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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LOREN DUNSWORTH, Plaintiff and Respondent. v. DAVID BEN SHOHAM et al., Defendants and Appellants,	B281356 (Los Angeles County Super. Ct. No. BC639082)

APPEAL from order of the Superior Court of Los Angeles County, Dalila Corral Lyons, Judge. Affirmed.

Nemeck & Cole, Jonathan B. Cole, Mark Schaeffer, for Defendants and Appellants Rodney Mesriani and Tracy Neal-Lopez.

Garrell Law, Peter E. Garrell, John M. Kennedy, for Defendants and Appellants David Ben Shoham, Lance Leedy, Ryan Anglin, and Zara Medina.

Silicon Beach Legal, Ashley Bennett Boardman, for Plaintiff and Respondent.

In prior litigation, several restaurant employees brought employment claims against the restaurant. The court granted the restaurant's motion to compel arbitration and referred the matter to binding arbitration pursuant to the employment contract. In the arbitration, the employees added the restaurant owner as a respondent even though she was not a party to the contract. The arbitrator found against the employees and in favor of the restaurant and the owner. The owner subsequently filed this separate lawsuit, asserting claims of malicious prosecution and intentional and negligent infliction of emotional distress against the employees and their attorneys, based on being named as a respondent in the arbitration. The attorneys and employees moved to strike the owner's complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1]

We affirm the trial court's order denying the anti-SLAPP motion because the owner's claims arose from the employees and their attorneys adding her to the private

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[1] "SLAPP" is an acronym for "'strategic lawsuit against public participation.' [Citation.]" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 413, fn. 2.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

contractual arbitration, which is not protected activity under the anti-SLAPP statute.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying employment action

In 2012, defendants and appellants David Ben Shoham, Lance Leedy, Ryan Anglin, and Zara Medina (employees) filed suit in the Los Angeles Superior Court naming Dunsworth, Inc. dba Lola's Restaurant (Lola's Restaurant) and Keith Lubow as defendants,[2] alleging various claims such as failure to pay wages, harassment, and wrongful termination.[3] The employees were represented by defendants and appellants Rodney Mesriani and Tracy Neal-Lopez (attorneys). Based on an arbitration clause in the employment contract, the court granted a motion to compel arbitration filed by Lola's Restaurant. The parties

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[2] Neither Lola's Restaurant nor Lubow are parties in the current case.

[3] The attorneys in fact filed two separate lawsuits, one on behalf of Leedy and Shoham and the other on behalf of Anglin and David Vancil. Medina was added as a claimant in the arbitration. Vancil was named as a defendant in Dunsworth's malicious prosecution complaint, but he is not an appellant. For appeal, the details of how the claims originated is less important than the fact that they were resolved in the context of binding arbitration.

selected an arbitrator and opened an arbitration case with JAMS. Several months later, the employees amended their statement of claims to add Loren Dunsworth, an individual, to the arbitration proceeding. The amended statement of claims alleged that Dunsworth was the president, owner, and managing agent of Lola's Restaurant and alleged a theory of alter ego liability.[4]

The arbitration hearing took place over seven days, and the arbitrator issued an interim award finding in favor of Dunsworth and Lola's Restaurant on all of the employees' claims. Dunsworth and Lola's Restaurant were represented by the same attorney at the arbitration hearing. The arbitration award noted that on the last day of the arbitration hearing, Dunsworth brought a motion for non-suit to have all claims against her as an individual adjudicated in her favor, and the motion was granted as to all causes of action.

The arbitrator's final award declined to award any costs to Dunsworth or Lola's Restaurant, noting that "although certain causes of action were without merit, looking at the litigation as a whole, I do not find that the lawsuit was 'unreasonable, frivolous, meritless or

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[4] The procedural history section of the arbitrator's award notes that the arbitrator overruled a demurrer to the amended statement of claims on October 2013, but the record on appeal does not contain the demurrer or the decision overruling the demurrer.

vexatious.'"[5] In May 2016, based upon a petition filed by Dunsworth and Lola's Restaurant seeking to confirm the arbitrator's decision and to enter judgment, the court confirmed the final arbitration award and ordered judgment to be entered as requested.

The current malicious prosecution action and anti-SLAPP motion

In November 2016, Dunsworth filed the current case naming the employees and the attorneys as defendants and alleging claims for malicious prosecution and intentional and negligent infliction of emotional distress. The complaint alleged the employees and their attorneys improperly named Dunsworth to the employment arbitration in an attempt to pierce the corporate veil because Lola's Restaurant had gone out of business. The attorneys responded with a motion to strike Dunsworth's complaint under the anti-SLAPP statute. The employees joined in the attorneys' anti-SLAPP motion. Dunsworth filed an opposition and supporting documents.

After a hearing, the court denied the anti-SLAPP motion filed by the attorneys and joined by the employees

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[5] The parties submitted separate letter briefs on the question of costs and attorney fees. Dunsworth and Lola's Restaurant argued that they were entitled to costs, including over $50,000 in arbitration fees, and attorney fees of close to $200,000. The employees argued that no costs should be awarded because the claims they asserted were not frivolous, unreasonable, or groundless.

(collectively, appellants), reasoning that because Dunsworth's claims arose from initiating private arbitration, appellants did not meet their burden of showing that the alleged conduct was protected under the anti-SLAPP statute. The court summarized the parties' positions and its reasoning: "[Dunsworth] argues California law is clear the anti-SLAPP statute does not apply to the act of initiating private contractual arbitration. [Dunsworth] argues she does not assert [appellants] engaged in wrongful actions in the context of a judicial proceeding or quasi-judicial proceeding and the claims are solely limited to the conduct of the Arbitration. [¶] Here [appellants] fail[] to meet [their] burden that the conduct alleged qualifies as constitutionally protected activity under the anti-SLAPP statute. [Fn. omitted.] During oral argument, both parties represented to the court that they were unable to locate any case in which an anti-SLAPP motion was brought to challenge a malicious prosecution action filed following contractual arbitration. While [appellants] cite ample authority that malicious prosecution is subject to the anti-SLAPP statue [*sic*], none of such cases involve malicious prosecution asserted following contractual arbitration." The attorneys and employees timely filed separate notices of appeal.

DISCUSSION

Appellants contend the trial court erroneously denied their anti-SLAPP motion. They argue that malicious

prosecution claims always fall within the scope of anti-SLAPP protections and that Dunsworth did not demonstrate her claims had minimal merit. Dunsworth contends the court correctly concluded her claims did not arise from protected activity, and that even if anti-SLAPP protections applied, she demonstrated a probability of prevailing on her claims.

The trial court correctly denied appellants' anti-SLAPP motion based on appellants' failure to show that Dunsworth's claims arose from activity protected under the anti-SLAPP statute. Because anti-SLAPP protections do not apply to malicious prosecution claims arising from initiating and pursuing contractual arbitration, we need not examine whether Dunsworth's claims have minimal merit.

Anti-SLAPP analysis and standard of review

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review

of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. (§ 425.16, subd. (b)(2); *Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89 [(*Navellier*)].) We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law. [Citation.]" (*Park*, *supra*, 2 Cal.5th at p. 1067.)

1. Arising from protected activity

Appellants contend that all claims for malicious prosecution arise from activity protected by the anti-SLAPP statute, arguing it is not necessary to distinguish whether such claims arise from litigation, statutory arbitration, or contractual arbitration. Dunsworth contends that because contractual arbitration is not a protected activity under the anti-SLAPP statute, malicious prosecution claims arising from contractual arbitration do not fall within the scope of anti-SLAPP protections. We conclude that claims arising from contractual arbitration, including malicious prosecution claims, do not fall within the ambit of the anti-SLAPP statute's protections.

A defendant meets its threshold burden of demonstrating that a cause of action arises from protected activity by showing that the act or acts underlying the claim fit into one or more of the four categories described in section

426.16, subdivision (e). (*Navellier*, *supra*, 29 Cal.4th at p. 88.) The two categories relevant to this case are subdivisions (e)(1): "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and (e)(2): "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." (§ 425.16, subds. (e)(1) & (e)(2).) Dunsworth's claims arise entirely from appellants naming her in the contractual arbitration, and so the proper focus is whether the arbitration is a "judicial proceeding" or "any other official proceeding authorized by law." (§ 425.16, subds. (e)(1) & (e)(2).)

Century 21 Chamberlain & Associates v. Haberman (2009) 173 Cal.App.4th 1 (*Century 21*), holds that claims arising from a demand commencing private contractual arbitration do not fall within the anti-SLAPP statute's protections. In *Century 21*, after a defendant homeowner (Haberman) accused plaintiffs of negligently marketing her home and demanded arbitration, plaintiffs sought declaratory relief that Haberman's demands were not subject to arbitration. Haberman filed an anti-SLAPP motion, which the court denied. (*Id.* at p. 6.) The appellate court affirmed, reasoning that Haberman's conduct leading to the plaintiffs' complaint—seeking to initiate arbitration—was not protected activity under subdivisions (e)(1) or (e)(2) of section 425.16 because private contractual arbitration is

neither a judicial proceeding nor an official proceeding within the meaning of section 425.16. (*Id.* at pp. 8–9.) "Arbitration is not a judicial proceeding—it is an alternative thereto." (*Id.* at p. 8.) The difference between contractual arbitration and a judicial proceeding is analogous to the difference between nonjudicial and judicial foreclosure; and just as nonjudicial foreclosure is not protected under the anti-SLAPP statute, neither is contractual arbitration. (*Ibid.*) Contractual arbitration is also not an "official proceeding authorized by law," because prior caselaw has limited the scope of that term in the anti-SLAPP context to particular comprehensive and mandatory statutory schemes not applicable here. (*Id.* at p. 9.) Our colleagues in Division Two recently quoted from *Century 21* with approval and gave a succinct summary: "As a general rule, 'private contractual arbitration' is 'not . . . an "official proceeding authorized by law"' under Code of Civil Procedure section 425.16, subdivision (e)(1) and (2), even though arbitration awards are subject to judicial confirmation or vacation. (*Century 21*[, *supra*,] 173 Cal.App.4th [at pp.] 7–9.) That is because '[a]rbitration is not a judicial proceeding,' but rather 'an alternative thereto.' (*Id.* at p. 8.)" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 703 (*Mission Beverage*).)[6]

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[6] Division Two acknowledged that statutorily mandated arbitration, such as mandatory attorney fee arbitration under Business and Professions Code section 6200 et seq., would be treated differently than a contractual

Appellants launch a multi-pronged attack against the trial court's reliance on *Century 21* to deny their motion, but none of their arguments are persuasive. Appellants first argue that all malicious prosecution cases are protected under the anti-SLAPP statute, regardless of whether the basis for the claim rests on litigation, statutory arbitration, or contractual arbitration. They point to California Supreme Court and Court of Appeal opinions finding anti-SLAPP protections applicable to malicious prosecution claims. (E.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 (*Jarrow*); *Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1355; *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 548.) Appellants' argument ignores the focus of the anti-SLAPP statute's protections on the activity upon which a plaintiff's claim is based, not the form the claim takes. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier*, *supra*, 29 Cal.4th at p. 92.) "Nothing in the statute itself categorically excludes any particular type of

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arbitration. The court concluded that a statutory arbitration would qualify as an "official proceeding" such that a party's acts in the context of a statutory arbitration may constitute protected activity. (*Mission Beverage, supra,* 15 Cal.App.5th at p. 703)

action from its operation . . . ." (*Ibid.*) In other words, the mere fact that Dunsworth brought a malicious prosecution claim against appellants—as opposed to a defamation claim or some other claim—does not automatically mean that her claim is subject to anti-SLAPP protections.

Next, appellants argue *Century 21* is not controlling because it contradicts California Supreme Court precedent that (according to appellants) sets forth a rule that all malicious prosecution claims are—without exception—subject to the anti-SLAPP statute. This argument fails because neither of the cases appellants rely upon, *Jarrow*, *supra*, 31 Cal.4th 728, nor *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 (*City of Montebello*), supports their assertion. The court in *Jarrow* rejected an argument that malicious prosecution claims are categorically exempt from application of the anti-SLAPP statute. (*Jarrow*, *supra*, at p. 736; *City of Montebello*, *supra*, at p. 418, fn. 7 ["[I]n *Jarrow* . . . we declined to infer an exemption from section 425.16 for malicious prosecution actions"].) In rejecting a categorical exemption, the *Jarrow* court did not hold that all malicious prosecution actions without exception are subject to anti-SLAPP protections; rather, the Court explained that, "section 425.16 *potentially may apply* to every malicious prosecution action, because . . . [b]y definition, a malicious prosecution suit alleges that the defendant committed a tort *by filing a lawsuit*. [Citation.]" (*Jarrow*, *supra*, at pp. 734–735, italics added, fns. omitted.) Later, in a 2006 opinion, the California Supreme Court emphasized that even for

malicious prosecution claims, in order to defeat an anti-SLAPP motion, defendants must first make a threshold showing that the plaintiff's malicious prosecution claim arises from protected activity. (*Soukup, supra,* 39 Cal.4th at p. 291.) Dunsworth's claims are based on appellants' actions adding her as a respondent to claims in a contractual arbitration, not by filing a lawsuit or petition with a court. As the *Century 21* court correctly explained, a contractual arbitration is sufficiently different from a lawsuit so as to place it outside the protections of the anti-SLAPP statute. (*Century 21, supra,* 173 Cal.App.4th at pp. 7–10.)

Third, appellants argue that the trial court's reliance on *Century 21* ignores California Supreme Court precedent that contractual arbitration qualifies as a judicial or quasi-judicial proceeding. They rely upon *Moore v. Conliffe* (1994) 7 Cal.4th 634, at page 645, and *Ribas v. Clark* (1985) 38 Cal.3d 355, at page 364, both cases concerning the litigation privilege under Civil Code section 47. This argument fails because it also ignores later Supreme Court decisions, discussed in *Century 21*, recognizing that "statements protected by the litigation privilege are not necessarily protected by the anti-SLAPP statute." (*Century 21*, *supra*, 173 Cal.App.4th at p. 10, discussing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322 ["the litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes"], and *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 202 [the litigation privilege "is a substantive rule of law, whereas the

anti-SLAPP statute is a procedural device to screen out meritless claims"].) Nothing in appellants' argument persuades us to depart from the conclusion in *Century 21* that a contractual arbitration is sufficiently different from litigation or statutory arbitration to place the activity at issue here—naming and pursuing Dunsworth as a respondent in a private contractual arbitration—outside the protections of the anti-SLAPP statute.

Appellants' various arguments that their activity is protected under section 425.16 also erroneously presume that we should analyze a malicious prosecution claim arising from conduct in a private contractual arbitration no differently than a malicious prosecution claim arising from the act of filing a lawsuit in court. There is a sharp distinction between these two contexts, however, as the California Supreme Court recognized in *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310 (*Brennan*). In *Brennan*, after an employer's claims against an employee were resolved in binding contractual arbitration, the employee sued the employer for malicious prosecution. (*Id.* at pp. 312–313.) The court held that the employee could not state a cause of action for malicious prosecution because "a contractual arbitration proceeding does not result in a favorable termination of a prior action." (*Id.* at pp. 312, 314.)[7] The

[7] In order to prevail on a cause of action for malicious prosecution, a plaintiff must plead and prove "that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable

court explained that, regardless of whether the prior action "started in court or in arbitration, if it ends in contractual arbitration, that termination [of the prior action] will not support a malicious prosecution action." (*Id.* at p. 314.) The Court reasoned that "to permit an action for malicious prosecution to follow contractual arbitration would defeat the purpose of that arbitration . . . . [C]ontractual arbitration is relatively quick and inexpensive, but necessarily a somewhat 'roughshod,' procedure that the parties may voluntarily choose to resolve their dispute and avoid further recourse to the courts. [Citation.]" (*Id.* at p. 316.) "[P]arties who voluntarily choose arbitration generally expect and desire that the arbitration will end their dispute . . . ." (*Id.* at p. 315.) As a result, "contractual arbitration should not lead to additional litigation in the courts." (*Id.* at p. 317.)[8]

While *Brennan* examined a plaintiff's malicious prosecution claim in the context of a demurrer, the question

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to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup, supra,* 39 Cal.4th at p. 292.)

[8] Appellants make this point in their own brief: "[D]ecisional law has established that the initiation and pursuit of private or contractual arbitration cannot be the basis of a malicious prosecution cause of action, as well as Dunsworth's two related IIED claims, which simply seek emotional distress damages for the same conduct - the pursuit of arbitration against her."

of whether Dunsworth's malicious prosecution claim would survive demurrer is not before us. As we have already explained, we reject appellants' argument that all malicious prosecution claims should be treated as subject to anti-SLAPP protections. Rather, *Brennan* supports the conclusion that the context from which a malicious prosecution claim arises—litigation or private arbitration—can be dispositive. (*Brennan, supra*, 25 Cal.4th at pp. 314–317.) Accordingly, appellants have failed to show that Dunsworth's claims are based on conduct protected under section 425.16.[9]

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[9] Dunsworth argues *Brennan* should not apply to her malicious prosecution claim because she did not voluntarily choose arbitration, but was coerced into participating when appellants amended their claim to add her as a defendant in their ongoing arbitration proceeding against Lola's Restaurant. We note that while Dunsworth argued *to the arbitrator* that she was a nonsignatory to the arbitration agreement and not properly brought into arbitration, Dunsworth did not seek a ruling *from the court* that, as a nonsignatory, she could not be compelled to arbitrate. (See *Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 469 [the question whether a nonsignatory is a party to an arbitration agreement is for the trial court in the first instance, and an arbitrator has no right to determine rights of one who is not a party to the agreement].) Indeed, after prevailing in the arbitration, Dunsworth sought to take full advantage of the arbitration ruling, petitioning the court to confirm the award and enter judgment in her favor.

Appellants also argue that Dunsworth's claims for intentional and negligent infliction of emotional distress are subject to the anti-SLAPP statute "because they arise from the same conduct as her malicious prosecution claim, i.e, [the attorneys'] initiation and pursuit of arbitration against her." We agree that all of Dunsworth's claims arise from the same activity, but as discussed above, that conduct does not fall within the purview of the anti-SLAPP statute.

2. Minimal merit

Because appellants have failed to make the threshold showing that Dunsworth's lawsuit arose from protected activities under section 425.16, it is unnecessary to examine whether Dunsworth has established that her claims against appellants have minimal merit. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80–81.)

DISPOSITION

The order denying the motion to strike filed by defendants and appellants Rodney Mesriani, Tracy Neal-Lopez, David Ben Shoham, Lance Leedy, Ryan Anglin, and Zara Medina under Code of Civil Procedure section 425.16 is affirmed. Each party shall bear their own costs on appeal.

MOOR, J.,

I concur:

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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BAKER, Acting P. J., Concurring

The majority's resolution of this case correctly applies existing law, and I concur in the result. I write separately only to briefly highlight the features of this case that support consideration of a change in existing law, which can come only from the Legislature.

Loren Dunsworth's malicious prosecution action is, by all appearances, a minimal-merit-lacking lawsuit that seeks retribution against employees for advancing legal claims against her. But for the forum in which the employees pursued those claims—a private arbitration rather than a court proceeding—the Dunsworth suit would be the sort of action that is within the anti-SLAPP statute's wheelhouse.

Critically, the forum for the employees' claims against Dunsworth was not of their own choosing; they wanted to prosecute their claims in court, but they were compelled to proceed in arbitration. Because they were so compelled, the anti-SLAPP remedy they otherwise would have had is not available to them.

With more and more employment disputes (and disputes generally) being resolved via arbitration, oftentimes by virtue of agreements that bear some indicia of procedural

unconscionability, there is good reason to consider whether the categories of activity protected by the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (e)) should be expanded to include written or oral statements made in a contractual arbitral proceeding, at least when such a proceeding results from a motion to compel arbitration of a dispute initially filed in court. Such an expansion of the anti-SLAPP statute would bring its scope in line with the reach of the litigation privilege (Civ. Code, § 47, subd. (b))—which *does* apply to statements in contractual arbitral proceedings (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 637-638) and, though not coextensive in every respect, is often looked to "as an aid in construing the scope of [the anti-SLAPP statute]" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323). Without such a change, the gap that now exists in the anti-SLAPP statute's definition of protected activity (protecting those who make statements when advancing legal claims in court while giving no protection to those who must advance their claims in arbitration) will grow wider as arbitration grows more prevalent, with effects perhaps felt most heavily by employees and consumers.

BAKER, Acting P. J.