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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JASON ABBOUD,

Plaintiff and Respondent,

v.

CITY OF POMONA, et al.,

Defendants and Appellants.

B276011

(Los Angeles County  
Super. Ct. No. BC599074)

APPEAL from an order of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Alvarez-Glasman & Colvin and Arnold Alvarez-Glasman, City Attorney of The City of Pomona; Stephen T. Owens for Defendants and Appellants.

Jeffrey Lewis for Plaintiff and Respondent.

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Defendants and appellants City of Pomona (the City), Elliott Rothman (Rothman), Ginna Escobar (Escobar), and Paula Lantz (Lantz) (collectively, Defendants) appeal an order denying their special motion to strike a complaint filed by plaintiff and respondent Jason Abboud (Abboud). (Code Civ. Proc., § 425.16.)<sup>1</sup>

Defendants contend the trial court erred in denying their special motion to strike because Abboud's lawsuit arose out of their protected activity. We find no error and affirm.

### **FACTUAL AND PROCEDURAL BACKGROND**

#### *1. Pleadings.*

On October 26, 2015, Abboud filed suit against Defendants. In brief, he pled that in 2006, he entered into a Business Assistance Loan Agreement (the Agreement) with the Redevelopment Agency of the City of Pomona (Agency), which extended him a \$500,000 loan. Of that sum, \$250,000 was for the purpose of renovating a commercial structure as a restaurant and brewery, and the other \$250,000 was to be disbursed in \$50,000 increments over a five-year period to fund Abboud's business operations.<sup>2</sup> The loan was secured by a deed of trust and assignment of rents on the subject real property. If Abboud failed to obtain a certificate of occupancy within 12 months from a date specified in the Agreement, then the entire loan would be immediately due and payable.

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<sup>1</sup> All unspecified statutory references are to the Code of Civil Procedure.

<sup>2</sup> In 2012, the City Council of the City of Pomona adopted a resolution electing to become the successor to the Agency, which had been dissolved.

Abboud alleged that after he signed the Agreement, Defendants failed to timely disburse loan proceeds, approve building plans, and issue permits. He asserted this conduct gave rise to six causes of action: intentional and negligent interference with prospective economic relations; intentional and negligent interference with contractual relationships; fraud and deceit; and breach of contract.

2. *Defendants' special motion to strike; Abboud's opposition.*

Defendants filed a special motion to strike under the anti-SLAPP<sup>3</sup> statute (§ 425.16), contending the entire complaint arose out of protected activity and Abboud could not prevail on his claims.

In opposition, Abboud argued the anti-SLAPP statute did not apply to any of his causes of action. Abboud asserted that Defendants had failed to recognize the distinction between free speech and petitioning, which is protected activity, and the act of governing, which is not conduct protected by section 425.16. As for the merits of his claims, Abboud stated that he intended to file a first amended complaint that would omit his first five causes of action, rendering the anti-SLAPP motion moot as to them. Finally, as for his sixth cause of action for breach of contract, he was capable of substantiating his claim.

Defendants' reply papers argued that Abboud's filing of the first amended complaint was an improper attempt to avoid the pending anti-SLAPP motion, and that the filing of the amended pleading did not moot their special motion to strike.

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<sup>3</sup> "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

### 3. *Trial court's ruling.*

After hearing the matter and taking it under submission, the trial court denied Defendants' special motion to strike. The trial court did not deny any portion of the special motion to strike as moot, nor did it limit its ruling to the sixth cause of action for breach of contract. Rather, the trial court denied the special motion to strike in its entirety, on the merits. It explained that although Defendants pointed to numerous instances of communicative conduct alleged in the complaint, "the harm alleged in the complaint arises from the City's refusal to grant certain permits to Plaintiff, not the communicative conduct itself." The trial court thus concluded that Abboud's "causes of action arise from acts of governance, which are not exercises of free speech or petition."

This appeal followed.<sup>4</sup>

## **CONTENTIONS**

Defendants contend: (1) the trial court should have granted the special motion to strike the first five causes of action because Abboud abandoned them prior to the hearing on the anti-SLAPP motion; and (2) the trial court should have granted the special motion to strike the sixth cause of action because it arose out of protected activity.

## **DISCUSSION**

### 1. *General principles.*

Under the anti-SLAPP statute, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States

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<sup>4</sup> The order denying the special motion to strike is appealable. (§ 425.16, subd. (i), § 904.1, subd. (a)(13).)

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).)

“Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Our review of the grant or denial of an anti-SLAPP motion is de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

2. *No merit to Defendants’ contention the anti-SLAPP motion should have been granted as to the first five causes of action due to Abboud’s election to abandon those claims prior to the hearing on the motion.*

As we have said, in opposition to the special motion to strike, Abboud asserted that he had “elected to withdraw the first 5 causes of action,” thus “render[ing] the anti-SLAPP motion moot, at least as to those causes of action.” Shortly thereafter, before the hearing on the special motion to strike, Abboud filed a

first amended complaint that omitted the claims asserted in the first five causes of action of the original complaint.<sup>5</sup>

On appeal, Defendants contend that because Abboud abandoned the first five causes of action prior to the hearing on the anti-SLAPP motion, the trial court should have granted the motion as to those causes of action. The argument is meritless. Merely because Abboud abandoned his first five causes of action does not compel the conclusion that those claims were subject to being stricken under section 425.16. Rather, as we have said, Defendants must show both that plaintiff's causes of action arose from protected activity and lacked even minimal merit. Defendants have done neither: Instead, they merely present a two-page argument in their opening brief that does not address either prong of section 425.16, or any of the elements of these five causes of action, or the evidence relating to those claims. Thus, Defendants have not met their appellate burden to show that the first five causes of action should have been stricken under section 425.16.

3. *Trial court properly denied the special motion to strike as to the sixth cause of action for breach of contract, which did not arise out of protected activity by the City.*

We now turn to the sixth cause of action for breach of contract, which is the crux of this appeal. In “deciding whether a cause of action arises from protected activity, ‘the critical point is

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<sup>5</sup> The first amended complaint set forth the following four causes of action: (1) breach of contract, alleging damages of \$250,000 based on the City's failure to disburse the five annual \$50,000 assistance payments; (2) violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO); (3) violation of civil rights; and (4) inverse condemnation.

whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech.' (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, original italics (*City of Cotati*)).) There is a '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].) To be subject to the anti-SLAPP statute, 'the prior protected activity [must] supply elements of the challenged claim.' (*Ibid.*) '[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.' (*Id.* at p. 1060, original italics.)" (*Crossroads Investors, L.P. v Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 776 (*Crossroads*)). If the plaintiff "*can establish the elements of his claim without relying on the protected activity*, the claim does not arise from protected activity. To be subject to the anti-SLAPP statute, the protected activity must 'supply elements of the challenged claim.' (*Park, supra*, 2 Cal.5th at p. 1064.)" (*Crossroads, supra*, 13 Cal.App.5th at p. 781, italics added.)

Here, Abboud's theory of breach of contract was narrowly drawn. Abboud alleged that pursuant to the Agreement, the City was required "to make certain payments upon certain benchmarks," and that the City breached the Agreement by failing to meet those benchmarks for disbursement of the loan proceeds. Thus, although Abboud alleged some communicative conduct<sup>6</sup> by the City, that conduct did not supply an element of

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<sup>6</sup> Defendants note the complaint alleged "comments regarding such public safety issues as the unlicensed architect that Abboud admits he used to draw up his architectural

Abboud's cause of action for breach of contract. That is, notwithstanding the communicative conduct alleged in the complaint, the City's failure to disburse the loan proceeds was the wrong complained of in the breach of contract claim, and Abboud is capable of establishing the elements of his claim without relying on any communicative conduct by Defendants. Abboud's breach of contract claim therefore did not arise from protected activity by the City in furtherance of its right of petition or free speech.

Defendants' arguments with respect to prong one of the breach of contract claim are meritless. They contend that pursuant to *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 (*Montebello*), the denial of the special motion to strike was error. *Montebello* recognizes a distinction, for anti-SLAPP purposes, between mere acts of governance, which are not exercises of petition or free speech, and the expressive conduct and deliberations that lead to them. (*Montebello, supra*, at pp. 425–426; *Park, supra*, 2 Cal.5th at p. 1064.) Defendants' reliance on *Montebello* is misplaced because Abboud's breach of contract claim arises from the City's unprotected activity in allegedly failing to disburse the loan proceeds per the Agreement, not from any expressive conduct by Defendants.<sup>7</sup>

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drawings and plans, size and configuration of a staircase on the outside of the building, fire department regulations, the terms of Abboud's conditional use permit (such as the hours of permissible alcohol sales), and other similar items of public interest and importance."

<sup>7</sup> Although Defendants apparently intend that their *Montebello* argument also apply to the first five causes of action, the analysis is wholly undeveloped. Defendants have not



Defendants also contend, in conclusory fashion, that *Baral*, *supra*, 1 Cal.5th 376, undercuts Abboud's position. *Baral* held when anti-SLAPP relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at the initial stage, and if relief is sought based on allegations arising from protected activity, the second prong is reached. (*Id.* at p. 396.) Defendants' *Baral* argument is entirely undeveloped, as Defendants have not identified the allegations of protected activity which they contend should have been stricken. Further, and in any event, Abboud's cause of action for breach of contract arises entirely from the City's unprotected activity in allegedly failing to disburse the loan proceeds.

Finally, even assuming the breach of contract claim did arise out of protected activity, a conclusion we do not reach, we would still affirm the trial court's order denying the special motion to strike. In their appellate briefing, Defendants have failed to address the second prong of the section 425.16 analysis, and thus have not shown that Abboud's breach of contract claim lacks minimal merit. Therefore, Defendants have not met their appellate burden to show that the breach of contract claim should have been stricken. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89 [only a cause of action that satisfies *both* prongs of the anti-SLAPP statute is subject to being stricken under section 425.16].)

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addressed the essential elements of those causes of action, nor have they identified which of Abboud's allegations relating to those causes of action arose out of their protected activity so as to be subject to anti-SLAPP scrutiny.

**DISPOSITION**

The order denying the special motion to strike is affirmed.  
Abboud shall recover his costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

KALRA, J.\*

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