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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

KYLE MADISON et al., Plaintiffs and Respondents, v. DANIEL J. SPIELFOGEL, Defendant and Appellant.	B280588 (Los Angeles County Super. Ct. No. BC626872)

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

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer, and Marshall R. Cole, for Defendant and Appellant.

Lyle R. Mink for Plaintiffs and Respondents.

Plaintiffs and respondents Kyle Madison and Marjan Madison (the Madisons) filed a lawsuit alleging a conversion claim against defendant and appellant Daniel Spielfogel (Spielfogel), an attorney who represents parties sued by Kyle Madison in a separate action. The trial court denied Spielfogel's anti-SLAPP special motion to strike the conversion claim.[1] We consider whether Spielfogel's receipt of payment from his clients in exchange for representing them in litigation constitutes protected activity under section 425.16.

I. BACKGROUND

In 2005, the Madisons agreed with Michael Theodore (Theodore) to purchase and remodel "Casa W," an investment property in Cabo San Lucas, Mexico, that was adjacent to "Casa Theodore," a rental property Theodore already owned. Theodore and the Madisons created a limited liability company—Casa W, LLC (the LLC)—to purchase and operate Casa W. Theodore

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[1] What is commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute provides that "[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." (Code Civ. Proc., § 425.16, subd. (b)(1); *Baral v. Schnitt* (2016) 1 Cal.5th 376, 381 & fn. 1 (*Baral*).) Undesignated statutory references that follow are to the Code of Civil Procedure.

owned 52.5 percent and the Madisons owned 47.5 percent of the LLC, which was managed solely by Theodore.

Over the next several years, the relationship between Theodore and the Madisons soured as construction costs exceeded, and rental incomes disappointed, the parties' initial expectations. Theodore requested additional funds from the Madisons, and the Madisons began depositing funds into an escrow account because they did not feel Theodore was providing them with sufficient information to justify the amounts requested. Theodore eventually changed the locks on Casa W to prevent the Madisons from accessing the house.

In 2011, plaintiff Kyle Madison sued Theodore and the LLC for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, fraud, dissolution of the LLC, appointment of a receiver, accounting, and injunctive relief. The complaint alleged Theodore misappropriated and converted LLC funds and commingled those funds with his personal accounts. Spielfogel was, and continues to be, the attorney of record for Theodore and the LLC in this lawsuit.

In this litigation filed by Kyle Madison, the trial court appointed certified fraud examiner Pamela Wax-Semus (Wax-Semus) to evaluate 17 areas of inquiry, which included analyzing financial information for both Casa W and Casa Theodore. The court subsequently held a 15-day bench trial on Kyle's equitable causes of action against Theodore and the LLC. The court "found Wax-Semus' work exceedingly credible, reliable, and instructive" and "found [her] conclusions based on her work credible, reliable,

and highly persuasive."[2] The court credited "numerous instances [found by Wax-Semus] where Theodore deposited Casa W funds in Casa T[heodore] bank accounts" and ultimately found (for that reason and others) Theodore breached a fiduciary duty to the Madisons. The court remarked "[t]hese were not insignificant sums of money" but did not make any determinations as to precisely how much money Theodore owed the Madisons. The court concluded imposition of a constructive trust would be "appropriate" and said it would order an accounting. Several months later, the trial court instructed Wax-Semus to conduct an accounting and "prepare a detailed tracing analysis to enable the court to make determinations regarding the imposition of a constructive trust."

Not long after the court entered its accounting order, the Madisons sued Spielfogel and Theodore's expert witness, Pastore, for conversion based on their receipt of payment from Theodore for the provision of legal and expert services. The Madisons alleged evidence presented at the 2015 bench trial showed (1) Theodore commingled LLC funds with his personal funds, (2) Theodore owed the Madisons "at least $1.7 million" in LLC profits,[3] and (3) Theodore paid Spielfogel and Pastore

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[2] The court also considered evidence from the parties' separate financial analyst experts and found the approach of Kyle Madison's expert, Anna Leh (Leh), to be "more credible and reliable" than that of Theodore's expert, Thomas Pastore (Pastore).

[3] The Madisons derived this figure based on Leh's application of certain assumptions to evidence presented at the bench trial.

approximately $309,295 and $68,820, respectively, from bank accounts that included LLC funds owed to the Madisons.

Spielfogel filed a section 425.16 special motion to strike the Madisons' complaint. He contended the Madisons' conversion claim was based on activity protected by section 425.16—namely, his "representation of Theodore in the [u]nderlying [a]ction, as the money he received from Theodore was based directly upon the services provided to Theodore in connection [with] said representation." Spielfogel maintained that allowing claims like the Madisons' "would have a chilling effect on the representation of the defendant [in] almost every civil case."

Spielfogel further contended the Madisons could not show a likelihood of prevailing on the merits of their conversion claim because the basis of their suit—his provision of litigation-related services—was protected by the litigation privilege (Civil Code, § 47, subd. (b)). Spielfogel also argued, in the alternative, that the Madisons could not establish a likelihood of prevailing because they could not prove ownership of the specific funds Spielfogel received, noting that no judgment had yet been entered in the underlying action.[4] In a declaration, Spielfogel averred all payments he received were for services rendered or costs advanced in the 2011 action filed by Kyle Madison and Spielfogel did not know what account Theodore used to pay attorney fees because Theodore always paid with a credit card.

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[4] Spielfogel disputed the amounts to which the Madisons claimed they were entitled and asserted that his clients would be putting on affirmative defenses during the second phase of the trial, which had not yet begun.

The Madisons opposed Spielfogel's special motion to strike, broadly contending that motions brought under section 425.16 could not be asserted against conversion claims. The Madisons also argued they had established a probability of prevailing based on evidence Theodore paid Spielfogel a specific sum of money from accounts containing funds to which the Madisons were entitled. The Madisons additionally disputed Spielfogel's reliance on the litigation privilege, arguing it was inapplicable because his conduct was tortious and noncommunicative in nature.

The trial court denied Spielfogel's motion to strike the Madisons' cause of action against him. The court reasoned Spielfogel's representation of Theodore was merely incidental to the gist of the Madisons' claim, namely, "that Spielfogel has property that rightfully belongs to [the Madisons]." "In other words," the trial court reasoned, "it is not the legal services themselves that is the gravamen of the complaint, it is the exercise of dominion over the funds used as payment for the legal services that is the gravamen." Because the court determined the Madisons' claim did not arise from Spielfogel's protected activity, it did not reach the question of whether the Madisons had shown a probability of prevailing on the merits.

II. DISCUSSION

Spielfogel contends the Madisons' conversion claim against him should have been struck as a SLAPP under section 425.16 because the Madisons seek recovery based on activity protected by that statute, namely, Spielfogel's representation of Theodore and the LLC that, in Spielfogel's view, qualifies as protected petitioning activity. Spielfogel's argument fails because the allegedly wrongful act underlying the Madisons' claim—that

Spielfogel received money to which the Madisons are entitled—is not "*itself* . . . an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*).)

A. The Anti-SLAPP Statute

The Legislature enacted section 425.16 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Because those suits "seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation]," the anti-SLAPP statute "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Section 425.16 "does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech," but "only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral*, *supra*, 1 Cal.5th at p. 384.)

The anti-SLAPP statute allows a court to strike, upon a defendant's motion, "[a] cause of action against [the defendant] arising from any act of that person in furtherance of the person's right of petition or free speech . . . 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).) Accordingly, "[o]nly 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 (*Navellier*).) The statute defines protected activity as "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement of 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 426.16, subd. (e).)

A court's resolution of an anti-SLAPP motion proceeds in two steps. "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. . . . 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." (*Baral*, *supra*, 1 Cal.5th at p. 396.) We review the denial of an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

B. The Madisons' Conversion Claim Against Spielfogel Does Not Arise From Protected Activity

In the first stage of anti-SLAPP analysis, we determine whether the plaintiff's cause of action "arises from protected activity"—that is, whether an act protected under section 425.16, subdivision (e) "underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062; see also *Cotati*, *supra*, 29 Cal.4th at p. 78 ["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"].) The merits of the plaintiff's claim are irrelevant at this stage of the analysis. (*Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 156-157 (*Sprengel*).)

"Nothing in [section 425.16] itself categorically excludes any particular type of action from its operation." (*Navellier*, *supra*, 29 Cal.4th at p. 92.) To determine whether a claim is based on activity protected by the statute, we "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis of liability." (*Park*, *supra*, 2 Cal.5th at p. 1063.) This analysis requires us to "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." (*Id.* at p. 1064.)

The Madisons' claim against Spielfogel is based on allegations that (1) Theodore diverted funds belonging to the Madisons into accounts under his sole control, and (2) Theodore paid Spielfogel from those accounts containing the intermingled funds. Thus, "the specific acts of alleged wrongdoing" (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804) do not entail Spielfogel's litigation activity on behalf of

Theodore or the LLC. The fact that Spielfogel would not have received payment but for his provision of litigation-related services does not establish that the Madisons' claim is based on his protected activity in performing those services. (*Navellier*, *supra*, 29 Cal.4th at p. 89 ["that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such"]; see also *Park*, *supra*, 2 Cal.5th at p. 1068 ["Plaintiff could have omitted allegations regarding [protected activity] and still state the same claims"].) Nor is the Madisons' intent in suing Spielfogel relevant. (*Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1399 (*Optional I*) ["whether the plaintiff's lawsuit intended to chill or actually chilled the defendant's conduct is not relevant"]; see also *Cotati*, *supra*, 29 Cal.4th at p. 78 ["a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic"].)

To be sure, Spielfogel is correct that the anti-SLAPP statute protects attorneys engaged in certain litigation-related conduct. (See, e.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 ["'any act . . . in furtherance of the person's right of petition or free speech'" protected by section 425.16 "includes communicative conduct such as the filing, funding, and prosecution of a civil action" and "includes qualifying acts committed by attorneys in representing clients in litigation"]; *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480 (*Cabral*) ["all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute"]; *Thayer v. Kabateck Brown Kellner LLP*

(2012) 207 Cal.App.4th 141, 158 (*Thayer*) ["if the plaintiff is a nonclient who alleges causes of action against someone else's lawyer based on that lawyer's representation of other parties, the anti-SLAPP statute is applicable to bar such nonmeritorious claims"].) But the statute's protection of litigation-related conduct is not unlimited. (*Optional I*, *supra*, 222 Cal.App.4th at p. 1400 ["[C]onduct is not automatically protected merely because it is related to . . . litigation; the conduct must *arise from* the litigation"], emphasis added; see also *Sprengel*, *supra*, 241 Cal.App.4th at pp. 151-155 [claims based on an attorney's violation of professional or ethical duties do not arise from litigation].)

Here, the Madisons' claim does not arise from the protected activity in which Spielfogel engaged—his litigation-related efforts on behalf of Theodore and the LLC. It "merely provide[s] context" (*Baral*, *supra*, 1 Cal.5th at p. 394), showing how Spielfogel came to have the funds to which the Madisons claim entitlement. Because proving the elements of the Madisons' conversion claim turns on Spielfogel's receipt of funds and not on the circumstances occasioning that receipt, the claim is not subject to a special motion to strike under section 425.16.

That is not to say, of course, that funding litigation cannot qualify as protected activity under section 425.16; we agree it often does. (See, e.g., *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1166 ["insofar as a cause of action is based on the payment of funds to maintain a lawsuit, this constitutes protected activity that will be subject to a special motion to strike pursuant to section 425.16 unless the opposing party can demonstrate a probability of prevailing on the claim"]; see also *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 681

[wife's support of her husband's litigation was protected activity under anti-SLAPP statute]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18 ["person who supports and encourages the filing of a lawsuit" engages in protected activity].) But, importantly, conceding that claims based on a defendant's payment for litigation services may be protected does not establish the converse, i.e., that claims based on a defendant's *receipt* of payment for litigation services must also be protected.[5] That is the type of claim at issue in this appeal, and the activity giving rise to the claim as alleged in the Madisons' complaint is not protected by the anti-SLAPP statute.

Other authorities on which Spielfogel relies to urge reversal are inapposite. The claims asserted against attorneys in *Thayer*, *supra*, 207 Cal.App.4th 141, *Cabral*, *supra*, 177 Cal.App.4th 471, *Contreras v. Dowling* (2016) 5 Cal.App.5th 394 (*Contreras*), and *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255 (*Neville*) arose from communicative acts in anticipation of, or during, litigation proceedings—e.g., sending pre-litigation

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[5] Funding litigation—i.e., paying for attorney representation—is an act "in furtherance of the person's right of petition" (§ 425.16, subd. (b)(1)) because it "helps to advance that right or assists in the exercise of that right" (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143). (Cf. *Save Westwood Village v. Luskin* (2014) 233 Cal.App.4th 135, 145 [political campaign contribution and charitable public university contribution are both expressive conduct protected under section 425.16].) A cause of action that arises from receipt of payment in exchange for representation, by contrast, does not invariably provide a similar conceptual linkage to suppression of free speech or petitioning activity.

correspondence (*Contreras*, *supra*, at pp. 411-412; *Neville*, *supra*, at p. 1262, fn. 6), initiating judicial proceedings (*Cabral*, *supra*, at pp. 479-480; *Contreras*, *supra*, at pp. 411-412), defending against litigation (*Cabral*, *supra*, at pp. 479-480), and settling litigation (*Thayer*, *supra*, at p. 158). The claims challenged by the attorney defendants in those cases, therefore, all arose from the defendants' actual litigation activity on behalf of their clients, as opposed to acts separate from litigation activity.

Spielfogel's invocation of *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200 (*Finton*) is also unavailing. In that case, the attorney defendants represented former employees of the plaintiff in a proceeding where the plaintiff alleged its former employees copied its confidential documents onto a hard drive owned by the plaintiff. (*Id.* at p. 206.) The former employees gave the hard drive to their attorneys, whom the employer then sued for conversion, receipt of stolen property, and injunctive relief. (*Id.* at p. 207.) The Court of Appeal affirmed the trial court's order striking the complaint under section 425.16, stating: "It is unquestionable and undisputed that the acts alleged in the complaint all arise out of defendants' representation of their clients in the underlying case. The only reason the hard drive was ever turned over to defendants is because they were counsel in that matter. The only purported reason defendants are being sued is because they refused to unconditionally return the hard drive, which constitutes potential evidence in the underlying matter. In reality, it seems they are being sued for representing their clients." (*Id.* at p. 210.)

While there are superficial similarities between *Finton* and this case—in particular, the assertion of a conversion cause of

action—a distinction exists that makes all the difference for purposes of applying section 425.16. In *Finton*, the property allegedly converted was evidence in the underlying action. Thus, by demanding a return of that property and challenging the defendants' possession of it, the plaintiff was directly targeting the defendants' performance of protected activity—i.e., defending their clients in litigation. The defendants' possession of the hard drive, as potential evidence relating to the plaintiff's allegations its former employees had engaged in information theft and unlawful competition, was inseparable from the defendants' representation of those employees. The circumstances here are different. While Spielfogel's engagement in protected, litigation-related activity might relate in some practical sense to his receiving payment for those services, the two activities are not inherently, necessarily linked as in *Finton*.

Our narrow holding today should not be understood to determine that the Madisons' cause of action against Spielfogel has merit or that Spielfogel lacks other remedies if the Madisons' claim is frivolous or abusive. (See, e.g., *Cotati*, *supra*, 29 Cal.4th at p. 78, fn. 4.) These are not considerations pertinent to the protected activity analysis required by section 425.16. Rather, because we conclude the conversion claim does not arise from Spielfogel's protected activity, we have no reason to address the Madisons' probability of prevailing.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

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BAKER, Acting P.J.

We concur:

MOOR, J.

KIM, 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.