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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

MONARCH CONSULTING, INC., Plaintiff and Appellant, v. VICTORIA ZAMORA, Defendant and Respondent.	B244791 (Los Angeles County Super. Ct. No. EC059320)

APPEAL from the order of the Superior Court of Los Angeles County. William D. Stewart, Judge. Reversed and remanded.

Law Offices of Farah Faramarzi and Farah Faramarzi for Plaintiff and Appellant.

Law Offices for Bernard R. Schwam and Bernard R. Schwam for Defendant and Respondent.

* * * * * * * * * *

Defendant and respondent Victoria Zamora was employed as vice president of plaintiff and appellant Monarch Consulting, Inc. Defendant resigned from her position in May 2011. After leaving plaintiff's employ, defendant went to work for one of plaintiff's competitors. Plaintiff learned of defendant's new position and sent a cease and desist letter to her and her new employer, asserting defendant had breached the nondisclosure agreement she signed with plaintiff. Several months later, plaintiff sued defendant for breach of contract and common counts based on defendant's alleged failure to repay loans plaintiff had extended to her during her tenure. Defendant filed a cross-complaint against plaintiff and its CEO, Stuart Grant, for libel, failure to pay wages, and related claims.

Plaintiff and Grant filed a special motion to strike pursuant to Code of Civil Procedure section 425.16 (section 425.16) seeking to dismiss the libel cause of action. Before the hearing on the motion, defendant filed a nonopposition to the motion, as well as a first amended cross-complaint dismissing the libel cause of action and Grant as an individual cross-defendant.

At the hearing on the motion, plaintiff asked the court to rule on the motion as a predicate for a ruling on plaintiff's request for attorney fees pursuant to section 425.16. The court denied the fee request, finding that plaintiff had not established the motion was meritorious because it failed to show the prelitigation statements upon which defendant's libel claim was based were protected by section 425.16. The trial court therefore found there was no basis for awarding fees to plaintiff.

Plaintiff timely appealed, arguing the trial court erred in denying its fee request. Plaintiff contends the allegedly libelous statements were good faith prelitigation statements protected by section 425.16. We conclude plaintiff discharged its movant's burden to show defendant's cross-complaint for libel arose from petitioning activity protected by section 425.16, that defendant failed to show a probability of prevailing, and plaintiff was entitled to consideration of its request for statutory fees. We therefore reverse and remand with directions for the trial court to conduct further proceedings on plaintiff's request for attorney fees pursuant to section 425.16.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff provides payroll services to entertainment industry clients. Grant is its sole shareholder and CEO. Grant hired defendant in February 2008 to oversee plaintiff's payroll operations, sales and software development. At the time of her hire, defendant signed an Employee Non-Disclosure Agreement (the agreement). The agreement provides, in relevant part, that in the event of the termination of her employment, defendant would not disclose any of plaintiff's trade secrets or confidential, proprietary data, and would return any such documents, materials and data that defendant maintained in her possession.

In January 2010, Grant promoted defendant to vice president. A little over a year later, on May 10, 2011, defendant emailed Grant and told him she planned to resign her position effective May 31, 2011. The next day, Grant and defendant discussed her notice of resignation, and defendant told Grant she was not happy with "the direction" he was taking the company and that she needed time to address some personal issues. She also represented she had not lined up any new job, but was considering moving back home to North Carolina.

On June 1, 2011, Grant sent an email to Tina Mendoza, one of plaintiff's larger clients (the June 2011 email). Defendant had previously been the primary contact person for Ms. Mendoza in her dealings with plaintiff. Grant wanted to advise Ms. Mendoza of defendant's departure and let her know to whom she should direct her future inquiries. The email stated defendant was "taking [a] leave" and Grant was unsure whether she would be returning, but that it "would be inappropriate" for him to give further details.

Grant then learned defendant had taken a position with a competitor of plaintiff's, CAPS Universal (CAPS). He also discovered that defendant had contacted at least one of plaintiff's clients, Michael Bouson, and that defendant had emailed confidential materials to her personal email address before she left. Grant contacted an attorney about his concern that defendant may have breached the agreement by contacting plaintiff's clients and possibly sharing trade secret information with her new employer. Attorneys on

behalf of plaintiff and Grant sent a cease and desist letter, dated June 21, 2011, to defendant and CAPS (the cease and desist letter).

Attorneys representing both defendant and her new employer, CAPS, sent a responsive letter to plaintiff's counsel denying any disclosure or misuse of proprietary information. The letter, among other things, also asserted that defendant was owed back wages and that defendant had only lawfully contacted certain of plaintiff's clients to advise of her new work affiliation with CAPS.

On January 23, 2012, plaintiff filed the underlying action against defendant, stating claims for breach of contract and common counts based on defendant's failure to repay $19,100 in loans made to her during her tenure. Plaintiff's complaint did not contain any claims alleging breach of the agreement, misappropriation of trade secrets or similar claims.

Defendant answered the complaint and filed a cross-complaint against both plaintiff and Grant, stating claims for libel, failure to pay wages, and related claims. The first cause of action for libel was based on two allegedly defamatory statements: the June 2011 email, and the cease and desist letter.

Plaintiff and Grant filed a special motion to strike pursuant to section 425.16 seeking an order striking defendant's cause of action for libel. The motion was based on the declaration of Grant and three attached exhibits (the June 2011 email, the cease and desist letter which included a copy of the agreement, and the responsive letter from counsel for defendant and CAPS).

In his declaration, Grant attested to his hiring of defendant and the terms of the agreement she executed when she was hired regarding plaintiff's proprietary business information. Grant explained that, at the time defendant gave notice of resignation, he understood defendant had been going through a difficult divorce and child custody battle. He said defendant denied having any plans regarding a new job and that she said she felt her "personal problems" were distracting her from her work. Defendant told Grant she was "seriously considering" moving back to North Carolina. Grant believed defendant was resigning solely to resolve these personal issues and he was willing to consider her

coming back to work. He asked her what she wanted him to tell clients and she suggested he say she was taking "a leave of absence."

Grant explained he sent the June 2011 email to Ms. Mendoza because he needed her to know who her new contact person would be at plaintiff in light of defendant's resignation.

Grant also attested to discovering early on in June 2011 that defendant had begun contacting plaintiff's clients in an apparent effort to solicit their business for her new employer, CAPS. He also saw defendant had sent several emails, containing plaintiff's proprietary information, to her personal email account. These discoveries prompted Grant to contact attorneys at Roxborough, Pomerance, Nye & Adreani to inquire about the options for protecting plaintiff from defendant's potential breaches of the agreement. In response, Roxborough, Pomerance, Nye & Adreani sent the cease and desist letter to defendant and CAPS.

Grant explained that shortly after the cease and desist letter was sent, his lawyers provided him with the responsive letter sent by counsel for defendant and CAPS. He attested that if defendant had "not ceased her unlawful communications" following receipt of the cease and desist letter, he would have immediately authorized plaintiff to proceed with litigation to address such conduct.

In response to the special motion to strike, defendant filed a nonopposition, along with a first amended cross-complaint dismissing the libel claim and Grant as an individual cross-defendant.

At the August 29, 2012 hearing on the motion, plaintiff asked the court to rule on the unopposed motion as a predicate for the filing of a noticed motion for attorney's fees as the prevailing party on the special motion to strike. In denying the motion, the court explained the statements contained in the June 2011 email and the cease and desist letter were not protected by section 425.16 because they did not concern the same subject matter as the complaint to recover the unpaid loans. Plaintiff had sued defendant solely to recover the allegedly overdue loans and had not made any claims against defendant regarding her allegedly improper contact with plaintiff's clients and other violations of

the agreement as set forth in the cease and desist letter. Therefore, the court reasoned the June 2011 email and the case and desist letter were not protected speech.

This appeal followed.

DISCUSSION

Defendant's dismissal of the libel claim before the hearing on plaintiff's special motion to strike did not extinguish plaintiff's right to recover attorney fees. Plaintiff was "entitled to have the merits of [the] motion heard as a predicate to a determination of [its] motion for attorney's fees and costs . . . .' [Citation.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365; accord, *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752-753.) Therefore, while plaintiff's appeal challenges the court's denial of attorney fees, our task is to review the court's finding that plaintiff's special motion to strike substantively lacked merit, which was the basis for the denial of fees.

Our review of the special motion to strike is de novo. "We review the record independently to determine whether the asserted cause of action arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits." (*Stewart v. Rolling Stone, LLC* (2010) 181 Cal.App.4th 664, 675; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Section 425.16 provides, in relevant part: "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 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." (*Id.*, subd. (b)(1).)

In resolving a special motion to strike under section 425.16, the court engages in a two-step analysis. The court must first determine whether the moving defendant "has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) If the court determines the defendant met this initial burden, "it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "In

making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) Only those causes of action that satisfy "*both* prongs" of section 425.16, i.e., arise from protected activity and lack minimal merit, are subject to being stricken under the statute. (*Navellier,* at p. 89.)

1. Step One—Act in Furtherance

An act in furtherance of a person's right to petition or of free speech is defined by statute to include "any written or oral statement or writing made before a . . . judicial proceeding, or . . . any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." (§ 425.16, subd. (e).) Where a party moves to strike a cause of action under subdivision (e)(1) or (e)(2) of the statute, that party "need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*).)

Plaintiff moved to strike defendant's libel cause of action on the grounds the allegedly defamatory statements were prelitigation statements made in connection with a judicial proceeding. It is well established that statements made *in anticipation of* litigation may qualify for protection under section 425.16, subdivision (e)(1) or (e)(2), as statements or writings made in connection with a judicial proceeding. As our Supreme Court has explained: " '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . *such statements are equally entitled to the benefits of section 425.16*.' [Citations.]" (*Briggs, supra,* 19 Cal.4th at p. 1115, italics added; accord, *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 887-888 (*Digerati*) [prelitigation letter sent to exhibitors of documentary film regarding alleged wrongful distribution of film qualified for protection under section 425.16]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [letter to private individuals

regarding proposed complaint to Attorney General was within "the shelter" of section 425.16].)

"Accordingly, although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration" ' [citations] then the statement may be petitioning activity protected by section 425.16." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268 [prelitigation letter to customers regarding former employee's improper contact and disclosure of trade secrets].)

Here, defendant's libel claim was primarily based on the prelitigation cease and desist letter outlining the allegedly wrongful conduct by defendant, and indicating that if such conduct did not cease, a lawsuit seeking to enjoin such conduct and seeking damages would be filed. The four-page, single-spaced letter sets out in detail the conduct which plaintiff believed had been occurring based on communications from clients (improper solicitation of clients), as well as other information discovered by Grant on company computers after defendant resigned (retention of proprietary business information). Grant, in support of the motion, attested that if defendant's wrongful conduct had not stopped after issuance of the cease and desist letter, he would have authorized counsel to file a lawsuit on behalf of plaintiff.

Defendant argued, and the trial court found, the cease and desist letter did not qualify for protection as a prelitigation communication under section 425.16 because plaintiff did not sue defendant for misappropriation of trade secrets but instead sued on claims to recover the unpaid debt. The court reasoned that since plaintiff did not file a lawsuit on the potential claims asserted in the cease and desist letter, and the cease and desist letter did not mention the unpaid debt that was the subject of the pending lawsuit, the letter was not protected speech.

Defendant led the trial court into error by arguing the cease and desist letter lost its protected status simply because plaintiff ultimately decided not to sue plaintiff on the potential claims asserted in that letter. On appeal, defendant acknowledges the letter was a cease and desist letter -- it plainly is -- and the letter, read together with Grant's

declaration, show the letter was sent in anticipation of litigation. The Grant declaration explained plaintiff did not file an unfair competition lawsuit because plaintiff received assurances that no confidential information would be used. "Both section 425.16 and Civil Code section 47 are *construed broadly, to protect the right of litigants to ' "the utmost freedom of access to the courts* without [the] fear of being harassed subsequently by derivative tort actions." ' [Citations.]" (*Healy v. Tuscany Hills Landscape & Recreation Corp*. (2006) 137 Cal.App.4th 1, 5 (*Healy*), italics added.)

The only reasonable inference from the foregoing is that plaintiff was contemplating litigation against defendant, and possibly CAPS, seriously and in good faith, when the cease and desist letter was written and served. Simply because plaintiff ultimately satisfied itself that a breach of contract or misappropriation claim need not be formally pursued does not take the cease and desist letter outside the protection of section 425.16. (See, e.g., *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 271-272 [absolute litigation privilege applied to protect statements made in prelitigation letter where opposing party substantially conformed behavior after receipt of letter and lawsuit was therefore not filed].) The proper focus for both section 425.16 and the litigation privilege is whether the proposed lawsuit was seriously considered in good faith, not on whether a civil claim is ultimately filed and pursued to resolution. The court erred in finding that plaintiff had failed to discharge its burden in establishing the first prong of the statute.[1]

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[1] The fact defendant's libel claim also included an allegation the June 2011 email to Ms. Mendoza (which does not qualify as a prelitigation statement protected under section 425.16) was libelous does not preclude the applicability of section 425.16. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288 ["A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity." Parties " 'cannot frustrate the purposes of [section 425.16] through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one "cause of action." ' "].)

2. Step Two—Probability of Prevailing

To defeat a section 425.16 motion, the opposing party must state and substantiate a legally sufficient claim. (*Navellier, supra*, 29 Cal.4th at p. 88; see also *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 820.) Here, defendant filed a nonopposition and an amended cross-complaint dismissing the libel claim. Defendant offered no evidence to contradict Grant's testimony or otherwise establishing the viability of the libel claim.

Moreover, the record supports a finding the libel claim would not have been meritorious as it was based primarily on statements in the cease and desist letter which are protected from derivative liability by the litigation privilege. (*Digerati, supra*, 194 Cal.App.4th at p. 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim."]; see also *Healy, supra*, 137 Cal.App.4th at p. 5.) The trial court erred in finding plaintiff had failed to make the requisite showing to be deemed a prevailing party on its special motion to strike for purposes of a statutory fee award.

3. The Fee Request

Section 425.16, subdivision (c) provides that a prevailing party on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." Where the requisite showing is made, a reasonable fee award is mandatory.

"[T]here are three ways in which a party may seek an award of attorney fees and costs in connection with a special motion to strike under section 425.16. The party filing such a motion may seek attorney fees in its moving papers, or the party prevailing on the motion may bring a separate, subsequently filed motion for fees and costs. [Citations.] 'The party prevailing on the special motion to strike can also seek its attorney fees as part of a cost memorandum at the conclusion of the litigation. [Citations.]' [Citation.]" (*Carpenter v. Jack in the Box Corp*. (2007) 151 Cal.App.4th 454, 468, italics omitted.)

Under the statutory scheme and applicable law, plaintiff was entitled to seek an award of statutory fees by subsequent noticed motion. To the extent the trial court's repeated reference in its written ruling to an "unknown" amount of attorney fees suggests

the court believed otherwise, the court was in error. On remand, the court shall allow the parties to properly brief the attorney fee issue and shall conduct a hearing related thereto.

DISPOSITION

The trial court's August 29, 2012 order denying plaintiff's request for statutory attorney fees in connection with its special motion to strike is reversed. The action is remanded to the trial court with directions to conduct further proceedings consistent with this opinion, including allowing briefing from the parties on plaintiff's request for fees related to the presentation of its special motion to strike, and the holding of a hearing thereon. Plaintiff and appellant shall also recover costs and attorney fees on appeal pursuant to section 425.16, subdivision (c), in an amount to be determined by the trial court. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1267.)

GRIMES, J.

We concur:

BIGELOW, P. J.

FLIER, J.