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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARLA MARIE DAVIS, Plaintiff and Appellant, v. MANDARICH LAW GROUP, LLP et al., Defendants and Respondents.	H049881 (Santa Clara County Super. Ct. No. 21-CV-386639)

Plaintiff Marla Marie Davis brought a putative class action against defendants Mandarich Law Group, LLP, Ryan Earl Vos, and Elizabeth Grace Sutlian-Mardikian, alleging violations of the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 et seq.). Defendants moved to strike the complaint under California's anti-SLAPP statute.[1] Plaintiff appeals from the order granting the special motion to strike. Finding no error, we will affirm the order.

I. BACKGROUND

Mandarich Law Group brings collection actions on behalf of its client CACH, LLC, a debt buyer. In April 2014, Mandarich Law Group commenced an action against plaintiff in California state court for collection of a debt owed to CACH. At that time, defendants Vos and Sutlian-Mardikian were attorneys employed by Mandarich Law Group and appeared as counsel of record for CACH in the collection matter.

[1] "SLAPP" is an acronym for "strategic lawsuits against public participation." (Code of Civil Procedure section 425.16; unspecified statutory references are to this code.)

After she filed an answer in the collection matter, plaintiff was served with the declaration of CACH employee Peter Huber under section 98. "A party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of" a section 98 declaration if the declaration "has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial." (§ 98, subd. (a).) Huber stated in his declaration that he was located in Denver, Colorado, but would accept service at the office of CACH's counsel in Oakland, California. According to plaintiff's complaint, she was confused by the declaration, which led her to hire an attorney.

In August 2014, plaintiff brought a putative class action against defendants and others in the United States District Court for the Northern District of California. Plaintiff alleged that the section 98 declaration of Peter Huber violated the FDCPA because it falsely represented that Huber was available for service of process despite being located more than 150 miles from the place of trial, and that defendants routinely used similar declarations in collection matters. Defendants moved to compel arbitration, which the district court granted in March 2015; plaintiff demanded arbitration in June 2015. The parties proceeded to individual arbitration, from which defendant Sutlian-Mardikian was dismissed, and an arbitration award was entered in favor of the remaining defendants in October 2016. The district court confirmed the arbitration award.

Plaintiff appealed to the Ninth Circuit Court of Appeals from the district court's judgment confirming the arbitration award. The Ninth Circuit vacated the judgment due to a question about whether plaintiff had Article III standing, and remanded the matter to the district court with instructions to answer that question. (*Davis v. Mandarich Law Group* (9th Cir. 2020) 790 Fed.Appx. 877, 878 (*Davis*).) The district court determined that plaintiff did not have standing, and dismissed the complaint for lack of subject matter

jurisdiction. Plaintiff then brought this action in California state court, alleging once again that defendants improperly used section 98 declarations in collection matters in violation of the FDCPA.

Defendants moved to strike the complaint under section 425.16, arguing that plaintiff's claim arose from litigation-related activity and that it lacked merit. They also asserted several defenses in the motion, including res judicata. The trial court granted the anti-SLAPP motion, finding plaintiff's claim barred by res judicata based on the arbitration award. Plaintiff now appeals from the trial court's order.

II. DISCUSSION

The anti-SLAPP statute is "designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 883–884.) A person may file an anti-SLAPP motion to strike claims "arising from any act of that person in furtherance of the person's right of petition" in connection with a public issue. (§ 425.16, subd. (b)(1).) Acts taken in furtherance of the right of petition include "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," such as a lawsuit. (*Id.*, subd. (e)(2).)

We review an order granting or denying an anti-SLAPP motion de novo, applying a two-step analysis. (*People ex rel. Fire Insurance Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822.) First, the defendant must meet the initial burden of showing that the lawsuit arose from protected activity. (§ 425.16, subd. (b)(1); *Kurz v. Syrus Systems, LLC* (2013) 221 Cal.App.4th 748, 757.) The burden then shifts to the plaintiff to show a probability of prevailing on the merits. (§ 425.16, subd. (b)(1); *Kurz*, at pp. 757–758.)

There is no dispute that plaintiff's lawsuit arose from protected activity. Litigation-related activities like the filing of a lawsuit reflect the exercise of the

constitutionally guaranteed right to petition the government for the redress of grievances. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) "The anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation." (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.) CACH's lawsuit against plaintiff and the statements made in connection with that lawsuit, including the section 98 declaration of Peter Huber, are thus protected by section 425.16.

Because plaintiff's lawsuit arose from protected activity, plaintiff bears the burden of establishing a probability of success. The anti-SLAPP statute "contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to constitutional defenses." (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) To defeat an anti-SLAPP motion, a plaintiff must therefore "overcome any substantive defenses that exist." (*Trinity Risk Management, LLC v. Simplified Labor Staffing Solutions, Inc.* (2021) 59 Cal.App.5th 995, 1006.) Here, in addition to arguing that plaintiff's FDCPA claim is substantively meritless, defendants have raised three defenses: they contend that the arbitration award has res judicata effect; plaintiff lacks standing; and plaintiff's claim is barred by the applicable statute of limitations. Like the trial court, we find the first of those defenses dispositive.

Defendants' res judicata defense is one of claim preclusion. "The prerequisite elements of res judicata in its claim preclusion form are (1) the claim in the present action must be identical to a claim litigated or that could have been litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding." (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 185

(*Bucur*).) As applied here, plaintiff was a party to the arbitration. She acknowledges that her claim in this action is substantively identical to the claim raised in the federal action and the associated arbitration. To the extent plaintiff's current claim differs from the claim at issue in the arbitration, the trial court was correct to find that her claim "could have been litigated in the arbitration and arises from an alleged violation of the same primary right as was litigated in the arbitration."

The only remaining question is whether the arbitration award should be treated as akin to a final judgment on the merits for res judicata purposes. "Although res judicata is usually applied to judicial decisions, a prior judgment confirming an arbitration award may also bar a subsequent lawsuit based on the same cause of action." (*Bucur*, *supra*, 244 Cal.App.4th at p. 185.) Plaintiff argues that because the district court's judgment confirming the arbitration award was vacated by the Ninth Circuit, the award itself can no longer be given res judicata effect. But several California courts, including this one, have held that even an unconfirmed arbitration award may be treated as a final judgment. (See *Bucur*, at p. 186 ["For purposes of res judicata, even an unconfirmed arbitral award is the equivalent to a final judgment"]; *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 761 (*Thibodeau*) ["We conclude that, under the particular circumstances of this case, the unconfirmed arbitration award should have a res judicata effect"]; see also *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 679 [reaching same conclusion with respect to award that was confirmed in an order but not reduced to a judgment].)

Plaintiff concedes that unconfirmed arbitration awards may have res judicata effect under some circumstances, but attempts to distinguish this case. She asserts that she would not have agreed to arbitrate her claim if not for the district court's order compelling arbitration, which she characterizes as erroneous, and that the arbitration award was made null and void by the district court's eventual finding that it had no jurisdiction to enter that order. But whatever plaintiff's rationale, she did ultimately

demand arbitration, where she received an adverse decision on the merits of her claim. Although the Ninth Circuit vacated the judgment confirming the arbitration award, and the district court then dismissed the case for lack of jurisdiction, neither court vacated the award itself. It remains in place, albeit unconfirmed, and plaintiff cites no authority for her contention that it should not be treated as "conclusive on matters of fact and law." (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 823; see *Lehto v. Underground Const. Co.* (1977) 69 Cal.App.3d 933, 939 ["Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata"].)

In support of her position, plaintiff points to a single sentence from the Ninth Circuit memorandum opinion. The Ninth Circuit instructed the district court to determine whether it had subject matter jurisdiction and stated that, should it find jurisdiction, it could either "reinstate the judgment or conduct whatever further proceedings it deem[ed] appropriate, including revisiting any other issues raised by the parties." (*Davis*, *supra*, 790 Fed.Appx. at p. 878.) Then, in the sentence cited by plaintiff, the Ninth Circuit specified that the district court could revisit plaintiff's argument that the documents assigning plaintiff's debt to CACH "did not convey a right to compel arbitration" because they included language that plaintiff described as an arbitration ban. (*Ibid.*) The district court never revisited that argument, which it had previously found unconvincing; instead it concluded that plaintiff had no standing and it therefore lacked jurisdiction. Plaintiff now argues that by indicating the district court could revisit her argument regarding arbitrability, the Ninth Circuit implied that the arbitration award should not be given res judicata effect.

The issue of claim preclusion was not before the Ninth Circuit, and we agree with the trial court here that the sentence relied on by plaintiff does not carry the significance she attaches to it. We read the sentence as making clear to the district court that it could, but need not, revisit plaintiff's arbitrability argument should it conclude that it had

jurisdiction to do so. We cannot do so now, as the arbitrability issue is not properly before us. Significantly, plaintiff references an "explicit arbitration ban in the assignment documents" as one reason why the arbitration award should not be given res judicata effect, but those documents were not introduced as evidence in the trial court and are not part of the record in this appeal. The trial court therefore properly determined that plaintiff did not meet her burden of producing evidence which, if credited, would overcome the res judicata defense. Nor has plaintiff provided any authority suggesting the defense does not apply in this case.

We note that one California court refused to find res judicata based on an unconfirmed arbitration award. (*Kahn v. Pelissetti* (1968) 260 Cal.App.2d 832.) Unsurprisingly, plaintiff does not cite *Kahn*, as the case does not support her position. Relying on statutory language giving an unconfirmed arbitration award "the same force and effect as a contract in writing between the parties to the arbitration" (§ 1287.6), the *Kahn* court applied contract law to conclude that a third party who did not participate in an arbitration was "at most an incidental beneficiary" of the unconfirmed award and could not "take advantage of it as a third party beneficiary" by invoking its res judicata effect to defend a lawsuit later brought against him by one of the parties to the arbitration. (*Kahn*, at pp. 834–835.) "Thus, the *Kahn* court did not hold that an unconfirmed arbitration award can never have a res judicata effect but only that it would not have such an effect under the particular circumstances of that case." (*Thibodeau*, *supra*, 4 Cal.App.4th at p. 761.) (The circumstances in *Kahn* involved an uninsured motorist seeking the benefit of an insurance contract between an injured passenger of another vehicle and the passenger's insurer, despite the motorist being neither a party to the insurance contract nor an intended beneficiary of it.)

Defendant Mandarich Law Group and defendant Vos were parties to the arbitration here, so there is no such concern regarding their use of the unconfirmed award vis-á-vis plaintiff. Defendant Sutlian-Mardikian was dismissed from the arbitration, but

the arbitration "concerned work done" by Sutlian-Mardikian for Mandarich Law Group and "was intended to resolve disputes arising out of" that work. (See *Thibodeau*, 4 Cal.App.4th at p. 761.) In *Thibodeau*, this court held that even third parties can rely on the res judicata effect of an unconfirmed arbitration award under such circumstances. (*Ibid.*) The arbitration here concerned all three defendants, and was intended to resolve the very claim that plaintiff now seeks to relitigate.

Because plaintiff's FDCPA claim is precluded by the arbitration award, plaintiff cannot meet her burden to show a probability of prevailing on that claim, the second prong of the anti-SLAPP analysis. The res judicata defense to plaintiff's suit is therefore dispositive as to the anti-SLAPP motion, and as a result we do not reach the remaining defenses asserted or the substantive merits of plaintiff's claim.

III. DISPOSITION

The order granting the special motion to strike is affirmed. Respondents are awarded their reasonable costs on appeal by operation of California Rules of Court, rule 8.278(a).

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Wilson, J.