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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DIANA GDOWSKI,

Plaintiff, Cross-defendant and
Appellant,

v.

WAYNE K. TSANG et al.,

Defendants, Cross-complainants
and Appellants.

B280158

(Los Angeles County
Super. Ct. No. BC605329)

APPEAL from orders of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed.

Cox, Castle & Nicholson and Stanley W. Lamport for Plaintiff, Cross-defendant and Appellant.

Hanger, Steinberg, Shapiro & Ash, Marc S. Shapiro and Christopher G. Kerr for Defendants, Cross-complainants and Appellants.

* * * * *

These cross-appeals from the denial of both sides' anti-SLAPP motions concern a long-running dispute between neighboring property owners. Plaintiff, cross-defendant and appellant Diana Gdowski owns a parcel of residential property located downslope from the property owned by defendants, cross-complainants and appellants Wayne K. Tsang and Bonni C. Ying.¹ For several years, defendants have been substantially remodeling their home and the rear yard of their property. According to plaintiff, the project is being developed in violation of an agreement between the parties regarding a drainage plan to remediate runoff from defendants' property onto plaintiff's property. On the other hand, defendants contend their project complies with all permits and conditions, and plaintiff has engaged in a campaign of harassment to thwart completion of the project.

In late 2015, plaintiff filed this action seeking specific performance of the alleged agreement with defendants, and subsequently amended her pleading to include claims for breach of contract and nuisance. Defendants answered and filed a cross-complaint seeking declaratory relief and stating claims for nuisance and fraud. Both sides filed special motions to strike pursuant to Code of Civil Procedure section 425.16 (section 425.16; the anti-SLAPP statute), seeking dismissal of each other's respective pleadings.

The trial court denied both motions, and both sides appealed. We affirm the trial court's rulings, concluding that

¹ Title is held by defendants as trustees of The Tsang Family Trust. We refer to Mr. Tsang, his wife Ms. Ying and their trust collectively as defendants, unless the context requires otherwise.

neither the operative first amended complaint, nor the operative cross-complaint arise from free speech or petitioning activity protected by the anti-SLAPP statute.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's home of many years is in the City of Palos Verdes Estates (City). The property is located downslope from a larger parcel owned by defendants. The boundary line between the two properties runs along defendants' rear yard.

There is a long history of drainage issues between the two properties dating back to at least 1995. In late 2008, defendants began plans for a substantial remodeling project on their property, including the construction of a new home, the addition of a swimming pool and changes to the grade of the rear yard. Plaintiff raised objections to the project, primarily related to the drainage plans. During the lengthy permitting process, the parties negotiated in an attempt to resolve plaintiff's concerns. Ultimately however, the dispute resulted in the filing of this action and cross-action. We summarize below the material allegations from the parties' operative pleadings.

1. The Operative First Amended Complaint

Plaintiff originally filed an action solely for specific performance against defendants.² Plaintiff amended her complaint to add causes of action for breach of contract and nuisance.

Plaintiff alleged a "long history" of drainage problems arising from the movement of surface and subsurface water from defendants' property onto plaintiff's property, including a serious

² Plaintiff also named defendants' architect and his firm. Those defendants are not parties to this appeal.

flooding event in 1995 that damaged plaintiff's home. Despite numerous discussions between the parties regarding this issue, defendants failed to take any action to remediate the drainage problems.

In early 2011, defendants sought approval from the City to proceed with a large-scale remodeling project on their property. The project called for demolition of the existing home, construction of a new home and significant grading and changes to the rear yard, including the addition of a swimming pool.

Plaintiff, with the assistance of a civil engineer, raised objections, both formally and informally, to defendants and with the City, primarily focused on the impact the project would have on the long-standing drainage problems between the properties.

Initial approval of defendants' project was granted in June 2011 from the City Planning Commission. Plaintiff appealed to the City Council. At the July 26, 2011 hearing before the City Council, the City Engineer explained that defendants were required to submit a drainage plan that adequately addressed the drainage issues.

The City Council "recessed the public hearing" and asked plaintiff and defendants "to meet to see if they could reach an agreement" about how to resolve plaintiff's objections to the project. During the recess, the parties came to an agreement and the substance of that agreement was then placed on the record when the hearing resumed.

"The agreement was in two parts. First, Plaintiff and Defendants agreed to the terms of a condition to address Plaintiff's privacy and view issues, which the City Council would impose in connection with approving the Project. Second, Plaintiff and Defendants agreed that the Drainage Plans (which

Defendants were required by the City to prepare and implement at their sole obligation, liability and expense) would be submitted to Plaintiff for review by Plaintiff and Plaintiff's civil engineers, and that Defendants would incorporate Plaintiff's civil engineers' comments into the Drainage Plans."

Defendants stated their assent to the agreement on the record and plaintiff agreed to withdraw her objections to the project.

Through April 2013, the parties "carried out their respective obligations" under the agreement, including the incorporation of plaintiff's engineers' recommended changes to the drainage plans. A "significant part of the drainage system" was located in the rear and side yards surrounding the swimming pool and near the common boundary with plaintiff's property. Defendants agreed that plaintiff and her civil engineers could be present when the drainage plans were being "implemented."

Demolition of the existing home and construction of the new home were substantially completed by 2015. "Defendants did not commence the exterior improvement work, including implementation of the Drainage Plans, until construction of the residence was largely completed." Work related to the drainage plans in the rear yard did not begin until August 2015.

Without notice to plaintiff, defendants "substantially modified" the original project site plan, including the drainage plans, and sought and obtained approval of those changes from the City. Plaintiff first received notice of the modifications when the City mailed her a copy of the approved modification dated June 16, 2015.

Plaintiff immediately sought to discuss the changes with defendants. Defendants advised that construction on the exterior

work based on the modified plans would begin immediately, but plaintiff could offer suggested changes. Plaintiff provided comments explaining that the modified plans would create conditions that exposed her property “to hazards from the movement of surface and subsurface water” and would “severely compromise the function and efficacy” of the agreed-upon drainage plans. Defendants proceeded with the construction of the exterior work according to the modified permit, without incorporating plaintiff’s recommended changes, and in some cases, without complying even with the modified plans.

Plaintiff’s first cause of action sought to specifically enforce the parties’ agreement, including orders requiring defendants to remove any portions of the completed exterior work that did not comply with the agreement or the original plans as approved by the City in 2011. In the event specific performance could not be awarded, plaintiff sought damages for breach of contract and nuisance

2. The Operative Cross-complaint

Defendants answered the complaint and filed a cross-complaint against plaintiff, stating claims for declaratory relief, “intentional nuisance,” and fraud.

As relevant here, defendants alleged that plaintiff “engaged in a calculated and relentless campaign to harass [defendants] and their agents by repeatedly interfering with, and delaying” their construction project, and “repeatedly [making] unreasonable demands,” misrepresentations and threats of litigation.

Throughout the permitting and review process with the City, plaintiff raised numerous and repetitive demands regarding the scope of the project, including with respect to the drainage

plans for the site. Defendants agreed to consider the comments and suggestions from plaintiff's civil engineer, and in 2012, all parties agreed to and signed off on drainage plans for the project. Defendants thereafter received all necessary approvals from the City.

"After failing to get the concessions she wanted in the administrative proceedings" with the City, plaintiff "resorted to engaging in a relentless campaign of harassment and intimidation outside the purview of the formal administrative process in order to force [defendants] to accept [her] unreasonable and ever-changing demands about the drainage plans." Plaintiff harassed defendants' architect, construction workers, and other agents and vendors, yelling at them over the fence, directing them to make changes, otherwise interfering with their work, and regularly threatening litigation if they did not comply with her demands. In making demands and threats to defendants, plaintiff asserted she had knowledge and expertise about what was required and what was lawful based on prior lawsuits she filed against other neighbors. Plaintiff's outrageous conduct caused extensive delays to the project and also significantly increased its cost.

Defendants sought declaratory relief, requesting, among other things, that in the event plaintiff was awarded specific performance and defendants were required to incorporate her additional changes, that defendants would be held harmless from any damages to plaintiff's property in the event the drainage system did not work effectively.

In the second cause of action for "intentional nuisance," defendants sought damages arising from plaintiff's constant harassment, interference and demands, and the third cause of

action for fraud sought damages for the same alleged harassing conduct.

3. The SLAPP Motions

Plaintiff and defendants each filed special motions to strike pursuant to the anti-SLAPP statute. Defendants moved to strike all three causes of action in the first amended complaint, and plaintiff moved to strike the second and third causes of action in the cross-complaint.

After briefing and oral argument, the court denied both motions, concluding that neither party had met the initial movant's burden of showing that the claims arose from protected activity.

Both plaintiff and defendants timely appealed the trial court's orders of November 21, 2016.

DISCUSSION

1. Standard of Review

A ruling on an anti-SLAPP motion is reviewed de novo. "We review the record independently to determine whether the asserted cause of action arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits." (*Stewart v. Rolling Stone, LLC* (2010) 181 Cal.App.4th 664, 675; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. Applicable Law

Section 425.16 was enacted to provide a procedure for the early dismissal of causes of action that infringe on the exercise of the constitutional rights to free speech and to petition for a redress of grievances. (*Park v. Board of Trustees of California*

State University (2017) 2 Cal.5th 1057, 1060 (*Park*).)³ “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 plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

In resolving an anti-SLAPP motion, the court engages in a two-step analysis. The court must first determine whether the moving defendant “has made a threshold showing that the challenged cause of action is one arising from protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If the court determines the defendant met this initial burden, “it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Ibid.*) “In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) Only those causes of action that satisfy “*both* prongs” of section 425.16, i.e., arise from

³ As relevant here, section 425.16, subdivision (e) defines an act in furtherance of speech or petitioning activity to include “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,” “any written or oral statement or writing made in connection with an issue under consideration or review” in such an official proceeding, “any written or oral statement or writing made in a . . . public forum in connection with an issue of public interest” and “any other conduct in furtherance of the exercise of the constitutional right of petition or . . . of free speech in connection with . . . an issue of public interest.”

protected activity and lack minimal merit, are subject to being stricken under the statute. (*Navellier*, at p. 89.)

In *Park*, our Supreme Court clarified the proper construction to be given the phrase “arising from.” *Park* explained, “[a] claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, ‘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.’ [Citations.] ‘[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’ [Citations.] Instead, the focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation.] ‘The only means specified in section 425.16 by which a moving defendant can satisfy the [“arising from”] requirement is to demonstrate that *the defendant’s conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)’” (*Park, supra*, 2 Cal.5th at pp. 1062-1063; see also *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343, 354 [the “definitional focus” of section 425.16 is whether “the defendant’s activity *giving rise to his or her asserted liability* . . . constitutes protected speech or petitioning”].)

In divining the gravamen of a challenged claim, a reviewing court must be “attuned to” and take care “to respect the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or

provide evidentiary support for the claim.” (*Park, supra*, 2 Cal.5th at p. 1064.)

With these principles in mind, we turn to the parties’ motions.

3. The Trial Court Correctly Determined that Plaintiff’s First Amended Complaint Is Not Based on Protected Activity

Defendants contend the core allegation upon which plaintiff’s claims are based is their conduct in obtaining the modified permit from the City in 2015. They argue the trial court erroneously relied on *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108 (*Applied Business*) in denying their motion, and ignored other applicable precedent that established the merit of their motion. We disagree.

The first amended complaint recites, at some length, the history of the permit process defendants pursued to obtain City approval for their construction project. Seeking construction permits from a government entity constitutes conduct taken in the course of an official proceeding in furtherance of the right to petition. (See, e.g., *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272 [concluding submission of “High Density Tract Map” to planning commission and city council for approval constituted acts within the ambit of section 425.16].)

However, the allegations concerning defendants’ efforts to obtain the construction permit, and later, modification of that permit, from the City are plainly collateral to the conduct upon which plaintiff bases her claims. Plaintiff did not allege defendants engaged in wrongful conduct by obtaining permits from the City. Rather, the basis of the complaint is that

defendants developed the project in violation of the parties' agreement and the original agreed-upon permit and scope of work, in particular with respect to the drainage plans. The wrongful conduct is the construction activity at the property, *not* any speech or petitioning activity that preceded it.

The trial court correctly relied upon *Applied Business*. There, the plaintiff sued the defendant for breach of a settlement agreement entered into by the parties to resolve an earlier federal lawsuit for copyright infringement. (*Applied Business*, *supra*, 164 Cal.App.4th at p. 1111.) The defendant filed a special motion to strike arguing, among other things, that the action was filed in retaliation for acts taken in the federal action and for declarations filed in support of another party involved in related litigation with the plaintiff. (*Id.* at p. 1115.) In affirming the trial court's denial of the motion, *Applied Business* explained, "the gist of plaintiff's complaint is not that defendant did something wrong by acts committed during the course of the underlying federal action, but rather that defendant did something wrong by breaching the settlement agreement after the underlying action had been concluded." (*Id.* at p. 1118.)

The same analysis applies here. Plaintiff's alleged injuries are not predicated on defendants' petitioning activity before the City, but rather from defendants' conduct *after* the permits were obtained.

Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790 (*Wang*) is also instructive. There, the plaintiff property owners sued Wal-Mart for breach of contract and fraud following a real estate transaction in which the plaintiffs sold two parcels to Wal-Mart, while retaining ownership of two adjoining parcels. (*Id.* at p. 795.) During the sale transaction, the parties

anticipated that the parcels purchased by Wal-Mart would be unified to allow for commercial development, which in turn would require obtaining city approval for a realignment of the adjacent road so that access to the parcels retained by the plaintiffs would not be cut-off from access to a public street. (*Id.* at pp. 795-797.) In bringing suit against Wal-Mart, the plaintiffs alleged that, without notice to them, Wal-Mart obtained permits from the city, and completed development of the properties, without securing the agreed-upon realignment of the adjacent road, thus impairing the value of the parcels retained by the plaintiffs. (*Id.* at p. 797.)

Wal-Mart filed an anti-SLAPP motion to strike the plaintiffs' complaint. The trial court granted the motion, concluding that all of the plaintiffs' causes of action were based upon the " 'permitting activity' " pursued by Wal-Mart in developing the property; " '[n]one of the causes of action states a claim without referring to the application for [the] development permit.' " (*Wang, supra*, 153 Cal.App.4th at p. 799.)

Wang reversed, explaining that the plaintiffs' causes of action were "based on allegations about the manner in which the private transactions between the parties were conducted, and the governmental development permit applications were only incidental or collateral to the principal purposes of those transactions." (*Wang, supra*, 153 Cal.App.4th at p. 794.) "The overall thrust of the complaint challenges the manner in which the parties privately dealt with one another, on both contractual and tort theories, and does not principally challenge the collateral activity of pursuing governmental approvals." (*Id.* at p. 809.)

Plaintiff's allegations pertaining to the official proceedings before the City are collateral to the primary allegations of

wrongdoing by defendants during the postpermit construction phase of the project. Defendants' motion was properly denied.

4. The Trial Court Also Correctly Concluded that Defendants' Cross-complaint Does Not Arise From Protected Activity

Plaintiff contends the trial court erred in denying her anti-SLAPP motion because the cross-complaint is based on oral and written statements made by plaintiff to the City during the permit process. Once again, we disagree.

Like plaintiff's first amended complaint, defendants' cross-complaint sets forth in some detail the background facts related to the project, beginning with the initial planning phase in 2008 and continuing through the permit proceedings from 2011 through 2015. These allegations merely provide context for the claims. The cross-claims are based on alleged statements and misrepresentations that plaintiff made after the modified permit was obtained in 2015 and which allegedly thwarted the timely completion of defendants' project.

It may be true that similar statements were made by plaintiff during the permit proceedings, but the cross-complaint is based on conduct occurring thereafter, conduct and statements by plaintiff that took place at the property during the construction. Defendants seek damages for verbal interference with the construction work and for disturbing their quiet enjoyment of the property; conduct which does not fall within the anti-SLAPP statute.

Since we conclude the trial court correctly found that neither party met their respective burdens in demonstrating the challenged claims arose from protected activity, we have no need

to discuss the second prong of the anti-SLAPP statute as to either motion.

DISPOSITION

The order denying defendants, cross-complainants and appellants Wayne K. Tsang, Bonni C. Ying and The Tsang Family Trust's special motion to strike the first amended complaint is affirmed.

The order denying plaintiff, cross-defendant and appellant Diana Gdowski's special motion to strike the cross-complaint is affirmed.

Each side is to bear their own costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

ROGAN, J.*

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