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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

OCEAN TOWERS HOUSING CORPORATION, Plaintiff and Respondent, v. RICHARD STONE, Defendant and Appellant.	B198657 (Los Angeles County Super. Ct. No. BC 359619)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane Johnson, Judge. Affirmed.

Stern & Goldberg, Alan N. Goldberg; Ford, Walker, Haggerty & Behar and Maxine J. Lebowitz for Defendant and Appellant.

Heyman Densmore, Roger P. Heyman and James K.T. Hunter for Plaintiff and Respondent.

* * * * * *

Respondent Ocean Towers Housing Corporation (OTHC) filed a defamation action against appellant Richard Stone, who moved to strike under Code of Civil Procedure section 425.16, the anti-SLAPP[1] statute. The trial court denied the motion and Stone appealed. We affirm.

FACTS

It is conceded that OTHC's action arises from protected activity. Thus, we address the facts as they relate to the likelihood that OTHC will prevail on the merits.[2]

OTHC, a corporation, owns and operates an apartment building located at 201 Ocean Avenue in Santa Monica. Appellant owns a leasehold interest in this apartment building and resides there.

In September 2006, appellant published the following statement (Statement) on his website:

> **"OTHC**
>
> "A LENDING INSTITUTION?
>
> "On September 27, 2004 Ocean Towers Housing Corporation financed the purchase of 1705P for Mourad Ascar. (See document at the end of this article on the web).
>
> "Who is Mourad Ascar?
>
> **"He is Board Member John Spahi's nephew.**

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1 Strategic lawsuit against public participation.

2 In applying the SLAPP statute, "a court generally is required to engage in a two-step process: 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

> "This is a case where the Board agreed to finance a loan to one of their own, while action on much needed building repairs has been stymied, due to lack of funds. Apparently, this Board lends our money to whomever they wish, and asks shareholders to carry the burden, while we continue to operate at a loss."

To the left of this column appears the following:

> "IF YOU'RE NOT
> **OUTRAGED**
> YOU HAVEN'T
> BEEN LISTENING!
>
> "VOTE
> ON
> THE BOARD
> RECALL
> POLL!"

OTHC's complaint alleges that, with the exception of the fact that Mourad Ascar is John Spahi's nephew, the Statement is false and defamatory on its face, "exposing the plaintiff to hatred, contempt, ridicule or obloquy and tending to injure the plaintiff in its reputation and business reputation."

The nub of the matter is whether OTHC actually lent money, or financed, the acquisition of a leasehold interest in the Ocean Towers building by Mourad Ascar. On this issue, OTHC submitted the following evidence:

(1) A declaration by Ascar in which he states under penalty of perjury that he acquired a leasehold interest in September 2004 and that this was secured by a deed of trust executed in favor of OTHC; that he executed a promissory note in favor of Hadlake America for $280,000 in order to finance the acquisition of the leasehold interest; that he refinanced this by borrowing $380,000 from NCB, a federal savings bank; and that he never was promised and never received a loan from OTHC or its board of directors.

Copies of the documentation reflecting the Hadlake America and NCB transactions are attached to Ascar's declaration.

(2) A declaration by Bernard Neiman, a certified public accountant and outside auditor for OTHC, in which Neiman states that OTHC did not loan Ascar any money to finance the acquisition of the leasehold interest.

(3) A declaration by Joseph Orlando, president and CEO of OTHC, in which he states that OTHC did not loan any money to Ascar. Orlando's declaration also includes a copy of a deed of trust executed by appellant that secures appellant's lease obligation to OTHC. As the trial court's findings reflect, this bears on the issue of malice (see next part, *post*).

THE TRIAL COURT'S FINDINGS AND ORDER

The court found that the Statement is defamatory per se because it alleged that OTHC had lent money to a board member's relative, which is a violation of fiduciary duty and trust.

Based on the evidence that we have summarized *ante* (declarations by Ascar, Neiman and Orlando), the trial court found that there was evidence that the Statement falsely claimed that OTHC lent money to Ascar.

The trial court went on to find that there was also evidence of malice. According to the court, appellant's own deed of trust that secures his leasehold interest shows that appellant was aware of the fact that the deed of trust executed by Ascar secured, just as in appellant's instance, Ascar's leasehold interest and that the deed of trust was not evidence of a loan made by OTHC to Ascar.

The trial court also rejected appellant's claim that the litigation privilege set forth in Civil Code section 47, subdivision (b) applied to this case. On appeal, appellant contends that the trial court did not rule on whether the privilege set forth in subdivision (c) of Civil Code section 47 applies to this case. We address this contention below.

DISCUSSION

1. There Is Substantial Evidence That OTHC Did Not Loan Any Money to Ascar

The test to be applied in a SLAPP motion to determine whether the plaintiff has adduced sufficient evidence to show a probability of success on the merits is well settled.

> "In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. . . . [¶] The court considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. [Citations.] The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward. [Citation.]" (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

The declarations by Ascar, Neiman and Orlando and the supporting documentation are substantial evidence that shows that OTHC did not lend money to Ascar or otherwise finance the acquisition by Ascar of a leasehold interest. We examine appellant's arguments to the contrary and find them to be without merit.

First, appellant points to a Westlaw document that is extremely sketchy that shows that "Ascar Mourad" is the owner of a unit at 201 Ocean Avenue, that there is a deed of trust on the property and that the lender is "Ocean Towers Hsng Corp." Appellant asserts that this shows that the assertion in the Statement that OTHC lent money to Ascar is not false or, at least, that there is a basis for the assertion in the Statement that OTHC actually lent money to Ascar.

As noted, for the purposes of the SLAPP motion, we must accept as true plaintiff's, i.e., respondent's, evidence that OTHC never lent any money to Ascar. That there is conflicting evidence, or evidence from which contrary inferences can be drawn, is not material. For the purposes of the SLAPP motion, the conflicting evidence adduced by appellant is relevant only to the extent that it defeats respondent's evidence as a matter of law (*HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 212); it clearly does not do that, and only establishes a conflict in the evidence. In this case, the

three declarations together with the supporting documentation show that respondent's action has more than the "minimal merit" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89) that is required to overcome a SLAPP motion.

Appellant contends that there is evidence that needed building repairs had not been made and that, instead of making these repairs, OTHC lent money to Ascar. Appellant once again relies on the Westlaw document we have described above.

Whether building repairs were needed and not made is not material for the purposes of the SLAPP motion. The issue is whether it is probable that OTHC will succeed on its defamation claim, which has no connection to whether repairs were or were not made. As we have pointed out, it is also true, at least for the purposes of the SLAPP motion, that appellant cannot ignore the substantial evidence produced by respondent showing no loan was made to Ascar by OTHC and rely solely on the Westlaw document.

In sum, we find there is substantial evidence that the Statement's assertion that OTHC lent money to Ascar is false.

2. The Statement Is Defamatory

Referring to the portion of the Statement that says that "[a]pparently, this Board lends our money to whomever they wish, and asks shareholders to carry the burden," appellant states that this is hyperbole and only constitutes an opinion that the board has been fiscally irresponsible. While appellant certainly will be free to argue that this is the inference that should be drawn from this sentence, for the purpose of the SLAPP motion we are to accept the plaintiff's, i.e., respondent's, evidence as true and disregard contrary evidence and inferences. (*HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 212.)

Nor do we agree with appellant that the statement that the board lent money to the nephew of one its members is merely yet another opinion, based on the Westlaw document, that the board "was fiscally irresponsible."

The assertion that the board lent money to a nephew of one of its members is the statement of a purported fact or event, i.e., the making of a loan by the board. To this

assertion appellant added the additional factual claim that the board neglected to make needed repairs "due to lack of funds." The innuendo of course is that the loan constituted a diversion of funds to the detriment of the association. As the trial court correctly found, these factual assertions amount to a claim that the board violated its fiduciary duties, which is defamatory. Needless to say, these assertions, ***if true***, may show the board to be fiscally irresponsible but the fundamental accusation is one of a breach of fiduciary, if not expressly legal, obligations.

That appellant now claims that these factual assertions are based on the Westlaw document does not vitiate the point that there is substantial evidence that, whether these assertions appeared on Westlaw or not, they are false. Appellant may decide to rely on the Westlaw document to show he did not act with malice but the possibly erroneous Westlaw entry cannot change the fact that there is substantial evidence that the board did not lend Mourad Ascar any money.

3. The Privileges Set Forth in Civil Code Section 47 Do Not Apply

The trial court rejected appellant's claim of the litigation privilege because it was based on *Adele Salawy v. OTHC*, Los Angeles Superior Court No. SC090976, a derivative action. Appellant is not even a nominal party to this action; thus, the trial courts' ruling was correct. Appellant claims he is "interested" in *Adele Salawy v. OTHC* because he has a leasehold interest in OTHC. This "interest" is insufficient to vest him with the litigation privilege, which is a privilege extended to persons like judges, attorneys, parties, jurors and witnesses who actually participate in the proceedings. (*Smith v. Hatch* (1969) 271 Cal.App.2d 39, 46; see generally 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 568, pp. 828-830.)

On appeal, appellant also relies on subdivision (c) of Civil Code section 47.[3] Specifically, appellants contends that the e-mail that he posted on the world wide web[4]

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3 In pertinent part subdivision (c) of Civil Code section 47 provides that a privileged publication or broadcast is made " [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive

was a communication, without malice, to a person interested therein by one who is also interested. (See fn. 3, *ante*.)

"The privileges set forth in C.C. 47(c) require 'interest' by the publisher of the allegedly defamatory communication or by both publisher and recipient. (See supra, § 591.) The 'interest' protected must be one of direct and immediate concern, not the general curiosity of readers of newspapers and magazines. It must be private or pecuniary, and the relationship between the parties must be close. [Citations.]" (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 594, p. 872.)

As respondent correctly observes, if appellant had made the statement in a letter to an Ocean Towers shareholder, it may be that the common interest privilege might have applied. But this is not what happened here. Appellant posted this e-mail on the world wide web. Excessive publication will defeat this privilege (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 847), which, as we have noted, is predicated on a close relationship between the parties. The common interest privilege is, as our Supreme Court has observed, a limited privilege that applies to essentially private interests. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 729.) At the very least, the extent of the publication raises factual issues about the privilege that cannot be resolved in a SLAPP motion.

Appellant contends that there is no evidence how many people actually read the Statement on the web and therefore excessive publication cannot be shown. This reflects a misunderstanding of the privilege. If a statement is made in a forum where the expectation is that the public in general will have access to the statement, the person issuing the statement does not intend to communicate with a specific person who has an interest in the matter and the common interest privilege therefore does not apply.

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for the communication to be innocent, or (3) who is requested by the person interested to give the information."

4 Appellant admits that the message appeared on his web page www.theoceanview.org and that the Statement was published on the internet.

There is an additional reason that the common interest privilege arguably does not apply. There is evidence of malice. Appellant was well aware of the fact that the trust deeds in favor of OTHC do not reflect loans made by OTHC but rather secured the leasehold interests; this was his own relationship with OTHC. Nonetheless, he purported to draw the conclusion that Ascar's trust deed reflected a loan made by OTHC. As the trial court found, this is evidence, albeit not conclusive evidence, of malice. Thus, it is at least a question of fact whether there was malice. Appellant therefore cannot invoke, as a matter of law, the common interest privilege.

Finally, there is no merit to appellant's contention that respondent did not address the common interest privilege in the trial court. It was raised by appellant in oral argument and respondent replied to the contention during the same hearing.

We conclude that respondent has shown that it is probable that it will succeed on its claim for the purposes of Code of Civil Procedure section 425.16, subdivision (b)(1).

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

EGERTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.