

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LESLIE GOULD et al.,

Cross-defendants and
Appellants,

v.

JOEL D. KETTLER,

Cross-complainant and
Respondent.

B266652

(Los Angeles County
Super. Ct. No. LC 101909)

APPEAL from an order of the Superior Court for the County of Los Angeles. Frank Johnson, Judge. Reversed and remanded with directions.

The Ring Law Firm and Bart I. Ring for Cross-defendants and Appellants.

Silver and Arsht, Samuel J. Arsht and Jeffrey A. Meinhardt for Cross-complainant and Respondent.

Joel D. Kettler filed a cross-complaint alleging defamation and eight other causes of action against cross-defendants Leslie and Susan Gould. Cross-defendants filed an anti-SLAPP (strategic lawsuit against public participation) motion (Code Civ. Proc., § 425.16).¹ The trial court denied the motion, and cross-defendants appeal.

The parties agree the cross-complaint contains so-called “mixed causes of action,” combining allegations of activity protected by the anti-SLAPP statute with allegations of unprotected activity. After briefing in this case was complete, the Supreme Court decided *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*). *Baral* gives the courts and parties precise directions on that very issue: “How . . . the special motion to strike operate[s] against a so-called ‘mixed cause of action’ that combines allegations of activity protected by the statute with allegations of unprotected activity.” (*Id.* at p. 381.) We solicited and received supplemental briefing on the application of *Baral* to this appeal.

Because the parties and the trial court did not have the benefit of *Baral*, and the trial court denied the anti-SLAPP motion without considering whether and to what extent allegations of protected activity could be stricken from a cause of action without affecting the allegations of unprotected activity, we reverse the trial court’s ruling and remand with directions that it do so. We briefly explain the statutory background, the *Baral* decision, and the application of *Baral* to the claims in this case.

A defendant may bring a special motion to strike any cause of action “arising from any act of that person in furtherance of the

¹ Further statutory references are to the Code of Civil Procedure.

person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" (§ 425.16, subd. (b)(1).) As relevant here, acts in furtherance of free speech rights in connection with a public issue include "(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" (*Id.*, subd. (e)(1)&(2).)

When ruling on an anti-SLAPP motion, the trial court employs a two-step process. It first looks to see whether the moving party has made a threshold showing that the challenged causes of action arise from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the moving party meets this threshold requirement, the burden then shifts to the other party to demonstrate a probability of prevailing on its claims. (*Ibid.*) In making 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); *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

As the Supreme Court explains in *Baral*, the question how to treat a cause of action that is based on allegations of both protected activity and unprotected activity has perplexed the Courts of Appeal. *Baral* resolves that issue, enunciating several principles:

First, "when the defendant seeks to strike particular claims supported by allegations of protected activity that appear

alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity.” (*Baral, supra*, 1 Cal.5th at p. 392.) To do so would “undermine[] the central purpose of the statute: screening out meritless claims that arise from protected activity before the defendant is required to undergo the expense and intrusion of discovery.” (*Ibid.*)

Second, “an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded.” (*Baral, supra*, 1 Cal.5th at p. 393.)

Third, “[a]ssertions that are ‘merely incidental’ or ‘collateral’ are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute.” (*Baral, supra*, 1 Cal.5th at p. 394.)

Fourth, “*particular* alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion. [Citation.] Thus, in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken.” (*Baral, supra*, 1 Cal.5th at p. 395.)

Finally, for the guidance of litigants and courts, *Baral* provided a summary of the showings and findings required by the statute. Thus:

- (1) At the first step, “the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both

protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached.” (*Baral, supra*, 1 Cal.5th at p. 396.)

- (2) At the second step, “the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (*Baral, supra*, 1 Cal.5th at p. 396.)

As we have observed, the case before us involves causes of action that combine allegations of protected activity and unprotected activity. Here, cross-defendants sought to strike the entire complaint, and the trial court denied the motion “in its entirety.” Responding to a request for clarification from counsel, the court indicated that “at least some of the ruling [was] based on mixed use precedents” From this we glean that, because all of cross-complainant’s causes of action were based at least in part on unprotected activity, the court concluded the anti-SLAPP motion could be denied in its entirety. We now know this was error.

By way of example, the following two allegations are incorporated into all of cross-complainant's causes of action, and describe both protected activity (reports to governmental agencies) and unprotected activity (defamatory statements to existing and potential clients). Thus, paragraph 13 states:

“Cross-Defendants have engaged in a malicious, vicious, mean-spirited, scorched earth campaign against Cross-Complainant, falsely accusing Cross-Complainant of misappropriating the Goulds' funds and intentionally deceiving them to obtain the [power of attorney] and become the successor trustee. In addition to filing this frivolous lawsuit, Cross-Defendants have filed complaints with every person or agency imaginable, including, but not limited to, the Department of Insurance, Certified Financial Planner Board of Standards, Inc. ('CFP Board'), Financial Industry Regulatory Authority ('FINRA'), Cross-Complainant's employer, and any other government agency, company, or person that could possibly interfere with Cross-Complainant's ability to engage in his profession. As a result of Cross-Defendants' wrongful actions, Cross-Complainant's employment relationship with his employer has been terminated.”

And paragraph 14 states:

“Cross-Defendants have also defamed Cross-Complainant's reputation to other Third Parties, including to existing and potential clients, which has caused one or more clients to cancel their business with Cross-Complainant and no longer use Cross-Complainant as their financial planner/advisor. Cross-Defendants have caused Cross-

Complainant to lose clients and hence, commissions, management fees, services fees and performance bonuses.”

In short, the allegations of both protected activity and unprotected activity within a single cause of action bring the *Baral* principles into play, and require the parties and the trial court to proceed in the manner described by the Supreme Court. We remand to allow cross-defendants to reframe their motion and the trial court to decide all issues as directed in *Baral*.

DISPOSITION

The order denying the special motion to strike is reversed, and the cause is remanded to the trial court with directions to vacate its order denying cross-defendants’ motion, order further briefing allowing cross-defendants to reframe their anti-SLAPP motion in conformance with the Supreme Court’s formulation in *Baral, supra*, 1 Cal.5th at page 396, and determine the issues in accordance with that formulation. The parties shall bear their own costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.