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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DUANE CHAPMAN et al.,

Plaintiffs and Respondents,

v.

BORIS KRUTONOG et al.,

Defendants and Appellants.

B214451

(Los Angeles County
Super. Ct. No. BC402849)

APPEAL from orders of the Superior Court of Los Angeles County, James C. Chalfant and Aurelio Munoz, Judges. Reversed and remanded.

King, Holmes, Paterno & Berliner, Howard E. King, and Stephen D. Rothschild for Defendants and Appellants.

Lavely & Singer, Martin D. Singer and Paul N. Sorrell for Plaintiffs and Respondents.

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The defendant appeals from an order granting a preliminary injunction restraining him from "proceeding with the prosecution of [an action for damages which he has filed] before the Supreme Court of the State of New York . . . ." The terms of this anti-suit injunction provide that it is to remain in effect until a related proceeding which is currently pending before the California Department of Industrial Relations, Division of Labor Standards Enforcement (the Labor Commissioner), has been resolved. We reverse the injunction because there are no "exceptional circumstances" justifying a restraint on the New York litigation. (*Advanced Bionics Corp. v. Medtronic, Inc*. (2002) 29 Cal.4th 697, 708 (*Advanced Bionics*).) We reverse the trial court's ensuing order denying defendant's anti slap motion because this order was based on the granting of the injunction. (See Code Civ. Proc., § 425.16.)

FACTS

The Parties to the Current Action for an Anti-Suit Injunction

Plaintiffs Duane "Dog" Chapman and Beth Chapman allege they are an "actor" and "actress" in a cable television show entitled *Dog, The Bounty Hunter* (the *Dog* show), and "artists" as defined in the California Talent Agencies Act or TAA. (See Lab. Code, § 1700 et seq.)[1] The Chapmans allege that Boris Krutonog,[2] the defendant, is their unlicensed "de facto" talent agent within the meaning of the TAA's statutory scheme. In a civil complaint According to a civil complaint for damages which he has filed in the Supreme Court of the State of New York against third-parties, i.e., not the Chapmans, Krutonog alleges he is a "well-known actor, screenwriter and television producer" who is under contract to act as a co-executive producer of the *Dog* show.

[1] All further section references are to the Labor Code.

[2] Our references to Krutonog include a business entity which he allegedly owns and operates, defendant Pivot Point Entertainment, LLC.

The Chapmans' Proceeding Before the Labor Commissioner

In May 2007, the Chapmans filed a "Petition for Determination of Controversy" with the Labor Commissioner. (*Chapman v. Krutonog* (Cal.Lab.Com., No. TAC 3351.) The Chapmans' petition to the Labor Commissioner, which is still pending, alleges they entered into a partly written and partly oral contract with Krutonog in June 2004 entitled a "Life Rights Agreement." The Chapmans' petition alleges this Life Rights Agreement provides that Krutonog would "procure employment" for the Chapmans "with respect to [their] professional endeavors as artists with the meaning of the [TAA]." The Chapmans' petition further alleges that Krutonog has, in accord with the terms of their Life Rights Agreement, performed "unlawful activities as an unlicensed talent agent [by] seeking to solicit and procure . . . employment" on behalf of the Chapmans, as "artists," in violation of the TAA.

The Chapmans' petition alleges that money paid, and to be paid, to Krutonog as a "producer fee" by the producers and distributors of the *Dog* show is "a ruse, designed to conceal [his] unlawful activities as [their] de facto talent agent[.]" According to the Chapmans, money paid to Krutonog as a "'producer fee' was directly out of the amount that [the Chapmans] . . . were to receive for their services [on the *Dog* show]."

The Chapmans' petition prays for a determination from the Labor Commissioner that their alleged June 2004 Life Rights Agreement with Krutonog is "null and void, in its entirety, *ab initio*," that the Chapmans have "no liability" to Krutonog under the contract, and that he has "no rights or privileges" under the contract. On a parallel, more specific and practical level, the Chapmans have prayed for an order from the Labor Commissioner determining that Krutonog's separate agreements with the producers and distributors of the *Dog* show "are void," and that the producers and distributors of the *Dog* show "shall not pay any further 'producer fees' or other compensation to [him on the *Dog* show], but shall pay any and all such compensation [directly to the Chapmans]."

The Labor Commissioner conducted hearings on the Chapmans' petition during October 2007, but did not issue a decision at that time. By November 2008, Krutonog had retained new counsel, and various discovery issues were in play. The record before

us on the current appeal suggests that the Labor Commissioner eventually scheduled the hearings on the Chapmans' petition to resume in January or February 2009, but does not shed any light on whether or not the Labor Commissioner has yet issued a decision on the petition.

Krutonog's Civil Action in New York

In May 2008, approximately six months after the Labor Commissioner had begun hearing the Chapmans' petition regarding Krutonog's status as a "de facto" talent agent, Krutonog filed a civil complaint for damages in the Supreme Court of the State of New York against the producers and distributors of the *Dog* show — Hybrid Films, Inc., D&D Television Productions, Inc., A&E Television Networks, and David Houts (collectively the Hybrid parties). Broadly summarized, Krutonog's complaint alleges that, beginning sometime around 1995, he entered into "the first of a series of contracts with 'Dog' Chapman [granting] Krutonog the exclusive right to produce a television program based on Chapman's life exploits." Krutonog's complaint alleges that the Hybrid parties could not have produced, nor distributed the *Dog* show without Krutonog's consent due to his "exclusive rights agreement with 'Dog' Chapman," and that, to obtain Krutonog's consent, they contractually promised to employ him as a "co-executive producer" of the *Dog* show, and to "compensate him accordingly." Krutonog alleges the Hybrid parties have breached their contracts with him by failing to pay him "in excess of $800,000" for shows which have already been produced, plus "potentially in excess of [$4.5 million] if the series continues for several additional seasons."

The complaint filed by Krutonog in his New York civil action does not name the Chapmans as party defendants.

The Chapmans' Current Action for an Anti-Suit Injunction

In December 2008, seven months after Krutonog filed his civil action for money damages in New York against the Hybrid parties, the Chapmans filed the current action for injunctive relief giving rise to the appeal before us today. The foundational factual allegations in the Chapmans' current complaint mirror the allegations in their pending "Petition to Determine Controversy" filed with the Labor Commissioner. In other words,

the Chapmans allege they entered into a contract with Krutonog in June 2004, that the contract was written in part and oral in part, and entitled as a Life Rights Agreement, and that, under the terms of the contract, Krutonog agreed to procure employment for the Chapmans as artists with the meaning of the TAA. The complaint further alleges that Krutonog has, in accord with the parties' Life Rights Agreement, performed unlawful activities as an unlicensed talent agent by seeking to solicit and procure employment for the Chapmans, as artists, in violation of the TAA.

The Chapmans' complaint further alleges that, unless Krutonog is enjoined from prosecuting his New York lawsuit prior to a determination of the Chapmans' proceeding before the Labor Commissioner, the Chapmans will be irreparably harmed in that they will be deprived of their right to have the Commissioner determine the validity of their June 2004 Life Rights Agreement. The fundamental thrust of the Chapmans' complaint is that a court in New York may find that Krutonog is owed money by the Hybrid parties, "notwithstanding [his] unlawful activities as an unlicensed talent agent" in violation of the TAA. Implicitly, the Chapmans do not want the New York court to order the Hybrid parties to pay any money to Krutonog under their contracts, because, in the Chapmans's view, any such money paid would constitute "talent agent fees" unlawfully earned by Krutonog, or, in other words, talent agent fees which the Chapmans should not be liable to pay to Krutonog.

The Chapmans' current action for injunctive relief does not name the Hybrid parties as defendants.

The Chapmans' Motion for a Preliminary Injunction in the Current Case

On the same day they filed their complaint seeking a judgment for a permanent anti-suit injunction enjoining Krutonog from litigating his New York action for damages, the Chapmans filed a motion for a preliminary injunction. The motion argued that an immediate anti-suit injunction was needed because the Labor Commissioner's exclusive original jurisdiction to decide the validity of the 2004 Life Rights Agreement between the Chapmans and Krutonog, vis-à-vis the TAA, would be "usurped" by any proceedings in Krutonog's New York lawsuit. The Chapmans further argued that an anti-suit injunction

was proper because Krutonog's New York lawsuit was "forum shopping" to evade a potentially adverse decision by the Labor Commissioner.

Krutonog filed opposition to the motion for a preliminary anti-suit injunction, arguing that the Chapmans had submitted no evidence showing that the New York Supreme Court had purported to exercise jurisdiction over any matters at issue in the Labor Commissioner proceeding under the TAA. Krutonog further argued that "it is not even clear that the same matters are at issue in both cases" because the "New York case is between Krutonog and . . . Hybrid Films, Inc., D&D Television Productions, Inc., and A&E Television Networks (collectively the 'Hybrid Parties'). [Whereas the] Labor Commission proceedings are between Krutonog and [the Chapmans. The Chapmans] are not parties to the New York case, and the Hybrid Parties are not parties to the Labor Commission proceedings."

Krutonog further argued that, related or not, the issues in the Labor Commissioner proceeding and those before the New York Supreme Court would not implicate any claim preclusion issues because the Chapmans were not parties in the New York case, and the Hybrid Parties were not involved in the Labor Commissioner proceeding, and because the Labor Commissioner had no jurisdiction over the Hybrid Parties.

Krutonog denied that he filed his New York case in bad faith, noting that his contracts with the Hybrid Parties contained a mandatory New York venue and choice of law clause. Krutonog also advised the trial court that the Hybrid Parties had already asked the New York Supreme Court to stay the New York case pending the outcome of the proceedings before the Labor Commissioner, and that the motion for a stay was then pending before the New York Supreme Court. In short, Krutonog maintained that the very relief which plaintiffs were seeking by suing for an anti-suit injunction was already being contemplated in the New York court.

The trial court issued an order granting the Chapmans' motion for a preliminary anti-suit injunction for the following stated reasons:

> "The [Labor] Commissioner has original jurisdiction over disputes arising under the TAA, including the matters alleged in the [Chapmans']

pending petition. On or about May 19, 2008, after [the Chapmans] instituted the proceedings with the [Labor] Commissioner, [Krutonog] filed the New York action seeking to enforce and obtain a judgment for fees allegedly owed to [him] pursuant to . . . agreements with the producers [of the *Dog* show]. These agreements are the very subject of [the Chapmans'] claims before the Commissioner, and [they] contend that they are void and unenforceable under the TAA. [The Chapmans] argue that [Krutonog is] not entitled to recover any monies from the producers as a result.

"[The Chapmans] further contend that [Krutonog] filed the New York action to forum-shop and evade the [Labor] Commissioner's jurisdiction . . . [and that, if Krutonog is] permitted to proceed with the New York action, the Commissioner's original jurisdiction to determine the issues raised by the petition (including the validity and unenforceability of [Krutonog's] agreements with the producers [of the *Dog* show]) will be defeated. The Commissioner has already determined that he has jurisdiction over the dispute between [the Chapmans] and [Krutonog] over whether the latter can enforce [his] agreements with the producers. . . .

"[Krutonog does] not dispute that the validity and enforceability of the agreements [he is] seeking to enforce in New York involves a dispute arising under the TAA, and is therefore within the exclusive original jurisdiction of the Commissioner.

"[Krutonog] contend[s] that [the Chapmans] are not entitled to injunctive relief because they are not parties to the New York action. This argument misses the point. The New York action involves a dispute over whether [Krutonog is] owed money pursuant to a Producers' agreement. [The Chapmans] contend that the money at issue in the New York action is owed to them, to the extent it is owed to anyone. [Their] theory is that the Producers' agreement is void and unenforceable because it arises from [Krutonog's] conduct in violation of the TAA. That issue is pending before

the Commissioner. Allowing [Krutonog] to pursue the New York action would usurp the Commissioner's exclusive jurisdiction over the issue.

"[Krutonog] also refer[s] to the statute of limitations and discovery being pursued in New York for the Labor Commissioner proceeding. The New York action has nothing to do with discovery for the TAA dispute. There are other procedures [Krutonog] would have utilized if [he was] simply doing discovery. As for the statute of limitations, [Krutonog] makes no showing that an injunction from proceeding with the already filed New York action will result in its dismissal, passage of the statute of limitations is imminent, or that such passage would not be tolled by the preliminary injuction."

DISCUSSION

I. The Trial Court Abused its Discretion By Enjoining the New York Action

In a series of arguments, Krutonog contends the trial court abused its discretion in granting the Chapmans' motion for a preliminary injunction because the Chapmans "are not entitled to an anti-suit injunction." Although we believe Krutonog's reference to the concept of an "entitled" right to be misplaced, we agree with the basic thrust of his argument on appeal, i.e., that the trial court abused its discretion by enjoining him from litigating his action in the New York trial court. The pending Labor Commissioner's proceeding, which will determine the validity of the 2004 Life Rights Agreement *between Krutonog and the Chapmans*, is not an "exceptional circumstance" justifying an anti-suit injunction restraining Krutonog from litigating his parallel action in New York, which will decide whether he is entitled to damages under contracts *between Krutonog and the producers and distributors* of the *Dog* show. (*Advanced Bionics, supra,* 29 Cal.4th 697.)

An "anti-suit" injunction restrains a party from pursuing an action in a court of a foreign jurisdiction. (*TSMC North America v. Semiconductor Manufacturing Internat. Corp.* (2008) 161 Cal.App.4th 581, 589-591 (*TSMC*).) Although California courts have a recognized power to issue an anti-suit injunction to restrain a party from litigating an

action in another state's courts, this power must be exercised "'sparingly.'" (*Id*. at p. 589, quoting *Advanced Bionics, supra,* 29 Cal.4th at p. 705.) The leading case is *Advanced Bionics, supra,* 29 Cal.4th 697.

In *Advanced Bionics*, an employee for a Minnesota-based company signed, as a condition of employment, an agreement that contained a covenant not to compete and required that all claims regarding the agreement be decided under Minnesota law. Later, the employee left his employer and accepted employment with a California company. The new California employer immediately filed a complaint for declaratory relief in a California trial court, alleging the Minnesota contract's noncompetition clause violated California law and public policy and was therefore void. Two days later, the Minnesota company responded with a breach of contract and tortious interference suit in Minnesota state court against the former employee and his new California employer. A California trial court issued a temporary restraining order (TRO) in the California lawsuit, compelling the Minnesota company not to undertake any litigation whatsoever, other than in the California action, to enforce its covenant not to compete. The Supreme Court ruled that the trial court had improperly issued the TRO.

The Supreme Court explained that an anti-suit injunction may be issued to prevent conflicts between different California courts in multiple cases, but the situation becomes more difficult, and requires additional "judicial restraint," when a second case is filed in another state's courts, and each state's "sovereignty concerns" are implicated. (*Advanced Bionics*, *supra*, at pp. 705-707.) The court cited with approval cases from other states holding that a difference in substantive law does not justify an injunction compelling a party not to litigate a proceeding in another state, nor does the potential that inconsistent judgments may be rendered, nor that a judgment in one action may have a preclusive effect on the other action. (*Ibid*.)

In addition to highlighting the importance of judicial restraint in the context of a motion for anti-suit injunction, the court also noted that the principle of comity must be considered when determining whether such an injunction should be issued. (*Advanced Bionics*, *supra*, at p. 707.) As the court explained, California courts should not, as a

matter of courtesy or comity, and as a matter of mutual utility and advantage, interfere with a court action in another state where neither the state nor its citizens will suffer any inconvenience from the operation of the foreign law.

The Supreme Court ruled that enjoining a proceeding in another state "requires *an exceptional circumstance that outweighs the threat to judicial restraint and comity principles*." (*Advanced Bionics, supra,* at p. 708, italics added.) In the employment context presented in *Advanced Bionics*, the court found no such "exceptional circumstance" to justify the anti-suit injunction because, in short, California's "strong interest" in protecting state-based employees from noncompetition agreements did not overcome the principles of judicial restraint and comity governing anti-suit injunctions. (*Id*. at pp. 706-708.)

In *TSMC, supra*, 161 Cal.App.4th 581, the Court of Appeal affirmed a denial of a motion for an anti-suit injunction, finding no exceptional circumstances in the context of a trade secrets lawsuit. (*Id*. at pp. 591-602.) In *TSMC*, the trial court declined to issue an injunction enjoining a party from litigating a parallel proceeding in the Peoples Republic of China. In affirming, the court rejected arguments that an anti-suit injunction was needed to (1) preserve a California company's constitutional rights of free speech and petition; (2) protect the California court's power and rulings; (3) protect California public policies; and (4) enforce contractual choice of law provisions. (*Ibid*.) As the Court of Appeal explained, if the Beijing court ultimately failed to provide the California company with due process, then that issue could be raised in arguing any judgment from the Beijing-issued judgment was not binding in California. (*Id*. at p. 602.)

In *Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827 (*Biosense*), the Court of Appeal granted a petition for writ of mandate challenging an anti-suit TRO, finding no exceptional circumstances in the context of an employment action involving, as in *Advanced Bionics*, a noncompetition agreement. In *Biosense*, a parallel proceeding had not yet been filed, and the injunction would have affected a possible action in the federal court. The court found the former element did not weigh in favor of the TRO because precluding the *filing* of an action implicated the principles of

judicial restraint and comity as much as stopping further litigation. It found the latter element weighed against an injunction as well because a state court is without power to enjoin the filing of a federal lawsuit. (*Id*. at pp. 837-839.)

We agree with Krutonog that no "exceptional circumstances" exist which would justify enjoining him from litigating his New York action. First, neither the same parties nor the same contracts are involved in the Chapmans' Labor Commissioner proceeding and in Krutonog's New York civil case. Everyone involved in the current case agrees that Labor Commissioner is vested with exclusive original jurisdiction to determine the validity of the 2004 Life Rights Agreement between the Chapmans and Krutonog, and/or to determine whether Krutonog has acted as the Chapmans' de facto, unlawfully unlicensed, talent agent in violation of the TAA. Assuming that the Labor Commissioner makes such a determination, the Chapmans may be freed of any obligation to pay any further "talent agent" compensation to Krutonog, and Krutonog may be ordered to compensate the Chapmans for any ill-gotten "talent agent" fees already received, and/or to turn over any future "talent agent" fees received.

The contract claims alleged by Krutonog in his New York action, however, involve a different contract or contracts, and none of the authorities cited to us by the Chapmans persuades us that the Labor Commissioner has any jurisdiction to make any ruling regarding the validity of Krutonog's contract or contracts with the producers and the distributors of the *Dog* show.

In addition to the distinction between claims involved in the Labor Commissioner proceeding, and the New York civil action, all of the published cases addressing anti-suit injunctions arise in the context of competing lawsuits in a California *court* and a *court* of a different state or nation, and all of the cases speak in terms of comity between co-equal, sovereign courts. We see little in the Chapmans' arguments, below or on appeal, which supports the proposition that a proceeding before a California administrative body may trump a judicial action filed in another state's courts. This concern is particularly applicable where, as under the TAA, any determination by the Labor Commissioner will be subject to judicial review in a California trial court. (§ 1700.44, subd. (a).)

Although we see the potential for efficiency in allowing the Labor Commissioner proceeding to be concluded first, we see no "exceptional circumstance" justifying the anti-suit injunction issued in this case. The Labor Commissioner retains jurisdiction over the 2004 Life Rights Agreement between the Chapmans and Krutonog. The record does not show that stopping Krutonog from prosecuting his New York action will in any way interfere with the ability of the Labor Commissioner to issue a decision declaring the 2004 Life Rights Agreement either valid or void. The Chapmans will have their say in the Labor Commissioner's forum, whether or not Krutonog's New York action moves forward or not, and regardless of the outcome of the New York case.

II. The Anti-SLAPP Motion Must be Reversed

Just prior to the court hearing on the Chapmans' motion for a preliminary injunction to enjoin Krutonog's prosecution of his New York action, Krutonog filed a motion to dismiss the Chapmans' complaint under the anti-SLAPP statute. (See Code Civ. Proc., § 425.16.) After the trial court granted the Chapmans' motion for a preliminary injunction, it then denied Krutonog's motion to dismiss the Chapmans' complaint under the anti-SLAPP statute, finding that the earlier ruling on the injunction issues meant that the Chapmans were likely to prevail.

On appeal, Krutonog argues that, in the event the injunction is reversed, so should the order denying his motion to dismiss. Because we have determined that a preliminary anti-suit injunction should not have been issued, we agree with Krutonog that the Chapman's complaint for injunctive relief should have been dismissed as a SLAPP action.

A defendant's motion to dismiss under the anti-SLAPP statute posits two inquiries for judicial consideration. The first inquiry is whether the defendant made a threshold prima facie showing that his or her conduct — i.e., the conduct upon which plaintiff's complaint is based — was in furtherance of his or her rights of free speech or petition. If the answer to his initial inquiry is yes, a second question must be addressed, namely, has plaintiff demonstrated a probability that he or she will prevail on the merits of his or

her claim. (See generally, *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)

In the Chapmans' current case there is no dispute that their claims are based on Krutonog's right of petition. Indeed, the express purpose of the Chapmans' case is to stop Krutonog from petitioning the Supreme Court of New York for a judgment. The only question, therefore, is whether the Chapmans showed a probability that they will prevail on the merits of their current case. For the reasons explained above, the answer is no. An anti-suit injunction may only issue in "exceptional circumstances," and no such circumstances are presented by the Chapmans' case. The potentiality that the Chapmans, having prevailed in their Labor Commissioner proceeding, may need to pursue to further actions to recoup money from Krutonog is not an "exceptional" problem justifying an order interfering with a judicial action in another state.

DISPOSITION

The trial court's order dated January 23, 2009, granting a preliminary injunction, is reversed. On remand, the trial court shall enter a new and different order denying the preliminary injunction. The trial court's order denying Krutonog's motion to dismiss the Chapmans pursuant to Code of Civil Procedure section 425.16 is reversed, and the cause is remanded to the trial court with directions to enter a new and different order granting Krutonog's motion to dismiss. Appellants are awarded costs on appeal.

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BIGELOW, J.*

We concur:

GILBERT, P. J.   YEGAN, J.

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* Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.