

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP,

Plaintiff and Respondent,

v.

HERBERT HAFIF, et al.,

Defendants and Appellants.

B152759 consolidated with B154311

(Los Angeles County

Super. Ct. No. BC247941)

TERRY HUTTON,

Plaintiff and Respondent,

v.

HERBERT HAFIF, et al.,

Defendants and Appellants.

B154184

(Los Angeles County

Super. Ct. No. BC249367)

APPEAL from orders of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Reversed with directions.

Aitken Aitken & Cohn, Darren O. Aitken, Wylie A. Aitken for Defendants and Appellants Wylie A. Aitken and the Law Offices of Wylie A. Aitken.

Law Offices of Herbert Hafif for Defendants and Appellants Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Greg K. Hafif.

Cheong, Denove, Rowell & Bennett and John D. Rowell for Plaintiff and Respondent Terry Hutton.

Peggy J. Soukup in pro. per. for Plaintiff and Respondent Peggy J. Soukup.

I. INTRODUCTION

Defendants, Wylie A. Aitken, the Law Offices of Wylie A. Aitken, the Law Offices of Herbert Hafif, Herbert Hafif, Cynthia D Hafif, and Greg K. Hafif,¹ appeal from a November 16, 2001, order denying their Code of Civil Procedure section 425.16² special motions to strike the abuse of process and malicious prosecution complaint of plaintiff, Peggy J. Soukup, filed April 2, 2001, in Superior Court case No. BC247941. Based in material part on our opinion in *Soukup v. Stock* (May 27, 2004, B154311) __ Cal.App.4th __, __-__ [14 Cal.Rptr.3d 82, 83-89, mod. on den. reh. 2004 WL 1376385], which arises out of the same superior court case commenced by Ms. Soukup, we reverse the orders denying the special motions to strike. Additionally, the Hafif defendants appeal from the November 27, 2001, denial of their special motion to strike the April 26, 2001, complaint for intentional severe emotional distress infliction filed by

¹ For purposes of clarity and not out of any disrespect, Greg K. Hafif will be referred to as Greg and Herbert Hafif as Mr. Hafif. On some occasions, Mr. Hafif, his relatives, and his firm will be referred to collectively as the Hafif defendants. Likewise, Mr. Aitken and his firm will be referred to as the Aitken defendants.

² All future statutory references are to the Code of Civil Procedure.

plaintiff, Terry Hutton, in Superior Court case No. BC249367. As in the case of the appeal involving Ms. Soukup, the November 27, 2001, order denying the special motion to strike will be reversed. As to both of the cases pursued by Ms. Soukup and Mr. Hutton, we remand for the trial court to impose attorney fees and costs pursuant to section 425.16, subdivision (c) in favor of defendants subject to our analysis in *Soukup* concerning attorneys appearing in pro se. (*Trope v. Katz* (1995) 11 Cal.4th 274, 279-282; *Soukup v. Stock, supra*, ___ Cal.App.4th at pp. ___ - ___ [2004 WL 1376385].)

II. MS. SOUKUP'S LAWSUIT

A. Mr. Aitken And His Firm

The Aitken defendants have been sued by Ms. Soukup in case No. BC247941 for malicious prosecution and abuse of process arising out of a lawsuit filed against her. The suit was filed or pursued by the Aitken defendants. The conduct is the same alleged against a codefendant, Ronald C. Stock. In *Soukup v. Stock, supra*, ___ Cal.App.4th at pages ___ through ___ [14 Cal.Rptr.3d at pages 86-89], we held that claims against Mr. Stock arose from the petition rights of his clients and such were within the protective ambit of section 425.16, subdivision (b)(1). (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 [malicious prosecution claim arises from petition rights]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116 [special motion to strike may be pursued by defendant who makes statements on behalf of others].) This analysis applies equally to the Aitken defendants and the burden thus shifted to Ms. Soukup to demonstrate the minimal merit of her claims. (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63.)

We agree with the Aitken defendants that Ms. Soukup's argumentative and conclusory declaration and the voluminous attached documents filed in opposition to the

special motion to strike did not demonstrate her claims have minimal merit. As to the first cause of action, the mere filing of a lawsuit, does not constitute the tort of abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; *Friedman v. Stadum* (1985) 171 Cal.App.3d 775, 779-780; *Drasin v. Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485; *Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 904-905; *Christensen v. Younger* (1975) 47 Cal.App.3d 613, 617.) Further, there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra*, 42 Cal.3d at p. 1169; *Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 595.) As to the second cause of action, malicious prosecution, there is no evidence of: malice; an absence of probable cause at any time during the underlying lawsuit; or damage. Hence, there has been no prima facie showing of potential malicious prosecution liability on the part of the Aitken defendants. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.) Therefore, the order denying the special motion to strike of the Aitken defendants must be reversed.

B. The Hafif Defendants

The result is the same as to the Hafif defendants who are also sued in case No. BC247941. Ms. Hafif was alleged to be counsel for Mr. Hafif and his firm. All of our analysis as it relates to Mr. Aitken and his firm applies equally to Ms. Hafif. As to Greg, he was sued as a fictitiously named defendant apparently in his role as counsel in the underlying lawsuit. Our analysis as to Ms. Hafif and the Aitken defendants applies equally to Greg.

As to Mr. Hafif and his firm, all of the abuse of process and malicious prosecution claims against them arise out of the underlying suit. Hence, the claims against them arise from the exercise of the right of petition. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31

Cal.4th at pp. 734-735; *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 90.) The burden then shifted to Ms. Soukup to demonstrate her abuse of process and malicious prosecution claims had minimal merit. (§ 425.16, subd. (b)(1); *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 63.) Our foregoing analysis as to Mr. Aitken and his firm has equal merit here: the mere filing of a lawsuit does not constitute the tort of abuse of process (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, *supra*, 42 Cal.3d at p. 1169; *Friedman v. Stadum*, *supra*, 171 Cal.App.3d at pp. 779-780); there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit, an essential element of an abuse of process claim (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, *supra*, 42 Cal.3d at p. 1169; *Loomis v. Murphy*, *supra*, 217 Cal.App.3d at p. 595); and as to the malicious prosecution claim, there is no evidence of malice, an absence of probable cause at any time during the underlying lawsuit, or damage. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 885.) Therefore, the order denying the special motion to strike of Mr. Hafif and his firm must be reversed.

III. MR. HUTTON'S LAWSUIT

A. The Hafif Defendants' Initial Burden

On April 26, 2001, Mr. Hutton sued the Hafif defendants for intentional severe emotional distress infliction. Mr. Hutton's spouse is Terrie Hutton. Ms. Hutton was sued by Mr. Hafif and his firm. Mr. Hutton sought to recover for the emotional distress he experienced when Ms. Hutton was unjustifiably sued. The challenged conduct of the Hafif defendants involved their role either as counsel or parties in the underlying lawsuit. Hence, Mr. Hutton's severe emotional distress claims arise from defendants' petition related conduct in the underlying lawsuit. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*,

31 Cal.4th at pp. 734-735; *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at pp. 1116; *Soukup v. Stock*, *supra*, ___ Cal.App.4th at pp. ___-___ [14 Cal.Rptr.3d at pp. 86-89]; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152-153.) The burden thus shifts to Mr. Hutton to show his case has minimal merit. (§ 425.16, subd. (b)(1); *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 63.)

B. Mr. Hutton's Burden

1. The underlying lawsuit

Ms. Hutton originally sued Mr. Hafif and his firm for legal malpractice on June 29, 1993. Ms. Hutton's legal malpractice action against Mr. Hafif and his firm was dismissed after a demurrer to her second amended complaint was sustained without leave to amend. Sanctions in the sum of \$25,000 were imposed against Ms. Hutton and her attorney, Sassoon Sales, for filing a frivolous lawsuit in bad faith. The judgment of dismissal and the sanctions order were reversed on appeal. Division Two of the Court of Appeal for this appellate district found plaintiff had stated a fiduciary duty breach cause of action. (*Hutton v. Hafif* (Aug. 20, 1997, B088405) [nonpub. opn.].) Ms. Hutton's legal malpractice action was later dismissed for failure to prosecute.

On May 6, 1994, a second lawsuit, *Law Offices of Herbert Hafif v. Killingsworth* (Super Ct. Orange County, 1994, No. 729347), was filed. Mr. Hafif and his firm alleged Ms. Hutton had conspired with others to coerce financial concessions by bringing specious legal malpractice lawsuits and instigating negative publicity. The causes of action asserted against Ms. Hutton in the second amended complaint in the *Killingsworth* lawsuit, filed on October 13, 1994, were for fraud, malicious prosecution, defamation, fiduciary duty breach, privacy invasion, and tortious interference with business relations.

In addition to the fact that Ms. Hutton filed a legal malpractice action against Mr. Hafif and his firm, the principle conspiracy evidence against her consisted of diaries she had kept. The diaries purportedly document Ms. Hutton's contacts with other members of the alleged conspiracy. Orange County Superior Court Judge Leonard Goldstein denied Ms. Hutton's summary judgment motion in the second lawsuit. Judge Goldstein found there were triable issues of material fact as to Ms. Hutton's participation in the alleged conspiracy based on her diaries. Ms. Hutton's subsequent special motion to strike pursuant to section 425.16 was granted. In connection with that motion, Orange County Superior Court Judge Robert E. Thomas ruled that Ms. Hutton's diaries were inadmissible. Division Three of the Court of Appeal for the Fourth Appellate District affirmed Judge Thomas's order granting the special motion to strike. (*Law Offices of Herbert Hafif v. Soukup* (April 27, 2000, G020977) [nonpub. opn.].) The Court of Appeal held in part: "The only evidence potentially showing merit in Hafif's claims came from Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were inadmissible." (*Id.*, typed opn. at p. 6.)

On November 30, 2000, Ms. Hutton filed a lawsuit alleging the second lawsuit, the *Killingsworth* matter, was maliciously prosecuted against her. The Hafif defendants in this suit were all sued by Ms. Hutton in the November 30, 2000, lawsuit. On July 20, 2001, the defendants filed a special motion to strike Ms. Hutton's malicious prosecution action. The defendants presented evidence that: a former associate had left the Hafif firm, taken clients with him, and then sought to coerce defendants to relinquish claims for fees and costs in connection with those matters; further, numerous frivolous legal malpractice claims by former clients and State Bar of California complaints had been subsequently filed against them, and negative publicity disseminated, in close proximity to each other; there was communication among the alleged conspirators, all former clients or employees of defendants; and a lawyer who represented some of the former clients in their legal malpractice actions subsequently apologized to the defendants. The defendants argued in part that probable cause was established as a matter of law because

Judge Goldstein had denied plaintiff's summary judgment motion in the second lawsuit, the *Killingsworth* action. Plaintiff opposed the defendants' section 425.16 motion in this lawsuit. The special motion to strike was denied. On appeal, we reversed the order denying the special motion to strike and remanded with directions that the defendants recover their attorney fees and costs from Ms. Hutton. (*Hutton v. Hafif* (May 11, 2004, B162572) [nonpub. opn.])

2. The Special Motion To Strike Should Have Been Granted

The Hafif defendants' special motion to strike argued: Mr. Hutton's intentional emotional distress complaint was legally insufficient; the Hafif defendants established probable cause as a matter of law to pursue the action against Ms. Hutton; and the Hafif defendants acted on the advice of counsel in bringing the *Killingsworth* action against Ms. Hutton. Mr. Hutton's opposition was premised on two declarations filed in response to a special motion to strike filed in a related action, those of Ms. Hutton and Drew Antablin, and a judicial notice request. No declaration was filed by Mr. Hutton. The Hafif defendants' reply argued: Mr. Hutton failed to introduce any evidence of causation and damages; there was no evidence negating the advice of counsel defense; there was no showing of malice; and Mr. Hutton failed to demonstrate the underlying lawsuit, the *Killingsworth* action, was commenced or maintained without probable cause; and there was no evidence the Hafif defendants intended to cause Mr. Hutton to suffer severe emotional distress.

As noted previously, because the section 425.16, subdivision (b)(1) burden shifted to Mr. Hutton, he had the responsibility of demonstrating his intentional severe emotional distress infliction cause of action had minimal merit. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 63.) We need not address the myriad of flaws in Mr. Hutton's evidentiary showing in this regard. Suffice to note, Mr. Hutton did not file a declaration. Hence, he has failed to

present minimal evidence that: he in fact suffered severe emotional distress; any severe emotional distress was legally caused by the conduct of the Hafif defendants; and he suffered any damage. Therefore, the Hafif defendants' special motion to strike should have been granted. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

IV. DISPOSITION

The November 16 and 27, 2001, orders denying the special motions to strike are reversed. Upon issuance of the remittitur, orders are to issue granting all special motions to strike. Defendants, Wylie A. Aitken, the Law Offices of Wylie A. Aitken, the Law Offices of Herbert Hafif, Herbert Hafif, Cynthia D. Hafif, and Greg K. Hafif, are to recover their costs on appeal and attorney fees from plaintiff, Peggy J. Soukup, subject to the limitation adverted to in the first paragraph of this opinion. Likewise, the Hafif defendants are to recover their costs and attorney fees from plaintiff, Terry Hutton. All attorney fee requests are to be made pursuant to California Rules of Court, rule 870.2(c).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.