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Court of Appeal, Fourth District, Division 2, California.

Edward BABBITT, Sr., et al., Petitioners,
v.
The SUPERIOR COURT of the County of Riverside, Respondent;
Joseph O. DiPuzo et al., Real Parties in Interest.

No. E033448. | (Super.Ct.No. INC029645). | May 13, 2004.

ORIGINAL PROCEEDINGS in mandate. Charles Everett Stafford, Jr., Judge. Petition granted in part and denied in part.

Attorneys and Law Firms

Schlueter & Schlueter and Jon R. Schlueter for Petitioners.

No appearance for Respondent.

Law Offices of Joseph A. Roman and Joseph A. Roman for Real Parties In Interest.

Opinion

OPINION

GAUT, Acting P.J.

***1** Edward Babbitt, Sr. (Babbitt)[1] likes to smoke a cigar on the private patio of his condominium. One of his neighbors, Joseph O. DiPuzo (DiPuzo), objects to the cigar smoke, which he alleges wafts not only onto his own patio but also into his condominium. On one occasion, DiPuzo voiced his objections to Babbitt whose response was unsatisfactory. According to Babbitt, DiPuzo then physically assaulted him.

Babbitt sued DiPuzo for assault. DiPuzo responded with the cross-complaint which is the subject of this petition.[2] Babbitt duly demurred to all causes of action, but the trial court overruled the demurrer in most respects. The only cause of action as to which Babbitt was successful was the third, alleging trespass, and in that respect the trial court gave DiPuzo leave to amend.[3] This petition followed. We proceed to discuss the individual causes of action and the specific facts pleaded by DiPuzo.

DISCUSSION

The standards to be applied in ruling on a demurrer are well established. Code of Civil Procedure section 452 mandates that "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (See also *Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 689-690.) Our review of the trial court's ruling is de novo. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1038.)

A. Negligence[4]

This cause of action is arguably that which has aroused the most interest and controversy in this case; perhaps unfortunately, we do not find ourselves in a position to dispose of it conclusively.

First, we note that the cause of action for negligence appears to incorporate claims both for personal injury *and* for damage to the premises. As a demurrer may not be directed to a part of a cause of action (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 910, p. 370), the demurrer was properly overruled if cross-complainants state a cognizable claim for either type of damage.

DiPuzo alleges that cross-defendants allow the smoke from Babbitt's cigars to "waft into the windows of the DiPuzo condo" and that said smoke contaminates draperies, furniture, clothing, etc. Cross-complainants also allege unusual sensitivity to tobacco smoke and resulting health difficulties, as well as "mental aggravation." They allege that cross-defendants owe a duty to "avoid releasing said cigar smoke ... in a manner which would cause injury to cross-complainants...." The basic positions of the parties are simple: Babbitt asserts that cigar smoking is a legal activity and there is no duty to refrain from indulging just because a neighbor doesn't like it. DiPuzo, on the other hand, points to the fact that even "secondhand" smoke is generally believed to have deleterious effects on human health and argues that the general rules of duty and negligence apply in his favor.

***2** We cannot agree with Babbitt's position as a matter of law. The basic principle of negligence law in California is that "[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person...." (Civ.Code, § 1714; *Rowland v. Christian* (1968) 69 Cal.2d 108, 111-112.) It is true that this duty of care does not extend indefinitely and in all directions. "The court's task in determining duty is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct. Instead the court evaluates more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party." (*Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 895.)

With respect to DiPuzo's claims for personal injury, as incorporated in the negligence cause of action, the dangers of "secondhand smoke" are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court. (See, e.g., *Helling v. McKinney* (1993) 509 U.S. 25, 33-34 [prisoner's suit].) The Legislature has adopted the California Indoor Clean Air Act of 1976 to protect residents from these dangers (Health & Saf.Code, §§ 118875 *ff.*), and the electorate enacted the California Children and Families Act of 1998, (Health & Saf.Code, §§ 130100 *ff.*) known as Proposition 10, based at least in part upon the argument that secondhand smoke was responsible for a substantial number of serious respiratory tract infections in infants and children. (See *California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 810.)

Whether or not recovery has previously been allowed in tort for "secondhand smoke" injuries is not dispositive. " ' "The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society...." ' " (*Soldano v. O'Daniels* (1983) 141 Cal.App.3d 443, 453.) " 'The law of torts is anything but static....' " (*Id.* at p. 454.) However, we do not decide here that a private cause of action for exposure to secondhand smoke will lie irrespective of the amount of smoke and the circumstances under which it is created; we are merely unable to say, as a matter of law, that such exposure can *never* be actionable. We also acknowledge that we lack the scientific expertise to opine on the subject of whether one smoker can create a substantial risk

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of harm, and the record at this stage is barren on the point.[5]

Babbitt argues that the complaint does not sufficiently allege an extreme, constant emission and invasion of smoke, and that a single smoker cannot commit a tortious act. We agree that the complaint is not strongly worded in this respect, but, generously read (*Lim v. The.TV Corp. Internat., supra,* 99 Cal.App.4th at pp. 689-690), the allegation of "regular and routine" actions by Babbitt adequately alleges the creation of a noxious atmosphere. There would certainly be no point in requiring a new round of pleadings merely to compel DiPuzo to embellish his allegation; we cannot evaluate the truth of any allegation at this stage (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 987), and, in our view, the matter will eventually require the taking of evidence.

***3** As for the claims of property damage, the pleading alleges that Babbitt's actions caused harm. Whether this is true or not is a matter to be determined on demurrer, and whether any damage was foreseeable again depends on facts not yet developed.

The demurrer was properly overruled to the cause of action sounding in negligence.

B. Nuisance

The trial court erred by sustaining the demurrer to this cause of action. Intrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions. (See, e.g., *Wade v. Campbell* (1962) 200 Cal.App.2d 54 [dairy with open manure piles and stagnant water]; 11 Witkin, Summary of Cal. Law (9th ed.1990 & 2003 supp.) Equity, § 127.) Civil Code section 3479 provides that an actionable nuisance is one which constitutes a "substantial and unreasonable invasion of [the possessor's] free use and enjoyment of [the] property." (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100.) Petitioner argues that cigar smoke cannot constitute a nuisance as a matter of law because it does not create a substantial or unreasonable invasion. He also cites to the principle that " 'Life in organized society and especially in populous communities involves an unavoidable clash of individual interests.... It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.' " (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937, quoting Rest.2d Torts, § 822, com. g, p. 112.)

On demurrer, however, we reiterate that we must accept the allegations of the pleading as true (*Santa Monica Beach, Ltd., v. Superior Court, supra,* 19 Cal.4th 952; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 806), and, once again, we are not prepared to embrace petitioner's proposed rule as a matter of law. Whether Babbitt's smoke is comparable to the reeking manure piles in *Wade v. Campbell, supra,* 200 Cal.App.2d 54, is not ascertainable without evidence. Real party is entitled to attempt to establish an actionable invasion in fact.[6]

C. False Arrest

This cause of action derives from the arrest of DiPuzo after Babbitt complained to police that DiPuzo had assaulted him. Civil Code section 47, subdivision (b)(2), provides that "[a] privileged publication or broadcast is one made: [¶] (b) [i]n any ... (2) judicial proceeding." The Supreme Court has recently confirmed the line of cases holding that the privilege applies not only to statements made *within* a judicial proceeding, but also to those intended to *instigate* legal (e.g., criminal) proceedings. (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 39, 49-65 (*Hagberg*).)[7] When it applies, the privilege is absolute, and bars all tort claims based on the statements except one for malicious prosecution. The demurrer was properly sustained to this cause of action.

D. Malicious Prosecution

***4** In this cause of action, DiPuzo bases his claim not on the arrest and the criminal case, but on the fact that Babbitt sought an anti-harassment restraining order against him. (See Code Civ. Proc., § 527.6.) As noted above, the absolute privilege does not apply to a claim for malicious prosecution. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 at fn. 5.)

However, Babbitt first relies on the rule that a malicious prosecution action cannot be based on an action by the defendant which constituted a mere "step" or interim proceeding in the prior action. Thus, a motion for discovery, however meritless, will not support a claim sounding in malicious prosecution (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 639 (*Lossing*)), and the same is true for a request for lien, for a temporary restraining order, and for a motion for reconsideration. (See *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 528 (*Adams*).) The reasons for the rule include the undesirability of disrupting litigation with cross-claims against the opponent's counsel, and the appropriateness of requiring an aggrieved party to invoke the trial court's powers of discipline, sanction, and control. (*Ibid.*)

Here, by contrast, it appears that Babbitt filed a separate proceeding under Code of Civil Procedure section 527.6 against DiPuzo. DiPuzo alleges that Babbitt sought not only a temporary restraining order, but also an injunction, and that the "action" was dismissed. Accordingly, on the face of the pleading the rule applied in *Lossing* and *Adams* does not apply.[8]

Babbitt's second argument, however, is more persuasive. By analogy to family law and small claims cases, he suggests that, as a matter of policy, a malicious prosecution action should not be recognized if the claim arises from the filing of an anti-harassment petition. We agree.

In *Bidna v. Rosen* (1993) 19 Cal.App.4th 27 (*Bidna*), a husband allegedly harassed by his wife's repeated filing of meritless applications regarding the custody of their child brought an action in malicious prosecution against her. The court summarized prior cases which generally held that the filing of an OSC or other motion would not support a later malicious prosecution action. (E. g., *Lossing, supra,* 207 Cal.App.3d 635 [contempt OSC in civil action]; *Silver v. Gold* (1989) 211 Cal.App.3d 17, pp. 23-24 [motion to disqualify counsel]; *Green v. Uccelli* (1989) 207 Cal.App.3d 1112, pp. 1121-1123 [family law OSC's].) Although it recognized the "arguable inadequacy of internal ... remedies" such as sanctions and awards of attorneys' fees, the court nevertheless established a "bright line" rule that "The remedy for egregious conduct in family law court is for the family law bench to nip it in the bud with appropriate sanctions, not to expand tort liability for malicious prosecution to the family law bar." (*Bidna, supra,* 19 Cal.App.4th at pp. 36, 29, 30.)

***5** The *Bidna* court was persuaded by comments from our Supreme Court in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 873 (*Sheldon Appel*) to the effect that the "most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability" but rather in "sanctions for frivolous or delaying conduct ....“ Because no case had yet *permitted* a malicious prosecution action to arise from a family law case, the *Bidna* court relied on *Sheldon Appel* to *refuse* to recognize an "expansion" of malicious prosecution law into that field.

In this case, it is perhaps less clear that DiPuzo seeks to "expand" the scope of the tort. However, the additional policy reasons underlying the decision in *Bidna* apply here with substantial force. As in a family law action, "[b]itterness and emotional distress often form a kind of background noise" (*Bidna, supra,* 19 Cal.App.4th at p. 35) to harassment petitions brought under Code of Civil Procedure section 527.6; indeed, such a petition is only justified if there *is* such distress. (Code Civ. Proc., § 527.6, subd. (b).) Often one or both parties are barely rational on the subject of their relationship and perceived grievances. (See *Oriola v. Thaler* (2000) 84 Cal.App.4th 397 [would-be boyfriend made 25-40 "crank calls" daily to victim and delivered "e-mail bomb" to her workplace];[9] *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105 [stalking, calling, letters, suicidal threats by psychologist's former patient]; *Byers v. Cathcart* (1997) 57 Cal.App.4th 805 [escalating neighbor dispute over parking].) It is not at all unlikely that where a matter under Code of Civil Procedure section 527.6 involves mutual

animosity, the successful respondent would be all too pleased to file a civil action against the petitioner for "malicious prosecution" of the petition, continuing the cycle of annoyance. Furthermore, the statute's insistence that Judicial Council forms for the procedure be "simple and concise" (Code Civ. Proc., § 527.6, subd. (m)) appears to reflect the understanding that anti-harassment petitions are not infrequently filed by parties acting in propria persona and without the benefit of a professional evaluation of the circumstances.[10] All in all, it seems undesirable to subject petitioners seeking relief from harassment to the possibility of serious financial harm.

Another point in favor of banning such actions is that the trial court, as in family law cases, possesses ample means of deterring or punishing actions taken in bad faith. In *Green v. Uccelli, supra,* 207 Cal.App.3d 1112, 1123, the court refused to recognize a malicious prosecution action based upon two family law OSC's which were dismissed or taken off calendar, noting that not only did the court have "the same power available in all civil actions to impose monetary sanctions pursuant to [former] Code of Civil Procedure section 128.5"[11] but was also authorized, unusually, "to award attorney fees ... as a sanction...." Notably, the same is true under Code of Civil Procedure section 527.6, subdivision (i), which authorizes an award of attorneys' fees ("if any") to the prevailing party.

***6** It also bears noting that proceedings under Code of Civil Procedure section 527.6 bear little relationship either to a criminal prosecution or a civil lawsuit. A petition is filed, and a hearing is normally held within a few weeks. (Code Civ. Proc., § 527.6, subd. (d).) An order is made, or not made, and that is the end of it. There is no risk of incarceration or financial ruin. A respondent is not likely to incur substantial legal fees, and any emotional upset should be short-lived. At worst, he or she will simply be ordered to stop doing something that he or she often denies ever having done in the first place. And, for the successful respondent, vindication is prompt. For these reasons too, it is peculiarly appropriate to leave abuses to the control of the court hearing the harassment petition, because any damages should be minimal.

Finally, in many respects proceedings under Code of Civil Procedure section 527.6 are analogous to those in small claims court. (Code Civ. Proc., § 116.110 et seq.) Both are intended to provide quick and economical solutions in part through informal procedures. Both encourage the trial court to take an active role in ascertaining the truth. (Code Civ. Proc., §§ 527.6, subd. (d); 116.520, subd. (c).) It has long been established that the filing of a small claims action will not support a malicious prosecution claim because to do so would tend to frustrate and complicate the scheme. (*Pace v. Hillcrest Motor Co.* (1980) 101 Cal.App.3d 476, 479.) We hold that the same applies to the unsuccessful filing of a petition for a restraining order under Code of Civil Procedure section 527.6.

E. Injunctive and Declaratory Relief

The trial court correctly overruled Babbitt's demurrer to these causes of action. It is well established that a plaintiff who seeks declaratory relief is entitled to a formal declaration even if it appears from the pleading that he is probably not entitled to a *favorable* judgment; it is considered preferable that the court resolve the dispute in a clear final declaration. (5 Witkin, Cal. Procedure, *supra,* Pleading, § 831, pp. 288-289.) The request for injunctive relief and abatement is perfectly proper in relation to the cause of action for nuisance, and we have explained above that this issue involves factual determinations which cannot be made at this stage of the litigation. Once again, we do not believe that any purpose would be served by requiring a new round of pleadings to "improve" what we find to be an adequate statement.

DISPOSITION

The petition for writ of mandate is granted in part. The trial court shall enter a new order sustaining the demurrer to the causes of action for false arrest and malicious prosecution. In all other respects the petition is denied. The parties shall bear

their own costs.

We concur: HOLLENHORST and McKINSTER, JJ.

Footnotes

1 The male parties' respective cohabitants are also parties to the action. However, as the actual disputants are Edward Babbitt, Sr. and Joseph O. DiPuzo, we will at times refer only to them.

2 The operative pleading is in fact the first amended cross-complaint.

3 However, to the best of our knowledge, DiPuzo did not take advantage of this leave. Hence, we do not consider the trespass cause of action.

4 With respect to this cause of action, and others, it may be of legal significance that cross-defendant Claudia Brakebill is alleged to be the legal owner of the condominium premises on which Babbitt smokes his cigars. However, cross-defendants do not address any specific argument towards the obligation of a landowner to *prevent* smoking on his or her property. We will focus our discussion on the smoker.

5 Cross-complainants allege that both are particularly sensitive to tobacco smoke. We do not attempt to determine here whether any such unusual sensitivity affects Babbitt's potential liability; although, in general, the tortiousness of conduct depends on the *reasonable likelihood* that it will result in injury. (*Martinez v. Bank of America, supra,* 82 Cal.App.4th 883.)

6 *Wade v. Campbell* also involved not only slimy ponds, overflowing sewage, dust, and flies, but also such irritants as loud nocturnal mooing and public animal mating.

7 *Hagberg, supra,* 59 Cal.App.4th 741, like this case, involved a report to the police of suspected illegal activity. The police responded and detained the plaintiff. Among the claims held to be barred was one for false arrest.

8 A request for injunctive relief may, of course, be brought as a cause of action included in a civil complaint. We note that a prevailing defendant may sue for malicious prosecution based on a favorable termination as to some, but not all, counts against him, so long as the claims are severable-that is, could have been the basis for separate actions. (*Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, 792.)

9 This "bomb" clogged up her office computer with crop and livestock messages from all 50 states and the United States Department of Agriculture.

10 Note that Code of Civil Procedure section 527.6, subdivision (d) expressly authorizes the trial court to make an "independent inquiry" into the facts if necessary. The small claims statutes provide the court with a similar, even broader, authority. (Code Civ. Proc., § 116.520, subd. (c).) These provisions clearly contemplate frequent appearances by unrepresented parties.

11 Code of Civil Procedure section 128.5 was amended in 1994 to apply to cases initiated on or before December 31, 1994, however, see Code of Civil Procedure section 128.7, enacted in 1994.

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