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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES MacDONALD, Plaintiff and Appellant, v. MARTIN DORI SINGER et al., Defendants and Respondents.	B261024 Los Angeles County Super. Ct. No. BC516016

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

James MacDonald, in pro. per., for Plaintiff and Appellant.

Kempinsky Law, Louis E. Kempinsky and Evan M. Effres for Defendants and Respondents Shereen Arazm and Oren Koules.

Kernan Law and S. Michael Kernan for Defendant and Respondent Paul Barresi.

Nemecek & Cole, Jonathan B. Cole, Michael McCarthy, Claudia L. Stone and Mark Schaeffer for Defendants and Respondents Martin D. Singer, Lavely & Singer and Andrew Brettler.

INTRODUCTION

In this consolidated appeal, plaintiff and appellant James MacDonald primarily challenges the trial court's orders granting special motions to strike the complaint under Code of Civil Procedure section 425.16[1] (anti-SLAPP statute) brought by two sets of defendants: Martin Singer, Andrew Brettler and the law firm of Lavely & Singer (collectively, Singer defendants), and Shereen Arazm and Oren Koules. Plaintiff, who largely represented himself below, continues to represent himself on appeal.

The present case is but one of multiple related cases arising from failed business relations between Arazm and her former business partners, Michael Moore and Lonnie Malin. In the course of the demise of the partnership, Arazm and her attorney, Singer, sent a demand letter to Moore and Malin. The demand letter attached a draft complaint which contained salacious details about unnamed parties' sexual activities; the letter threatened to fill in the blanks, thereby revealing that Malin had, among other things, been using company money to arrange sexual liaisons.

In this case, plaintiff (who worked as a controller for business ventures of the partnership) sued the Singer defendants and Arazm and Koules for violation of civil rights, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff contended he was one of the targets of the demand letter and that Singer, Arazm, and Koules had each contacted him and threatened to name him and disclose his

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1 All undesignated statutory references are to the Code of Civil Procedure.

sexual proclivities in the complaint. Each set of defendants filed a special motion to strike the complaint under the anti-SLAPP statute, contending their conduct was speech protected by the anti-SLAPP statute and which is absolutely protected by the litigation privilege. The court agreed, as do we. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. General Background[2]

Malin, Moore, and Arazm were business partners in several ventures including Geisha House, LLC (Geisha House). (*Malin, supra,* 217 Cal.App.4th at pp. 1287–1288.) Plaintiff worked with Arazm and was the controller for several of the partners' businesses.

In 2011, Arazm consulted her attorney, defendant Martin Singer, regarding Malin and Moore's alleged misappropriation of company assets. On Arazm's behalf, Singer sent Malin a demand letter (the demand letter) and a draft of Arazm's proposed complaint. The text of the letter[3] reads as follows:

> "I am litigation counsel to Shereene [sic] Arazm. I am writing to you with respect to your outrageous, malicious, wrongful and tortious conduct. As a result of your embezzlement, conversion and breach of fiduciary

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[2] Where appropriate, we have drawn some background facts from *Malin v. Singer* (2013) 217 Cal.App.4th 1283 (*Malin*), an appeal in one of the related cases (*Malin v. Singer* (Super. Ct. L.A. County, 2011, No. BC466547)).

[3] The copy of the demand letter contained in the appellate record was redacted as noted.

duty, you have misappropriated more than a million dollars from my client. As a result thereof, my client intends to file the enclosed lawsuit against you, Lonnie Moore, and various business entities that you and Mr. Moore control. As alleged in the Complaint, you, Mr. Moore and several of your co-conspirators have been embezzling and stealing money from Ms. Arazm and Geisha House, LLC for years. As set forth in detail in the Complaint, you and Mr. Moore have devised various schemes to embezzle money from the restaurants and clubs which you own and/or manage, including, but not limited to Geisha House and WonderLand. You and Mr. Moore have created a special account or 'ledger,' which allows you to keep tabs on how the stolen funds are divided among you, Mr. Moore and your various co-conspirators. My client intends, as part of the lawsuit, to seek a full-fledged forensic accounting of the books and records for Geisha House, LLC, 2HYPE Productions, Inc., LTM Consulting, Inc., and Malin & Moore Enterprises, LLC, in addition to your personal accounts.

"In addition, as set forth in the Complaint, we have information that you and Mr. Moore have engaged in insurance scams designed to defraud not only the insurers of your establishments, but also the insurers of WonderLand. You have also taken steps to hide your assets from creditors as well as from the taxing authorities. We are aware that you have converted my client's monies and deposited them in accounts in the Cook Islands. We have also confirmed that you have planned to illegally transfer your shares in Geisha House

Los Angeles to Sylvain Bitton in a further attempt to hide from creditors and avoid tax liability.

"Because Mr. Moore has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange [redacted] liaisons with [redacted] (see enclosed photo), [redacted]. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading.

"My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client's satisfaction within five (5) business days from your receipt of this Complaint."

The draft complaint included with the demand letter did not identify any alleged sexual partners but contained several blank spaces and redactions that, according to the letter, would be filled in before the complaint was filed. The draft complaint stated in relevant part:

"[O]ver the past several months, _____ has arranged through email and through Internet websites such as craigslist.org to have multiple sexual encounters with [redacted] which include _____. Based on information and belief, _____ used company resources to facilitate these rendezvous and to communicate with various [redacted] including _____, _____, and _____."

After he received the demand letter, Malin sued Singer and Arazm for civil extortion, violation of civil rights, and intentional and negligent infliction of emotional distress. (*Malin v. Singer*

(Super. Ct. L.A. County, 2011, No. BC466547).) In response, Singer and Arazm filed an anti-SLAPP motion asserting the demand letter was pre-litigation conduct protected by the anti-SLAPP statute and, further, that their conduct was absolutely protected by the litigation privilege (Civ. Code, § 47, subd. (b)). (*Malin, supra*, 217 Cal.App.4th at p. 1290.) Malin responded that unlawful conduct, such as extortion, is not protected by the anti-SLAPP statute in the first instance and contended the demand letter constituted extortion as a matter of law.

In a published decision, Division Four of this court held the demand letter was not extortion as a matter of law and was therefore protected by the anti-SLAPP statute. (*Malin, supra*, 217 Cal.App.4th at pp. 1299–1300.) The court also agreed that the parties' pre-litigation conduct was absolutely protected under Civil Code section 47, subdivision (b), and therefore Malin could not demonstrate a probability of success on the merits. (*Id*. at pp. 1301–1302.)

2. Plaintiff's Complaint

On July 24, 2013, approximately one week after Division Four of this court issued its decision in *Malin v. Singer*, plaintiff filed the complaint in the present case against the Singer defendants as well as Arazm, Koules, Paul Barresi, and Thomas Mummey Martinez. The complaint contains three causes of action: violation of civil rights including the right to privacy; intentional infliction of emotional distress; and negligent infliction of emotional distress.

Plaintiff generally alleges that although the demand letter was not addressed to him and he was not explicitly mentioned in the letter, he was nevertheless a target of the demand letter.

Specifically, plaintiff alleges the Singer defendants hired Barresi to deliver a package containing the demand letter to plaintiff and to instruct him to open and read the letter, which he did. In addition, plaintiff claims Singer, Arazm, and Koules threatened to name plaintiff in the complaint and disclose specific details about his particular sexual preferences. Plaintiff understood the demand letter as "part of a threat to publicly expose intimate and excruciatingly detailed sexual matters having nothing to do with the gravamen of the dispute which was the subject of the draft Complaint." Plaintiff also alleged the defendants hired Martinez to steal plaintiff's cell phone, which defendants subsequently used to access plaintiff's personal emails.

3. Relevant Procedural Background[4]

3.1. Singer Defendants

The Singer defendants filed a demurrer, a motion to strike the punitive damages allegations, and a special motion to strike the complaint under section 425.16. Plaintiff opposed. All three matters came for hearing before the court on June 3, 2014. The court granted the anti-SLAPP motion and on June 30, 2014, entered a judgment of dismissal in favor of the Singer defendants. Plaintiff filed an untimely notice of appeal from that judgment and we dismissed the appeal. The remittitur issued on January 2, 2015.

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[4] This consolidated appeal arises from four separate notices of appeal which together identify 23 judgments and orders as the subject of plaintiff's appeal. However, as plaintiff addresses only a few of those items in his briefs, we discuss only those facts relevant to the issues actually raised.

On January 5, 2015, plaintiff filed a motion under section 473, subdivision (b), to vacate the judgment in favor of the Singer defendants on the basis of fraud and/or mistake. The court denied the motion and plaintiff timely appealed from that order.

3.2. Defendants Arazm and Koules

Defendants Arazm and Koules also filed a motion to strike the complaint under section 425.16 which plaintiff opposed. The court granted the anti-SLAPP motion and entered a signed order dismissing Arazm and Koules from the case on October 30, 2014. Plaintiff timely appealed from both the judgment of dismissal and the subsequent order awarding these defendants costs and attorney's fees.

3.3. Defendant Barresi

Barresi filed a demurrer and a special motion to strike under section 425.16. The court sustained the demurrer without leave to amend and granted the anti-SLAPP motion. On August 1, 2014, the court entered a judgment of dismissal in favor of Barresi. Barresi served notice of entry of that judgment on October 1, 2014. Plaintiff did not timely appeal from the judgment of dismissal. Thus, although Barresi filed a respondent's brief in this appeal, we do not have jurisdiction to consider any challenge to the judgment in his favor. (Cal. Rules of Court, rule 8.104(a)(1).)

DISCUSSION

Although plaintiff's briefs purport to address myriad issues, we limit our discussion to those issues adequately presented on appeal. As to those issues, we are not persuaded by plaintiff's arguments and analysis. Accordingly, we will affirm the

judgment and orders in favor of the Singer defendants and Arazm and Koules.

1. Scope of Review

As noted, plaintiff represents himself on appeal. Nonetheless, he is bound to follow the most fundamental rule of appellate review which is that the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

In addition, parties must provide citations to the appellate record directing the court to the supporting evidence for each factual assertion contained in that party's briefs. When an opening brief fails to make appropriate references to the record in connection with points urged on appeal, the appellate court may treat those points as waived or forfeited. (See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 779–801 [several contentions on appeal "forfeited" because appellant failed to provide a single record citation demonstrating it raised those contentions at trial].) Further, "an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that lack adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.)

Plaintiff's opening brief contains a wide-ranging collection of arguments and allegations untethered to the record on appeal or to pertinent legal authority. By way of example, plaintiff appealed from a handful of orders awarding the defendants attorney's fees under the anti-SLAPP statute. On appeal, he presents several single-sentence "arguments" purporting to challenge the fee awards, e.g., "The Trial Court erred by awarding fees that were duplicative between the SLAPP fees and the Fees award after the Motion to Vacate, awarded under SLAPP." Plaintiff fails to identify any supporting information in the record or provide any analysis of the evidence submitted to the trial court in connection with the two motions at issue. Moreover, he fails to provide any further discussion or relevant legal authority in support of his argument. We disregard this issue (and others which are similarly devoid of support and analysis) because we conclude plaintiff failed to carry his burden on appeal to establish error.[5]

Our review is further hampered in this case because plaintiff often fails to link his arguments on appeal to specific rulings made by the trial court. Given that plaintiff challenges 23 different rulings in these four consolidated appeals and the record is nearly 4,000 pages in length, his failure to identify with particularity what he is challenging and where he raised the issue below makes our work substantially more difficult.

In our review of the appellate record, however, we were able to discern the basis of several of plaintiff's arguments. We

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[5] We do not consider, therefore, plaintiff's arguments that he was denied due process of law, the trial judge was biased, or that the Singer defendants committed a violation of public trust.

therefore address the following issues raised by plaintiff below and timely challenged in this appeal: (1) The anti-SLAPP statute does not apply because the demand letter constitutes extortion as a matter of law and is therefore not protected speech within the meaning of the anti-SLAPP statute; (2) Assuming the statute applies, plaintiff is likely to prevail on the merits. The litigation privilege does not protect the Singer defendants in this case because they were not authorized to represent Geisha House at the time they sent the demand letter; and (3) The Singer defendants committed a fraud on the court by representing that they were authorized to represent Geisha House.[6]

As to defendants Arazm and Koules, plaintiff raised the above contentions in his opposition to their anti-SLAPP motion and he timely appealed from the order granting the anti-SLAPP motion. He also challenges the court's fee and cost award in favor of Arazm and Koules and timely appealed from that order.[7]

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[6] To the extent plaintiff may have intended to raise additional arguments, they are forfeited. We note, in particular, that at oral argument counsel for Arazm and Koules discussed two recent anti-SLAPP cases (*Okorie v. Los Angeles Unified School District* (2017) 14 Cal.App.5th 574 (*Okorie*) and *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147 (*Sheley*)) applying *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*). We requested and received supplemental briefing from the parties regarding those cases. Plaintiff has not requested that we adopt the approach taken by the court in *Sheley* and we therefore do not do so. (See *Okorie,* at p. 590.)

[7] An attorney's fees order entered after the dismissal of an action upon the grant of an anti-SLAPP motion is directly appealable under section 904.1, subdivision (a)(2), as a postjudgment order. (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251 (*Ellis Law Group*).)

With respect to the Singer defendants, we have already noted plaintiff's appeal from the order granting the anti-SLAPP motion[8] was untimely. Accordingly, to the extent plaintiff's arguments directly challenge the anti-SLAPP ruling in favor of the Singer defendants in this appeal, they are improper and we do not consider them. However, plaintiff raised the above contentions in a motion to vacate the judgment filed January 5, 2015 and he timely appealed[9] from the court's denial of that motion. We construe his arguments on appeal as a challenge to the court's denial of his motion to vacate the judgment in favor of the Singer defendants.[10]

2. Legal Principles Regarding the Anti-SLAPP Statute

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the

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[8] "Although denominated an 'order,' the granting of an order dismissing a case on the basis of the anti-SLAPP statute has the same effect as a final judgment." (*Ellis Law Group, supra,* 230 Cal.App.4th at p. 251.)

[9] An order denying a motion for relief from judgment under section 473, subdivision (b), is appealable as an order after final judgment. (See *Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 928, fn. 6.)

[10] We do not consider whether, as the Singer defendants argue, plaintiff's motion should be treated as a motion for reconsideration rather than a motion to vacate because an order denying a motion for reconsideration is not appealable. (§ 1008, subd. (g).)

plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Our Supreme Court recently clarified the scope of the anti-SLAPP statute: "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [The Supreme Court has] described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' [Citation.]" (*Baral, supra,* 1 Cal.5th at pp. 384–385, fn. omitted, original italics.)

3. Defendants Arazm and Koules

3.1. Standard of Review

In an appeal from an order granting or denying a motion to strike under section 425.16, the standard of review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260,

269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

3.2. Motion and Ruling

Arazm and Koules moved to strike plaintiff's complaint under section 425.16. Primarily, these defendants argued plaintiff's claims were barred by the doctrine of collateral estoppel to the extent *Malin v. Singer* addressed identical issues, such as whether the demand letter constitutes criminal extortion. In any event, Arazm and Koules asserted their conduct was fully protected by the litigation privilege (Civ. Code, § 47, subd. (b)) and therefore plaintiff could not ultimately succeed on the merits of his case.

Plaintiff opposed the motion and, in support of his opposition, he submitted a request for judicial notice of declarations and other documents in related cases. In addition, both Moore and Malin submitted declarations in support of plaintiff's opposition to the anti-SLAPP motion. Both attested that under the terms of the operating agreement for Geisha House, Arazm did not have the authority to retain counsel to represent Geisha House because such actions need to be approved by two of the three managing members of Geisha House. Both Malin and Moore also denied consenting to the representation.

Arazm and Koules raised numerous objections to the request for judicial notice as well as to the declarations submitted

by Malin and Moore. The court denied the request for judicial notice and sustained most of the defendants' objections.

The court granted the motion to strike in its entirety and plaintiff timely appealed from the order.

3.3. The trial court properly granted the anti-SLAPP motion.

3.3.1. First Prong

Plaintiff asserts the demand letter is extortion as a matter of law and is therefore outside the scope of speech protected by the anti-SLAPP statute. This issue was analyzed extensively in *Malin v. Singer, supra*, which, although technically not binding here, is persuasive. We adopt the analysis and conclusions stated there and provide a brief summary of that court's discussion in the section that follows.

Only the statutorily enumerated forms of speech and petitioning activity are protected under the anti-SLAPP statute. Pertinent here, section 425.16, subdivision (e), provides protection for "(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] (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."

"Statements made before an 'official proceeding' or in connection with an issue under consideration or review by a legislative, executive, or judicial body, or in any other 'official proceeding,' as described in clauses (1) and (2) of section 425.16, subdivision (e), are not limited to statements made after the commencement of such a proceeding. Instead, statements made

in anticipation of a court action or other official proceeding may be entitled to protection under the anti-SLAPP statute. ' "[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ... such statements are equally entitled to the benefits of section 425.16." [Citations.]' (*Briggs* [*v. Eden Council for Hope & Opportunity* (1999)] 19 Cal.4th [1106], 1115; accord, *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322, fn. 11.)

"The California Supreme Court has stated that a prelitigation communication is privileged only if it 'relates to litigation that is contemplated in good faith and under serious consideration.' (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*).) 'Good faith' in this context refers to a good faith intention to file a lawsuit rather than a good faith belief in the truth of the communication. (*Ibid.*) Similarly, the Courts of Appeal have stated that a prelitigation statement falls within clause (1) or (2) of section 425.16, subdivision (e) if the statement ' "concern[s] the subject of the dispute" and is made "in anticipation of litigation 'contemplated in good faith and under serious consideration' " [citation].' [Citations.]" (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 886–887 (*Digerati*).)

Ordinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [" 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding' " are protected

by section 425.16].) But in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), the Supreme Court articulated an exception for a demand letter that was so extreme that it was found to constitute criminal extortion as a matter of law.

In *Flatley*, the court recognized that extortion "has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. '[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal when coupled with a demand for money.' [Citation.]" (*Flatley, supra,* 39 Cal.4th at p. 326, fn. omitted.) There, an attorney threatened to publically reveal explicit details of an alleged rape of his client by Flatley (a well-known performer and dance impresario) unless Flatley paid his client at least "seven figures." (*Id.* at p. 311.) In addition, the attorney threatened to provide the information to U.S. and international law enforcement, immigration, tax and other authorities. (*Id.* at p. 329.)

After Flatley sued the attorney for extortion, defamation and other claims, the attorney filed a special motion to strike the complaint under section 425.16. The court concluded the attorney's communications constituted criminal extortion[11] and,

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[11] The crime of extortion is defined as " 'the obtaining of property from another, with his consent … induced by a wrongful use of force or fear … .' (Pen. Code, § 518.) Fear, for purposes of extortion 'may be induced by a threat, either: [¶] ... [¶] 2. To accuse the individual threatened ... of any crime; or, [¶] 3. To expose, or impute to him ... any deformity, disgrace or crime[.]' (Pen. Code, § 519.) 'Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same

as such, they were not protected under the anti-SLAPP statute: "[W]here a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra*, 39 Cal.4th at p. 320.) Notably, the court explained it was not implying "that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. [Citation.]" (*Id*. at p. 332, fn. 16.)

In *Malin*, the plaintiff relied on *Flatley* and argued the demand letter sent to him by Singer constituted criminal extortion because, like the threats in *Flatley*, the letter threatened to expose secrets about his sexual exploits. In considering whether the demand letter might constitute criminal extortion, Division Four of this court noted that unlike the threats made by the attorney in *Flatley*, the threats contained in the demand letter were directly connected to the potential litigation, namely Arazm's embezzlement claim: "The demand letter accused Malin of embezzling money and simply informed him that Arazm knew how he had spent those funds. There is no

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manner as if such money or property were actually obtained by means of such threat.' (Pen. Code, § 523.)" (*Flatley, supra*, 39 Cal.4th at p. 326, original brackets.)

doubt the demand letter could have appropriately noted that the filing of the complaint would disclose Malin had spent stolen monies on a car or a villa, if that had been the case. The fact that the funds were allegedly used for a more provocative purpose does not make the threatened disclosure of that purpose during litigation extortion." (*Malin, supra*, 217 Cal.App.4th at pp. 1299.) Further, our colleagues noted, Singer's demand letter did not (like the letter in *Flatley*) go beyond the scope of proper legal representation by threatening to disclose Malin's activity to prosecuting agencies. (*Ibid*.) Accordingly, the court concluded as a matter of law that the demand letter was not criminal extortion.

Plaintiff's position here, as we understand it, is that *Malin v. Singer* was wrongly decided. He states, among other things, that "[t]he *Malin v. Singer* case should be unpublished and is a travesty of justice." We are not in a position to consider this request as only our Supreme Court has the authority to depublish or overrule a decision of the Court of Appeal.

Plaintiff also urges that the present case is distinguishable from *Malin v. Singer* in that it is "far more horrific." Characterization aside, we agree the facts alleged by plaintiff are unique to his case and, as far as we can tell, his complaint may implicate some conduct by Singer, Arazm, and Koules not at issue in *Malin v. Singer*. However, plaintiff has failed to support his arguments with any reasoned argument or citation to the record. He has therefore forfeited the issue.

Finally, plaintiff asks us to hold that the demand letter constitutes criminal extortion because the Singer defendants did not have the authority to represent Geisha House when they sent the letter to Malin. We fail to see the relevance of his argument, particularly as it relates to Arazm and Koules. Plaintiff's

extortion theory, as we understand it, is that Singer, Koules, and Arazm threatened to include plaintiff's name in the complaint Arazm planned to file against Malin and Moore—thereby publicly revealing intimate details about plaintiff's personal life—if he did not cooperate with them as they prepared to pursue litigation against Malin and Moore. But the demand letter stated Singer was representing *Arazm* (not Geisha House) and plaintiff does not allege that Arazm and Koules were acting on behalf of Geisha House when they allegedly threatened him.

Presumably, plaintiff bases his argument on the fact that in addition to Arazm, Geisha House was listed as a plaintiff in the draft complaint attached to the demand letter as well as the complaint Arazm ultimately filed against Malin and others (*Arazm v. Carri et al.* (Super Ct. L.A. County, 2011, Case No. BC466696)). However, the fact that both Arazm and Geisha House were plaintiffs in the action against Malin and Moore does not convert the actions of Arazm, Koules, or Singer taken prior to the filing of that complaint into representative acts taken on behalf of Geisha House—particularly in light of Singer's express statement that he was representing Arazm as well as the absence of any allegation by plaintiff that Arazm and Koules were acting in a representative capacity.[12]

In sum, plaintiff's allegations as to Arazm, Koules, and the Singer defendants (as Arazm's counsel) implicate legitimate pre-litigation activity protected under the anti-SLAPP statute.

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[12] At oral argument, plaintiff invited us to impose sanctions on the Singer defendants based upon their continued fraud on this court as it concerns their prior representation of Geisha House. Plaintiff's motion is denied.

3.3.2. Second Prong

Under the second step of the section 425.16 analysis, plaintiff must demonstrate a probability of prevailing on his claims for violation of civil rights and negligent and intentional infliction of emotional distress. We conclude he has failed to meet this burden because his claims are barred by the litigation privilege under Civil Code section 47, subdivision (b). (See *Digerati, supra*, 194 Cal.App.4th at p. 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim"].)

The litigation privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) " 'The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." [Citation.]' (*Action Apartment* [*Assn., Inc. v. City of Santa Monica* (2007)] 41 Cal.4th [1232,] 1241.) The litigation privilege is interpreted broadly in order to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions. (*Ibid.*) The privilege is absolute and applies regardless of malice. [Fn. omitted.] (*Action Apartment*, at p. 1241.)" (*Digerati, supra*, 194 Cal.App.4th at p. 889; *Malin, supra*, 217 Cal.App.4th at p. 1301.)

"A prelitigation communication is privileged only if it 'relates to litigation that is contemplated in good faith and under serious consideration' (*Action Apartment, supra*, 41 Cal.4th at p. 1251) ... . The requirement of good faith contemplation and

serious consideration provides some assurance that the communication has some ' " 'connection or logical relation' " ' to a contemplated action and is made ' "to achieve the objects" ' of the litigation. (*Ibid.*) 'Whether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact.' (*Ibid.*; [citation].)" (*Digerati, supra*, 194 Cal.App.4th at p. 889; *Malin, supra*, 217 Cal.App.4th at p. 1301.)

As explained above, under plaintiff's theory of the case, the threats allegedly made by Singer, Arazm, and Koules were designed to coerce plaintiff into assisting them before, and perhaps during, a lawsuit Arazm intended to file against Malin and Moore relating to their misappropriation of corporate funds. The facts here plainly demonstrate that the conduct at issue had some connection to the contemplated litigation. The demand letter from Singer attached a draft complaint and the subsequent threats related to the content of the complaint which Arazm intended to, and then did, file. Accordingly, plaintiff's claims are absolutely barred by the litigation privilege. (Civ. Code, § 47, subd. (b).) We therefore affirm the court's order granting the anti-SLAPP motion.

3.4. Costs and Fee Award

3.4.1. Standard of Review

"An order granting an award of attorney fees is generally reviewed for abuse of discretion. [Citations.] In particular, '[w]ith respect to the *amount* of fees awarded, there is no question our review must be highly deferential to the views of the trial court.' [Citations.] 'An appellate court will interfere with the trial court's determination of the amount of reasonable attorney fees only

where there has been a manifest abuse of discretion.' [Citations.]" (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1319–1320.)

3.4.2. Additional Facts

As the prevailing parties, Arazm and Koules sought to recover their costs and attorneys' fees from plaintiff under section 425.16, subdivision (c). They sought costs in the amount of $8,084.80 and sought attorney's fees in the amount of $177,144.80, representing 275.5 hours. The court subsequently awarded Arazm and Koules the costs requested but reduced the attorney's fees to $120,000.

3.4.3. Analysis

Section 425.16, subdivision (c)(1), provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Plaintiff challenges the cost and fee award in favor of Arazm and Koules in two respects.

First, plaintiff asserts the request for costs and fees by Arazm and Koules was untimely. He notes that California Rules of Court, rule 3.1702(b), states a motion for statutory attorney's fees must be filed within the time allowed to file an appeal, i.e., generally within 60 days of notice of entry of the order. Because these defendants filed their motion after that date, plaintiff claims the trial court was without jurisdiction to entertain the motion for costs and fees. We disagree because "[f]lexibility is built into Rule 3.1702 through subdivision (d), which allows a judge ' "[f]or good cause" ' to 'extend the time for filing a motion for attorney's fees in the absence of a stipulation or for a longer period than allowed by stipulation.' A court may grant a request

for extension of time to file a motion for attorney's fees even if the motion is not filed until after the deadline for filing an attorney's fees motion under Rule 3.1702. [Citation.] … . [¶] A litigant faces a steep uphill battle in seeking to reverse a court's finding of 'good cause' for an extension of time." (*Robinson v. U-Haul Company of California* (2016) 4 Cal.App.5th 304, 326.) Further, " '[r]ule 3.1702(d) is "remedial" and is to be given a liberal, rather than strict interpretation. [Citation.]' [Citation.]" (*Ibid.*) In short, the court had the discretion to consider the late-filed motion for costs and fees.

Because plaintiff only argues the court lacked jurisdiction to hear the motion for costs and attorney's fees, he does not address the relevant issue—whether the court abused its discretion in allowing Arazm and Koules to file an untimely motion. Accordingly, the issue is forfeited.

Plaintiff also contends the award should be reversed in its entirety if the order granting the special motion to strike is reversed. This argument is mooted by our affirmance of the order.

Notably, plaintiff does not challenge the amount of fees and costs awarded. Accordingly, we affirm the cost and fee award in favor of Arazm and Koules.

4. The Singer Defendants

Plaintiff contends the court erred by denying his motion to vacate the judgment in favor of the Singer defendants. We disagree.

4.1. Standard of Review

We review a trial court's ruling on a motion to vacate the judgment for abuse of discretion. (*Philippine Export & Foreign*

Loan Guarantee Corp. v. Chuidian (1990) 218 Cal.App.3d 1058, 1077; *In re Marriage of Wipson* (1980) 113 Cal.App.3d 136, 141.)

4.2. Additional Background

The Singer defendants demurred to the complaint and simultaneously filed a motion to strike plaintiff's punitive damages allegations as well as a special motion to strike under section 425.16 (anti-SLAPP motion). With respect to the anti-SLAPP motion, the Singer defendants asserted plaintiff's complaint was based upon pre-litigation activity protected by the anti-SLAPP statute. Further, the Singer defendants asserted plaintiff could not prevail at trial because his claims were barred by the statute of limitations and the litigation privilege (Civ. Code, § 47, subd. (b)).

Plaintiff opposed the motion, asserting the demand letter constituted extortion as a matter of law and was therefore not protected activity within the scope of the anti-SLAPP statute. Specifically, he argued "the bulk of the communications between the parties do not fall under the litigation privilege because they were made with threats of extortion and in good faith [*sic*] and in any case, without the authorization of the Company, Geisha House, LLC; the Singer Defendants have alleged that they were acting on behalf of Geisha House LLC but could not produce any authorization to that effect." He claimed further that the gravamen of his claims was not protected litigation conduct, but rather "the egregious conduct[ ] of Singer Defendants" and, to the extent his "causes of action refer to any communications that were made in anticipation of litigation, which they do not, such allegations are only incidental to the fraud claims."

In support of his opposition, plaintiff submitted four declarations: his own (which attached approximately 250 pages of

documents including email correspondence, internet stories about the parties, especially Paul Barresi, a transcript of a phone conversation between Singer and alleged mob boss Anthony Pellicano, and a copy of the operating agreement for Geisha House, LLC), two expert witness declarations, and a declaration by the former assistant general manager of Geisha House. In addition, he submitted a request for judicial notice of the documents attached to his declaration, other documents including complaints, transcripts of hearings, and several declarations filed in related cases, and a complaint and stipulated settlement entered in an unrelated proceeding involving Barresi. The court sustained nearly all of the Singer defendants' numerous objections to plaintiff's proffered declarations and attachments and denied plaintiff's request for judicial notice.

The court granted the anti-SLAPP motion and dismissed the Singer defendants from the case. The court found, on the first prong of the anti-SLAPP analysis, that the actions targeted by plaintiff's suit were legitimate speech activities relating to litigation that was contemplated in good faith at the time. As to the second prong, the court noted it sustained numerous objections to the evidence proffered by plaintiff and, as a result, plaintiff failed to produce any *admissible* evidence in support of the merits of his case. For that reason, the court concluded plaintiff failed to establish a probability of prevailing against the Singer defendants at trial.

As noted, plaintiff attempted to appeal the court's ruling on the anti-SLAPP motion but his appeal was untimely. Accordingly, we dismissed that appeal.

After jurisdiction returned to the court, plaintiff moved to vacate the judgment on the basis of "fraud and/or mistake."[13] Citing section 473, subdivision (b), plaintiff asserted the judgment should be vacated due to "intrinsic and extrinsic fraud." Specifically, plaintiff argued, "[t]he defendants relied upon California Civil Code §47(b) and invoked the absolute litigation privilege as a defense. The court should vacate the orders since it mistakenly relied on Defendants['] fraudulent claims of lawful pre-petitioning activities and litigation privilege." He further contended the Singer defendants filed a lawsuit "claiming authority of Geisha House" even though "the control group and highest authority, specifically a majority of the managing members have provided declarations that they did not authorize [the Singer defendants] to bring suit."[14] In addition, he claimed the Singer defendants' "deceit involved promoting a fraudulent settlement demand and fraudulent petitioning activity with false representation under false pretense in deceit and collusion to prevent Plaintiff MacDonald from presenting all of his case to the court, just as if defendants had physically prevented him from appearing in court."

Plaintiff also argued the demand letter constituted extortion as a matter of law, citing CALCRIM No. 1831. He urged that the court's reliance on *Malin v. Singer*, which held the same letter was not extortion as a matter of law, was erroneous. He

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[13] Plaintiff filed an identical motion to vacate while the appeal was pending. The court correctly concluded it did not have jurisdiction to consider that motion.

[14] We presume plaintiff refers to *Arazm v. Carri et al.* (Super. Ct. L.A. County, 2011, Case No. BC466696).

also claimed his case was distinguishable from and "far more horrific" than *Malin v. Singer* and the court should therefore depart from the holding in the prior case. Finally, plaintiff asserted he mistakenly submitted his expert witness declarations without stating they were submitted under penalty of perjury. The Singer defendants opposed the motion.

The trial court denied plaintiff's motion to vacate. It appears the court may have considered the motion to be, in substance, a motion for reconsideration rather than a motion to vacate. Along those lines, the court stated it could not entertain a motion for reconsideration because judgment had already been entered. In addition, to the extent the motion was properly seeking to vacate the judgment on the basis of fraud, the court noted it was the moving party's burden to show by a preponderance of the evidence the existence of excusable neglect, mistake or surprise. On that point, the court found plaintiff's motion was untimely and, in any event, failed to contain competent evidence to support his assertions.

4.3. Analysis

Section 473, subdivision (b), provides, in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief … shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Initially, we note, as the court did, that plaintiff's motion to vacate was untimely. The court entered the order granting the Singer defendants' anti-SLAPP motion on June 30, 2014. Plaintiff

filed his motion to vacate the judgment on January 5, 2015, more than six months after judgment was entered. More to the point, the "six-month time limitation is jurisdictional; the court has no power to grant relief under section 473 once the time has lapsed." (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 928.) Accordingly, to the extent the court's ruling was based on section 473, it is void. We therefore do not consider plaintiff's challenges to the order to the extent those challenges are based on section 473.

Plaintiff seems to argue, however, that even if "relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a default judgment or order on equitable grounds where a party establishes that the judgment … resulted from extrinsic fraud or mistake. (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937)." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228.) Here, plaintiff asserts the Singer defendants committed a "fraud upon the court" (which he characterizes as extrinsic fraud) by purporting to represent Geisha House when they did not, in fact, have that authority. We presume plaintiff is referring to the lawsuit filed by Arazm against Malin and Moore concerning the misappropriation of business assets, i.e., the suit threatened in the demand letter sent by Singer to Malin and Moore because both Arazm and Geisha House were plaintiffs in that action. Even if the Singer defendants did not have the authority to represent Geisha House when they filed the lawsuit and that action constitutes extrinsic fraud, an issue we do not reach, plaintiff nevertheless fails to establish entitlement to relief from the judgment in favor of the Singer defendants in this case.

" 'To be entitled to relief from a judgment on the ground of extrinsic fraud, a party must show he or she had a meritorious defense, which would have been raised but for the other party's wrongful conduct [citations], and also must establish all of the elements of fraud [citations], which include an intentional or reckless misrepresentation and justifiable reliance on the misrepresentation by the aggrieved party.' [Citation.]" (*Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1229.) "The clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. [Citation.] In both situations the party is 'fraudulently prevented from presenting his claim or defense.' [Citations.]" (*Estate of Sanders* (1985) 40 Cal.3d 607, 614–615.)

Plaintiff has not identified any defense or argument he was unable to present in this action and, further, does not claim he was misled or that he relied in any way upon the Singer defendants' purported representation of Geisha House. Accordingly, inasmuch as plaintiff failed to establish a necessary element of extrinsic fraud, we see no abuse of discretion in the court's denial of his motion to vacate.

DISPOSITION

The judgment and orders are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, 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.