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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STANDARD GENERAL, L.P. ET AL., Plaintiffs and Respondents, v. DOV CHARNEY ET AL., Defendants and Appellants.	B294313 (Los Angeles County Super. Ct. No. BC706996)

APPEAL from orders of the Superior Court of Los Angeles County, Ernest Hiroshige, Judge. Affirmed.

Keith A. Fink & Associates, Keith A. Fink and Imbar Sagi-Lebowitz, for Defendant and Appellant Dov Charney.

Law Offices of Olaf J. Muller and Olaf J. Muller for Defendant and Appellant Keith A. Fink.

Jessica Taran for Plaintiffs and Respondents.

Between 2016 and 2018, plaintiffs Standard General, L.P., Standard General Master Fund, L.P., and P Standard General, Ltd. (collectively, plaintiffs) obtained a series of judgments against Dov Charney (Charney) totaling nearly $30 million. In this case, plaintiffs allege Charney attempted to shield real property they could use to collect on these judgments by (among other things) fraudulently transferring the property to his attorney, Keith Fink (Fink). Charney and Fink appeal the trial court's denial of their special motions to strike plaintiffs' fraudulent transfer causes of action under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] We shall assume the causes of action arise from activity protected by the anti-SLAPP statute and consider instead whether plaintiffs satisfied their burden to demonstrate a probability of success on the merits. Specifically, we decide whether plaintiffs' claims are barred by the litigation privilege and whether plaintiffs were required to comply with special procedures required by statute when bringing a cause of action for a civil conspiracy against an attorney based on the attorney's representation of a client.

I. BACKGROUND

Charney is the founder and former chief executive officer of American Apparel, Inc. (American Apparel). In 2014, Charney borrowed funds from plaintiffs to increase his stake in American Apparel. The relationship later deteriorated and produced several lawsuits. These lawsuits resulted in three judgments against Charney totaling approximately $30 million: a January

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[1] Undesignated statutory references that follow are to the Code of Civil Procedure.

2016 judgment for $151,808.16; a September 2017 judgment for $92,045.79; and a January 2018 judgment for $29,107,449.31.[2]

Nineteen days prior to the January 2016 judgment, Charney executed a short form deed of trust to, and assignment of rents in, his Los Angeles home that names Fink, "a single man," as both trustee and beneficiary.[3] The next month, Charney executed another short form deed of trust and assignment of rents for the same property, again listing Fink as both trustee and beneficiary. Unlike the January 2016 deed, the February 2016 deed specified that its purpose was to secure "indebtedness in the amount of $3,750,000." Several months after executing the trust deeds, in May 2016, Charney purported to convey the same property to Apex Property Management, LLC (Apex) by grant deed.

In this action, plaintiffs allege Charney, Fink, and various entities have engaged in a series of fraudulent transfers to enable Charney to avoid paying plaintiffs' judgments against him. Charney and Fink filed section 425.16 special motions to strike two causes of action in the operative complaint[4] that allege the

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[2] The January 2016 and September 2017 judgments were for attorney fees and costs after the Los Angeles Superior Court granted plaintiffs' special motion to strike a complaint filed by Charney. The January 2018 judgment was entered in a case plaintiffs filed in the Delaware Court of Chancery in July 2015.

[3] Plaintiffs describe the home, "also known as the 'Garbutt House,'" as "a twenty-room mansion located on a hilltop spread over 37 acres overlooking the Silver Lake reservoir . . . ."

[4] Other causes of action, not relevant to this appeal, concern the grant deed to Apex and payments by another clothing

January and February 2016 trust deeds were fraudulent transfers under California's Uniform Voidable Transactions Act (UVTA). (Civ. Code, § 3439 et seq.[5]) Fink also demurred to these causes of action, contending, among other things, that because the complaint alleges a civil conspiracy between attorney and client, Civil Code section 1714.10 requires plaintiffs to demonstrate a probability of success and obtain a court order to that effect before suing.

Fink and his law firm, Keith A. Fink & Associates, provided legal services to Charney in several matters between 2014 and 2018. Charney asserts he was "not insolvent" in early 2016. But he contends he executed the trust deeds because he could not pay his "legal bills outright" and "[t]he transfer was for reasonably equivalent value for services rendered by Fink on [his] behalf, which were continuing and ongoing." According to Fink, these included at least seven lawsuits as well as "efforts to retake control of American Apparel" and "start various new businesses." Fink also "handled dozens, if not over one hundred, media inquiries on Charney's behalf during and after his suspension and termination from American Apparel," "issued a number of retraction demands to media outlets that reported inaccurate and damaging information about Charney," and "provided legal advice . . . in connection with potential film deals offered to him." The record does not include any billing records,

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company of which Charney is founder and CEO to entities allegedly controlled by Charney.

[5] In particular, the operative complaint cites Civil Code sections 3439.04 (defining transfers voidable as to present and future creditors) and 3439.07 (defining remedies of creditors).

but Fink estimates "[a]t the time Charney recorded the lien, his debt to [Fink] and [Fink's] firm roughly equaled $3.7 [million]."

The trial court denied Charney and Fink's special motions to strike and overruled Fink's demurrer. With respect to the special motions to strike, the trial court found the allegations concerning the trust deeds did not arise out of Charney and Fink's protected activity and, even if they did, plaintiffs demonstrated a probability of success on the merits. With respect to Fink's Civil Code section 1714.10 argument in the demurrer, the trial court ruled Fink "provided no substantive analysis of this argument, but rather merely state[d] that the claims fail for lack of court order." Charney and Fink appeal each of these orders.

II. DISCUSSION

Charney and Fink contend plaintiffs' fraudulent transfer causes of action target litigation activity protected under the anti-SLAPP statute, namely, Charney's funding of litigation, Fink's representation of Charney, and the recording of the trust deeds. Even if Charney and Fink are correct that plaintiffs' causes of action arise from this activity (and that it is indeed protected), their anti-SLAPP motions fail because plaintiffs have demonstrated a probability of success on the merits.

The timing of the transfers relative to the judgments against Charney plus the lack of evidence to support the existence of a $3.7 million debt are red flags, and Charney and Fink's uncorroborated declarations do not rebut plaintiffs' showing as a matter of law. Other purported obstacles to plaintiffs' causes of action—the litigation privilege and pre-filing requirements in Civil Code section 1714.10—do not apply. Fink's

appeal of the trial court's ruling on his demurrer, which is limited to his argument based on Civil Code section 1714.10, lacks merit for the same reason.[6]

A. Charney and Fink's Anti-SLAPP Appeals

1. Legal framework

The Legislature enacted section 425.16 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The statute "authorizes a special motion to strike claims 'arising from any act of [the moving party] in furtherance of [their] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.' (§ 425.16, subd. (b)(1).)" (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884.)

"'The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. 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

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[6] Plaintiffs filed a motion for sanctions against Charney and Fink arguing their anti-SLAPP appeals are frivolous and were taken solely to cause delay. Charney and Fink opposed the motion, and we combined oral argument on the issue of sanctions with oral argument on the merits. We refrain from imposing sanctions.

plaintiff to demonstrate the merit of the claim by establishing a probability of success. [Our Supreme Court has] described this second step as a "summary-judgment-like procedure." [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] "[C]laims with the requisite minimal merit may proceed.'" [Citation.]" (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788 (*Monster Energy*).)

Our review of the denial of an anti-SLAPP motion is de novo. (*Monster Energy*, *supra*, 7 Cal.5th at 788.)

2. Plaintiffs demonstrated a probability of success

Assuming for the sake of argument that plaintiffs' UVTA causes of action against Charney and Fink arise from conduct protected under the anti-SLAPP statute (i.e., that Charney and Fink have met their burden under the first step of the anti-SLAPP analysis), the trial court was nonetheless correct in denying their special motions to strike because plaintiffs demonstrated a probability of success on the merits.

Under the UVTA, a transfer may be invalid either because of actual fraud (Civ. Code, § 3439.04, subd. (a)(1)) or constructive fraud (Civ. Code, § 3439.04, subd. (a)(2)). (*Potter v. Alliance United Ins. Co.* (2019) 37 Cal.App.5th 894, 903-904 (*Potter*); see also *Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [discussing earlier version of statute].) "'A creditor who is damaged by a transfer described in . . . section 3439.04 . . . can set the transfer aside or

seek other appropriate relief under Civil Code section 3439.07.' [Citation.]" (*Potter*, *supra*, at 904.) Although a fraudulent transfer is voidable against both "[t]he first transferee of the asset or the person for whose benefit the transfer was made" (Civ. Code, § 3439.08, subd. (b)(1)(A)), it is not voidable "against a person that took in good faith and for a reasonably equivalent value" (Civ. Code, § 3439.08, subd. (a)).

In this case, plaintiffs allege actual fraud and seek to void the transfer against both Charney (the person for whose benefit the transfer was made) and Fink (the first transferee). On the evidentiary record compiled by the parties below, and viewed through the minimal merit lens that applies to step-two anti-SLAPP analysis, we cannot say plaintiffs' fraudulent transfer obligations fail as a matter of law. Plaintiffs make the requisite low-threshold showing that the deeds of trust are fraudulent and Fink did not take the interest in property in good faith and for a reasonably equivalent value.

"Actual fraud under the UVTA is shown when a transfer is made, or an obligation is incurred, '[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.' (§ 3439.04, subd. (a)(1).)" (*Potter*, *supra*, 37 Cal.App.5th at 904.) Civil Code section 3439.04, subdivision (b) sets forth a non-exhaustive list of 11 factors—which have been dubbed "'badges of fraud'" (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 174)—for courts to consider when determining whether a debtor made a transaction with actual intent to hinder, delay, or defraud for purposes of Civil Code section 3439.04, subdivision (a)(1). The factors are: "(1) Whether the transfer or obligation was to an insider. [¶] (2) Whether the debtor retained possession or control of the property transferred

after the transfer. [¶] (3) Whether the transfer or obligation was disclosed or concealed. [¶] (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. [¶] (5) Whether the transfer was of substantially all the debtor's assets. [¶] (6) Whether the debtor absconded. [¶] (7) Whether the debtor removed or concealed assets. [¶] (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. [¶] (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. [¶] (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred. [¶] (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor." (Civ. Code, § 3439.04, subd. (b).)

Here, the timing of the transfers is suspect. When Charney executed the first trust deed in January 2016, plaintiffs' Delaware action (which resulted in a nearly $30 million judgment) had been pending for nearly six months and Charney was 19 days away from entry of the first adverse California judgment. The California judgment was for attorney fees and costs after the trial court had already granted plaintiffs' special motion to strike a complaint filed by Charney. Although there is nothing in the record to indicate when, precisely, the court granted the special motion to strike and motion for attorney fees, Charney surely anticipated the judgment. And there is no question, regardless, that Charney had been "sued or threatened with suit" before he executed the trust deeds (Civ. Code, § 3439.04, subd. (b)(4)) and that the transfers occurred "shortly

before [and] shortly after a substantial debt was incurred" (Civ. Code, § 3439.04, subd. (b)(10)).

Beyond the timing of the transactions, there are other indicia of potential fraud. Scant evidence backs the assertion that the trust deeds were necessary to secure a $3.7 million debt for legal work done. Although there is evidence Fink represented Charney in several matters, Charney and Fink did not produce any billing records. It was not their initial burden to do so, of course, but the absence is conspicuous and inspires doubt as to Fink's actual billing rate and the number of hours billed. (See Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].) This doubt is exacerbated by evidence suggesting Charney "retained possession or control of the property transferred after the transfer" (Civ. Code, § 3439.04, subd. (b)(2)). Though Charney claims he did not continue to reside at the property following his execution of the trust deeds to Fink, plaintiffs have shown that he continued to receive documents at the property and, among other things, listed it as his address on a preliminary change of ownership report after executing the trust deeds. Nothing in the record indicates that Charney made payments on the purported debt or that Fink took steps to foreclose.

The evidence as to the other badges of fraud does not establish, as a matter of law, that fraud was not afoot. It is true that the trust deeds were "disclosed [and not] concealed" (Civ. Code, § 3439.04, subd. (b)(3)) because they were publicly recorded. But disclosure of the transfer is still consistent with plaintiffs' theory of fraud. The trust deeds would have been void

and liable to cancellation—no use in shielding the property from plaintiffs' judgments—if they had not been recorded. (Civ. Code, §§ 1214, 3412.) Similarly, although establishing Fink's role as an "insider" (Civ. Code, § 3439.04, subd. (b)(1)) is not, as plaintiffs suggest, as simple as stating that he was Charney's attorney (see *Kaisha v. Dodson* (N.D.Cal. 2010) 423 B.R. 888, 901 [insider relationships include "'family, friendship, or close associate relationship[s]'"]), the relationship was undeniably close. Fink as "a single man," as opposed to his law firm, was named by Charney as trustee and beneficiary for the real property transfers, and Fink now acknowledges he "personally rendered some form of legal services to Charney on close to a daily basis" for several years.[7] Finally, although Charney maintains he was solvent and expected to remain so when he executed the trust deeds (Civ. Code, § 3439.04, subd. (b)(9)), he does not explain why Fink needed a security interest in the property if his solvency was not in question.

With several factors suggesting a probability plaintiffs may be able to prove the trust deeds are fraudulent, plaintiffs have carried their burden at step two of the anti-SLAPP inquiry. (*Monster Energy*, *supra*, 7 Cal.5th at 788.) Charney and Fink's related contention that Charney was entitled to prefer one creditor (Fink) over others (plaintiffs), which assumes the existence of genuine indebtedness, fails for the same reason:

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[7] With this sort of close working relationship, it is plausible, though certainly not proven, that Charney would trust Fink as a safe pair of hands to shield assets from creditors.

Plaintiffs made a prima facie showing that the trust deeds do not properly secure a debt to Fink.[8]

Charney and Fink's alternative arguments that plaintiffs' causes of action are barred by the litigation privilege (Civ. Code, § 47, subd. (b)) and the pre-filing requirements of Civil Code section 1714.10 do not alter our bottom line conclusion.

"The litigation privilege of Civil Code section 47, subdivision (b) 'applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.' [Citation.] '[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that ha[s] some connection or logical relation to the action.' [Citation.]" (*Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1404.) The litigation privilege "'"extends beyond statements made in the proceedings, and includes statements made to initiate official action. [Citation.]"' [Citation.]" (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126.)

"A threshold issue in determining if the litigation privilege applies is whether the alleged injury arises from a communicative act or noncommunicative conduct. [Citation.] 'The distinction between communicative and noncommunicative

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[8] Charney's suggestion that a "presumption against fraud" requires a more robust showing by plaintiffs in this case is unfounded. (See *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 292 [disapproving standard of proof higher than preponderance of the evidence in fraud case].)

conduct hinges on the *gravamen of the action*. [Citations.] That is, the key in determining whether the privilege applies is whether the injury resulted from an *act that was communicative in its essential nature*. . . .' [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1248.)

Charney and Fink propose three theories under which plaintiffs' causes of action arise from conduct protected by the litigation privilege: (1) they arise from Fink's representation of Charney; (2) they arise from the public recording of the trust deeds; and (3) they arise from Charney's efforts to fund litigation. Even if all of these theories describe communicative acts, however, which we do not decide, none describes the gravamen of plaintiffs' claims.

The first theory fails because plaintiffs' allegations concerning Fink's representation of Charney merely provide context for the challenged transfers. (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 ["Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute"].) The operative complaint discusses Fink's representation of Charney to support plaintiffs' characterization of Fink as an "insider." This does not, however, suggest the fraudulent transfer claims arise from the attorney-client relationship.

Charney and Fink's second theory suffers from the same defect. Fink contends plaintiffs' causes of action arise from the public recording of the trust deeds because plaintiffs' allegation that Charney's home was "beyond their reach" can only be true if the trust deeds are not void under Civil Code section 1214.[9]

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[9] Civil Code section 1214 provides, in pertinent part, that "[e]very conveyance of real property . . . is void . . . as against any

Fink's position, in effect, is that plaintiffs must prove the trust deeds are not void under Civil Code section 1214 in order to have them set aside under the UVTA. But Civil Code section 3439.04 makes a transfer voidable based on the debtor's *intent* to hinder, delay, or defraud creditors—it does not require that the debtor has taken all steps necessary to *succeed* in doing so.

Charney and Fink's third theory fails because the gravamen of plaintiffs' fraudulent transfer suit is predicated not on who Charney chose in an alleged attempt to shield assets from judgment collection (i.e., that plaintiffs' suit arose from Charney's engagement of Fink to defend against litigation) but that he chose anyone at all. In other words, it might be different if plaintiffs brought their fraudulent transfer claim while Fink was representing Charney before any judgments against him had been rendered. But those judgments were on the books long before the fraudulent transfer lawsuit and nothing suggests plaintiffs' lawsuit arose from Charney's decision to fund his own defense as opposed to the transfer of assets to a third party that might otherwise be levied upon for judgment collection. Charney and Fink's arguments to the contrary reduce, ultimately, to the assertion that Charney did not execute the trust deeds with the intent to defraud plaintiffs. Raising this issue in the context of the litigation privilege does not make it any more persuasive or increase the burden on plaintiffs.

Turning to the pre-filing requirements of Civil Code section 1714.10, this statute provides that "[n]o cause of action against an attorney for a civil conspiracy with his or her client arising

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judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action."

from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless," subject to certain exceptions, the court issues an order finding a "reasonable probability" the plaintiff will prevail. (Civ. Code, § 1714.10, subds. (a), (c).) Here, plaintiffs did not petition for such an order. Even assuming fraudulent transfer causes of action are generally subject to Civil Code section 1714.10, however, plaintiffs' claims do not arise from an "attempt to contest or compromise a claim or dispute." Rather, plaintiffs' claims arise from an alleged fraud that amounted to a back-up plan to safeguard a portion of Charney's assets if efforts to contest or compromise disputes with plaintiffs failed. (See *Stueve v. Berger Kahn* (2013) 222 Cal.App.4th 327, 331 [holding that section 1714.10 did not apply to claims that "arose from transactional activities—the siphoning off of assets through fraudulent estate planning"].)

B. Fink's Demurrer

As Fink concedes, he is entitled to appeal the trial court's ruling on his demurrer only to the extent that it addresses his argument that plaintiffs' causes of action against him are barred under Civil Code section 1714.10. (Civ. Code, § 1714.10, subd. (d) ["Any order made under subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed, shall be appealable as a final judgment in a civil action"]; *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445, 454 ["An order overruling a demurrer based on section 1714.10 is directly appealable"].) As we have already discussed, Civil Code section 1714.10 does not apply because

plaintiffs' fraudulent transfer causes of action do not arise from an attempt to contest or compromise a claim or dispute.

DISPOSITION

The trial court's orders denying Charney and Fink's anti-SLAPP motions and overruling Fink's demurrer are affirmed. Plaintiffs shall recover their costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.