Filed 1/26/04 Rusheen v. Cohen CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TERRY RUSHEEN, Cross-Complainant and Appellant, v. BARRY E. COHEN et al., Cross-Defendants and Respondents.	B152948 (Los Angeles County Super. Ct. No. EC022640)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. Stoll, Judge. Reversed.

Law Office of Robert F. Henry and Robert F. Henry for Cross-Complainant and Appellant.

Lewis Brisbois Bisgaard & Smith, John R. Feliton, Jr., Elizabeth G. O'Donnell and Raul L. Martinez for Cross-Defendants and Respondents.

Terry Rusheen appeals from an order striking his cross-complaint as a SLAPP suit (strategic lawsuits against public participation) under Code of Civil Procedure section 425.16 (hereafter "section 425.16"). He argues that cross-defendants Barry E. Cohen and his law firm lacked standing to bring a special motion to strike under section 425.16 because this cross-complaint is based on Cohen's conduct in representing the interests of his clients in the underlying action. We conclude, first, that Cohen has standing. Second, we conclude that Rusheen has demonstrated a probability that he will prevail on the claim because the litigation privilege of Civil Code section 47, subdivision (b) does not bar the entire cause of action for abuse of process. The trial court erred in granting the special motion to strike.

FACTUAL AND PROCEDURAL SUMMARY

Terry Rusheen's father, Henry Rusheen, sold the house Rusheen was occupying to Niki Han and Maurice Abikzer. Rusheen refused to move out after escrow closed, leading Han and Abikzer to attempt an eviction. This led to three legal actions, one brought by Han and Abikzer and two by Rusheen.[1] In June 1997, Abikzer and Han filed motions to declare Rusheen a vexatious litigant in each of these three cases, and to require him to post a bond.[2] The trial court ordered Rusheen to move out and awarded Abikzer and Han attorney fees of $3,150. Rusheen's applications for temporary restraining orders were denied. The trial court issued a stay preventing him from filing

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[1] Case Nos. ES004477 - *Abikzer and Han v. Rusheen* (Abikzer and Han sought a writ of possession of the real property, an order to show cause re harassment, and a temporary restraining against Rusheen); ES004472 - *Rusheen v. Han* (Rusheen sought an order to show cause re harassment and temporary restraining order, Abikzer not named as a defendant); ES004476 - *Rusheen v. Abikzer* (Rusheen sought an order to show cause re harassment and temporary restraining order, Han not named as defendant).

[2] From this point forward, we refer to appellant as "Rusheen."

any pleadings, motions or other documents except those relevant to the vexatious litigant motions until those motions could be heard.

Before the motions were heard, Han filed a new action, *Han v. Rusheen* (EC022640), for property damage, fraud, assault and battery, and unjust enrichment. On motion by Han and Abikzer, the trial court froze $30,000 of Rusheen's assets pending the vexatious litigant hearing. After the hearing, the trial court found Rusheen to be a vexatious litigant, and entered a formal order stating that a default would be entered in favor of Han in case No. EC022640 if Rusheen failed to post a $15,000 cash bond before August 4, 1997.

Rusheen failed to post the bond. Default judgment against him was entered on February 24, 1998. The trial court denied Rusheen's motion to vacate the default and the vexatious litigant order. His motion for reconsideration also was denied. On his appeal (*Han v. Rusheen*, B125618), we reversed the trial court in an unpublished opinion. We held there was insufficient evidence to support the finding that Rusheen was a vexatious litigant. We concluded the trial court was without authority to issue the vexatious litigant order, the order freezing $30,000 of Rusheen's assets, and the order requiring him to post a $15,000 bond or suffer a default in case No. EC022640. We also reversed the default judgment because the erroneous trial court orders precluded Rusheen from filing any pleading unless he first posted the $15,000 bond.

On remand, the trial court granted Rusheen's motion to vacate the default judgment and the other orders. Rusheen then initiated the cross-complaint at issue in the present appeal. In June 2000, he filed a first amended cross-complaint against Han, Abikzer, Cohen and his law firm,[3] and others. In that pleading he alleged causes of action for abuse of process, conversion, negligence, and intentional infliction of emotional distress.

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[3] Rusheen sued Cohen individually, and also the Law Offices of Cohen & Cohen and Barry Cohen, a professional corporation. For convenience, we refer to these entities collectively as "Cohen."

Cohen demurred based on the litigation privilege (Civ. Code, § 47, subd. (b)) and Civil Code section 1714.10, which prohibits a party from filing a cause of action against an attorney for conspiring with his client unless plaintiff first demonstrates a probability of prevailing in the action. The trial court sustained Cohen's demurrer without leave to amend as to the first and third causes of action (abuse of process and negligence). Since Cohen and his firm were not named as cross-defendants in the second and fourth causes of action, the order on the demurrer disposed of all causes of action against the Cohen cross-defendants. Apparently no order of dismissal as to Cohen was entered.

On January 29, 2001, Rusheen filed a second amended cross-complaint, again naming Cohen and his law firm as cross-defendants. They were named in the third cause of action for abuse of process and in the fifth cause of action for declaratory relief and apportionment of fault. The cause of action for abuse of process alleged that Cohen made an illegal vexatious litigant motion against Rusheen, failed to properly serve the complaint, took an improper default judgment against him without proper notice, permitted his client to execute on the judgment in Nevada, and filed false declarations on the issue of service.

At this point, Cohen, who had been appearing in propria persona, retained counsel and brought a special motion to strike the second amended cross-complaint under the anti-SLAPP suit statute, section 425.16.[4] Because he was sued for conduct in connection with his representation of Han in the action against Rusheen, Cohen argued there was no

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[4] On appeal, Cohen also seeks to justify striking the cross-complaint because the demurrer to the first amended cross-complaint had been sustained without leave to amend. He did not make that argument to the trial court. While the second amended cross-complaint was subject to being stricken as unauthorized, there was no motion to do so by Cohen, and the trial court did not raise the issue sua sponte. (See *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162.) Instead, the second amended cross-complaint was stricken solely on the ground that it was an improper SLAPP action. We consider the matter solely on that issue. (See *Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 925, fn. 9.)

reasonable probability that Rusheen would prevail on the cross-complaint since his conduct was privileged under Civil Code section 47, subdivision (b). The trial court granted the motion, struck the cross-complaint as to Cohen and his firm, and entered judgment in their favor. Cohen's motion for attorney's fees was granted and $9,926 in fees was awarded. This appeal is from the judgment.

After we filed our original opinion in this matter on April 11, 20003, Cohen petitioned for rehearing. We granted rehearing and ordered counsel to file supplemental briefs confined to the question of the applicability of the opinion in *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009.

DISCUSSION

I

We independently review the trial court's order granting a special motion to strike under section 425.16. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

Rusheen first challenges Cohen's standing to invoke the anti-SLAPP statute to strike the abuse of process cause of action. Rusheen argues the cross-complaint implicated only Cohen's conduct in representing Han in the underlying litigation, and that Cohen was advancing his client's First Amendment rights rather than his own, and so cannot rely on section 425.16. Rusheen relies on *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141. In that case, the court concluded that attorneys who were sued for their conduct in representing clients in litigation against a cross-complainant had standing to move to strike the cross-complaint under section 425.16. The *Shekhter* court reasoned that allegations of the cross-complaint arose from the exercise of free expression rights by the attorney and his firm, in contacting the media about the underlying insurance fraud case against Shekhter. (*Id.* at pp. 152-154.) This conclusion was based on the provision in section 425.16, subdivision (b)(1) that "[a] cause of action against a person arising from any act of *that person* in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection

with a public issue shall be subject to a special motion to strike . . . ." (Italics added.) The *Shekhter* court concluded that the term "'that person'" means that the moving party must "be the individual who is or was being sued for exercise of 'that person['s]' right of petition or free expression." (*Id.* at p. 152.)

The court went on to observe: "We recognize that in some cases a lawyer may not be 'that person' within the meaning of section 425.16, subdivision (b)(1) exercising free expression or petition rights. Under some circumstances, 'that person' will merely be the client but not the attorney." (*Shekhter v. Financial Indemnity Co., supra*, 89 Cal.App.4th at p. 152.)

Based on *Shekhter*, Rusheen argues that a defendant attorney's own right to petition must be implicated by the action against him, not just the right of his clients, in order to have standing under section 425.16. We do not agree. The *Shekhter* court addressed only the free speech prong of the anti-SLAPP statute and did not consider whether an attorney could bring a special motion to strike based on the exercise of the attorney's right to petition as counsel in the underlying action. (*Shekhter v. Financial Indemnity Co., supra*, 89 Cal.App.4th at p. 154.)[5] Here we consider the attorney's right based on the exercise of the right to petition.

The third cause of action of the second amended cross-complaint alleges abuse of process. We shall discuss the specific ways in which Rusheen claims that process was abused. At this point, we observe that conduct that falls within the tort may also trigger application of the anti-SLAPP statute. Section 425.16, subdivision (e) provides that 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' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or

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[5] In a later case, the same court determined that a defendant attorney has standing to bring a special motion to strike under section 425.16 where the complaint alleges only conduct in relation to litigation in which the attorney represented a client. The Supreme Court granted review in that case and issued a decision which did not address the standing question. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728.)

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, . . ." As the Supreme Court explained in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113: "[P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." The *Briggs* court held that the constitutional right to petition the government includes civil litigation. (*Id.* at p. 1115.)

The approach suggested by Rusheen is inconsistent with the purpose of the anti-SLAPP statute. The Legislature amended section 425.16 to add an express statement of its intent: "The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." (§ 425.16, subd. (a).) If attorneys who are sued for their conduct in representing clients in litigation are not entitled to invoke section 425.16, two results contrary to this declared intent would occur. First, if clients are unable to retain representation because counsel fear a retaliatory lawsuit, the constitutional rights of the clients would be chilled. Second, attorneys have a right to practice their profession without fear of lawsuits brought for the primary purpose of chilling their participation in the judicial process. An attorney is subject to liability for malicious prosecution or abuse of process, but the attorney has a right to test the lawsuit through a special motion to strike under section 425.16. We conclude that Cohen and his firm had standing to bring a special motion to strike under section 425.16.

II

Rusheen argues that the special motion to strike was improperly addressed to the entire complaint, rather than specific causes of action. This argument mischaracterizes the motion to strike. Cohen specifically addressed the cause of action for abuse of process in his motion.

III

Finally, Rusheen argues that he sustained his burden of showing a probability of success on the merits of his cause of action for abuse of process.

A defendant moving to strike under section 425.16 must first "make a *prima facie* showing that the plaintiff's cause of action arises from an act in furtherance of the defendant's First Amendment rights, that is, from any one of the four types of conduct" listed in subdivision (e). (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 863.) Once the defendant has satisfied this test, the burden shifts to the plaintiff to establish that there is a probability that he or she will prevail on the claim. (§ 425.16, subd. (b)(1); *Paul v. Friedman*, *supra*, 95 Cal.App.4th at p. 863.) "[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.)

A. The Litigation Privilege

Cohen argues that Rusheen cannot meet this standard because the cause of action for abuse of process is barred by the litigation privilege of Civil Code section 47, subdivision (b). Civil Code section 47 provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . judicial proceeding, . . ." To be privileged, a statement must (1) be made in a judicial proceeding, (2) by litigants or other authorized

participants, (3) aim to achieve the litigation's objects, and (4) have some logical connection or relation to the proceeding. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)

B. Privilege Applies in Special Motion to Strike

In reply, Rusheen seems to argue that the litigation privilege does not apply at all to a special motion to strike under section 425.16. He cites *Jarrow Formulas, Inc. v. La Marche*, *supra*, 97 Cal.App.4th 1, 17-18, for the proposition that the anti-SLAPP statute controls rather than the litigation privilege. The Supreme Court granted review in *Jarrow* and it may not be cited as authority.[6] The court in *Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226 applied Civil Code section 47 in concluding that the plaintiff had not shown a probability of success against the defendants and affirmed the trial court's order granting a special motion to strike under section 425.16. We agree that Civil Code section 47 may be the basis for a finding that the plaintiff has not shown a probability of success as required under section 425.16.

C. Privilege for Communicative Conduct

Rusheen argues that neither section 425.16 nor the litigation privilege has "eliminated" the tort of abuse of process. We agree. In an opinion decided shortly before we issued our original opinion in this case, *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, Division Eight of this district concluded that a plaintiff had established a prima facie case of abuse of process, not barred by the litigation privilege, based on the defendant's conduct in levying on property pursuant to a writ of execution.

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[6] The Supreme Court decided *Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th 728 after we granted rehearing. That decision does not directly address the applicability of the litigation privilege in an anti-SLAPP action. But in rejecting an analogy between the litigation privilege and the anti-SLAPP statute, the court observed that the litigation privilege "enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings [citations]." (*Id.* at p. 737.)

The *Drum* court observed that, on at least four occasions, the California Supreme Court had emphasized the distinction between communication and conduct in applying the privilege. (*Drum v. Bleau, Fox & Associates, supra*, 107 Cal.App.4th at pp. 1024-1026.) It concluded that the failure to distinguish between conduct and communication "runs the risk of essentially eliminating the tort of abuse of process, something we do not believe the Legislature intended when it amended the litigation privilege in the 1873-1874 session to include publications made in judicial proceedings." (*Drum,* at p.1028.) We, too, recognize this critical distinction and apply these principles to Rusheen's cause of action for abuse of process.

D. Rusheen's Claim for Abuse of Process

Rusheen's cause of action for abuse of process alleges Cohen abused the court's process by: (1) making an illegal vexatious litigant motion against Rusheen; (2) failing to properly serve and give notice of the complaint; (3) taking an improper default judgment without proper notice; (4) failing to provide a statement of damages as required to support a default judgment; (5) permitting their clients (Han and Abikzer) to "cause to be filed a sister-state judgment" which resulted in the taking of his property; and (6) obtaining inconsistent and fraudulent declarations concerning the purported service of legal documents on Rusheen to prevent the trial court from vacating the default judgment, leading to the delay and expense of an appeal from the default judgment.

Our review is not confined to the cross-complaint, but must include the evidence submitted by the parties on the special motion to strike. As to each alleged abuse of process, we must determine whether a cause of action for abuse of process is stated, and if so, whether the litigation privilege applies. "To succeed in an action for abuse of process, a litigant must establish two elements: that the defendant (1) contemplated an ulterior motive in using the process; and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings. [Citations.]" (*Brown v. Kennard* (2001) 94 Cal.App.4th 40, 44.)

1. Vexatious Litigant Motion

In his opposition to the motion to strike, Rusheen's only reference to the vexatious litigant motion was that Cohen "was totally without merit" in bringing it. In support, he cites to exhibit 8 of his request for judicial notice, which was part of the opposition to the motion to strike. Exhibit 8 is Rusheen's motion to reconsider the denial of his motion to vacate the default judgment and order declaring him a vexatious litigant, a 16-page document. Our record omits pages 2 through 4 of this motion, but includes the declaration of Rusheen's attorney, Anne G. Koza. This declaration states that the only proof of service of the vexatious litigant motion on Rusheen showed it was mailed on July 8, 1997, although it was filed on June 20, 1997 (the hearing was scheduled for July 18, 1997). The declaration also notes that Cohen filed a proof of service of various pleadings on October 7, 1997, including declarations in support of the motion to declare Rusheen a vexatious litigant and the order declaring Rusheen a vexatious litigant. This was after the hearing on the motion.

Ms. Koza's declaration challenges the authenticity of declarations submitted by Cohen on behalf of Han and Abikzer regarding this October 7, 1997 service. She points out discrepancies in the declarations. Her declaration is rambling and stream of consciousness.

This showing is insufficient to establish that the vexatious litigant motion was brought with the requisite ulterior motive or that it constituted "'a willful act in the use of the process not proper in the regular conduct of the proceedings.'" (*Brown v. Kennard*, *supra*, 94 Cal.App.4th at p. 44.) Since Rusheen failed to show a probability of success action based on the vexatious litigant motion, we need not consider whether defense of the litigation privilege applies.

2. Improper Default Judgment

The remaining bases for the abuse of process cause of action relate to Cohen's alleged failure to serve the complaint and notice of the default proceedings. The declaration of Ms. Koza, which we discussed above, raises factual issues about the truth

of declarations filed by Cohen regarding the service of these pleadings. The allegation is that these documents were not properly served on Rusheen or his counsel in order to obtain the default judgment, and that the declarations submitted by Cohen were perjured. Based on these allegedly false declarations of service, Rusheen argues that Cohen enabled his clients to execute on an improperly obtained default judgment.

In *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, a cause of action for abuse of process was established where the allegation was that false declarations of service of process were submitted to the court to obtain a default judgment. (*Id.* at pp. 1463-1466.) The *Kappel* court held: "Thus, while [the defendant's] institution of a suit against plaintiff . . . did not satisfy the second requirement of a cause of action for abuse of process, *knowing* execution of a false declaration of service by the defendants . . . would constitute the necessary 'willful act,' i.e., one which is not proper in the regular conduct of the proceeding." (*Id.* at p. 1466.)

As in *Kappel*, Rusheen has alleged that false declarations of service of process were submitted to obtain a default judgment. This adequately alleges a cause of action for abuse of process. The remaining issue is whether this conduct falls within the litigation privilege.

The *Drum* court distinguished between a court filing, which is communicative and hence within this privilege, and action taken on the basis of the filing, which is not. In *Drum*, the filing was a document in support of a writ of execution; actual execution of the writ was not a "communication" within the ambit of the tort. (*Drum v. Bleau, Fox & Associates, supra*, 107 Cal.App.4th at p. 1026.)

In his petition for rehearing, Cohen argued that we should distinguish *Drum v. Bleau, Fox & Associates*, *supra*, 107 Cal.App.4th 1009 because the conduct at issue in that case was both non-communicative and wrongful. He claims that his conduct was not wrongful. He claims that the act of levying on a judgment procured through the use of perjured proofs of service was not wrongful.

His argument is posited on an incorrect characterization of Rusheen's position. Cohen asserts that Rusheen presented no evidence that he was involved in the

enforcement of the judgment in Nevada. This disregards the evidence that the default judgment was procured with perjured proofs of service filed and served by Cohen. There was an adequate showing that Cohen submitted false declarations of service of process in order to obtain the default judgment that was later enforced by others in Nevada. Rusheen alleges that Cohen was part of a conspiracy to obtain the default judgment without proper notice and that Cohen's conduct was essential to the ultimate enforcement of the judgment. Thus, while Cohen's filing of perjured documents was privileged as communicative conduct under Civil Code section 47, the conspiracy in which he was alleged to have participated culminated in the noncommunicative conduct of enforcing the judgment; and therefore the Civil Code section 47 privilege does not apply.

As Cohen himself argues, "the distinction between communicative acts and noncommunicative conduct ultimately hinges on the gravamen of the action . . . ." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 771.) The *Navellier* court recognized that "exceptional situations can arise where pleadings and conduct connected with litigation are not privileged (see *Yu v. Signet Bank/ Virginia* [(2002)] 103 Cal.App.4th [298] at p. 311 [action challenged location where suit was filed, not relief sought in the complaint]; *Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 7-8 [54 Cal.Rptr.2d 530] [claim for payment on public works project not privileged even though claimant anticipated suing for sums claimed])." (*Ibid.*) Here, the gravamen of the action was a conspiracy to enforce a judgment obtained through the use of perjured declarations of service. Under the reasoning of the court in *Drum v. Bleau, Fox & Associates*, *supra*, 107 Cal.App.4th 1009, the filing of a perjured proof of service may have been communicative but executing on the resulting default judgment was not.[7] The litigation privilege therefore does not establish a complete defense to the abuse of process cause of action.

Cohen relies on a line of cases which he contends applied the litigation privilege to post-judgment collection activities. (*Brown v. Kennard*, *supra*, 94 Cal.App.4th 40, 49-

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[7] Of course, we express no opinion on the merits of the falsity claim.

50; *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130; *Merlet v. Rizzo* (1998) 64 Cal.App.4th 53.) We agree with the *Drum* court's treatment of these cases. That court recognized that certain steps *preliminary* to the actual levy, such as filing an application for a writ of sale, are communicative and therefore privileged, as the court held in *Merlet v. Rizzo*, *supra*, 64 Cal.App.4th 53. (*Drum v. Bleau, Fox & Associates, supra*, 107 Cal.App.4th at p. 1028.) But it disagreed with *Brown v. Kennard*, *supra*, 94 Cal.App.4th 40 and *O'Keefe v. Kompa*, *supra*, 84 Cal.App.4th 130. In *Brown*, the abuse of process claim arose out of the execution on exempt Social Security and retirement funds, which the court held privileged. The *Drum* court concluded that the court in *Brown* "lost sight of the fact that the essential nature of actually levying on exempt funds was not communication but was action." (107 Cal.App.4th at p. 1027.) It continued: "[I]t does not follow that, merely because the application for the writ [of execution] -- essentially the statement by the judgment creditor to the clerk that the creditor has a judgment and requests the issuance of the writ -- is a privileged communication, subsequent acts in levying on property are likewise privileged." (*Drum,* at pp. 1027-1028.) For the same reason, it disagreed with *O'Keefe v. Kompa*, *supra*, 84 Cal.App.4th 130, which found privileged execution on a bank account. (*Drum*, at p. 1028, fn. 12.)

Cohen also argues that California does not recognize a cause of action based on subornation of perjury or the submission of false evidence, citing *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1. In the passage on which Cohen relies, the Supreme Court reviewed cases holding there is no civil remedy in damages based on perjured trial testimony, withheld or concealed evidence, or false evidence. (*Id.* at pp. 9-10.) In that case, the Supreme Court held that there is no tort remedy for intentional spoliation of evidence if the spoliation victim *knew or should have known of the spoliation before the trial or other decision on the merits in the underlying action*. (*Id.* at pp.17-18.) The *Cedars-Sinai* opinion does not change our analysis. First, the cause of action here is the recognized tort of abuse of process, which was not addressed in the Supreme Court opinion. Rusheen is not attempting to allege a novel tort. Further, since the allegation is that Cohen and his co-conspirators obtained a default judgment through

the use of false proofs of service, it seems unlikely that Cohen can show that Rusheen knew (or should have known) of the perjury before default judgment was entered.

Cohen also cites *Silberg v. Anderson*, *supra*, 50 Cal.3d 205, 214 for the proposition that the reason litigants bear the burden of exposing false evidence during trial is to avoid burdening the justice system with attacks on the integrity of the evidence after the proceedings have concluded. But the gravamen of the complaint here is that there *were no proceedings* because Cohen and his co-conspirators obtained a judgment by default by using false proofs of service. Rusheen could hardly be limited to exposing the perjury in a trial which did not take place.

Rusheen thus showed the requisite probability of prevailing on his cause of action for abuse of process based on these allegations; the trial court erred in granting the special anti-SLAPP motion to strike.

DISPOSITION

The judgment is reversed. Rusheen is to have his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J

HASTINGS, J.