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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MOLINA HEALTHCARE, INC., et al., Cross-complainants and Respondents, v. PARTHA CHOUDHURY et al., Cross-defendants and Appellants.	B237174 (Los Angeles County Super. Ct. No. NC055957)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph E. DiLoreto, Judge. Reversed in part and dismissed in part.

Law Office of James A. Otto, James A. Otto; Regina Ashkinadze for Cross-defendants and Appellants.

Lewis Brisbois Bisgaard & Smith, John Barber, Rachel Lee; Snell & Wilmer, Mary-Christine Sungaila for Cross-complainant and Respondent Molina Healthcare, Inc.

Kassinove & Raskin, Edward B. Raskin, Joshua M. Caplan for Cross-complainant and Respondent Amir M. Desai.

Appellants filed a lawsuit against their former employer and a supervisor, respondents to this appeal. The employer and the supervisor brought separate cross-complaints alleging that appellants breached the terms of general release agreements in which appellants had agreed to fully settle and release all claims against respondents. Appellants sought to strike respondents' cross-complaints as Strategic Lawsuits Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)[1]

We determine that the trial court improperly denied appellants' special motion to strike with respect to the former employer because the employer failed to submit evidence showing that it had a reasonable probability of prevailing on its cross-complaint. We dismiss this appeal with respect to the former supervisor because appellants' motion sought to strike a nonoperative cross-complaint.

BACKGROUND

In April 2011, 18 former employees of Molina Healthcare, Inc. (Molina) sued, inter alia, Molina and its former chief information officer, Amir Desai. Plaintiffs had previously worked as security analysts and computer programmers in Molina's information technology department. All were American citizens or green card holders. In their complaint, plaintiffs alleged that Molina and Desai engaged in improper discrimination and violated various laws by firing plaintiffs and replacing them entirely with Indian nationals holding "H-1B visas."[2]

In August 2011, Molina filed a cross-complaint against plaintiffs and appellants Partha Choudhury, Tim Nguyen, James Nguyen, Edward Duong, Ismail Guzey, Chongwei ("Steve") Mo, and Karen Ku. Molina's cross-complaint alleged that in January and February of 2010, each of the cross-defendants entered into written general releases with Molina, whereby the cross-defendants agreed to "compromise, fully settle

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[1] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

[2] Under certain conditions, the United States may grant a work visa to an alien "who is coming temporarily to the United States to perform services in . . . a specialty occupation." (8 U.S.C. § 1101(a)(15)(H)(i)(b).)

and fully release all claims which [the cross-defendants] may have or claim to have against [Molina] arising out of or in any way relating to . . . employment with and separation of employment from [Molina]." The cross-complaint stated that the cross-defendants received significant lump-sum severance payments for agreeing to the releases. Molina alleged that by filing the initial complaint, the cross-defendants breached the terms of the general releases, and that Molina was entitled to an award of attorney fees in connection with this breach.

On the same day that Molina filed its cross-complaint, Desai filed his own cross-complaint, alleging that he was a specifically identified beneficiary of the releases signed by the cross-defendants. Desai's cross-complaint was directed at the same cross-defendants as Molina's, and it allegations were substantively the same.

The cross-defendants responded by filing a consolidated special motion to strike targeting both cross-complaints. They pushed forward with all aspects of their special motion to strike even after they discovered that, prior to filing the motion, Desai had filed an amended cross-complaint. The trial court heard the special motion to strike in October 2011 and denied it, finding that the cross-defendants failed to establish that the cross-complaints arose from any act in furtherance of the cross-defendants' rights to petition or free speech.

This appeal followed.

DISCUSSION

I. Appeal and Review

Appeal lies from the order denying appellants' motion to strike under the anti-SLAPP statute. (§ 425.16, subd. (i).) The anti-SLAPP statute applies to cross-complaints, as well as to complaints. (§ 425.16, subd. (h); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735, fn. 2.) The trial court's ruling is subject to de novo review. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 670; § 425.16, subd. (a); *Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) There are two components to a motion to strike brought under section 425.16. First, the defendant must show that the challenged cause of action is one arising from protected activity; i.e., from the defendant's exercise of the right to petition or free speech in connection with a public issue. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects constitutional rights, the plaintiff must establish a reasonable probability that it will prevail on the merits of its claims. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) To protect First Amendment rights, the anti-SLAPP statute must "be construed broadly." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 735.)

III. Appeal as to Molina

A. Protected Activity

Appellants argue that Molina's cross-complaint arises out of appellants' act of filing the initial complaint in this case. They contend that their filing of a complaint is constitutionally protected activity. Molina counters that the underlying basis for appellants' liability is not their filing of a complaint, but rather their breach of the general releases through which they agreed to fully settle and release all claims against Molina. According to Molina, the gravamen of the cross-complaint is Molina's attempted enforcement of the general releases; appellants' act of filing the complaint is no more than evidence relevant to demonstrating breach.

Appellants' position is the correct one. The filing of a complaint is an act undertaken in furtherance of the constitutional right of petition. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 (*Navellier I.*) It is a "writing made before a . . . judicial proceeding." (§ 425.16, subd. (e)(1).) *Navellier I* is squarely on point. In that case, the

Supreme Court recognized that the plaintiff's breach of contract claim, which was based on the defendant's act of filing counterclaims in violation of a release, fell "within the ambit of the anti-SLAPP statute's 'arising from' prong." (29 Cal.4th at p. 90.) Recently, we applied *Navellier I* in finding that a claim arose from protected activity when it alleged that a party breached a settlement agreement by filing a complaint. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1408-1409.)

The same analysis applies here. Molina alleges in its cross-complaint that appellants' "filing and prosecution of the Complaint . . . constitutes a violation of the Releases." Molina's claim, therefore, clearly arises from activity protected by section 425.16. (*Navellier I*, *supra*, 29 Cal.4th at p. 90; *Mundy v. Lenc*, *supra*, 203 Cal.App.4th at pp. 1408-1409.)

In arguing that appellants failed to meet their burden on the first prong, Molina relies on the statement from *Navellier I* that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Navellier I*, *supra*, 29 Cal.4th at p. 94) Molina's reliance is misplaced. The anti-SLAPP statute involves a two-step process. The first step merely determines if a protected right to free speech or petition has been targeted. (*Id.* at p. 92.) Whether a party has "waived" the right to free speech or petition is a question requiring proof to answer—it is thus a subject of the second prong of the anti-SLAPP analysis. (See *id.* at p. 94; *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 351.)

Other authorities cited by Molina are likewise inapplicable. The defendant's breach of contract claim in *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108 was not based on the opposing party's filing of a complaint, but instead was based on the defendant's use of software that it had agreed to stop using and its failure to provide a certification called for in the parties' settlement agreement. (*Id.* at p. 1117.) The dispute in *Episcopal Church Cases* (2009) 45 Cal.4th 467, 473, concerned property ownership, not protected activity. And the court in *Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 948-949, held that

where "no litigation is ever commenced—although possibly contemplated by one side or another—but, rather, an agreement [is] entered into to resolve the parties' disputes, a later suit alleging breach of that agreement and related tortious conduct *does not* constitute the sort of activity encompassed by the SLAPP statute's first prong." None of these three cases involve the filing of a cross-complaint based on the plaintiff's filing of a complaint, activity which is clearly subject to the anti-SLAPP statute.

B. Probability of Prevailing on the Merits

Because appellants were successful in showing that Molina's complaint arose from protected activity, the trial court erred by finding that the first prong of the anti-SLAPP statute was not satisfied. This does not mean that appellants' special motion to strike necessarily should have been granted, however. Molina still had the opportunity to defeat the motion by establishing a reasonable probability of prevailing on the merits. (§ 425.16, subd. (b)(1).)

Once the first prong of an anti-SLAPP motion is satisfied, the burden shifts to the party asserting the cause of action to establish a probability of prevailing. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 213.) The party must show that the complaint is legally sufficient and is supported by prima facie evidence sufficient to sustain a favorable judgment if the evidence is credited. (*Navellier I, supra,* 29 Cal.4th at p. 93; *Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 738; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498.) The burden on the second prong is similar to that of a party opposing a motion for summary judgment. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768; *Delois v. Barrett Block Partners, supra,* 177 Cal.App.4th at p. 947.) The party opposing the special motion to strike cannot simply rely on the allegations of the complaint; its opposition must be based on evidence that would be admissible at trial. (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.)

The gravamen of Molina's cross-complaint was a cause of action for breach of contract. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's

breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal. 4th 811, 821.) Assuming that the allegations in the cross-complaint were true—that appellants all entered into general releases, that Molina performed its obligations under the releases, that appellants breached the releases by filing the complaint, and that Molina was damaged—it should not have been particularly difficult for Molina to produce evidence sufficient to carry its burden on the second prong. *Navellier I* discussed what sort of evidence a party in Molina's position could provide: "Any such action presumably would involve at a minimum the pleading and proof of the alleged agreement. To require that plaintiffs substantiate speech-burdening claims at the outset [citation] by appending the alleged agreement to an affidavit stating the facts upon which the defendant's liability is based, as the anti-SLAPP statute provides (§ 425.16, subd. (b)), hardly seems excessive." (*Navellier I*, *supra*, 29 Cal. 4th 82, 94.)

The problem with Molina's opposition to appellants' anti-SLAPP motion (at least as it appears in the record on appeal) is that Molina did not submit the general releases in any sort of legally admissible manner. In connection with Molina's opposition, two of Molina's attorneys submitted declarations. These declarations, strangely, discussed only seemingly trivial discovery disputes. Neither declaration attempted to establish any elements of the breach of contract claim. Most strikingly, neither declaration appended any of the general releases or any sort of information relevant to establishing their validity.

Perhaps recognizing its error, on appeal Molina attempts to introduce the general releases by citing to a declaration given by Terry Bayer, chief operating officer of Molina. This declaration attached the general releases signed by most appellants. Unfortunately for Molina, the declaration was submitted in support of a motion for preliminary injunction filed by Molina, not in opposition to the special motion to strike. "The caption of a declaration must state the name of the declarant and *must specifically identify the motion or other proceeding that it supports or opposes*." (Cal. Rules of Court, rule 3.1115, italics added.) The Bayer declaration specifically identified the motion for preliminary injunction and did not reference the special motion to strike.

Furthermore, as correctly pointed out by appellants, it would deprive appellants of their procedural rights were we to consider the evidence submitted in connection with Bayer's declaration. Molina's opposition to the special motion to strike did not state that it would rely on the evidence submitted in connection with the preliminary injunction motion. Nor did Molina's opposition mention the Bayer declaration. And the preliminary injunction papers, including the Bayer declaration, did not state that they related to the anti-SLAPP opposition. Appellants never had the opportunity to object or otherwise counter the Bayer declaration with respect to the anti-SLAPP motion. Molina cannot attempt to introduce evidence in such a misleading and procedurally improper manner.

It is true that a party opposing a special motion to strike may rely on evidence submitted by the moving party to establish a probability of prevailing on a claim. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289-1290.) The record before us, however, only shows that one general release was submitted in connection with appellants' moving papers on the special motion to strike. General releases were not submitted for six of seven appellants.

Furthermore, the declaration attaching the single general release was insufficient for Molina to establish a reasonable probability of prevailing. Josephine Wittenberg, a former human resources director for Molina, submitted a declaration in support of appellants' special motion to strike. Attached to her declaration was a "standard employee general release form," apparently signed by appellant Edward Duong. Wittenberg's declaration did not establish that a binding agreement between Molina and Duong was executed. "Documents must be authenticated before the trial court may receive them into evidence." (*Caron v. Mercedes-Benz Financial Services USA LLC* (2012) 208 Cal.App.4th 7, 15.) The Wittenberg declaration did not mention Duong by name or provide any basis for knowledge that Duong entered into the agreement. The declaration simply described the attachment as "a true and correct copy of the General Release." Moreover, the declaration did nothing to satisfy other elements of Molina's

breach of contract cause of action, including whether Molina performed its obligations under the general release.

Therefore, because appellants met their anti-SLAPP burden on prong one, and Molina failed to meet its burden on prong two, the anti-SLAPP motion should have been granted as to Molina.

C. Attorney Fees

Appellants are entitled by statute to recover attorney fees and costs they incurred in the trial court and on appeal as the prevailing parties on their anti-SLAPP motion against Molina. The amount of fees and costs awardable in connection with the successful anti-SLAPP motion is to be determined by the trial court upon appellants' motion. (§ 425.16, subd. (c)(1); *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1446.)

IV. Appeal as to Desai

Desai filed his initial cross-complaint on August 5, 2011. He filed an amended cross-complaint on August 16, 2011. Appellants filed their special motion to strike—directed at Desai's *original* cross-complaint—on August 17, 2011.

Code of Civil Procedure section 472 provides that, as a matter of right and without leave of court, a party may amend an initial complaint (or cross-complaint) once before a responsive pleading is filed. (See *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 175.) An amended cross-complaint supersedes all prior cross-complaints, which cease to perform any function as pleadings. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884; *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1307.) The filing of an amended cross-complaint moots a motion directed to a prior cross-complaint. (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131.)

Appellants acknowledge that they filed their special motion to strike Desai's initial cross-complaint *after* Desai filed his amended cross-complaint. However, they contend that they were unaware of the amended cross-complaint because it "crossed in the mail" with the special motion to strike. We have no reason to doubt appellants' claim, but this

does not mean that we should up-end well-established procedural rules and decide a challenge to a nonoperative pleading.

Appellants' insistence that we disregard procedural rules and opine on a challenge to a nonoperative pleading is somewhat bizarre. The record reflects that appellants' attorney received the amended cross-complaint soon after it was filed, and that he sent an e-mail stating that he would file another motion to strike the "newer" cross-complaint. In fact, it appears that appellants *did* file a special motion to strike the operative amended cross-complaint. It is the order on that subsequent special motion to strike that would be appealable, not an order pertaining to a nonoperative pleading.

Appellants cite to several cases, including *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055, and *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074, which hold that a plaintiff may not avoid an unfavorable ruling on an anti-SLAPP motion by amending its complaint after an anti-SLAPP motion is filed. These cases are not applicable here. Desai filed his amended cross-complaint *before* appellants' initial anti-SLAPP motion was filed.

Because appellants' special motion to strike Desai's initial cross-complaint was moot due to the prior filing of Desai's amended cross-complaint, any order pertaining to Desai on that motion was also moot. Appellants may not appeal from a nonappealable order. (See Code Civ. Proc., § 904.1.) We therefore dismiss appellants' appeal as to Desai.

DISPOSITION

Appellants' appeal with respect to Desai is dismissed. Desai shall recover his costs on appeal. The order denying appellants' special motion to strike Molina's cross-complaint is reversed. On remand, the trial court shall enter an order dismissing Molina's cross-complaint and, upon appellants' motion, award the attorney fees and costs that

appellants incurred in the trial court proceedings and on appeal in connection with their special motion to strike Molina's cross-complaint.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.