted the special motion to strike all but the FEHA claim, which the trial court found did not arise from protected activity.[4] As to the remainder of the claims, the trial court ruled that statements that formed the basis for Omidi's claims against the Medical Board defendants were the two emails that Schunke sent to UCSD, in which he forwarded the articles that appeared in the Los Angeles Times. The emails, which allegedly interfered with Omidi's right to employment, were sent in connection with an issue of public interest, and therefore satisfied the first prong of the anti-SLAPP analysis. As for the second prong, the trial court found that Omidi had failed to establish a probability of prevailing on his claims.

Claims against the UC defendants; demurrer sustained without leave to amend. With respect to the UC defendants, the operative pleading was the FAC, which pled in relevant part causes of action for (1) violation of civil rights under 42 U.S.C.

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[2] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

[3] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

[4] The trial court subsequently sustained a demurrer by the Medical Board defendants to the FEHA claim. That ruling is not before us; our review is confined to the order granting the Medical Board defendants' special motion to strike.

section 1983, (2) violation of the FCRA, (3) sexual harassment based on a hostile work environment, pursuant to the FEHA, and (4) state civil rights violations (Civ. Code, §§ 51, 52.1). The trial court sustained the UC defendants' demurrer to the FAC without leave to amend.

Omidi filed timely notices of appeal from the order granting the Medical Board defendants' special motion to strike, and the order of dismissal following the sustaining of the UC defendants' demurrer to the FAC without leave to amend.[5]

CONTENTIONS

With respect to the UC defendants, Omidi contends the demurrer to the FAC should have been overruled because his claims were well pled.

With respect to the Medical Board defendants, Omidi contends the special motion to strike should have been denied because his claims did not arise out of their protected activity, and even if the second prong of the SLAPP analysis is reached, he established a reasonable probability of prevailing on his claims.

DISCUSSION

I. The appeal from the order sustaining the UC defendants' demurrer to the FAC without leave to amend.

1. *Standard of appellate review*.

"In determining whether [a plaintiff has] properly stated a claim for relief, our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but

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[5] Both the order granting the special motion to strike (§ 425.16, subd. (*i*), § 904.1, subd. (a)(13)) and the order of dismissal (§ 581d; *City of Los Angeles v. City of Los Angeles Employee Relations Bd*. (2016) 7 Cal.App.5th 150, 157) are appealable.

not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid.*)

2. *No cause of action stated against the UC defendants for violating the FCRA because neither the Medical Board nor Schunke are a consumer reporting agency and the newspaper articles which Schunke forwarded to UCSD were not consumer reports.*

Omidi contends he properly alleged the UC defendants, as the employer, violated their obligations under the FCRA by failing to provide him with certain disclosures required by the statutory scheme. Omidi's theory is that the Medical Board and Schunke are consumer reporting agencies and the newspaper articles that Schunke forwarded to UCSD were consumer reports, and therefore, the UC defendants, as the employer, were required to provide him with statutory disclosures before taking any adverse action on the consumer reports. [6]

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[6] 15 U.S.C. § 1681b(b)(3)(A) states in relevant part:

The FCRA claim against the UC defendants is not well pled because Omidi's allegations fail to implicate the FCRA. Although Omidi pled that the Medical Board and Schunke "were a consumer reporting agency," on demurrer the court is not required to accept as true allegations containing legal conclusions or unsupported speculation. (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 960.) Omidi failed to plead facts to show that the Medical Board and Schunke, one of its managers, are persons who, "for monetary fees, dues, or on a cooperative nonprofit basis, regularly engage[] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties[]." (15 U.S.C. § 1681a(f).)[7] Simply stated, the Medical Board and Schunke are not in the business of assembling and evaluating consumer credit

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"(3) Conditions on use for adverse actions.

(A) In general. [¶] Except as provided in subparagraph (B), in using a consumer report for employment purposes, *before taking any adverse action based in whole or in part on the report*, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title." (Italics added.)

[7] The three major consumer credit reporting agencies are TransUnion, Experian, and Equifax. (*Harris v. Pennsylvania Higher Education Assistance Agency/American Education Services* (3d Cir. 2017) 696 Fed.Appx. 87, 90, fn. 1.)

information within the meaning of the FCRA; the Medical Board is in the business of licensing and regulating the medical profession. (Bus. & Prof. Code, §§ 2002, 2004.)[8]

Further, the newspaper articles which Schunke forwarded to UCSD did not constitute a "consumer report" from a consumer reporting agency within the meaning of the FCRA. (*Barge v. Apple Computer, Inc*. (2d Cir. 1998) 164 F.3d 617, No. 97-9068, 1998 WL 650578, at *1 [a defendant's procurement of a newspaper article written about the plaintiff did not constitute the obtaining of a consumer report from a consumer reporting agency for purposes of the FCRA].)

For these reasons, Omidi failed to state a cause of action against the UC defendants under the FCRA. Further, because the newspaper articles that were forwarded to UCSD do not implicate the FCRA, leave to amend is not warranted.

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[8] Business and Professions Code section 2004 enumerates the Medical Board's responsibilities as follows: "(a) The enforcement of the disciplinary and criminal provisions of the Medical Practice Act. [¶] (b) The administration and hearing of disciplinary actions. [¶] (c) Carrying out disciplinary actions appropriate to findings made by a panel or an administrative law judge. [¶] (d) Suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions. [¶] (e) Reviewing the quality of medical practice carried out by physician and surgeon certificate holders under the jurisdiction of the board. [¶] (f) Approving undergraduate and graduate medical education programs. [¶] (g) Approving clinical clerkship and special programs and hospitals for the programs in subdivision (f). [¶] (h) Issuing licenses and certificates under the board's jurisdiction. [¶] (i) Administering the board's continuing medical education program."

3. *No cause of action stated for sexual harassment arising out of a hostile work environment*.

Omidi pled the following: he was the victim of third party sexual harassment by Schunke, who allegedly harassed and solicited men in the Graduate Medical Education Department at UCSD via a series of emails during 2012; Omidi discovered the emails in April 2014; Schunke's alleged sexual harassment of those individuals created a hostile work environment; the UC defendants violated the FEHA "because they required [him] to work in an environment permeated with harassment."

The sexual harassment claim fails to state a cause of action because Omidi failed to allege he suffered a hostile work environment. "[T]o establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show [he] was subjected to sexual advances, conduct, or comments that were severe enough or sufficiently pervasive to alter the conditions of [his] employment and create a hostile or abusive work environment. [Citations.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283, italics omitted.) Further, a hostile work environment sexual harassment claim by a plaintiff "who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [his] direct work environment.' [Citation.]" (*Id*. at p. 285.)

Here, the allegations of the complaint reflect that Omidi's fellowship was terminated before his employment ever commenced. Further, Omidi alleged he did not discover

Schunke's sexual harassment until April 2014, two years after the termination of his fellowship, when he learned of Schunke's emails. Given that Omidi did not perceive or experience sexual harassment during any employment period, he is incapable of stating a cause of action against the UC defendants for sexual harassment arising out of a hostile work environment.

4. *No cause of action stated for alleged Civil Code violations*.

Civil Code section 52.1 (the Tom Bane Civil Rights Act) authorizes an action against anyone who interferes, or tries to interfere, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law. (*Jones v. Kmart Corp*. (1998) 17 Cal.4th 329, 331.) "Speech alone is not sufficient to support an action brought [under the statute], except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (Civ. Code, § 52.1, subd. (j).)

As the trial court found, Omidi failed to allege sufficient facts to show that the UC defendants engaged in threats, intimidation, or coercion to deprive him of his rights. Omidi's allegations that the UC defendants deprived him of his rights by terminating his employment and by concealing their misconduct are insufficient to state a claim under the Bane Act.[9] Further,

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[9] Omidi's related argument that he stated a claim against the UC defendants under Civil Code section 51, the Unruh Civil Rights Act, is undeveloped and therefore requires no discussion.

Omidi has not met his burden to show that leave to amend is warranted.

5. *No cause of action stated against the UC defendants for violation of 42 U.S.C. section 1983.*

Omidi's final contention against the UC defendants pertains to his cause of action for violation of 42 U.S.C. section 1983. The argument is undeveloped and therefore has been forfeited.

As the UC defendants point out in their respondents' brief, Omidi made no attempt in his opening brief to demonstrate that he properly stated a cause of action against them under 42 U.S.C. section 1983. In the opening brief, Omidi solely argued that the UC defendants lack qualified immunity. However, qualified immunity is merely an affirmative defense. (*Macias v. County of Los Angeles* (2006) 144 Cal.App.4th 313, 319.) The threshold issue is whether the complaint alleged the violation of a constitutional right under color of state law. (*Ibid.*) Instead of briefing the issue, Omidi merely refers the court to arguments that he made earlier in the opening brief, at section V.C.2.b.iii. However, that discussion pertained to prong two of the anti-SLAPP analysis, on his cause of action against Schunke and the Medical Board under 42 U.S.C. section 1983. Here, on review of the ruling on the demurrer, the relevant issue is the sufficiency of the pleading; in contrast, the analysis on prong two of an anti-SLAPP ruling is whether the plaintiff has shown a reasonable probability of prevailing on his claims. Therefore, Omidi's attempt to incorporate his earlier arguments by reference is of no assistance.[10]

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[10] In the reply brief, Omidi attempts to expand the arguments which were undeveloped in his opening brief. However, we do not

In sum, Omidi has not met his burden to show the trial court erred in sustaining the UC defendants' demurrer to his claim under 42 U.S.C. section 1983 without leave to amend.

II. The appeal from the order granting the Medical Board defendants' special motion to strike.

1. *General principles.*

Under the anti-SLAPP statute, "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." (§ 425.16, subd. (b)(1).)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

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consider arguments raised for the first time in the reply brief. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 362, fn. 18.)

Our review of the grant or denial of an anti-SLAPP motion is de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

2. *First prong of the anti-SLAPP analysis; trial court properly determined that Omidi's claims arose out of protected activity.*

The trial court ruled that *except* for Omidi's FEHA claim (which was based on alleged sexual solicitation emails sent by Schunke to UCSD personnel), all of Omidi's claims against the Medical Board defendants arose from Schunke's February 17 and February 23, 2012 emails forwarding the newspaper articles regarding Omidi, the two emails were sent in connection with an issue of public interest, and therefore the Medical Board defendants satisfied the first prong of the anti-SLAPP statute with respect to each cause of action except for the FEHA claim. We agree.

Section 425.16, in subdivisions (e)(1) through (e)(4), identifies four categories of petitioning and free speech activity and conduct that constitute 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,' " to wit: "(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, or (4) *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." (§ 425.16, subd. (e), italics added.)

Unlike clauses (1) and (2) of section 425.16, subdivision (e), which include the element of an official proceeding, clauses (3) and (4) contain the limitation that the statement or writing be made in connection with "an issue of public interest." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Further, unlike clause (3), which includes the requirement that the statement or writing be made "in a place open to the public or a public forum" (§ 425.16, subd. (e)(3)), subdivision (e)(4)), which covers "other conduct," does not contain that requirement. (§ 425.16, subd. (e)(4); *Briggs*, *supra*, at p. 1123.) Thus, the issue here is simply whether Schunke's two emails to UCSD were sent "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

Omidi contends Schunke's conduct did not constitute protected activity because Schunke was engaged in "routine ministerial statutory compliance activity" when he forwarded the newspaper articles to UCSD. Schunke bases his argument on language in *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, stating that "a retailer's submission of sales tax returns to the [State Board of Equalization (SBE)] in the ordinary course of business and the SBE's transmission of local sales tax revenues to local jurisdictions based on the returns does not involve either a 'proceeding' or 'an issue under consideration or review' by an official body within the meaning of clauses (1) and (2) of section 425.16, subdivision (e)." (198 Cal.App.4th at p. 217.) That language is inapposite, as the instant case involves clause (4), which, unlike clauses (1) and (2), does not require an

official proceeding. (*Briggs*, *supra*, 19 Cal.4th at p. 1123.) Further, the emails sent by Schunke reflected that his conduct in forwarding the emails ("Just looking out for my friends") did not involve a routine ministerial submission by him to UCSD officials.

We agree with the trial court's resolution of the issue and we reiterate it here. "With regard to the February 17 and 23 emails, they appear to have been sent in connection with an issue of public interest. The February 17 email includes a link to an L.A. Times article. This article, published on January 17, 2012, is entitled 'Plaintiffs allege "gruesome conditions" at Lap-Band clinics.' . . . . The article discusses a lawsuit relating to a weight-loss surgery center which allegedly was owned by Plaintiff and his brother. The February 23 email includes the text of a February 22, 2012 L.A. Times article with the headline: 'GET-THIN exec stole ID, suit says; President formed an insurance billing firm without approval, a doctor alleges.' . . . The article discusses a lawsuit accusing the president of the 1-800-GET-THIN marketing firm of identity theft. The article identifies Plaintiff as the owner of 1-800-GET-THIN, and as a defendant in the lawsuit. The public has an interest in the information that is disseminated in these articles, including an interest in the safety of medical procedures performed on patients, and the allegedly unlawful business practices of medical service providers. The fact that the LA Times reported on these lawsuits demonstrates that the public has an interest in these matters."[11]

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[11] Omidi's reliance on *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119 (*Colyear*), which he cited in a letter brief filed after oral argument, is misplaced. *Colyear* states: " '[*I*]*n cases where the issue is not of*

We agree with the trial court that apart from the FEHA claim, the Medical Board defendants met their burden with respect to prong one, so as to shift the burden to Omidi to establish a probability of prevailing on his claims.

3. *Second prong of the anti-SLAPP analysis; trial court properly determined that Omidi failed to establish a probability of prevailing on his claims.*

a. *Trial court properly found Omidi did not establish a probability of prevailing on the claim under 42 U.S.C. section 1983 against the Medical Board defendants.*

Although local entities and local officers sued in their official capacity are persons subject to suit under 42 U.S.C. section 1983, *state* agencies and *state* officials acting in their official capacity are not persons subject to suit under 42 U.S.C. section 1983. (*Will v. Michigan Department of State Police* (1989)

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interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.' [Citations.]" (*Id.* at p. 131, italics added.) *Colyear* involved a dispute between two homeowners over the authority of a homeowners association to enforce tree trimming covenants. Therefore, *Colyear* went on to determine that the controversy was a subject of interest to the entire membership of the community. (*Id.* at pp. 130–134.) Here, the controversy regarding Omidi was the subject of repeated coverage by the Los Angeles Times, reflecting that the controversy was of interest to the general public. Therefore, the emails that Schunke sent to UCSD constituted protected activity within the ambit of section 425.16, subdivision (e)(4).

491 U.S. 58, 64–71 [105 L.Ed.2d 45]; *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829.) Accordingly, Omidi cannot prevail on this cause of action against the state Medical Board or against Schunke in his official capacity.

The remaining question is whether Omidi is capable of prevailing on his cause of action under 42 U.S.C. section 1983 against Schunke in his *individual* capacity, given Schunke's asserted defense of qualified immunity. This defense " 'shields public officers from section 1983 actions unless the officer has violated a clearly established constitutional right.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 385.)

When evaluating "an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense. [Citations.]" (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

It is established that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person would have known*." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L.Ed.2d 396], italics added; accord, *Green v. City and County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1051.) Here, the papers on the special motion to strike did not indicate any binding authority to the effect that a government official's disclosure of news articles about public lawsuits filed against a plaintiff violates any constitutional right.

The trial court so found, stating that Schunke had not presented any evidence "to support a finding that Schunke's conduct violated any right or that a reasonable person would have known that Schunke's conduct was illegal."

On appeal, Omidi argues that the affirmative defense of qualified immunity cannot be determined on an anti-SLAPP motion, but he fails to identify any evidence to support the claim that Schunke's forwarding the articles that had been published in the Los Angeles Times violated a clearly established statutory or constitutional right of which a reasonable person would have known. Because Omidi failed to controvert Schunke's defense of qualified immunity, Omidi failed to show a probability of prevailing on his claim against Schunke, individually, under 42 U.S.C. section 1983.

b. *Omidi's claim for violation of the FCRA.*

Schunke pled that the Medical Board and Schunke, as a consumer reporting agency, provided employment reports to UCSD and NRMP without complying with the disclosure requirements of the FCRA.

The trial court ruled that Omidi's FCRA claim against the Medical Board defendants failed because "[t]here is no indication that the Medical Board's responsibilities include assembling or evaluating consumer information for the purpose of furnishing consumer reports to third parties." We agree. As discussed above, the term "consumer reporting agency" within the meaning of the FCRA refers to firms that are in the business of assembling and evaluating consumer credit information. (*Ante*, pp. 8–9.) Because Omidi failed to show that either the Medical Board or Schunke are a consumer reporting agency within the meaning of

the statute, he failed to show a probability of prevailing on his FCRA claim.

c. *Omidi's cause of action for sexual harassment based on a hostile work environment.*

Omidi contends the trial court erred in granting the special motion to strike his sexual harassment claim against the Medical Board defendants. The argument is meritless because the trial court actually resolved this issue in Omidi's favor. The record reflects the trial court *denied* the special motion to strike the FEHA claim on the ground that cause of action did not arise from protected activity.

Further, the trial court's subsequent ruling, sustaining the Medical Board defendants' demurrer to the FEHA claim without leave to amend, is beyond the scope of this appeal, which was taken from the order granting the special motion to strike. (See fn. 4, *ante*.)

d. *Omidi's claims under Civil Code sections 51 and 52.1.*

In its ruling on the special motion to strike, the trial court found that Omidi "fail[ed] to identify any evidence of threats, intimidation or coercion by [the] Medical [Board] Defendants," as required by Civil Code section 52.1. (*Jones v. Kmart Corp.*, *supra*, 17 Cal.4th at p. 331.)

On appeal, Omidi asserts the trial court erred in dismissing his claim under Civil Code section 52.1 because the claim was well pled. The argument does not meet the issue because the inquiry on this appeal from the ruling on the special motion to strike is not the sufficiency of the pleading, but rather, whether Omidi established a probability of prevailing on his claim. Omidi has not shown that the Medical Board defendants interfered with

his rights "by threat, intimidation, or coercion[.]" (*Ibid*.) Accordingly, we agree with the trial court that Omidi has not shown a probability of prevailing on his claim under section 52.1.[12]

e. *Omidi's claims for IIED and NIED.*

The elements of the tort of IIED include extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 (*Christensen*).) Conduct to be outrageous must be " 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' " (*Ibid*.) The trial court found that Schunke's conduct in forwarding to UCSD the two articles that had been published in the Los Angeles Times did not constitute extreme and outrageous conduct. The trial court also found that Omidi had failed to cite any evidence to support his claim that the Medical Board defendants acted with deliberate intent to destroy his fellowship.

On appeal, Omidi merely contends in conclusory fashion, and without citation to authority, that the "unlawful deprivation" of his fellowship is sufficiently outrageous to support his claim for IIED. The argument is unpersuasive. We note the pleading reflects that it was *not* the Medical Board defendants who terminated Omidi's fellowship. Further, the Medical Board defendants' alleged conduct consisted of forwarding two readily

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[12] Omidi's related argument that the trial court erred in granting the Medical Board defendants' special motion to strike his claim under Civil Code section 51 is entirely undeveloped and therefore we do not address it. (*Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521.)

available newspaper articles to UCSD. Omidi has not cited any authority for the proposition that such activity by the Medical Board defendants rose to the level of extreme and outrageous conduct for purposes of the tort of IIED. Nor did Omidi show that in forwarding the articles, the Medical Board defendants either intended to cause, or recklessly disregarded the probability of causing, emotional distress. (*Christensen*, *supra*, 54 Cal.3d at p. 903.) Thus, Omidi did not establish a reasonable probability of prevailing on his IIED claim.

Along the same lines, Omidi contends the unlawful deprivation of his fellowship is a sufficient basis for his claim against the Medical Board defendants for NIED. However, " '[t]he negligent causing of emotional distress is not an independent tort, but the tort of negligence. [Citation.] The traditional elements of duty, breach of duty, causation, and damages apply." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072, italics omitted.) Omidi has not addressed the various elements of the tort of negligence, and thus has failed to demonstrate a probability of prevailing on his NIED claim.

f. *Omidi's claims for intentional and negligent interference with prospective economic advantage*.

The elements of the tort of intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134,

1153.) Similarly, the tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship. (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078.)

Both torts require that the plaintiff establish not only interference, but also that the interference was *independently wrongful*, apart from the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, USA, Inc.* (1995) 11 Cal.4th 376, 393; *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 439–440.) An act is "independently wrongful . . . if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1159.)

Here, as the trial court found, Omidi failed to establish any independently wrongful conduct by the Medical Board defendants. Although Omidi pled the Medical Board defendants interfered with his prospective economic advantage by forwarding the newspaper articles to UCSD, Omidi has not

shown that Schunke's act of forwarding to UCSD the two articles that had been published in the Los Angeles Times was independently wrongful.

Omidi also pled that Schunke interfered with his prospective economic advantage by sexually harassing members of UCSD's Graduate Medical Education Department, "to create a quid pro quo and hostile work environment where Defendant Schunke's wish to inflict harm and injury on Dr. Omidi would be fulfilled and maintained." This argument is meritless. To reiterate the trial court's ruling, "it is entirely unclear how the alleged sexual solicitation emails sent by Schunke to UCSD officials, which made no reference to [Omidi], could have been designed to disrupt [Omidi's] economic relationship with UCSD. [Omidi] presents no evidence to support such a connection."

We conclude Omidi failed to establish a probability of prevailing on his claims for intentional and negligent interference with prospective economic advantage.

DISPOSITION

The order of dismissal following the sustaining of the UC defendants' demurrer to the FAC without leave to amend, and the order granting the Medical Board defendants' special motion to strike, are affirmed in their entirety. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.