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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

CLAUDIA VASQUEZ, Plaintiff and Respondent, v. JENNIFER LOPEZ, Defendant and Appellant.	B233442 (Los Angeles County Super. Ct. No. BC451452)

APPEAL from the order of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Reversed and remanded.

Lavely & Singer, John H. Lavely, Jr., and Paul N. Sorrell for Defendant and Appellant.

The Armenta Law Firm, M. Cristina Armenta; Credence E. Sol; and Claudia Vasquez, in pro. per., for Plaintiff and Respondent.

SUMMARY

Film producer Claudia Vasquez (plaintiff) collaborated on a film project with Ojani Noa and Ed Meyer, about Noa's former marriage to celebrity Jennifer Lopez (defendant). Lopez's attorney sent a cease and desist letter to Vasquez and the other project collaborators, informing them that Noa was restrained from sharing personal details about his marriage to Lopez by a 2005 confidential settlement agreement and 2007 injunction, and that these also bound third parties working with Noa. Vasquez did not respond to the letter, and it was assumed that she no longer intended to produce the film. Therefore, Lopez did not name Vasquez as a defendant in Lopez's later lawsuit against Noa and Meyer concerning the project. But a year after Lopez filed her lawsuit against Noa and Meyer, Vasquez initiated this action against Lopez, complaining that Lopez's threats of litigation interfered with the marketability of the film.

Lopez filed a special motion to strike Vasquez's complaint under Code of Civil Procedure section 425.16,[1] contending that Vasquez's claims arose from Lopez's protected activity and that the litigation privilege was an absolute bar to the claims. Although the trial court found the lawsuit involved protected activity under section 425.16, it concluded the litigation privilege did not apply. We find that all of plaintiff's claims arose from Lopez's protected, litigation-related cease and desist letter, and that the litigation privilege bars Vasquez's claims. We therefore reverse and remand this matter so that the trial court may assess Lopez's entitlement to her reasonable attorney fees.

FACTS

This dispute is rooted in past litigation between Lopez and her ex-husband, Noa. In December 2004, Noa sued Lopez for employment claims arising out of his work at a restaurant owned by a company in which Lopez is a principal. The parties settled the dispute with a confidential settlement agreement in 2005, under which Noa agreed to

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

certain confidentiality provisions. Among those provisions, Noa was prohibited from disclosing intimate details about his relationship with Lopez for monetary gain and from disparaging her "in any way or mode."

In 2006, Lopez sued Noa for breaching the 2005 agreement by marketing a book manuscript containing disparaging statements about Lopez and private details about their marriage. Lopez obtained a temporary restraining order against Noa. The case was ordered to arbitration, and the arbitrator issued a final award in favor of Lopez. The court confirmed the award and entered a judgment including a permanent injunction enjoining Noa and his agents or other people acting in concert with him from "[c]riticizing, denigrating, casting in a negative light or otherwise disparaging . . . Jennifer Lopez" as well as "[d]isclosing for monetary gain any private or intimate details about Lopez or Noa's relationship with Lopez." Noa was also ordered to pay Lopez $544,814.21 in damages, costs, and attorney fees.

On June 28, 2009, Vazquez, a self-described producer, actor, and creator of films and television shows, entered into a production agreement with Noa and writer Ed Meyer to produce a comedic film portraying Noa's "tumultuous life, from Cuban immigrant to husband (and later ex-husband) of Jennifer Lopez and beyond." This film was created under the working title "I Owe JLO" and was funded in part through a deal with Telemundo, an American television network broadcasting in Spanish.

On October 23, 2009, Lopez's attorney, John H. Lavely, Jr., sent a letter to Vasquez, Noa, Meyer and another individual, Joe Estevez, citing the 2007 injunction and demanding they "cease and desist from proceeding with the Proposed Film." The letter referenced a casting notice for the film that appeared on the website, talentrep.breakdownexpress.com, naming Noa as the film's writer, Vasquez as the "producer," and Meyer as the "executive producer." The website described the film as the "[s]tory of Jennifer Lopez's tumultuous first marriage to Cuban immigrant, chef and model Ojani Noa." Meyer responded to the letter, insisting that he was going to proceed with the project, which he characterized as a parody, and also that he would disseminate home video footage of Lopez he received from Noa. Although Noa did not respond to

the letter, Meyer represented that Noa was his "management client," and that the two had an exclusive deal concerning "11+ hours of previously unseen home videofootage [*sic*] of Jennifer Lopez and Ojani Noa." Meyer also stated that Noa had asked him to "release the embarrassing tapes [of Lopez] immediately on the Internet." Estevez replied that he was not involved with the film. Vasquez did not respond to the cease and desist letter and was not mentioned by Meyer in his communications with Lopez's attorneys.

On November 6, 2009, Lopez sued Noa and Meyer, demanding $10 million and alleging claims for breach of contract, invasion of privacy, common law right of publicity and interference with contractual relations based on their attempts to sell home videos from Noa and Lopez's marriage, as well as their production of a film titled, "How I Married Jennifer Lopez: The JLo and Ojani Noa Story." Reasoning that Noa and Meyer tried to exploit the film and video footage in violation of the 2005 agreement, 2007 injunction, and Lopez's rights to privacy and publicity, the trial court issued a preliminary injunction enjoining them from disclosing confidential and personal information about Lopez. The trial court concluded that although Meyer was not named in the 2007 injunction, "he is nonetheless bound by its terms as a party acting in concert with Noa and encouraging him to violate the permanent injunction." The 2009 injunction also enjoined any third parties "having knowledge or notice of this Injunction" from engaging in such conduct.[2]

On December 20, 2010, Vazquez filed a complaint, which was amended on December 30, 2010, seeking declaratory relief based upon Lopez's claim in her letter that the film was barred by the 2005 settlement and 2007 injunction, a declaration that any restraint on Vasquez's profession was unlawful under Business and Professions Code

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[2] Lopez has asked this court to take judicial notice of an unpublished appellate opinion concerning the trial court's denial of Lopez's motion to compel arbitration of the 2009 dispute. (*Lopez v. Noa* (Jul. 29, 2011, B222183) [nonpub. opn.].) In that opinion, Division Four of this district concluded that an arbitration clause contained in the 2005 settlement agreement with Noa was binding on both Noa and Meyer in the 2009 lawsuit. The request for judicial notice is granted. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485.)

section 16600, and a declaration that the film did not violate Lopez's right to privacy. The complaint also included causes of action for intentional interference with prospective economic advantage, intentional interference with contractual relations, and unfair competition pursuant to Business and Professions Code section 17200, based on allegations that the "threats" in Lopez's letter prevented Vasquez from marketing the film. The complaint admits that Vasquez entered into a production agreement with Noa and Meyer to create a comedic parody of Noa's life, and alleges that "[t]he gravamen of the Film is Noa's attempts to earn money in America to pay Jennifer Lopez, including the various and menial jobs he undertook to attempt to make a living and satisfy Jennifer Lopez with money."

Lopez demurred and filed a special motion to strike the complaint under section 425.16, maintaining that her attorney's letter was an exercise of her free speech and petition rights, and that Vasquez could not prevail on her claims because the conduct underlying them was protected by the litigation privilege under Civil Code section 47. In support of her motion, Lopez introduced evidence that she sued Noa and Meyer in connection with the film they partnered with Vasquez to produce. The production agreement between Noa, Meyer, and Vasquez was also presented, where Noa purported to "exclusively license[] any and all rights that he may own or is legally entitled to, regarding the story of himself and singer/actress Jennifer Lopez." Also included was Vasquez's declaration (previously submitted in support of a temporary restraining order sought in this action), in which she testified that the letter rendered her "radioactive" in the entertainment industry, and that after receiving the letter she was forced to suspend development on the film because she "feared being sued by Ms. Lopez's army of lawyers, and because the credible threat of suit rendered the Film unmarketable to any production company," including Telemundo, which passed on the film for legal reasons associated with her conflict with Lopez.

In opposition to Lopez's motion, Vasquez averred that the cease and desist letter "rendered the Film unmarketable." She also stated that she worked on the film independently, through her development deal with Telemundo, and was not working in

concert with Noa. Telemundo paid Vasquez for the "rights of 'First Negotiation' " and " 'Last Refusal' " for any "audio-visual entertainment or new programming." She claimed that the litigation privilege did not apply to her claims because Lopez's previous lawsuits involving Noa had already concluded, and because the cease and desist letter sent to her was a sham threat of future legal action because she was never named as a defendant.

Lopez responded with evidence that she did not name Vasquez as a defendant in the 2009 lawsuit because Lopez had not received an answer to the cease and desist letter from Vasquez. The purpose of the cease and desist letter "was to put Vasquez . . . on notice of the existence of the terms [and conditions] of the Judgment and Permanent Injunction . . . . The letter was also intended to advise the addressees of the potential consequences of . . . proceeding with the production, marketing and distribution of the Proposed Film."

The trial court overruled the demurrer and denied the special motion to strike. The trial court found that Lopez met her burden of "establishing a prima facie showing that Plaintiff's complaint arises from Defendant's constitutionally protected free speech and petition activity," based on Lopez's purported enforcement of the 2005 agreement and 2007 injunction. The court, nevertheless, concluded that Lopez failed to establish the applicability of the litigation privilege because she failed "to provide any evidence that litigation against Plaintiff was being seriously considered at the time that Vasquez received the 2009 letter," and because the earlier litigation had already concluded and therefore "the 2009 Letter . . . was not made *during* judicial proceedings." The trial court found that Vasquez had shown a probability of prevailing on her claims because there was an actual controversy concerning whether she was bound by the 2005 agreement and 2007 injunction, and because Vasquez adduced evidence that her plans to make and distribute the film were interrupted by Lopez. This timely appeal followed.

DISCUSSION

1. Standard of Review

A defendant may bring a special motion to strike any cause of action "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 California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) The trial court rules on a defendant's SLAPP[3] motion using a two-step process. First, it looks to see whether the defendant has made a prima facie showing that the challenged causes of action arise from protected activity. (§ 425.16, subd. (b)(1).) Second, if the defendant meets this threshold requirement, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claims. (*Ibid.*; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) In making both of these determinations, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) In the second prong assessment, the court looks to admissible evidence. (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329, disapproved on other grounds by *Simpson Strong-Tie Co., Inc., v. Gore* (2010) 49 Cal.4th 12, 25, fn. 3.) Our review on appeal is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. Protected Activity

The defendant is required to make a prima facie showing that one or more causes of action arise from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.) The defendant meets this burden by demonstrating that plaintiff's claims arise from "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or

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[3] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53; *id.* at p. 57, fn. 1 (*Equilon Enterprises*).)

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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) The defendant need not prove that the challenged conduct is protected by the First Amendment as a matter of law (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80 (*City of Cotati*), and arguments about the merits of the claims are irrelevant to the court's analysis in the first step. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 [it is irrelevant that defendant might prevail on the merits of the claims where defendant cannot meet the first prong of the anti-SLAPP analysis].)

Section 425.16, subdivision (e)(1) and (2) "encompass[] any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.) Courts have broadly construed the definition of litigation-related activity under section 425.16. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) The statute protects not only the litigants themselves, but also any litigation-related statements made by their attorneys. (*Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1185.) Furthermore, communications preparatory to or in anticipation of litigation or other official proceedings are within the scope of protected activity. (*Briggs*, *supra*, 19 Cal.4th at p. 1115.) In this way, section 425.16 is similar to the litigation privilege. (Civ. Code, § 47, subd. (b).)

The litigation privilege covers communications where litigation is not just a possibility, but has ripened into a proposed proceeding, contemplated in good faith, under serious consideration. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment Assn.*) Such communications also fall under section 425.16's definition of protected activity. (*Rohde v. Wolf* (2007) 154 Cal.App.4th

28, 36-37 (*Rohde*) [attorney's voicemail messages accusing plaintiff of conspiracy and threatening to take " 'appropriate action' " was protected activity under section 425.16].) "[T]he [litigation] privilege is . . . applicable to any communication . . . and all torts except malicious prosecution. [Citations.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) It also applies to actions for declaratory relief. (*Thompson v. California Fair Plan Assn.* (1990) 221 Cal.App.3d 760, 766.)

In deciding whether a complaint arises from defendant's protected activity, courts do not look to "the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) Hence, "the mere fact that an action was filed after protected activity took place does not mean it arose from that activity." (*Equilon Enterprises*, *supra*, 29 Cal.4th at p. 66.) Nor does the fact "[t]hat a cause of action arguably may have been triggered by protected activity" necessarily mean that it arises from such activity. (*City of Cotati*, *supra*, 29 Cal.4th at p. 78.) In the anti-SLAPP context, the crucial determinant is "whether the cause of action is *based on* the defendant's free speech or petitioning activity." (*Navellier*, at p. 89.) Put another way, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*City of Cotati*, *supra*, 29 Cal.4th at p. 78.) Courts focus on the substance or gravamen of the plaintiff's lawsuit to make this determination. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669-670.)

Lopez contends that all of Vasquez's claims arise from activity that is protected under section 425.16 *and* the litigation privilege, because they arose from the letter sent by her lawyer in connection with existing litigation, and future litigation that Lopez contemplated filing in good faith. Vasquez urges that, because Lopez did not name Vasquez as a defendant in any lawsuit after sending the letter, Vasquez's claims do not arise from Lopez's protected activity, and the litigation privilege does not apply. Vasquez contends that the "gravamen of the case is a dispute over the meaning and interpretation of the injunctions" Lopez obtained against Noa, and not any protected

activity by Lopez involving Vasquez. We conclude that Vasquez's claims are based on litigation-related activity that is protected under section 425.16 and the litigation privilege. Accordingly, the trial court erred in denying the motion.

3. Plaintiff's Claims Are Based on Protected Conduct

The complaint alleges that through her cease and desist letter, "Defendant . . . has claimed . . . Plaintiff is not legally entitled to produce the Film." "Plaintiff . . . has claimed that she is legally entitled to produce the Film[.] . . . [¶] An actual controversy has arisen[.]" The complaint also alleges that "[t]he threats of Defendant Lopez . . . did interfere with Plaintiff Vasquez and other business relationships," and "thwart[ed] . . . the production . . . and the distribution of the Film." Vasquez contends the "gravamen of the case is a dispute over the meaning and interpretation of the injunctions." Vasquez would have us ignore her allegations that Lopez's letter, and its threat of litigation, interfered with the marketability of the film. We find the gravamen of the complaint is that the cease and desist letter, threatening litigation if Vasquez pursued the film production in violation of the permanent injunction, derailed Vasquez's business plans and aspirations.

Finding that Lopez's assertion of rights is the gravamen of Vasquez's claims, we next conclude that her attorney's letter is protected activity, as it was a communication made in anticipation of litigation against Vasquez. The litigation privilege covers communications where litigation is not only a possibility, but has ripened into a proposed proceeding, contemplated in good faith and under serious consideration. (*Action Apartment Assn.*, *supra*, 41 Cal.4th at p. 1251.) Such communications also fall under section 425.16's definition of protected activity. (*Rohde*, *supra*, 154 Cal.App.4th at p. 36.)

In support of her motion, Lopez introduced evidence that she did file suit against the other recipients of the letter, Noa and Meyer, for their involvement in the film project. Although Vasquez was not made a party to the action, this is not evidence that Lopez did not contemplate litigation against Vasquez in good faith. It seems plain to us that it was Vasquez's seeming acquiescence in the demand to cease and desist the film production that spared her from being named as a defendant in Lopez's 2009 lawsuit against Noa

and Meyer. Vasquez's own declaration admitted that she was "forced to suspend development [of the film]" because of Lopez's "credible threat of suit." Because "the spectre of litigation loomed over [the] communications between the parties" (*Rohde, supra,* 154 Cal.App.4th at p. 37), Lopez satisfied her burden under the first prong of the SLAPP test.

4. Plaintiff's Probability of Prevailing on Her Claims

Once a defendant establishes that the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a "reasonable probability" of prevailing on the merits. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 61.) "To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) The plaintiff's prima facie showing need only demonstrate that the claim has " 'minimal merit.' " (*Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 291.)

The court should grant the motion "if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Freeman v. Schack, supra*, 154 Cal.App.4th 719, 733.) "The [litigation] privilege in [Civil Code] section 47 is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]' " (*Rohde, supra,* 154 Cal.App.4th at p. 38.)

As discussed *ante,* there is ample evidence that the letter was made in anticipation of litigation. (See *Rohde, supra,* 154 Cal.App.4th at p. 38 [because statements were protected statements made in anticipation of litigation under the anti-SLAPP statute, they are also privileged under Civ. Code, § 47].) Because Lopez has shown that the letter was a statement made in anticipation of litigation, it is absolutely privileged under Civil Code section 47. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) Plaintiff therefore cannot meet her burden under the second prong of the anti-SLAPP statute. Accordingly, we do

not address the merits of defendant's other bases for striking the complaint. The litigation privilege bars all of plaintiff's claims, and the trial court erred in denying the motion. Defendant is therefore entitled to an award of attorney fees on remand. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141-1142 [defendant prevailing on the special motion to strike generally is entitled to mandatory award of attorney fees and costs].)

DISPOSITION

The order is reversed and remanded to the trial court to ascertain any award of attorney fees. Appellant is to recover her costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.