Filed 9/5/18 Durning v. Cohen CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARY ANN DURNING, Plaintiff and Respondent, v. RAYMOND COHEN et al., Defendants and Appellants.	B282576 (Los Angeles County Super. Ct. No. BC625932)

APPEAL from an order of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed in part, reversed in part, and remanded with directions.

Alpert Barr & Grant, Adam D.H. Grant and Ryan T. Koczara for Defendants and Appellants.

ADLI Law Group and Drew H. Sherman for Plaintiff and Respondent.

Defendants Raymond Cohen and Raymond M. Cohen, CPA, a Professional Corporation (collectively, Cohen) appeal from the trial court's denial of their special motion to strike brought under the anti-SLAPP[1] statute, Code of Civil Procedure section 425.16.[2] Cohen brought the motion in a lawsuit filed by plaintiff and respondent Mary Ann Durning[3] alleging that Cohen and other accounting professionals engaged in a years-long conspiracy—first to manipulate Ms. Durning's ailing husband, actor Charles Durning, to amend his estate plan to disinherit her in favor of Mr. Durning's children; then to deprive plaintiff of her share of community property, while saddling her with disproportionate tax liabilities; and finally to charge her for accounting services she did not receive.

The focus of Cohen's anti-SLAPP motion is a portion of paragraph 47 in the first amended complaint, in which Ms. Durning alleges Cohen misrepresented the amount of Charles Durning's 2010 residuals to the family law court and plaintiff during Ms. Durning's action for legal separation. The trial court denied the motion, finding that any protected activity was merely incidental to the allegations of unprotected activity that served as the basis for liability.

Cohen contends on appeal that (1) the alleged misrepresentations about the 2010 residuals in paragraph 47 were made in connection with a judicial proceeding, and thus

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[1] "SLAPP" stands for "Strategic Lawsuit Against Public Participation."

[2] Undesignated references are to the Code of Civil Procedure.

[3] Ms. Durning has since died. Her daughter, Anita Gregory, has been substituted in her place.

protected under the anti-SLAPP statute; (2) all causes of action in the first amended complaint are premised on those misrepresentations and thus the entire first amended complaint should be stricken; and (3) whether Ms. Durning would prevail on any of her causes of action is "irrelevant at this stage" and "superfluous."

We conclude that paragraph 47's allegation of misrepresentations to plaintiff and the family law court regarding the 2010 residuals describe activity protected by the anti-SLAPP statute that is not incidental to the remaining allegations of unprotected activity in the first amended complaint within the definition of "incidental" set forth in *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*). Because Ms. Durning failed to demonstrate a probability of prevailing on claims based on those misrepresentations, the trial court erred in not striking that portion of paragraph 47 alleging that Cohen misrepresented the 2010 residuals to plaintiff and the family law court.

We part company with Cohen as to its argument that paragraph 47 is the basis for the entire first amended complaint. Cohen ignores the allegations in that complaint of additional conduct aimed at disinheriting Ms. Durning in favor of Mr. Durning's children and other conduct to Ms. Durning's detriment. Accordingly, we reverse in part and order the trial court to strike the allegation in paragraph 47 about what Cohen represented to the family law court and plaintiff about the 2010 residuals, and affirm the trial court's ruling as to the remaining allegations in the first amended complaint.[4]

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[4] As set forth *post*, Ms. Durning sought attorney fees in the trial court as a sanction for Cohen's filing an anti-SLAPP motion that Ms. Durning contended was frivolous. In light of our ruling,

FACTUAL BACKGROUND

Mary Ann and Charles Durning married in August 1974. Mr. Durning had three children by a previous marriage (the Durning Kids), and Ms. Durning had two or more children. The couple executed an estate plan on January 6, 1999—the Durning Family Trust of 1999. According to the first amended complaint, the 1999 plan provided that the surviving spouse would receive the entire estate, while the Durning Kids would inherit a small amount of cash and personal property. Both Charles and Mary Ann Durning were to serve as trustees, with successor trusteeships divided between the Durning Kids and plaintiff 's children. The Durnings amended their estate plan on May 24, 2007, allegedly "to make it more difficult for the Durning Kids to take over and cut out Plaintiff if Charles was to pass away first."

Defendant Raymond Cohen allegedly served as a CPA and business manager for Charles and Mary Ann Durning from 2006 until their legal separation on June 24, 2010. He also represented Mr. Durning's interests in Charmaran, Inc. (Charmaran), a company created by the Durnings that received the residuals earned by Mr. Durning during his acting career. Mr. Cohen allegedly provided his services through defendant Raymond M. Cohen, C.P.A., a Professional Corporation (Cohen Corp.).

In 2009, Mr. Durning began to experience dementia and symptoms of Alzheimer's disease. On May 26, 2009, allegedly at

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the trial court did not err in denying Ms. Durning's request. As also set forth *post*, on remand, the trial court should consider Cohen's request for attorney fees and costs under § 425.16, subd. (c)(1). We express no opinion on how the trial court should rule on that request.

the instigation of the Durning Kids and Cohen, Mr. Durning executed a new estate plan that he allegedly believed contained only minor changes. He revoked the Durning Family Trust of 1999 and executed the Charles Durning Trust of May 26, 2009. The new plan allegedly "gave complete control of the estate, even during Plaintiff 's and Charles' lifetime, to the Durning Kids." It also provided that while Ms. Durning would have everything in the estate during her lifetime, upon her death the entire estate would go to the Durning Kids. On October 15, 2009, two of the Durning Kids, Michele Durning and Jeanine Durning, executed a "Determination of Incapacity" of Charles. The first amended complaint alleges that in late 2009, Mr. Cohen visited Ms. Durning in the hospital, where she was undergoing cancer treatment, and "attempted to get her to sign a document transferring her personal property over to Charles' trust that was under the control of the Durning Kids."

Also according to the first amended complaint, on June 21, 2010, "after Charles had been declared incapacitated, the Durning Kids and Cohen took Charles to, or brought before him, a notary public who witnessed and notarized estate planning documents which amended Charles' estate plan which had the effect of providing the Durning Kids with everything and totally disinheriting Plaintiff from anything in Charles' estate."[5]

Meanwhile, in April 2010, Ms. Durning's children assisted her in filing for legal separation from Mr. Durning, allegedly "to protect herself from the Durning Kids." Shortly thereafter, Ms. Durning's daughter, Anita Gregory, was appointed as the

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[5] The first amended complaint appears to allege, albeit not entirely clearly, that Mr. Durning amended his estate plan in 2009 and again in 2010.

guardian ad litem of Ms. Durning, who was unable to care for herself or her property due to multiple physical ailments and memory loss.

A judgment of legal separation was entered on June 24, 2010. On September 24, 2010, a partial judgment on reserved issues finalized the disposition of the Durnings' real property and Mr. Durning's pension plans. Around this time, Ms. Durning, through her attorney of record, retained the firm White Zuckerman Warsavsky Luna and Hunt, LLP (WZW) as her business manager/CPA and for forensic accounting services "against the Durning Kids." WZW continued to provide accounting services to Ms. Durning through 2015.

A final judgment on reserved issues (the final judgment) was filed in the separation action on July 22, 2011. Among other things, it addressed the division and disposition of Mr. Durning's residuals. The final judgment divided the residuals into those earned for work before the date of the marriage, which were Mr. Durning's separate property, and those earned during the marriage, which were community property. It further specified that the community property residuals were paid to Charmaran, "except for a very small amount of residuals that may be paid directly to [Mr. Durning], which amounted to $0.00 in 2010."

The final judgment acknowledged an existing dispute between the parties "as to Cohen's involvement in the payment of [Mr. Durning's] community property residuals." It stated that the parties agreed that an independent third party could assume responsibility for the receipt and distribution of the residuals paid to Charmaran, but also made provisions if Mr. Cohen were to continue to have this responsibility. The first amended complaint alleges that Mr. Cohen was "the court appointed

fiduciary in charge of collections, accounting, and distributions of certain residuals from SAG/AFTRA" until he resigned in 2015. The pleadings and supporting evidence do not specify whether the SAG/AFTRA residuals were among those paid to Charmaran or non-Charmaran residuals paid directly to Mr. Cohen.

PROCEDURAL HISTORY

On July 5, 2016, plaintiff filed suit against Cohen, WZW, and individual accountants associated with WZW.[6] She alleged misconduct, beginning with the manipulation of Charles Durning in 2009 and culminating in a conspiracy between Cohen, WZW and individual accountants to appropriate and retain her property while failing to provide her with competent accounting services. Cohen demurred to the complaint on the grounds that each of the claims was barred by the applicable statute of limitations, a breach of contract claim failed to specify whether the contract was oral or written, and fraud claims were not pled with the requisite particularity. The trial court sustained the demurrer in its entirety with leave to amend.

Plaintiff filed her first amended complaint on October 24, 2016. She alleged that Cohen assisted the Durning Kids in amending Charles Durning's estate plan to deprive her of any inheritance. She further alleged that Cohen—acting as CPA for Mr. Durning and herself until the legal separation and then as a fiduciary after the final judgment—exploited his position to provide the Durning Kids with cash from community property, retain for Charles Durning (and ultimately his children) funds that should have been community property, record plaintiff 's

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[6] In addition to Cohen, defendants include Keith Benson, Keith Benson & Associates, Paul White, and WZW.

medical expenses inaccurately to justify distributions from Charles Durning's retirement account, and burden plaintiff with a disproportionate share of taxes. The allegations also include claims that WZW, in collusion with Cohen, took advantage of plaintiff 's infirmity and billed her for forensic and other accounting services while actually ignoring her account and using her payments to shore up a troubled firm. The complaint recites over 20 specific allegations of accounting misconduct, including failures to file and pay plaintiff 's taxes.

The first amended complaint includes 11 causes of action, including claims for breach of contract, breach of fiduciary duty, negligence, fraudulent misrepresentation and concealment, elder abuse, and conspiracy. Each of the individual causes of action relies primarily or exclusively on the general factual allegations in the complaint and provides few, if any, specific allegations in the body of each cause of action. Cohen demurred to the first amended complaint on November 23, 2016.

Before the demurrer was heard, Cohen moved to strike the entire first amended complaint pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute. Cohen argued that the entire complaint, and each cause of action within it, arose from the following misrepresentation alleged in paragraph 47 of the complaint: "Cohen and Cohen Corp., while representing Plaintiff prior to the date of legal separation and after the date of legal separation, misrepresented to the Family Law Court, Plaintiff and the IRS that Charles had made $0 in residual income in 2010 when, in reality, Charles had personally made close to $70,000 in residual income, in order to acquire a better settlement position for the legal separation as well as cover the fraudulent numbers Cohen and Cohen Corp. manufactured so

as to reduce the monies that had to be paid to Plaintiff for the first half of 2010."[7] Cohen contended that the alleged statements constituted activity in furtherance of the rights of free speech and petitioning protected by the anti-SLAPP statute, and noted that each pleaded cause of action incorporated by reference the allegation of paragraph 47.

Cohen additionally argued that plaintiff could not demonstrate a probability of prevailing on any of her causes of action because the misrepresentations to the family law court fall under the litigation privilege, the entire first amended complaint is time-barred, the family law court has exclusive jurisdiction over matters related to the final judgment, and claims related to the payment of residuals and loans are barred by collateral estoppel and res judicata. In support of the motion, Cohen requested judicial notice of the partial and final judgments in the separation action and a 2010 declaration by plaintiff 's daughter.[8]

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[7] Paragraph 47 continues: "As well, in the fiduciary position Cohen held by the [final judgment] through 2015, Cohen did not pay the total residuals to which Plaintiff was entitled to have the Durning Kids retain more of Charles' inheritance than they should have." Cohen does not argue that this part of paragraph 47 alleged protected activity.

[8] The record on appeal does not include any opposition to Cohen's request for judicial notice. The trial court did not expressly rule on the request but stated in its order denying the motion to strike: "In determining the first step [of the anti-SLAPP analysis], judges are not limited to considering pleadings, but also may consider the moving and opposing parties' filed evidence to ascertain the conduct or communications upon which liability is allegedly based," citing *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1200; *City of Cotati v. Cashman* (2002)

Opposing the motion, plaintiff argued that Cohen focused on a single allegation, ignoring the balance of her claims—which alleged malfeasance by Cohen through 2015. "The gravamen of Plaintiff 's FAC is not Cohen's lies to the Court in 2010; it is a continued conduct of bad acts as a whole." Plaintiff additionally contended that Cohen's alleged misrepresentations to the family law court were not protected by the anti-SLAPP statute because they were illegal perjury. Plaintiff submitted as evidence in support of its opposition excerpts from a 2011 deposition of Raymond Cohen during the Separation Action and a copy of the Screen Actors Guild's Summary of Earnings for Charles Durning in 2010.[9]

The trial court denied the motion to strike on May 2, 2017. It found that "[a] careful reading of the First Amended Complaint readily reveals that it is not based upon protected communications or conduct, but instead contains extensive allegations of professionals misdirecting funds belonging to Plaintiff, and misrepresenting. Further, apparently supportive Paragraph 47 of the First Amended Complaint, actually does not express a theory of liability based upon representations in protected court proceedings." The trial court quoted

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29 Cal.4th 69, 79. We construe this comment to mean the trial court considered the documents in Cohen's request for judicial notice.

[9] Cohen objected to this evidence as untimely, improperly served, and lacking authentication. The trial court noted in its order on the motion to strike: "As for step two, the Court need not address the insufficiency or untimeliness of the opposing papers, as to the lack of competent proof to show the argued merits of each of the claims."

Martinez v. Metabolife Internat., Inc. (2003) 113 Cal.App.4th 181, 188: " '[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' " The trial court denied plaintiff 's request for attorney fees as a sanction for what plaintiff argued was a frivolous anti-SLAPP motion.

Cohen timely appealed on May 11, 2017.

DISCUSSION

I. STANDARD OF REVIEW

The anti-SLAPP statute resulted from legislative concern over "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The statute authorizes a special motion to strike a cause of action arising from a defendant's exercise of petition or speech rights, unless the plaintiff establishes a probability of prevailing on the claim. (*Id.,* subd. (b).) The anti-SLAPP special motion "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral*, *supra*, 1 Cal.5th at p. 384.)

Trial courts evaluating anti-SLAPP motions engage in a two-step process. First, the defendant bringing the motion must establish that the challenged cause of action arises from activity protected by the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) The burden then shifts to the plaintiff to demonstrate a probability of prevailing on the merits of her claim. (*Ibid.*) The trial court "consider[s]

the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

We review a trial court's denial of an anti-SLAPP motion de novo, following the same two-step procedure. (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42.)

Before turning to the merits of the motion, we address a threshold matter. Section 425.16 permits a defendant to file an anti-SLAPP motion to strike "within 60 days of the service of the complaint or, in the trial court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f).) At oral argument, plaintiff cited for the first time *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637 (*Newport Harbor*). In *Newport Harbor,* the Supreme Court considered whether subdivision (f) of section 425.16 permits filing a special motion to strike within 60 days after an *amended* complaint is served. (*Newport Harbor*, at p. 642.) The Court concluded that subdivision (f) "should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court's discretion to permit a late motion)." (*Id.* at p. 645.) When more than 60 days have passed since service of the original complaint, a special motion to strike may be brought only against causes of action that were not pled in the original complaint and " 'new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion.' " (*Id.* at pp. 641, 645.)

At oral argument, plaintiff contended that *Newport Harbor* rendered Cohen's special motion to strike untimely. The original

complaint was filed on July 5, 2016. Cohen did not file a special motion to strike until December 22, 2016—more than 60 days after Cohen was served with the original complaint. The anti-SLAPP motion was filed less than 60 days after the first amended complaint was served on Cohen on October 26, 2016, but the first amended complaint includes the same causes of action that were pled in the original complaint. In particular, the first sentence of paragraph 47 of the first amended complaint, on which Cohen especially bases his motion to strike, appears in the original complaint. Thus the motion to strike could have been brought to the original complaint.

We nevertheless conclude that *Newport Harbor* does not provide a basis for affirming the trial court's denial of Cohen's motion on the basis of untimeliness. First, the timing requirement of section 425.16, subdivision (f), is not a jurisdictional bar preventing the trial court from hearing an untimely motion. On the contrary, the statute expressly provides that a defendant may file a motion to strike "within 60 days of the service of the complaint *or, in the trial court's discretion, at any later time upon terms it deems proper*." (§ 425.16, subd. (f), italics added.) In ruling on the merits of Cohen's motion, the trial court implicitly exercised its discretion to permit the late-filed motion. Plaintiff did not contend at oral argument, and we do not conclude, that the trial court abused its discretion in doing so.

Second, plaintiff failed to object to the untimeliness of the motion either in the trial court or in its appellate briefing. Although the Supreme Court's opinion in *Newport Harbor* was not handed down until March 22, 2018—after the appellate briefing in the instant matter was complete—the Court of Appeal's decision with virtually the same holding had been filed

on November 30, 2016—before Cohen filed the anti-SLAPP motion. (See *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1219.) Plaintiff thus forfeited the issue and may not assert it for the first time on appeal. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 8:229; p. 8–169 ["As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal"].)

II. FIRST STEP: DO THE CHALLENGED CAUSES OF ACTION ARISE FROM PROTECTED ACTIVITY?

Turning to the merits, our first step in the anti-SLAPP analysis is to determine whether the moving defendant has shown that the challenged complaint, claim, or allegation is based on activity that comes within the scope of the anti-SLAPP statute. The statute applies to "cause[s] 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." (§ 425.16, subd. (b)(1).)

As pertinent to this appeal, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (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."[10] (§ 425.16, subd. (e)(1)-(2).) If a moving defendant shows that the cause of action arises from a statement described in clauses (1) or (2), the defendant is not required to demonstrate that the statement was made in connection with a "public issue." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1114 (*Briggs*).)

This first step itself entails two inquiries: (1) whether the alleged acts at issue constitute activity protected by the statute, and (2) whether the first amended complaint's claims do in fact "arise from" the alleged activity. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130.) At this stage of the analysis, we review the pleadings, declarations, and other supporting documents only " 'to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.' " (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 491.)

A. The Protected Activity Determination

1. The allegations

Cohen based its anti-SLAPP motion to strike exclusively on the following portion of paragraph 47 of the first amended complaint: "Cohen and Cohen Corp., while representing Plaintiff

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[10] The acts defined as coming within the scope of the statute also include "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" and "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)(3)-(4).)

prior to the date of legal separation and after the date of legal separation, misrepresented to the Family Law Court, Plaintiff, and the IRS that Charles had made $0 in residual income in 2010 when, in reality, Charles had personally made close to $70,000 in residual income, in order to acquire a better settlement position for the legal separation as well as cover the fraudulent numbers Cohen and Cohen Corp. manufactured so as to reduce the monies that had to be paid to Plaintiff for the first half of 2010."

Neither the first amended complaint nor the parties' briefing detail any facts related to these allegations. The above-quoted portion of paragraph 47 alleges that Cohen misrepresented the amount of Charles Durning's 2010 residuals (1) to Ms. Durning prior to the judgment of legal separation filed on June 24, 2010, and (2) to the family law court and possibly Ms. Durning at some point during the proceedings in the separation action. Plaintiff 's opposition to the motion to strike in the trial court refers to the allegations as "Cohen's 2010 perjury to the Family Law Court."

The final judgment in the separation action states that the parties agree that "all residuals earned by [Mr. Durning] after date of marriage are community property and are paid to [Mr. Durning's] loan-out corporation, Charmaran, Inc., a New York Corporation authorized to do business in California ('Charmaran'), *except for a very small amount of residuals that may be paid directly to Respondent, which amounted to $0.00 in 2010, which are hereinafter referred to as 'the non-Charmaran residuals*.' " (Italics added.) Paragraph 47 refers generally to "residual income," however, not to non-Charmaran residuals paid directly to Mr. Durning. In addition, the final judgment does not

state that Cohen provided the residual information referenced in that document.

2. Analysis

Although the record is somewhat confusing, as just noted, we conclude that the activity identified by Cohen's motion comes within section 425.16's purview. First, plaintiff 's allegation that Cohen misrepresented the amount of Mr. Durning's 2010 residuals "to the Family Law Court" appears to concern oral and/or written statements made to the court as part of the separation action, a judicial proceeding. Section 425.16 protects litigation-related speech when undertaken on another's behalf. (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 576; *Briggs*, *supra*, 19 Cal.4th at p. 1116.) Thus, the alleged misrepresentations to the family law court come within the scope of section 425.16, subdivision (e)(1).

Second, to the extent the alleged misrepresentations were made to plaintiff herself in anticipation of, or during the pendency of the separation action, they constitute "oral statement[s] or writing[s]made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).) A statement is " 'in connection with' " an issue under consideration by a court in a judicial proceeding if it (1) is related to "a substantive issue in the proceeding," and (2) is directed to "a person having some interest in the proceeding." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1167; see *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.)

Communications may come within the scope of section 425.16, subdivision (e)(2), if they are made in

anticipation of litigation. (*Briggs*, *supra*, 19 Cal.4th at p. 1115; *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 482 ["communications that are intimately intertwined with, and preparatory to, the filing of judicial proceedings qualify as petitioning activity for the purpose of the anti-SLAPP statute"].) Statements made in the course of settlement negotiations likewise may constitute protected activity. (See *Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal.App.5th 118, 123 (*Suarez*); *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-964.) The protection applies "even against allegations of fraudulent promises made during the settlement process." (*Suarez,* at p. 123.)

For instance, in *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*), plaintiffs sued the defendant for fraud, alleging the defendant had misrepresented his intent to be bound by a release in a previous federal action. (*Id.* at p. 87.) The court held that plaintiffs' fraud allegations concerned the defendant's "alleged negotiation, execution, and repudiation" of the release in the federal action and therefore came within the plain language of the anti-SLAPP statute. (*Id.* at p. 90.) In *Suarez*, the court found that the protections of section 425.16 applied where the defendant allegedly failed to disclose the existence of a letter of intent to purchase its property in order to prevent the plaintiff from obtaining a more favorable settlement in the plaintiff 's action for compensation for services rendered in attempting to locate a buyer for the property. (*Suarez*, *supra*, 3 Cal.App.5th at pp. 121-125.) The court concluded that "[t]he alleged wrongdoing was directed squarely at the underlying litigation." (*Id.* at p. 124.)

Here, plaintiff alleges in paragraph 47 that Cohen misrepresented the amount of Mr. Durning's 2010 residuals "in

order to acquire a better settlement position for the legal separation." The final judgment shows that the amount of Charles Durning's residuals—as well as when they were earned and when they were paid—was a central issue in settling the separation action and determining the parties' rights under the final judgment. The alleged statements by Cohen to plaintiff were thus related to the litigation and settlement process.

Plaintiff argues that the alleged conduct cannot come within the scope of the anti-SLAPP statute because "[k]nowingly submitting false information to a court's record under oath" is perjury and, as illegal conduct, it not protected by the anti-SLAPP statute. (See Pen. Code, § 118.) Plaintiff relies on *Flatley v. Mauro* (2006) 39 Cal.4th 299, in which the Supreme Court held that section 425.16 cannot be invoked by a defendant "whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by the constitutional guarantees of free speech and petition." (*Flatley*, at p. 317.) *Flatley* limited the reach of this holding, however, to cases where "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Id.* at p. 320.)

The record here contains neither a concession by Mr. Cohen that he committed perjury nor evidence of such perjury. In opposing Cohen's motion to strike in the trial court, plaintiff asserted that "Cohen has admitted under oath that his 2010 statements were perjurious." Plaintiff cited Mr. Cohen's January 11, 2011 deposition in the separation action for this claim, but even putting aside Cohen's objections to that evidence, nowhere in the excerpts offered by plaintiff did Mr. Cohen admit perjury. Indeed, he was not asked about any statement that

Mr. Durning made $0 in residuals in 2010. Mr. Cohen did testify that the total residuals received by Charmaran for 2010 amounted to $75,682. This does not conclusively establish perjury, however, because in opposing the anti-SLAPP motion, plaintiff failed to offer any evidence that Mr. Cohen ever stated—in family law court or to plaintiff—that Mr. Durning received $0 in residuals in 2010.

Thus, we conclude that Cohen has identified activity within the scope of section 425.16.

B. The "Arising From" Analysis

We next analyze whether plaintiff 's claims in the first amended complaint arise from the identified protected activity. "[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) That is, the defendant's conduct, *by which the plaintiff claims to have been injured,* must fall within one of the categories set forth in section 425.16, subdivision (e). Consequently, we "consider the elements of the challenged claim" to determine "what actions by the defendant supply those elements and consequently form the basis for liability." (*Park*, at p. 1063; see *Navellier*, *supra*, 29 Cal.4th at p. 92.) Only if protected activity supplies one or more of the elements of a claim are the allegations of that activity subject to being struck. In performing this analysis, we distinguish between " 'a cause of action based squarely on a privileged communication . . . and one based upon an underlying course of conduct *evidenced* by the communication.' " (*Park*, at p. 1064, italics added.)

When a complaint or an individual cause of action alleges both protected and unprotected conduct, additional considerations are necessary. Although a cause of action "aris[es] from" protected activity if any of the supporting allegations includes conduct furthering the defendant's right of free speech or petition, it does not follow that where allegations of both unprotected and protected activity provide the basis for a cause of action, the entire cause of action must be stricken. (*Baral*, *supra*, 1 Cal.5th at pp. 381-382.)

The *Baral* Court distinguished between a pled "cause of action" and a "claim" asserted as a basis for relief, holding that "[s]ection 425.16 is not concerned with how a complaint is framed"—that is, how the causes of action are pled. (1 Cal.5th at pp. 381-382, 395.) The Court held that although section 425.16 refers to a "cause of action" arising from activity furthering the rights of petition or free speech, it does not refer to causes of action in the sense of pled counts, but instead refers to "*particular* alleged acts giving rise to a claim for relief." (*Id.* at p. 395.) Therefore, a pled cause of action may contain numerous claims for relief, each defined by a particular act by the defendant.

In complaints alleging both protected and unprotected activity, the anti-SLAPP statute applies to allegations amounting to distinct claims of protected activity, but does not reach claims based on unprotected activity. (*Baral*, *supra*, 1 Cal.5th at p. 382.) "[C]ourts may rule on plaintiffs' specific claims of protected activity," regardless of how they are framed or grouped in the pleading. (*Id.* at p. 393; see *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1164-1165.)

The *Baral* court cautioned that assertions of protected activity that are " 'merely incidental' or 'collateral' " are not subject to section 425.16. (*Baral*, *supra*, 1 Cal.5th at p. 394.) "Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Ibid.*)

Cohen argues on appeal that "the allegations of paragraph 47 are the injury causing event. All causes of action in the [first amended complaint] are based on a misrepresentation and the only misrepresentation alleged against Appellants is the one made to the court in the Separation Action." Cohen bases this contention on the incorporation by reference of paragraph 47 into each cause of action, as well as paragraphs in individual causes of action that refer generally to defendants' "actions as set forth more fully above."

These general references do not establish that the alleged misrepresentations caused injury giving rise to the entirety of each cause of action. Nothing in the first amended complaint's references to previously alleged "actions" limits the referenced actions to misrepresentations, much less to the specific misrepresentations alleged in paragraph 47 on which Cohen relies. As discussed above, the first amended complaint alleges numerous improper acts directed towards disinheriting Ms. Durning, depriving her of assets, and falsely billing her for services.

We further observe that Cohen makes no effort on appeal to address whether these allegations of other misconduct, i.e., those alleging conduct other than the misrepresentations about the 2010 residuals, describe activity protected by the anti-SLAPP statute. We thus do not address this unasserted issue either.

Our task, therefore, is to determine whether the alleged misrepresentations concerning the 2010 residuals comprise injury-causing conduct that provides a basis for relief within each of plaintiff 's causes of action. We must determine if the alleged misrepresentation is itself "the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."[11] (*Park*, *supra*, 2 Cal.5th at p. 1060.)

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[11] We recognize that our approach differs somewhat from this Court's reasoning in previous cases in which we analyzed the "gravamen" or "principal thrust" of each cause of action to determine whether the cause of action should be stricken. (See *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 586-590 (*Okorie*); *Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 110-111 & fn. 5.) In *Okorie*, we were faced with the moving parties' failure to identify any particular allegation describing protected conduct; instead, we had to analyze a general request to strike the entire complaint based on " 'the gravamen of the complaint.' " (14 Cal.App.5th at p. 589.) It is this context in which we observed, "*Baral* did not say that a special motion to strike must *always* be limited to challenges *within* a pleaded count." (*Ibid.* at p. 589, italics added.) Such an approach would present difficult challenges, we further observed, "where the plaintiff 's protected and unprotected claims . . . are not well delineated and are even enmeshed within another." (*Ibid.*)

Here, unlike in *Okorie,* the allegations of protected activity are well delineated. Cohen based its motion exclusively on one sentence in paragraph 47, which allegation can readily be distinguished from other allegations in the first amended complaint. In this circumstance, the approach endorsed by *Baral*, which reaches specific allegations of protected activity without sweeping in allegations of unprotected activity, is more faithful to the stated purpose of the anti-SLAPP statute to deter litigation brought "primarily" to chill the valid exercise of

1. Plaintiff 's contract causes of action

In her first two causes of action, plaintiff alleges breach of contract and breach of an implied in fact contract. Plaintiff avers that Cohen offered to provide her with CPA and business management services "in consideration for a monthly [fee] or a percentage of her assets under management." She alleges she had a contract with Cohen "by virtue of Cohen's written engagement with Charles and the [final judgment]." In her cause of action for breach of a contract implied in fact, plaintiff alleges that Cohen "initially took actions" to provide Plaintiff with CPA and business management services. Plaintiff further alleges that the Cohen and the co-conspirator defendants breached the alleged contracts "by their actions as set forth more fully above." Plaintiff 's eighth cause of action alleges that Cohen and the other defendants "materially breached the covenant of good faith and fair dealing by engaging in the wrongful conduct and omissions as more fully set forth above and described herein."[12]

Cohen asserts that the referenced "actions" and "omissions" that breached the contracts and covenant include the misrepresentation to plaintiff and the family law court about the 2010 residuals, and thus include protected activity causing injury alleged in the contract causes of action.

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constitutional rights of free speech and petition. (§ 425.16, subd. (a).)

[12] A covenant of good faith and fair dealing is implied by law in every contract. (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) The covenant supplements the express contractual provisions " ' "to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." ' " (*Ibid.*)

We agree. In the contract claims, plaintiff, in effect, alleges that Cohen failed to provide the agreed-upon accounting and business management services and/or performed incompetently in doing so by, among other things, misrepresenting the actual amount of residuals earned by Charles Durning in 2010 to her and to the family law court. Plaintiff further alleges that, as a result, she was disadvantaged in the separation action in the family law court. The alleged misrepresentation about the 2010 residuals thus forms a basis for relief under plaintiff 's contract theories of liability.

For the same reasons, the alleged misrepresentation was not merely incidental to the other alleged misconduct incorporated in the contract causes of action. Plaintiff alleged that while representing her before the legal separation, Cohen kept "intentionally inaccurate records of Plaintiff 's medical expenses, showing more medical expenses than actually attributable to Plaintiff . . . so as to justify the $100,000 in income taken from Charles' IRA for which Plaintiff had to pay taxes." Plaintiff further alleged that while representing plaintiff, Cohen conspired with the codefendant forensic accountants and their firm "to financially ruin and leave Plaintiff with nothing but 'the shirt on her back' for some consideration and favor" to help the financially ailing codefendants. The misrepresentation about the 2010 residuals may have allegedly been part of a greater scheme of misconduct, but as alleged it resulted in a discrete injury to plaintiff. Accordingly, the misrepresentation comes within the cross-hairs of the anti-SLAPP statute.

2. Plaintiff 's negligence causes of action

In her third cause of action, plaintiff alleges negligence based on "the acts and conduct set forth previously in this

Complaint." In her fourth cause of action, plaintiff alleges negligent misrepresentations including, but not limited to codefendants "White, Benson, and WZW's (White for himself and WZW) verbal representation in person to Plaintiff that they had set up a payment plan with the IRS for her tax liability or Cohen and Cohen Corp.'s verbal on the phone and written representations to Plaintiff in May 2010 that Cohen had a fiduciary duty to both Charles and Plaintiff, as business manager." She further alleges that Cohen and the other defendants had no reason to believe their representations were true, and should have known they were false when they made them, because "Cohen and Cohen Corp. had the documentation showing substantially more than zero dollars was paid to Charles in residual income in 2010 and that White, Benson, and WZW because they had called the IRS to set up the payment plan but never finished the call and, at the same time, they had been receiving notices from the IRS that taxes had not been paid."

The elements of a professional negligence claim include: " ' "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.]" ' " (*Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 179.)

To prove a claim of negligent misrepresentation, a plaintiff must show "(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.)

As Cohen points out, the allegation about the absence of residuals in 2010 supplied elements of breach and misrepresentation for the negligence claims, as well as damages in the form of lost residuals. Plaintiff alleges that Cohen breached the duty of care by negligently misrepresenting to the family law court and to her the amount of residuals paid to Mr. Durning in 2010. Thus the allegation in paragraph 47, by itself, would support causes of action for negligence and negligent misrepresentation, even if plaintiff were unable to prove any other negligent conduct. Under *Park,* this allegation of protected activity under the anti-SLAPP statute is not merely incidental to the negligence causes of action because it provides an element of those claims. (See *Park*, *supra*, 2 Cal.5th at p. 1063-1064.) It is therefore a proper target of the anti-SLAPP statute.

This is true even though the first amended complaint contains numerous allegations of unprotected negligent activity spanning many years, including failures to report and pay plaintiff 's taxes, to calculate her income and expenses correctly, and to inform her that the IRS had put a levy on her residence. "[T]he mere fact that there are numerically far fewer allegations of protected wrongdoing than there are allegations of nonprotected wrongdoing does not mean that the allegations of protected activity are merely *incidental* to either the causes of

action or the nonprotected activity." (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1553; see *id.* at pp. 1550-1552.) This reasoning applies here as well.

3. Plaintiff's fraud causes of action

In her fifth cause of action, plaintiff alleges that defendants "each made verbal and written representations to Plaintiff between 2010 and 2013, as more fully described above, including but not limited to, White, Benson, and WZW's (White for himself and WZW) verbal representation in person to Plaintiff that they had set up a payment plan with the IRS for her liability or Cohen and Cohen's Corp.'s verbal on the telephone and written representations to Plaintiff in May 2010 that Cohen had a fiduciary duty to both Charles and Plaintiff, as business manager." Defendants "never intended such representations to be true and knew they were false when they made them because White, Benson, WZW, Cohen, and Cohen Corp., each of them, were a team in a conspiracy to damage the Plaintiff and leave her destitute." Plaintiff alleges that she was harmed by the misrepresentations "in that Plaintiff did not pay her tax liability to the IRS for the years at issue and had penalties, interest, and fees levied, and paid more income tax than she needed to pay."

In her sixth cause of action, plaintiff alleges that the defendants fraudulently "disclosed some facts to Plaintiff but intentionally failed to disclose other important facts." "With knowledge of the true facts including, but not limited to, that no payment plan for Plaintiff 's tax liabilities and that Cohen was not representing both Charles and Plaintiff but just Charles, and others described above, White, Benson, WZW, Cohen, and/or

Cohen Corp., respectively, in their capacity as certified public accountants owed a duty to Plaintiff to disclose curative facts."

Plaintiff did not refer to the misrepresentation about the 2010 residuals expressly in her fraud causes of action; once again, she merely incorporated that allegation in paragraph 47 of the general factual presentation. Paragraph 47, however, alleges activity that satisfies elements of the fraudulent misrepresentation cause of action. Those elements are: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.)

Plaintiff alleges that Cohen knowingly misstated that Mr. Durning's 2010 residuals amounted to $0 "to acquire a better settlement position for the legal separation as well as cover the fraudulent numbers Cohen and Cohen Corp. manufactured so as to reduce the monies that had to be paid to Plaintiff for the first half of 2010."

The alleged statement that Mr. Durning earned $0 in 2010 residuals likewise amounts to a claim for relief under a theory of fraudulent concealment. The required elements of that cause of action are: "(1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.)

As alleged, Cohen's statements that Mr. Durning "made $0 in residual income in 2010" served to conceal that he actually made $70,000 or more. The concealment, as much as the actual statement, is protected under section 425.16 to the extent it was made to the family law court or in connection with the separation action. (See *Suarez*, *supra*, 3 Cal.App.5th at pp. 123-125 [failure to disclose material information during settlement negotiations can be protected activity]; *Navellier*, *supra*, 29 Cal.4th at pp. 89-90 [alleged misrepresentations and omissions during negotiation of release of claims "fall[ ] squarely within the plain language of the anti-SLAPP statute"].)

The alleged misrepresentation about the 2010 residuals was not merely incidental to, or just evidence of relevant conduct because, standing alone, it described fraud and injury resulting from it. Accordingly, under *Baral*, that portion of paragraph 47 describing the misrepresentations about the 2010 residuals and the effect of those misrepresentations on plaintiff 's settlement posture is subject to being stricken under the anti-SLAPP statute.

4. Plaintiff 's cause of action for breach of fiduciary duty

Plaintiff alleges Cohen "enjoyed a position of trust in that Plaintiff relied upon and trusted . . . Cohen" and breached its fiduciary duty to her "by the actions and inaction as more fully set forth above and described herein." "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 483.) "A fiduciary . . . relationship may arise whenever confidence is

reposed by [a party] in the integrity and good faith of another." (*Ibid.*) A fiduciary owes a "duty of undivided loyalty" to his or her principal (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30), and "must give 'priority to the best interest of the beneficiary' " (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 641).

The misrepresentation alleged in paragraph 47 is among the acts by which Cohen allegedly breached plaintiff 's trust and acted directly contrary to her interests while acting as her fiduciary. Although Cohen's alleged misrepresentation was also asserted as part of Cohen's larger plan to disadvantage plaintiff in favor of Mr. Durning and the Durning Kids and to deprive plaintiff of her assets, the alleged misrepresentation of the 2010 residuals constituted a breach of Cohen's fiduciary duty to plaintiff and the misrepresentation's effect on her settlement position amounted to injury. Accordingly, the misrepresentation was not merely incidental to the other allegations of misconduct incorporated in plaintiff 's breach of fiduciary duty cause of action and is subject to being stricken under section 425.16.

5. Plaintiff 's causes of action for elder abuse

In her ninth and tenth causes of action, plaintiff alleges financial elder abuse and aiding and abetting financial elder abuse under Welfare and Institutions Code section 15610.30. The statute creates a cause of action against one who "(1) [t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both[;] [¶] (2) [a]ssists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both[;] [or] [¶] (3) takes, secretes, appropriates,

obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence." (Welf. & Inst. Code, § 15610.30, subd. (a).)

At this stage of the anti-SLAPP analysis, the question is whether the alleged misrepresentation about the 2010 residuals constituted a wrongful taking, secreting or retaining of plaintiff 's property, or the aiding and abetting of such activity—such that the misrepresentation provides an element of the elder abuse claims. Subdivision (c) of section 15610.30 provides that "a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder . . . is deprived of any property right, *including by means of an agreement*, . . . regardless of whether the property is held directly or by a representative of an elder." (Welf. & Inst. Code, § 15610.30, subd. (c), italics added.)

We conclude that the alleged misrepresentation about Mr. Durning's 2010 residuals constituted a secreting and retention of plaintiff 's property, or assistance thereof, within the meaning of section 15610.30, subdivision (c). Cohen has not disputed that Ms. Durning was at all relevant times an elder and dependent adult protected by the Elder Abuse and Dependent Adult Protection Act. As acknowledged by the final judgment, the residuals earned during the marriage were community property shared by Mr. and Ms. Durning. It can be inferred from the final judgment and other documents that Cohen received and controlled not only those residual payments made to Charmaran, but also the non-Charmaram residuals paid to Mr. Durning directly. By allegedly misrepresenting and thereby concealing the amount of the 2010 residuals, Cohen secreted and retained

property to which plaintiff had a lawful right under the terms of the final judgment. To the extent that the alleged misrepresentations were made to the family law court or during settlement negotiations to induce plaintiff 's agreement to less favorable terms in the final judgment, Cohen took or assisted others in taking plaintiff 's property by means of an agreement within the meaning of Welfare and Institutions Code section 15610.30, subdivision (c) .

Accordingly, the alleged misrepresentations regarding the 2010 residuals provide the basis for a claim of relief and are not merely incidental to the elder abuse causes of action.[13]

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[13] Although the first amended complaint alleges conspiracy separately, it is not a separate cause of action, but depends on other torts. (*Applied Equipment Corp. v. Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, 514.) Thus, we do not analyze it separately.

III. SECOND STEP: PLAINTIFF 'S PROBABILITY OF PREVAILING ON THE CLAIMS BASED ON PROTECTED ACTIVITY

Because we have determined that plaintiff seeks relief based on allegations arising from activity protected by the anti-SLAPP statute, we proceed to the second step of the anti-SLAPP analysis: a determination whether plaintiff has made a prima facie showing, by admissible evidence, of facts that would merit a favorable judgment on the claims, assuming plaintiff 's evidence were credited.[14] (*Baral*, *supra*, 1 Cal.5th at p. 396; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 584). We consider not only direct evidence, but also "facts that reasonably can be inferred from the evidence." (*Fremont Reorganizing Corp. v. Faigin*, *supra*, 198 Cal.App.4th at p. 1166, citing *Oasis West Realty, LLC v.* Goldman (2011) 51 Cal.4th 811, 822.) As set forth earlier, an anti-SLAPP motion cannot be defeated by showing a likelihood of success on claims arising from *unprotected* activity. (*Baral*, *supra*, 1 Cal.5th at p. 392.)

Plaintiff did not demonstrate a probability that she would prevail as to the alleged misrepresentations about the 2010 residuals. Most critically, plaintiff failed to provide any admissible evidence of a misrepresentation or concealment. In the trial court, plaintiff submitted excerpts of a 2011 deposition of

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[14] While some appellate courts have remanded to the trial court for this determination where, as here, the trial court denied a motion to strike based on the first step, we may make this determination in the first instance. (See *Navellier*, *supra*, 29 Cal.4th at p. 95 [reversing and remanding with instructions that the Court of Appeal should consider in the first instance whether plaintiffs demonstrated a probability of prevailing].)

Raymond Cohen that, according to the declaration of plaintiff 's counsel, shows Mr. Cohen "stat[ing] that there were no Charles Durning named residuals (community property) from 2010, even though he knew that there were Charles Durning residuals which were community property." As noted above, however, the deposition excerpts do not include any such statement. Plaintiff also submitted the Screen Actor Guild's Summary of Earnings for Charles Durning for 2010, showing residuals paid that year. The document does not establish that Cohen misrepresented or concealed these earnings to plaintiff or the family law court; nor does the deposition testimony.[15] Plaintiff submitted no other evidence purporting to establish a misrepresentation or concealment as alleged in paragraph 47.

Because plaintiff failed to establish a probability of prevailing on her claim based on that part of paragraph 47 alleging Cohen's misrepresentation regarding the 2010 residuals, those allegations must be stricken.

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[15] As noted in footnote 9 *ante*, the trial court did not rule on Cohen's objections to plaintiff 's evidence. Because the evidence, even if admitted, failed to show a probability that plaintiff would prevail on her claim based on the first sentence of paragraph 47, we likewise need not reach the issue.

IV. PLAINTIFF 'S REQUEST FOR SANCTIONS AND ATTORNEY FEES

Plaintiff requests that this court award plaintiff attorney fees against Cohen as sanctions for filing a frivolous anti-SLAPP motion. The anti-SLAPP statute provides that "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c).) Costs and fees may be awarded for an appeal. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659 [section 425.16 "does not preclude recovery on appeal"], disapproved in part on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5).

The trial court denied plaintiff 's request for attorney fees ~(2AA 458)~ and, because we have concluded that the trial court erred in denying Cohen's anti-SLAPP motion in part, we likewise deny plaintiff 's sanctions request on appeal.

DISPOSITION

The trial court's order is partly reversed and modified to grant the special motion to strike as to the following allegation in paragraph 47 of in plaintiff 's first amended complaint: "Plaintiff is informed and believes and thereon alleges that Cohen and Cohen Corp., while representing Plaintiff prior to the date of legal separation and after the date of legal separation, misrepresented to the Family Law Court, Plaintiff and the IRS that Charles had made $0 in residual income in 2010 when, in reality, Charles had personally made close to $70,000 in residual income, in order to acquire a better settlement position for the

legal separation as well as cover the fraudulent numbers Cohen and Cohen Corp. manufactured so as to reduce the monies that had to be paid to Plaintiff for the first half of 2010."

The trial court's order is affirmed as to the remainder of the first amended complaint. Under the anti-SLAPP statute, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (§ 425.16, subd. (c)(1).) We therefore remand the within case to the trial court with instructions to consider Cohen's request filed below for an award of attorney fees and costs pursuant to section 425.16. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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