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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PATRICK YAMTOUBI, Plaintiff and Respondent. v. ALALEH KAMRAN et al., Defendants and Appellants,	B275813 Los Angeles County Super. Ct. No. BC577390

APPEAL from an order of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Parker Mills, David B. Parker, William K. Mills, Melissa M. Kurata, Steven S. Wang and Mark A. Graf for Defendants and Appellants.

Peter M. Kunstler for Plaintiff and Respondent.

INTRODUCTION

Defendants Alaleh Kamran and the Law Offices of Alaleh Kamran (collectively, Kamran) appeal from an order denying their special motion to strike under California's antistrategic lawsuit against public participation (anti-SLAPP) statute (Code Civ. Proc., § 425.16).[1] The motion attacked a claim asserted by Kamran's former client, plaintiff Patrick Yamtoubi, alleging Kamran breached her fiduciary duty to Yamtoubi by making false representations in a subsequent small claims action about her authority to release certain claims on Yamtoubi's behalf. In denying the motion, the trial court found Kamran failed to establish that the challenged claim arose out of protected activity. We conclude the ruling was correct, and affirm.

FACTS AND PROCEDURAL BACKGROUND

In January 2008, Yamtoubi retained Kamran to represent him in a criminal matter involving a fraudulent loan. The case went to trial in September 2009, and ended with a jury verdict finding Yamtoubi guilty on numerous counts of forgery, grand theft, and money laundering. In December 2011, the Fifth District Court of Appeal vacated two of the forgery counts and stayed Yamtoubi's sentence on the money laundering count. Kamran remained Yamtoubi's attorney of record through the appeal. Yamtoubi served his sentence and was released from prison in February 2015.

In April 2015, Yamtoubi filed this action against Kamran. The operative first amended complaint asserts one cause of action for breach of fiduciary duty, based primarily on allegations that

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[1] Statutory references are to the Code of Civil Procedure, unless otherwise designated.

Kamran extorted Yamtoubi to pay unearned fees in connection with the criminal case. As relevant to this appeal, the cause of action also states the following allegations regarding a small claims action that Yamtoubi instituted to recover expert witness fees he incurred in the criminal case:

> "l. Defendants [Kamran] hired an expert whose services were not used at trial, and whose work was therefore wasted, because of a dispute between the expert and Defendants, for which dispute Plaintiff [Yamtoubi] was not responsible . . . .
>
> "m. When Plaintiff instituted a small claims action for return of the expert's fees, while the expert had also sued Defendants in small claims court, Defendants falsely represented to the small claims judge and to the expert that Plaintiff had authorized Defendants to withdraw Plaintiff's claim in exchange for withdrawal of the expert's claims against Defendants, all for the benefit of Defendants and their continued ability to engage the expert in other matters."

Kamran moved to strike the complaint as a SLAPP. Quoting the above allegations, she argued "the gravamen of Plaintiff's [first amended complaint] is that the Defendants' communications and actions they undertook in the small claims action resulted in a breach of their fiduciary duty." She maintained this conduct "indisputably falls within the protection of [the anti-SLAPP statute]—written or oral statements or writings made before a judicial body or in connection with an

issue under consideration or review by a judicial body." She also argued the action had no probability of success because it was barred by the litigation privilege under Civil Code section 47.

In opposing the motion, Yamtoubi argued the complaint's " 'gravamen' " was not "Kamran's use of the small claims court for her own benefit, but rather . . . her *abuse* of that forum ostensibly in her representation of Plaintiff." Thus, Yamtoubi maintained the claim was based on "*the breach of duty, not the 'protected activity.'*" To substantiate the claim's allegations, Yamtoubi offered a declaration with a copy of a letter that Kamran sent to the expert named in the small claims action. In that letter, Kamran wrote: "Enclosed please find the signed Settlement Agreement and Mutual General Release. I am signing on behalf of Mr. Yamtoubi. I have full authorization to sign on his behalf."

The trial court denied the anti-SLAPP motion, concluding Kamran failed to establish that the challenged claim arose out of protected activity. Citing the complete set of allegations stated in support of the breach of fiduciary duty cause of action, the court reasoned: "The portion of the action dealing with the incidents at the small claims hearing is merely only a part of the evidentiary landscape within which [the] claims arose whereas the gravamen of Plaintiff's claims is that defendants[] . . . conduct resulted in . . . breaches of fiduciary duties owed to Plaintiff—not the conduct directly related to the small claims action."

DISCUSSION

Kamran contends the trial court erred in its assessment of whether the challenged claim arose out of protected activity. She argues the court's analysis, which employed a "weighing" of the purportedly protected versus nonprotected allegations, is inconsistent with our Supreme Court's decision in *Baral v.*

Schnitt (2016) 1 Cal.5th 376 (*Baral*). As we discuss below, in *Baral*, the Supreme Court resolved a split of authorities regarding mixed causes of action, and held that an anti-SLAPP motion may be used to strike discrete allegations of protected activity without defeating an entire cause of action.[2] (*Id.* at p. 393.) Although we agree with Kamran that the trial court's analysis conflicts with *Baral*, we conclude the court's ruling was nevertheless correct under the established principle that a claim must be "*based on*" protected activity to come within the anti-SLAPP statute's purview. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) Here, the allegations regarding Kamran's representations to the small claims judge were merely incidental and ancillary to the basis for the breach of fiduciary duty claim—Kamran's release of Yamtoubi's claims against the expert without Yamtoubi's authorization or consent.

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[2] Kamran acknowledges that the trial court ruled on her anti-SLAPP motion approximately four months before the Supreme Court issued its decision in *Baral*. Yamtoubi argues Kamran is barred from invoking *Baral* on appeal to challenge discrete allegations because her motion in the trial court sought to strike the entire breach of fiduciary duty cause of action on the theory that its "gravamen" was protected activity. We agree with Kamran that *Baral* applies retroactively and that she may rely on the case in this appeal to argue a question of law based on incontrovertible facts. (See *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 536 [usual rule of retrospective application applies to decisions of statutory construction]; *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511 [a party is not estopped from presenting a theory for the first time on appeal that "involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence"].)

The anti-SLAPP statute, section 425.16, provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

The first prong of the anti-SLAPP analysis requires the court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) "[T]he statutory phrase 'cause of action . . . arising from' means simply that 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. [Citation.] In the anti-SLAPP context, the critical point is 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, supra,* 29 Cal.4th at p. 78.) "In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Id.* at p. 79, quoting § 425.16, subd. (b).) An " 'act in furtherance of a person's right of petition or free speech' " includes "any written or oral

statement or writing made before a . . . judicial proceeding." (§ 425.16, subd. (e)(1).)

If the court finds the defendant has made the threshold showing, the analysis proceeds to the second prong, under which the court "determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) To establish the requisite probability of prevailing, the plaintiff need only have " 'stated and substantiated a legally sufficient claim.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

We independently review the trial court's ruling on a SLAPP motion under the de novo standard. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) "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.) "[I]f the defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266, disapproved on other ground in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1071 (*Park*).)

In *Baral*, our Supreme Court resolved a split among the Courts of Appeal regarding application of the two-prong anti-SLAPP analysis to "mixed claims"—i.e., causes of action that contain both allegations based on protected activity and allegations based on unprotected activity. (See *Baral, supra,* 1 Cal.5th at pp. 385-388.) Before *Baral*, some courts had held an anti-SLAPP motion must defeat an entire cause of action as pleaded (see, e.g., *Mann v. Quality Old Time Service, Inc.* (2004)

120 Cal.App.4th 90), while others concluded allegations of protected activity could be stricken from a mixed cause of action without affecting the allegations of unprotected activity (see, e.g., *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751). The *Baral* court resolved the split in favor of the latter view, holding that "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Baral,* at p. 393.)

This conclusion, the *Baral* court explained, is compelled by the text of the anti-SLAPP statute: "The statute provides: '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 . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the plaintiff will prevail on the claim.' [Citation.] These terms express the Legislature's desire to require plaintiffs to show a probability of prevailing on 'the claim' arising from protected activity, not another claim that is based on activity that is beyond the scope of the anti-SLAPP statute but that happens to be included in the same count. . . . [¶] The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Baral, supra,* 1 Cal.5th at p. 393.)

Having resolved the split, the *Baral* court gave the following instructions on how the rule must be applied in performing the two-prong analysis: "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. There, 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, italics added.)

Finally, the *Baral* court addressed the concern that its holding would allow defendants to abuse the anti-SLAPP statute by targeting "fragmentary allegations, no matter how insignificant." (*Baral, supra,* 1 Cal.5th at p. 394.) The court declared the concern "misplaced," explaining: "Assertions 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." (*Ibid.*) Rather, "[t]he targeted claim must amount to a 'cause of action' in the sense that it is *alleged to justify a remedy*" and only "*allegations of protected activity that are asserted as grounds for relief*" are properly subject to a special motion to strike. (*Id.* at p. 395, first italics added.)

Because it ruled on Kamran's anti-SLAPP motion some four months before the *Baral* decision came down, the trial court did not have the benefit of our Supreme Court's guidance in addressing the purported mixed cause of action asserted in Yamtoubi's complaint. Consequently, when the trial court identified Kamran's alleged statement to the small claims judge as "the one allegation . . . that may implicate a Anti-SLAPP motion," the court treated it as just part of the overall cause of action, without assessing it independently to determine whether it was asserted to justify a remedy. As *Baral* now confirms, that approach to the first-prong analysis was erroneous. However, reversal is not warranted if the ruling was nevertheless correct under the current law. (See *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307 ["If the trial court's decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion."].) We conclude it was.

Even when we treat the allegations regarding the small claims action as a separate "claim," we still find no basis under *Baral* or other Supreme Court precedent to conclude it arose from protected activity. Oral and written statements made in court are of course protected petitioning activities under the anti-SLAPP statue (see § 425.16, subds. (e)(1) & (e)(2)), but Yamtoubi's breach of fiduciary duty claim was not *based* on these protected activities. (See *City of Cotati, supra,* 29 Cal.4th at p. 78.)

According to the complaint's allegations and the submitted evidence, Kamran released Yamtoubi's claims against the expert, *without Yamtoubi's authorization*, in order to secure a benefit for

herself—the release of the expert's claims against her—in derogation of the duty owed to her former client. Although the alleged breach may have been carried out, in part, by making false representations in court, it was not this petitioning activity *itself* that produced Yamtoubi's alleged injury. (See *Park, supra,* 2 Cal.5th at p. 1063.)[3] Rather, as the letter submitted with

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[3] In *Park*, a case decided nine months after *Baral*, our Supreme Court revisited the showing necessary to establish a claim arose from protected activity. There, the court emphasized that " '[t]he 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 p. 1063.) Thus, *Park* instructs that "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid*.) This holding, as the court in *Gaynor v. Bulen* (2018) 19 Cal.App.5th 864 (*Gaynor*) recently observed, is consistent with the " 'primary thrust' or 'gravamen' analysis" that courts have long used as a "shorthand way of describing the need to show—with respect to each targeted claim—that the alleged wrongful and injury-producing conduct was not incidental and fell within one of the four categories enumerated in section 426.16, subdivision (e)." (*Gaynor,* at p. 86, citing *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-492 (*Castleman*).)

In her reply brief, Kamran relies on *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147 (*Sheley*) for the proposition that, under *Baral*, trial courts may no longer use the "gravamen" or "primary thrust" analysis to determine whether a claim arises from protected activity. (See *Sheley,* at p. 1169 ["After *Baral*, when deciding whether claims based on protected activity arise out of

Yamtoubi's declaration showed, it was Kamran's unauthorized release of Yamtoubi's claims, which Kamran accomplished by abusing her status as Yamtoubi's former attorney, that caused the alleged harm. Kamran's alleged misrepresentation to the small claims judge was merely incidental to and evidence of this injury causing conduct. (See *Baral, supra,* 1 Cal.5th at p. 394; *Park,* at p. 1064 [in assessing the arising from prong, courts must be "attuned to and . . . 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"].)

Our conclusion is consistent with a long line of decisions involving breach of fiduciary duty claims asserted by clients against their former attorneys. The courts have held these claims are not subject to the anti-SLAPP statute because the client is seeking recovery for the attorney's breach of loyalty—not

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protected activity we do not look for an overall or gestalt 'primary thrust' or 'gravamen' of the complaint or even a cause of action as pleaded."].) The *Gaynor* court found *Sheley* to be "unpersuasive" on this point, explaining that "*Sheley* was decided before *Park*, and did not have the benefit of *Park*'s clear admonitions regarding the need to identify the specific elements of the claim relied upon by the defendant to invoke the anti-SLAPP statute." (*Gaynor, supra,* 19 Cal.App.5th at pp. 885-886.) We agree with *Gaynor* that "under *Park* and *Baral*, a court must continue to analyze whether the allegations of protected activity within each 'claim' are incidental or whether the principal thrust of the claim triggers anti-SLAPP protection." (*Gaynor,* at p. 886; see also *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 588-590 [rejecting *Sheley*'s view on anti-SLAPP "gravamen" analysis].)

the attorney's petitioning activities—even when petitioning activities are alleged to be wrongful or harmful to the client's interests. (*Gaynor, supra,* 19 Cal.App.5th at pp. 880-881 [applying *Baral*, holding allegations that trustees wasted trust assets to pursue petitions to modify trust were not basis for claim because activity giving rise to the alleged harm was the breach of loyalty in formulating and pursuing a plan to wrongfully benefit the trustees]; see *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 505 [the "fact that the complaint 'focus[es] specifically on particular statements or positions taken in connection with matters under review by a court,' . . . does not alter the fact that the claim is . . . based on the alleged breach of loyalty owed to" the plaintiff]; *Castleman, supra,* 216 Cal.App.4th at pp. 490-496 ["[a]lthough protected speech and petitioning are part of the 'evidentiary landscape' within which the action arose, the claims are ultimately based on the allegation that [the attorney] engaged in conduct inconsistent with the fiduciary obligations he owed to the respondents"]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 ["claim is not based on 'filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client' "].) Similarly, here, Yamtoubi is suing Kamran *not* because Kamran exercised her petitioning rights before the small claims court, but rather because Kamran allegedly breached her duties of loyalty and professional responsibility by making an unauthorized release of Yamtoubi's claims to secure a benefit for herself over her former client's interests. The trial court's ruling was correct under *Baral* and other controlling precedents.

DISPOSITION

The order is affirmed. Yamtoubi is entitled to his costs.

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EGERTON, J.

We concur:

LAVIN, Acting P. 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.