IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOE PANICARO,
Appellant,
vs.
MARTIN G. CROWLEY, D/B/A AMERICAN LEGAL SERVICES,
Respondent.

No. 67840

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from orders denying special motions to dismiss pursuant to NRS 41.660. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant, Joe Panicaro, worked for respondent, Martin Crowley, as a freelance paralegal for a number of years. Disputes arose between the two during Crowley's representation of both Panicaro and his girlfriend in two public records cases, where Panicaro was working on the cases in exchange for Crowley's legal representation. As a result of these disputes, Panicaro terminated representation and filed complaints with the State Bar of Nevada, and Crowley sued Panicaro for defamation, tortious interference with a contract, and breach of contract.[1] Panicaro filed a special motion to dismiss pursuant to NRS 41.660, which the district court denied, and this appeal followed.[2] On appeal, Panicaro

[1]Crowley initially asserted other claims, but those were dismissed by the district court under NRCP 12(b) and were not appealed.

[2]We do not recount the facts except as necessary to our disposition.

17-900024

argues the district court erred by holding that Crowley's suit was not based on Panicaro's anti-SLAPP protected conduct.[3]

NRS 41.660 was enacted to protect defendants against "strategic lawsuits against public participation," or "SLAPPs." NRS 41.660—colloquially the "anti-SLAPP" statute—provides for a special motion to dismiss as a procedural mechanism for defendants to quickly and cheaply dispose of meritless suits against them filed in retaliation for certain forms of speech. Nevada's first anti-SLAPP law was passed in 1993 and has been modified by the Legislature several times, in 1997, 2013, and 2015.

The 1997 statute, which applies here as Panicaro filed his anti-SLAPP motions in 2011 and 2012, protected those who petition the government in good faith, and requires the district courts treat special motions to dismiss as motions for summary judgment. NRS 41.660(3)(A) (1997). The 1997 statute was also at issue in the seminal Nevada case *John v. Douglas Cty. Sch. Dist.*, which explained the burden shifting framework of NRS 41.660 in detail. 125 Nev. 746, 753, 219 P.3d 1276,

---

[3]We have carefully considered Panicaro's argument that the court lacked jurisdiction to enter the order because it missed the 30 day deadline of NRS 41.660(3)(c) (1997), but disagree. *See Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1088, 194 P.3d 1254, 1260 (2008) (holding that a statute using the word "shall" was directory instead of mandatory in light of the Legislature's intent and the practical effect); *see also* NRS 41.660(6) as amended in 2015 (allowing the court to modify the deadlines).

Additionally, we do not address Panicaro's arguments that Crowley cannot prevail at trial, as these arguments are not pertinent to the denials of the special motions to dismiss and Panicaro did not appeal the denial of his 12(b) motions to dismiss.

1281 (2009). First, the defendant must file the special motion to dismiss within 60 days of receiving the complaint, and make a threshold showing that the plaintiff's action was brought "based upon [the defendant's] good faith communication in furtherance of the right to petition." *Id.* at 754, 219 P.3d at 1282. If the defendant satisfies that burden, the burden shifts and the plaintiff must then demonstrate a genuine issue of material fact. *Id.* at 757, 219 P.3d at 1284. This court reviews orders granting or denying special motions to dismiss de novo. *Id.*

We agree with the district court that some of Panicaro's conduct was protected under the anti-SLAPP statute, but we disagree with the district court's holding that Crowley's defamation and interference with a contract claims were not "based upon" such activity. The district court founded its holding on Crowley's assertion that those claims were based on Panicaro defaming him to "seven private parties," which it determined created a "genuine dispute of fact" as to whether Panicaro satisfied his burden. The court, however, is not to rely on arguments of counsel, but rather the "pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id.* at 757, 219 P.3d at 1284. Here, the admissible documents in the record were inadequate to establish genuine disputed issues. Panicaro carried the burden of establishing Crowley's claims were based on protected conduct. Panicaro met his burden for the defamation and interference with a contract claims, which were based on Panicaro's alleged statements, but not the breach of contract claim, as this claim alleged failure to perform pursuant to a work agreement, which does not constitute an anti-SLAPP "communication" at all. *See* NRS 41.637 (1997).

Because the district court resolved the first special motion to dismiss on Panicaro's first burden, it did not reach Crowley's second. Our de novo review of the record indicates Crowley failed to meet his burden under the second step of NRS 41.660. Crowley's first amended complaint does not establish a genuine issue of material fact regarding the defamation and interference with a contract claims because it utterly lacks specificity. Crowley failed to point to any defamatory statements or even to whom they were directed. Crowley also does not identify which contracts Panicaro interfered with and how, nor does he identify how Panicaro breached his own contract with Crowley.[4]

Nonetheless, the fact that Crowley's complaint was deficient does not wholly defeat his burden—he could have provided and relied on affidavits or other evidentiary support for his claims to demonstrate that a genuine issue of material fact exists. *John*, 125 Nev. at 753, 219 P.3d at 1281. But Crowley's evidence did nothing to identify any defamatory statements by Panicaro, or that other clients fired Crowley because of Panicaro's tortious acts. Thus, Crowley failed to meet his burden to establish a genuine dispute of material fact for his interference of contract and defamation claims, based on his pleadings and additional evidence submitted to the court. *See id.* at 754, 219 P.3d at 1281 (2009) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)).

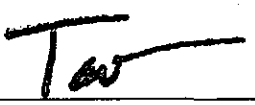
[4]The dissent, like the district court, errs by conflating the two-step burden-shifting analysis into one step, and furthermore relies on argument of counsel rather than admissible evidence.

Thus, those two claims should have been dismissed with prejudice, and only the breach of contract claim should proceed on remand.[5]

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Gibbons



_____, J.
Tao

SILVER, J., dissenting:

Having reviewed the parties' briefs and appendix, I would affirm the district court's order. Here, the district court properly found that Panicaro did not meet the requirements of NRS 41.660. At the time of the district court's ruling, the anti-SLAPP statute protected actions "brought against a person based upon a good faith communication in furtherance of the right to petition." NRS 41.660(1). A good faith communication is one that is "truthful or made without [the] knowledge of falsehood." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 761, 219 P.3d

---

[5]Because we reverse the order denying the first special motion to dismiss, the order denying reconsideration of that order and the order denying the second special motion to dismiss are also reversed as both subsequent orders are based on the same erroneous grounds.

1276, 1286. "[T]he moving party must first make a threshold showing that the lawsuit is based on good faith communication[s made] in furtherance of the right to petition the government." *Id.* at 754, 219 P.3d at 1282 (internal quotations omitted) (second alteration in original).

Here, I agree with the district court that although some statements Panicaro made were to the State Bar of Nevada and may have been protected communications made in furtherance of the right to petition the government, Panicaro also admitted in his motion to dismiss that he made various other statements to individuals—Crowley's clients. Had Panicaro only reported Crowley to the State Bar of Nevada and thereafter spoke with only the Bar's investigators, then perhaps a granting of Panicaro's motion to dismiss would have been proper. Instead, Panicaro, in his *own* motion to dismiss, readily admits to speaking with others, including directly to Crowley's clients, regarding Crowley's legal performance or lack thereof. This speech is not protected because it is not good faith communications made in furtherance of the right to petition the government. There is no evidence in the record to show that Panicaro's direct comments to Crowley's clients made *around the same time* Panicaro complained to the State Bar of Nevada were made in conjunction with the State Bar of Nevada's investigation of Crowley.

Thus, I do not believe that Panicaro may utilize a special motion to dismiss based on "anti-SLAPP" to eliminate what may be legitimate defamation or interference with contract claims. Accordingly, I agree with the district court's order and would affirm the denial of Panicaro's motion to dismiss and allow the case to proceed to a trial for a jury to determine the facts of what actually occurred in this extremely

contested case. The purpose of the statute is to deter frivolous lawsuits, not to prevent one party from presenting their case to a jury.

Silver, C. J.
Silver

cc: Hon. Janet J. Berry, District Judge
Kozak Lusiani Law
Martin G. Crowley
Washoe District Court Clerk