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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MELISSA ROSE, Plaintiff and Appellant, v. ANASTASIYA KOLCHEVA et al., Defendants and Respondents.	B288189 (Los Angeles County Super. Ct. No. SC127744)

APPEAL from an order of the Los Angeles Superior Court. Lisa Hart Cole, Judge. Affirmed in part, reversed in part.

Goodstein & Berman, Gary J. Goodstein and Bruce A. Berman for Plaintiff and Appellant.

Bendel Law Group, Jason R. Bendel for Defendants and Respondents.

* * * * * *

Soon after they became business partners, two media planners had a falling out and eventually sued each other. When one of the planners filed a motion to dismiss the other's lawsuit under the anti-SLAPP law (Code Civ. Proc., § 425.16),[1] the trial court denied the motion after concluding the lawsuit involved no "protected activity" under anti-SLAPP. This was partially wrong. Accordingly, we reverse in part and affirm in part.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Melissa Rose (Rose) and Anastasiya Kolcheva (Kolcheva) are media planners in the field of advertising; Rose specializes in advising clients where to spend their money placing ads in broadcast media, while Kolcheva specializes in digital media.

In 2014, Rose and Kolcheva formed RoKo Media Group, LLC (RoKo) to combine their media planning expertise. They agreed to be 50/50 members. San Diego Zoo Global, which owns the San Diego Zoo and the San Diego Zoo Safari (collectively, the Zoo) was RoKo's chief client and accounted for 75 to 80 percent of its business.

Almost immediately after forming RoKo, the relationship between Rose and Kolcheva soured. Rose felt that she was the tireless worker who labored away as Kolcheva traveled the world and tried to cut Rose out of the profitable side of RoKo's business. Kolcheva felt that *she* was the tireless worker who labored away as Rose shirked her responsibilities to RoKo.

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1 "SLAPP" is short for Strategic Lawsuit Against Public Participation.

All further statutory preferences are to the Code of Civil Procedure unless otherwise indicated.

In January 2016, Rose sent Kolcheva a letter invoking her right under RoKo's Operating Agreement to expel Kolcheva as a member of RoKo.

II. Procedural Background

A. *Rose's lawsuit*

On June 23, 2017, Rose sued Kolcheva for (1) a declaration that her expulsion of Kolcheva from RoKo was proper and that Kolcheva was entitled to no further remuneration, (2) a judicial dissolution of RoKo, (3) an accounting of (and, if necessary, a constructive trust over) RoKo's profits, and (4) compensatory and punitive damages arising from Kolcheva's breach of fiduciary duty, conversion and money it had received.

B. *Rose's letter to Bank of America*

Two weeks after filing her lawsuit, on July 7, 2017, Rose's attorney sent a letter to Bank of America (the bank). The letter (1) notified the bank that Kolcheva had opened an account with the bank and denied Rose access to the account in violation of the terms of RoKo's Operating Agreement, (2) advised that Rose had "recently filed [a] lawsuit" against Kolcheva regarding RoKo, and (3) "demand[ed] that no funds be released from" the account without Rose's "written consent." The letter referred to an account that Kolcheva had opened in RoKo's name in February 2017. Rose and Kolcheva disagree as to whether Kolcheva told Rose she was going to open that account.

On August 4, 2017, the bank sent Kolcheva a letter exercising its right to freeze the account unless it received a stipulation from the parties or a court order regarding who controlled the funds in the account.

Because the account housed the money the Zoo advanced to RoKo to purchase advertising services on the Zoo's behalf, the Zoo

declared RoKo in breach of its media contract once it learned that its money was frozen in RoKo's account.

C. *Kolcheva's counter-lawsuit*

On August 31, 2017, Kolcheva cross-complained against Rose for (1) breach of fiduciary duty, and (2) unjust enrichment. More specifically, Kolcheva alleged that Rose had breached her fiduciary duties to RoKo by (1) "trying to . . . remove Kolcheva as a member and manager of RoKo," (2) "refusing to sign the [2016 and 2017 media] . . . contract[s]" between the Zoo and RoKo, (3) "disparaging Kolcheva to RoKo's clients and vendors," (4) "making large unilateral withdrawals from RoKo's [other] bank accounts," (5) "intentionally refusing to perform her duties in connection [with] the operations of RoKo," (6) "intercepting checks made payable to RoKo," (7) "causing a freeze of RoKo's bank accounts," and (8) refusing Kolcheva's pleas to ask the bank to lift the freeze. Of these acts, Kolcheva alleged that the "most egregious" was Rose's act of "sen[ding] [the] letter to [the] bank," since the resulting freeze on RoKo's funds brought "the business to a halt." Kolcheva sought compensatory and punitive damages.

D. *Rose's anti-SLAPP motion*

Rose filed a motion to strike Kolcheva's entire cross-complaint under the anti-SLAPP law. After full briefing and a hearing, the trial court denied the motion on the ground that none of Kolcheva's claims involved "protected activity" within the meaning of the anti-SLAPP law. According to the court, Kolcheva was "not alleging that Rose breached her fiduciary duty by drafting and sending the letter" to the bank, but rather by "causing [the bank to] freeze . . . RoKo's bank accounts." Drawing an analogy to *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*), the court viewed freezing

of the bank account as the injury-causing conduct and Rose's letter as merely "communcat[ing]" "the decision or the freezing" and hence not itself protected activity.

E. *Appeal*

Rose filed this timely appeal.

DISCUSSION

Rose argues that the trial court erred in concluding that her act of sending the letter to the bank, which Kolcheva alleges as part of her breach of fiduciary duty claim, was not "protected activity" within the meaning of the anti-SLAPP law. We independently review this claim. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

I. The Anti-SLAPP Law, Generally

The anti-SLAPP law "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) When a party moves to strike a cause of action (or portion thereof) under the anti-SLAPP law, a trial court must ask: (1) Has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056), and if it has, (2) has the nonmoving party demonstrated that the challenged cause of action has "minimal merit" by making "a prima facie [factual] showing" sufficient "to sustain" a judgment in its favor (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93-94; § 425.16, subd. (b)(1))?

II. Analysis

A. *Was Rose's act in sending the letter to the bank and thereafter refusing to retract it "protected activity"?*

In assessing whether the challenged cause of action (or portion thereof) constitutes protected activity, a court must ask "two subsidiary questions: (1) What conduct does the challenged

cause of action 'arise[] from'; and (2) is that conduct 'protected activity' under the anti-SLAPP [law]?" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 698.) In evaluating the first subsidiary question, a cause of action "arises from" protected activity when it is "based on" protected activity—that is, when the protected activity is the """principal thrust or gravamen""" or "'core injury-producing conduct'" warranting relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 134, italics omitted.) In evaluating the second subsidiary question, the anti-SLAPP law itself defines four categories of protected activity. (§ 425.16, subd. (e).) One is pertinent here: "[A]ny 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." (*Id.*, subd. (e)(2).)

Kolcheva's breach of fiduciary duty claim partially arises from Rose's act of sending a letter notifying the bank of pending litigation involving ownership of RoKo's account, demanding that the bank act to protect the assets in that account, and refusing to retract that demand once the bank froze the account. That is because Kolcheva specifically alleges that Rose's "most egregious" breach of her fiduciary duty to RoKo was Rose's act of "sen[ding] [this] letter to [the] bank," and further alleges that these acts were what prompted the bank to "caus[e]" and thereafter maintain "a freeze of RoKo's bank accounts." In other words, this was core, injury-producing conduct.

Because the letter was a "writing made in connection with an issue under consideration or review by a . . . judicial body," Rose's act in sending that letter and refusing to retract it also

constitutes protected activity under the anti-SLAPP law. Although "[n]ot all attorney conduct in connection with litigation . . . is protected" (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1037; *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1400 ["conduct is not automatically protected merely because it is related to pending litigation"]), an attorney's act in sending a letter to a third party with an interest in anticipated or ongoing litigation qualifies as protected activity. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 3-6 [letter sent to third-party homeowners regarding ongoing litigation and how it will result in higher homeowners association fees; protected activity]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [letter sent to third-party customers providing an "update" on ongoing litigation; protected activity].) This is especially so where, as here, the letter to the third party is sent as a means of mitigating potential damages or preserving the availability of assets necessary to satisfy a possible judgment. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1267-1268, 1270 [letter sent to third-party customers to "mitigate . . . potential damage" arising from misappropriation of their information by a litigant; protected activity]; cf. *Drell v. Cohen* (2014) 232 Cal.App.4th 24, 30 [letter sent to third-party insurer to preserve attorney lien rights; would be protected activity if lawsuit sought to invalidate the lien (rather than determine the lien's priority)].) Because Rose's refusal to accede to Kolcheva's requests to ask the bank to un-freeze the account was also accomplished via a statement that maintained the freeze—and hence mitigated potential damages and preserved assets to satisfy a possible judgment—it, too, constitutes protected activity.

Drawing on the trial court's reasoning, Kolcheva likens this case to the line of authority holding that when a plaintiff sues a defendant for injuries arising from the defendant's decision to take some action (here, to freeze the bank account or to engage in a course of conduct to systematically dismantle RoKo), a writing by the defendant that merely communicates, or constitutes evidence of, the underlying decision is not protected activity. (See *Park*, *supra*, 2 Cal.5th at pp. 1068-1069 [in lawsuit for wrongful denial of tenure, letter communicating employer's decision to deny tenure is not protected activity]; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 353-357 [in lawsuit for unlawful decision to assess pension contributions, statements made in public hearing and votes of Board members preceding that decision are not protected activity]; *Shahbazian v. City of Rancho Palos Verdes* (2017) 17 Cal.App.5th 823, 826, 835 [same, as to vote regarding grant of land use permit]; see also *Jesperson v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630-632 [in lawsuit for legal malpractice, lawyer-defendant's filed declaration is evidence of the malpractice and not protected activity].)

This line of authority is inapt here for two reasons. First, Kolcheva is not suing Rose for injuries arising from Rose's *decision* to take some action. Instead, and as her complaint plainly states, Kolcheva is suing Rose for the *communicative act* of "send[ing] [the] letter to [the] bank" and her subsequent refusal to retract that letter. Put differently, it is the communications—and not the decisions preceding them—that forms part of the basis for the alleged breach of fiduciary duty. Second, it is incorrect to view the freezing of the bank account as the injury-producing conduct and Rose's letter as merely

"communicating" that decision or providing evidence of it. That is because Kolcheva never sued the bank for freezing the bank account; her lawsuit therefore cannot be based on its decision to do so. Kolcheva sued *Rose*. Because Rose's decision to send the letter produced no injury *until she communicated that decision by sending the letter*, Kolcheva's reliance on *Park* to distinguish between the two fails.

B. *Has Kolcheva shown that the portion of her breach of fiduciary duty claim based on Rose's letter has minimal merit?*

The litigation privilege precludes one party from suing another for making a communication that bears "'some relation'" to anticipated or ongoing judicial proceedings. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194; Civ. Code, § 47, subd. (b).) Rose's letter to the bank informing it of her ongoing lawsuit and asking the bank to freeze the account because ownership of its contents is disputed most certainly has "some relation" to ongoing litigation. As such, Kolcheva may not seek to hold Rose liable for sending it.

C. *What is the appropriate remedy?*

In *Baral*, *supra*, 1 Cal.5th at p. 393, our Supreme Court ruled that the anti-SLAPP law functions "like a conventional motion to strike" and, as such, can "be used to attack parts of a count as pleaded." (*Id.*; see also *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 51.) Rose's protected activity in sending the letter to the bank and refusing to retract that letter constitutes two of the many breaches of fiduciary duty by Rose that Kolcheva alleges in her counter-complaint. And Rose does not challenge the trial court's ruling that the other alleged breaches or that Kolcheva's unjust enrichment claim are not based on protected

activity. Consequently, we adhere to *Baral* and order that only the allegations regarding Rose's sending of the letter and refusal to retract it be stricken.

DISPOSITION

The trial court's order denying Rose's anti-SLAPP motion is reversed in part, and the court is ordered to strike all allegations from Kolcheva's counter-claim regarding Rose's protected activity in sending her July 7, 2017 letter to the bank. Otherwise, the order is affirmed. The parties are to bear their own costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ