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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

MARC CHEMLA, et al., Plaintiffs and Respondents, v. LOU BERMUDEZ, et al., Defendants and Appellants.	B275628 (Los Angeles County Super. Ct. No. BC549755)

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

Law Office of Marlene Leiva and Marlene Leiva for Defendants and Appellants Lou Bermudez; Practice Sales and Appraisals, L.L.C.; and Marlene Leiva.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Brandon E. Woodward, and Eric V. Anderton for Plaintiffs and Respondents Marc Chemla and Marc Chemla, D.D.S., Inc.

Defendants and appellants Lou Bermudez and Practice Sales & Appraisals, LLC (sometimes collectively Bermudez defendants) and defendant and appellant Marlene Leiva (Leiva) appeal from the trial court's denial of their anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP statute).[1] Defendants sought to strike the Doe amendment[2] adding Leiva as a defendant to the fourth cause of action for legal malpractice[3] in the First Amended Complaint (FAC) of plaintiffs and respondents Dr. Marc Chemla, D.D.S. and Marc Chemla, D.D.S., Inc. (sometimes collectively the Chemla plaintiffs).

The Chemla plaintiffs alleged that Leiva is Lou Bermudez's wife and the Bermudez defendants' in-house counsel when the Bermudez defendants brokered the sale of the Chemla plaintiffs' dental practice to John M. Chaves, D.D.S. and his two professional corporations (the Chaves buyers). The Chaves buyers thereafter sued the Chemla plaintiffs in separate litigation for misrepresentations in connection with the sale of the Chemla plaintiffs' dental practice; the Chaves buyers' litigation ultimately settled.

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[1] An anti-SLAPP motion refers to a motion to strike matter within the purview of Code of Civil Procedure section 425.16.

[2] California procedure allows a plaintiff to sue a fictitious "Doe" and to amend to add the true name of the "Doe" defendant once it is ascertained. (Code Civ. Proc, § 474.)

[3] Arguably the Doe Amendment added Leiva to more causes of action, but except for a passing reference at oral argument, the parties appear to assume that the Doe Amendment added her only to the fourth cause of action for legal malpractice. We thus do the same.

Leiva argues that the Doe amendment was an "abuse of judicial process to gain a bad faith tactical advantage" and was "an attempt to squelch [her] constitutionally protected right to free speech by representation of her clients." She further argues that the trial court should have stricken the Doe amendment as a sham pleading. The trial court denied the anti-SLAPP motion, finding that the malpractice claim against Leiva did not arise from activity protected by the anti-SLAPP statute. We agree and affirm.

FACTUAL AND PROCEDURAL BACKROUND

On June 24, 2014, the Chemla plaintiffs filed their original complaint against the Bermudez defendants, East West Bank, and "Does 1-50." Both sets of defendants demurred, and on February 3, 2015, the trial court sustained the demurrers with leave to amend as to some of the causes of action. With respect to the fourth cause of action for legal malpractice, the trial court noted the allegations that Lou Bermudez represented to the Chemla plaintiffs that Practice Sales & Appraisals, L.L.C. had an in-house law firm expert in sales of dental practices. Because the Chemla plaintiffs failed to allege that Lou Bermudez was an attorney or that Practice Sales & Appraisals, L.L.C. was a law firm, and failed to allege any reliance on legal advice from those defendants, the trial court sustained the Bermudez defendants' demurrer to the legal malpractice cause of action with leave to amend.

The Chemla plaintiffs filed their FAC on February 23, 2015 initially against the Bermudez defendants, East West Bank and Does 1-50. The Chemla plaintiffs alleged statutory, tort, contract, indemnity, and declaratory relief causes of action

against the Bermudez defendants[4] based on the following nucleus of facts:

(1) Pursuant to an exclusive brokerage agreement, Plaintiffs engaged Practice Sales & Appraisals, L.L.C. to be its broker for the sale of their dental practice. Lou Bermudez provided professional services "exclusively" through Practice Sales & Appraisals, L.L.C., and Practice Sales & Appraisals, L.L.C. received a $120,000 brokerage commission from that sale.

(2) The Chaves buyers sued the Bermudez defendants and the Chemla plaintiffs in a separate case in which they alleged that the Chemla plaintiffs and the Bermudez defendants defrauded the Chaves buyers by failing to disclose material facts.

(3) Throughout the sale of the dental practice, Practice Sales & Appraisals, L.L.C. acted illegally as a real estate broker as defined in Business and Professions Code section 10131 because a limited liability company cannot be a licensed real estate broker or receive compensation for the sale of a business opportunity. Lou Bermudez had no written agreement that would have entitled him to receive a brokerage commission.

(4) The Bermudez defendants breached their professional and fiduciary duties to the Chemla plaintiffs when they disclosed to the Chaves buyers that the Chemla plaintiffs would take a lower price for their dental practice.

(5) The Chemla plaintiffs gave the Bermudez defendants access to the dental practice's books and records. They also disclosed all material facts affecting the practice's value,

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[4] East West Bank allegedly financed the Chaves buyers' purchase of the Chemla plaintiffs' dental practice. East West Bank is not a party on appeal. Accordingly, we do not describe the Chemla plaintiffs' claims against the bank.

including informing the Bermudez defendants that an associate dentist had taken over 400 patient charts including 100 "active" patients when she left the Chemla plaintiffs' practice group in February 2012, and that the computer system marked many of those patients—now patients of the departed dentist's separate practice—merely as "inactive." This inflated the dental practice's existing and future receipts, and thus, the dental practice's value. The Bermudez defendants failed to relay this information to the Chaves buyers, and also misled the Chaves buyers into believing the associate dentist would be onsite so that the Chaves buyers could maintain two different practice groups, when in fact, that dentist was no longer affiliated with the Chemla plaintiffs. The Bermudez defendants' concealments resulted in the Chemla plaintiffs' paying the Chaves buyers to settle the aforementioned litigation.

(6) The Bermudez defendants failed to obtain authorization for their dual agency in representing the Chemla plaintiffs in the sale of the dental practice and holding themselves out to be the Chaves buyers' broker with respect to that same sale.

(7) In the legal malpractice cause of action, the Chemla plaintiffs alleged Lou Bermudez "touted" Practice Sales & Appraisals, L.L.C.'s "in house law firm and lawyers expert in dental practice sales" and "as such owed a duty of care to [the Chemla plaintiffs'] to represent them in accordance with relevant legal standards of care in the practice of law." Leiva, whose office was located "with" the Bermudez defendants, was "one of the lawyers [who] provides and assists Bermudez in offering legal services to his . . . brokerage clientele to distinguish his brokerage services from others." The Chemla plaintiffs relied

upon "the representation that [Practice Sales & Appraisals, L.L.C.] did in fact have an in-house law firm overseeing their transaction with Dr. Chaves."

(8) The Bermudez defendants breached their duty of care by, among other acts, failing to disclose to the Chemla plaintiffs that Practice Sales & Appraisals, L.L.C. was not a licensed real estate broker and therefore not entitled to collect a brokerage commission; to draft the brokerage agreement competently; to obtain a written conflict waiver for serving as a dual brokerage agent; and to disclose to the Chemla plaintiffs and Chaves buyers in writing "all facts material to the value and desirability of the Practice".

(9) "Does 1-5" are California licensed attorneys who breached their duty of care to the Chemla plaintiffs as described above and who "provided legal services to Plaintiff "as members of the [Practice Sales & Appraisals, L.L.C.] in-house law firm and lawyers, the identities of which will be determined in discovery and added to this complaint."

On March 18, 2015, the Bermudez defendants filed a motion to strike various portions of the FAC pursuant to Code of Civil Procedure sections 435 and 436. On September 17, 2015, the trial court denied the motion to strike in its entirety, but sustained the Bermudez defendants' demurrer to the fourth cause of action for legal malpractice without leave to amend for the same reasons it had sustained the demurrer to the same cause of action in the original complaint. The trial court also observed: "To the extent that Plaintiffs contend that they received legal services from Marlene Leiva's law firm or from Does 1-5, Plaintiffs plausibly could state a cause of action for legal malpractice against such defendants."

On September 17, 2015, the Chemla plaintiffs added Leiva as "Doe 1" and amended the FAC "by substituting the true name for the fictitious name wherever it appears in the complaint" (Doe Amendment). As noted previously, the parties assume that the Doe Amendment added Leiva only to the fourth cause of action for legal malpractice.

On February 16, 2016, Leiva filed a motion on behalf of the Bermudez defendants and herself to strike the Doe Amendment pursuant to Code of Civil Procedure sections 435 and 436. She contended inter alia that the legal malpractice claim was time-barred, the Doe Amendment was not proper because her identity was known to the Chemla plaintiffs at the time they filed the original complaint, and the legal malpractice claim against her was a bad faith litigation tactic and sham. The record does not contain the trial court's ruling on that motion.[5]

On March 2, 2016, Leiva and the Bermudez defendants filed an anti-SLAPP motion.[6] Leiva and the Bermudez defendants contended that Leiva never represented anyone in the sale of the Chemla plaintiff's dental practice; her only involvement regarding that sale was as defense counsel to the Bermudez defendants in the Chaves buyers' litigation and in the

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[5] We note the Bermudez defendants' and Leiva's notice of appeal recites that they are appealing only from denial of the anti-SLAPP motion.

[6] We observe that defendants refer to a cross-complaint Leiva filed on behalf of the Bermudez defendants against the Chemla plaintiffs. That cross-complaint is not in the record or noted in the Case Summary, although there is a reference in the Case Summary to an "Answer to Cross-Complaint" filed on November 5, 2015. In her anti-SLAPP motion, Leiva also refers to a request for judicial notice. That request is not in the record.

instant case. They attacked the Doe Amendment as a sham pleading on procedural and substantive grounds.

As to the former, defendants argue the Chemla plaintiffs did not conduct any discovery that would have made them any more aware of Leiva's identity than they were when they filed their original complaint. As to the latter, defendants contend the Chemla plaintiffs knew that she had never represented them, having met her only after the Chaves buyers' litigation commenced. Indeed, the Chemla plaintiffs knew before filing the original complaint that they were represented by "A. Lee Maddox, DDS, Esq. and the Law Offices of A. Lee Maddox, DDS, A Professional Law Corporation" in the sale of their dental practice and were expressly informed in the sales agreement to seek independent counsel. In addition, contrary to allegations in the FAC, Leiva did not share offices with the Bermudez defendants, but instead, conducted her law practice in a separate suite, albeit at the same street address. The Bermudez defendants and Leiva further asserted that Leiva was never the Bermudez defendants' employee. The only allegation specifically about Leiva was that she is Lou Bermudez's wife.

Defendants argued that the true motive for the Doe Amendment was to "attenuate [Leiva's] ability to represent [her clients,]" the Bermudez defendants. This kind of bad faith tactic interfered with "Leiva's right to free speech" as well as with the Bermudez defendants' "right[ ] to petition." Accordingly, the anti-SLAPP statute required striking the Doe Amendment. The Bermudez defendants and Leiva proffered Lou Bermudez's and Leiva's own declaration in support of these arguments.

The Chemla plaintiffs argued that the anti-SLAPP motion was procedurally faulty. First, it was untimely under Code of

Civil Procedure section 425.16, subdivision (f) because the motion was not filed within 60 days of service of the FAC.[7] Second, the motion was moot as to the Bermudez defendants because the motion sought to strike only the Doe Amendment adding Leiva to the legal malpractice claim.

On the merits, the Chemla plaintiffs asserted Leiva did not demonstrate that the Chemla plaintiffs' legal malpractice claims "arise" from any free speech or petitioning activity within the purview of the anti-SLAPP statute. They further contended that far from being the product of a sham or ulterior purpose, the Doe Amendment was necessitated by the trial court's ruling on the demurrer to the fourth cause of action: "Plaintiffs could not have known that the Court would require naming of the specific licensed attorney in the attorney malpractice claim rather than the entity purporting to provide legal services to Plaintiff." Finally, they argued that the Bermudez defendants cannot prevail on the only issue on the merits in the anti-SLAPP motion, to wit, whether their Doe Amendment was a sham pleading. In support of their opposition, they proffered a website printout advertising that unlike other healthcare practice brokers, Practice Sales & Appraisals, L.L.C. provides access to "our in-house law firm," responses to plaintiffs' interrogatories prepared by Leiva, and their counsel's declaration authenticating the latter documents.

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[7] The record is devoid of a ruling, if any, by the trial court on the timeliness of defendants' anti-SLAPP motion. The Chemla plaintiffs also do not raise this issue on appeal; we therefore do not address it.

The trial court issued a tentative ruling[8] and heard oral argument on the anti-SLAPP motion on April 5, 2016; it then took the motion under submission. On May 31, 2016,[9] the trial court denied the Bermudez defendants' and Leiva's anti-SLAPP motion because even if these defendants could show that the Chemla plaintiffs filed the Doe Amendment to interfere with Leiva's representation of her clients in this case, the Bermudez defendants and Leiva had not demonstrated that the legal malpractice cause of action "itself arises out of a protected activity." The trial court relied principally on *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921 (*Kajima*) in making its ruling. The trial court then announced that "[b]ased on the foregoing, the tentative ruling stands."

On June 14, 2016, the Bermudez defendants and Leiva timely appealed from the trial court's denial of their anti-SLAPP motion.[10]

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[8] We obtained a copy of that tentative ruling in response to our letter request dated March 7, 2018.

[9] In a June 3, 2016 minute order giving notice of "ruling of submitted matter/notice of entry of order," the trial court states that it signed and filed its ruling on May 31, 2016.

[10] On July 31, 2017, we granted the Bermudez defendants' and Leiva's motion to augment the record to add the anti-SLAPP motion and the trial court's May 31, 2016 ruling on that motion.

DISCUSSION

On appeal, the parties posit essentially the same arguments they asserted in the trial court. The Chemla plaintiffs also argue that attacking a pleading as a sham is beyond the scope of the instant appeal in the absence of a writ petition or this court's exercising discretion to review the issue. For the first time on appeal, the Chemla plaintiffs seek attorney fees pursuant to Code of Civil Procedure section 425.16, subdivision (c)(1)[11] on the theory that defendants' anti-SLAPP motion was frivolous.[12]

We review de novo the denial of an anti-SLAPP motion. (*Park v. Board of Trustees of California State* University (2017) 2 Cal.5th 1057, 1067 (*Park*).) "We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based.

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[11] Code of Civil Procedure section 425.16, subdivision (c)(1) provides in pertinent part: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

[12] Under Code of Civil Procedure section 425.16, subdivision (c)(1) " 'a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.' " (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199.) The Chemla plaintiffs never sought attorney fees in the trial court; a fortiori, they did not adhere to the requirements of Code of Civil Procedure section 128.5 in seeking attorney's fees. The Chemla plaintiffs' claim to these fees is thus not properly before us.

[Citations.] We do not, however, weigh the evidence, but accept plaintiff 's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law. [Citation.]" (*Ibid.* at p. 1067.)

We "engage[ ] in a two-step process, determining first whether the defendant made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the defendant's exercise of a right to petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the statute; and if so, whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Jespersen v. Zubiate-Beauchamp* (2004) 114 Cal.App.4th 624, 628 (*Jespersen*).)

The anti-SLAPP statute describes claims within its purview: "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., § 426.16, subd. (b)(1).)

The anti-SLAPP statute defines " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " 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 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, (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." (Code Civ. Proc., § 425.16, subd. (e).)

The Chemla plaintiffs and the trial court rely heavily on *Kajima*, *supra*, 95 Cal.App.4th 921, to argue that the Chemla plaintiff's legal malpractice claim does not arise in furtherance of the exercise of free speech or petitioning rights within the anti-SLAPP statute. There, Division Seven of our Court held that a cross-complaint did not arise out of protected activity merely because it was retaliatory or in the words of the *Kajima* court, "an oppressive litigation tactic." (*Ibid*. at p. 924.)

In that case, the plaintiff construction company sued the defendant city for sums due under a construction contract and for indemnity for attorney fees incurred in lawsuits arising out of the construction project. The defendant city brought cross claims for, among other causes of action, fraud, breach of contract and statutory unfair business practices relating to the defendant construction company's bidding practices, untrue representations of minority ownership, and submission of payment requests for work the company did not perform.

In holding that the plaintiff construction company had failed to satisfy the first prong of the anti-SLAPP analysis, the appellate court observed: "Kajima wrongly focuses on the City's filing of the amended cross-complaint as a supposed act of retaliation without demonstrating, as it must under the anti-SLAPP statute, that the amended cross-complaint 'alleges acts in

furtherance of [Kajima's] right of petition or free speech in connection with a public issue.' [Citation.] This error is fatal to Kajima's motion: The amended cross-complaint alleges causes of action arising from Kajima's bidding and contracting practices, not from acts in furtherance of its right of petition or free speech." (*Kajima*, *supra*, 95 Cal.App.4th at p. 929.)

In *Jespersen, supra,* 114 Cal.App.4th 624, defendants in a legal malpractice suit brought an anti-SLAPP motion after their former clients lost the underlying suit allegedly because the malpractice defendants had caused discovery sanctions to be issued. These sanctions ultimately resulted in the striking of the plaintiff clients' answer and cross-complaint and entry of a default judgment in the underlying case against the plaintiff clients.

The attorney defendants in the malpractice case argued the legal malpractice claim arose out of their petitioning activity because it was based on their filing declarations seeking relief from the entry of default in the underlying case. After reviewing the pleadings, briefs, and trial court rulings regarding the discovery sanctions and entry of default, Division Four of our Court held that defendants had not demonstrated petitioning activity implicating the anti-SLAPP statute: "Plainly, respondents' cause of action is not based on Zubiate-Beauchamp's declaration or any of appellants' declarations. Appellants have not been sued for having negligently filed declarations admitting their malpractice, but for their failure to comply with a discovery statute and two court orders to do so. Appellants have failed to demonstrate that such conduct amounts to constitutionally protected speech or petition, and we reject their attempt to turn

garden-variety attorney malpractice into a constitutional right." (*Jespersen*, *supra*, 95 Cal.App.4th at p. 632.)

More recently, in *Park*, *supra*, 2 Cal.5th 1057, the California Supreme Court further clarified what it means to *arise* out of activity protected by the anti-SLAPP statute. The Supreme Court emphasized the difference between on the one hand, contesting "an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity" and on the other, "speech or petitioning activity that *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Ibid*. at p. 1060.) It held that the latter, but not the former, is within the purview of the anti-SLAPP statute. (*Ibid.* at pp. 1060-1061.)

The Court applied this distinction in an employment discrimination claim based on national origin brought by a teacher who was denied tenure. Writing for a unanimous Court, Justice Werdegar observed, "[t]he elements of Park's claim . . . depend not on the grievance proceedings, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible." (*Park*, *supra*, 2 Cal.5th at p. 1068.)

The lesson of these cases is that the subject of the anti-SLAPP motion must itself be petitioning or free speech activity. It is not enough just to argue that the challenged activity was retaliatory or that the medium of communication was petitioning or free speech activity.

Applying these precepts to the pleadings and evidence in the instant case, we conclude the challenged conduct here is

purportedly negligent advice given with respect to the sale of a dental practice. As the trial court observed, for purposes of the anti-SLAPP motion, whether the Doe Amendment was motivated by retaliatory animus was of no moment if the Chemla plaintiffs' claims did not arise out of protected activity under the anti-SLAPP statute. To the extent the Bermudez defendants and Leiva believe filing the Doe Amendment had no factual basis and was done with animus, we agree with the trial court when it wrote in its tentative ruling: "There are several avenues through which Defendants can challenge the doe amendment, such as a demurrer, motion to strike, motion for judgment on the pleadings, or motion for summary judgment." An anti-SLAPP motion is just not one of those remedies.[13]

[13] We express no opinion on whether the Bermudez defendants and Leiva would be successful in pursuing these other "avenues." In light of our opinion, we also do not address the Chemla plaintiffs' argument that the appeal is moot as to the Bermudez defendants.

DISPOSITION

The trial court's order denying the anti-SLAPP motion is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.