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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

C & C DEVELOPMENT, INC.,

Plaintiff, Cross-defendant and Appellant,

v.

CBS OUTDOOR, INC.,

Defendant, Cross-complainant and  
Respondent.

B240195

(Los Angeles County  
Super. Ct. No. BC468761)

APPEAL from an order of the Superior Court of Los Angeles County. Steven J. Kleifield, Judge. Affirmed.

Alston & Bird, James R. Evans and Ryan McCoy for Plaintiff, Cross-defendant and Appellant.

Caldwell Leslie & Proctor, Christopher G. Caldwell, Jeanne A. Fugate, and Craig H. Bessenger for Defendant, Cross-complainant and Respondent.

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Landlord C & C Development, Inc., and tenant CBS Outdoor, Inc., are the successors to a lease whereby tenant rented a portion of landlord's property to operate a billboard. Landlord sued tenant for unlawful detainer, claiming tenant had not paid rent or utilities due under the lease. Tenant abandoned the premises and tried to remove its billboard, which belonged to tenant under the terms of the lease. Landlord prevented tenant from re-entering the premises to remove the billboard, claiming ownership of the billboard.

The original unlawful detainer action was dismissed without prejudice, and landlord then filed this lawsuit, seeking damages for unpaid rent and trespass. Tenant filed a cross-complaint for conversion and declaratory relief, to determine ownership of the billboard. The cross-complaint summarized the previous unlawful detainer litigation between the parties. On this basis, landlord filed a special motion to strike the claim for conversion, asserting it arose from landlord's protected activity in filing the unlawful detainer action. The trial court denied the motion, finding the gravamen of the cross-complaint was not the filing of the unlawful detainer, but ownership of the billboard. We agree, and affirm the order below.

### **BACKGROUND**

In December 1997, Outdoor Systems Advertising, as tenant, and Robert and Yee Lin Chan, as landlord, entered into a lease. Outdoor Systems Advertising leased a portion of the Chans' Los Angeles property for the purpose of erecting and operating a billboard. The lease was for a term of 10 years, with an option for two 5-year extensions. The lease would automatically extend unless Outdoor Systems Advertising gave written notice of its intention not to extend the lease. The lease called for rent of \$18,000 a year, which would increase by 20 percent for each five-year extension. An amendment to the lease was executed in June 1998, reducing the rent to \$12,000 a year (but increasing the rent if Outdoor Systems Advertising added another advertising face to its billboard). In February 2007, landlord bought the property from the Chans, and tenant (Outdoor Systems Advertising's successor) continued to make lease payments.

On March 24, 2009, landlord served a 10-day notice to pay rent or quit, seeking \$3,750 in unpaid utilities, and \$7,500 in unpaid rent. Landlord claimed that monthly utility payments of \$150 had not been made between February 2007 and February 2009. Also, monthly rent of \$750 had not been paid between May 2008 and February 2009. On May 6, 2009, landlord served another 10-day notice to pay rent or quit, this time seeking \$4,200 in utility payments. On August 17, 2009, landlord instituted unlawful detainer proceedings against tenant.

The lease provided that “Title to the [billboard] shall be held by the Lessee. All of Lessee’s Structure shall remain the property of Lessee and are not fixtures. Lessee has the right to remove all Lessee’s Structure at its sole expense on or Thirty (30) days after the expiration or termination of this Lease.” The lease also provided that “Lessor shall provide access to Lessee . . . to the Premises twenty-four (24) hours a day, seven (7) days a week . . . to construct, maintain, install and operate Lessee’s Structure.”

On August 31, 2009, tenant informed landlord that it would agree to terminate the lease, surrender possession of the property, and remove its billboard. Landlord did not respond to tenant’s correspondence. In September 2009, tenant started to dismantle the billboard, but did not complete the removal. Landlord called the police and did not allow tenant’s crew to remove the structure, claiming it belonged to landlord.

On October 2, 2009, landlord filed a notice with the trial court, indicating that possession was no longer at issue in its unlawful detainer lawsuit against tenant. Therefore, the trial court converted the unlawful detainer action to a limited civil case. Tenant continued, without success, to make arrangements with landlord to remove the billboard from landlord’s property. Landlord made clear it would not give tenant access to its property. The case languished in court, until the trial court issued an order to show cause re: dismissal in May 2011 for landlord’s failure to request that its case be set for trial. Landlord moved to dismiss the unlawful detainer action, without prejudice, and that action was dismissed on August 25, 2011.

Landlord then filed this case on August 30, 2011. Landlord asserted causes of action for breach of contract and trespass, claiming the lease was breached when tenant

failed to make utility payments and “abandon[ed] the leasehold and fail[ed] to pay rent.” The complaint also alleged tenant wrongfully entered landlord’s property and attempted to remove the billboard, asserting “it had no right of entry without [landlord’s] permission for purposes of removing the . . . billboard and supporting structure.” The complaint also alleged tenant did not obtain necessary permits or plans for the removal of the billboard, and that landlord was concerned that improper removal of the billboard could damage its building on the property because of the proximity of the billboard to the building’s foundation.

Tenant cross-complained for declaratory relief and conversion. The cross-complaint summarized the earlier litigation between the parties (as discussed above), describing the filing of the notices to pay rent or quit, the unlawful detainer action, the assertion by landlord of ownership rights to the billboard and refusal to allow tenant to remove the billboard. The cross-complaint alleged the billboard belonged to tenant under the terms of the lease, and that landlord wrongfully denied access to the billboard, as required by the lease. The cause of action for declaratory relief alleged a controversy concerning the ownership of the billboard had arisen. The claim for conversion alleged “[tenant] is . . . the owner and title holder to the remaining steel billboard structure . . . located on the Property[;] [¶] [t]he steel used to construct the billboard structure is valuable[;] [¶] [tenant] has sought the right to safely remove the remaining billboard structure since September 24, 2009. [Landlord] has refused all such requests . . . .”

Landlord filed a special motion to strike the conversion cause of action in the cross-complaint under Code of Civil Procedure section 425.16<sup>1</sup> (anti-SLAPP motion), contending it arose from protected petitioning activity. Landlord seized upon the allegation in the cross-complaint that landlord’s “purpose in serving the Notices to Quit and filing the Original Lawsuit was simply to seek [and] take ownership of [the] Billboard.” Tenant countered that the cross-complaint was not based on litigation

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

conduct, but rather on the refusal to allow tenant to recover its property as required by the lease. The trial court found that landlord failed to make a prima facie showing that the cross-complaint arose from protected activity. The trial court concluded the conversion claim was essentially a claim by a tenant that the landlord wrongfully retained personal property following termination of the lease, and that prosecution of the unlawful detainer did not bring the claims within the anti-SLAPP statute.

We affirm the order, finding the cross-complaint does not arise from protected activity.

### **DISCUSSION**

A party opposing a SLAPP claim may bring a special motion to strike any cause of action “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.” (§ 425.16, subd. (b)(1).) A special motion to strike may be addressed to individual causes of action and need not be directed to the complaint as a whole. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.) The trial court rules on an anti-SLAPP motion using a two-step process. First, it looks to see whether the moving party has made a prima facie showing the challenged causes of action arise from protected activity. (§ 425.16, subd. (b)(1).) Second, if the moving party meets this threshold requirement, the burden shifts to the other party to demonstrate a probability of prevailing on the claims. (*Ibid.*; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) In making both of these determinations, the trial court considers “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) Our review on appeal is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

The moving party has the burden of making a prima facie showing one or more causes of action arise from an act in furtherance of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subd. (e); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Statements made in litigation, or in connection with litigation, are protected by section 425.16, subdivision (e). Courts have

taken a fairly expansive view of what constitutes litigation-related activity for purposes of section 425.16. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) The motion must be denied if the required prima facie showing is not made. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.)

When a cause of action involves both protected and unprotected activity, the court looks to the gravamen of the claim to determine if the claim is a SLAPP. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) Protected conduct which is merely *incidental* to the claim does not fall within the ambit of section 425.16. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; *Peregrine, supra*, at p. 672.) Where the moving party's protected activity will only be used as evidence in the case, and none of the claims are based on it, the protected activity is only incidental to the claims. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809-810.) Determining the gravamen of the claims requires examination of the specific acts of alleged wrongdoing and not just the form of the claim. (*Peregrine, supra*, at pp. 671-673.)

The elements of a claim for conversion are a plaintiff's ownership or right to possession of personal property, defendant's disposition of the property in a manner that is inconsistent with plaintiff's rights, and damages. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) Although the cross-complaint alleged that landlord's "purpose in serving the Notices to Quit and filing the Original Lawsuit was simply to seek and take ownership of [the] Billboard," the conversion claim is not *based* on litigation conduct. Rather, the basis of the conversion claim is unlawful retention of the billboard (ownership of which had not been litigated in the unlawful detainer action) and interference with tenant's contractual right to the billboard by refusing access to the property. The details of the litigation, recited in the cross-complaint, merely provide a context to explain how the claim evolved.

In *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 (*1105 Alta Loma Road*), the appellate court refused to apply the anti-SLAPP statute to a complaint for housing discrimination.

A dispute between the landlord and a disabled tenant arose when the landlord, in accordance with local rent control regulations, issued a notice of intention to remove its apartment building from the rental market. After receiving the notice, the tenant requested an extension of her tenancy on the ground she suffered from a disability. The landlord filed an unlawful detainer action, and ultimately secured a writ of possession that resulted in the tenant's eviction. The Department of Fair Employment and Housing (DFEH) sued the landlord for disability discrimination on behalf of the tenant. The landlord filed a special motion to strike portions of the complaint that were based on protected communications made in connection with the unlawful detainer action. The trial court denied the motion on the ground "the gravamen of the complaint was for disability discrimination." (*Id.* at p. 1281.)

The appellate court affirmed, finding the landlord had failed to meet its threshold burden of showing the acts alleged in the complaint were in furtherance of its right of petition or free speech. (*1105 Alta Loma Road, supra*, 154 Cal.App.4th at p. 1284.) The court distinguished between the landlord's acts and communications in furtherance of the unlawful detainer action, which constituted protected petitioning or free speech activity, and the landlord's alleged failure to accommodate the tenant's disability, which was not a protected activity. (*Id.* at pp. 1284-1285.) "Contrary to [the landlord's] argument, the communications and the actual eviction itself were not the acts attacked in DFEH's complaint. Instead, the allegations of wrongdoing in DFEH's complaint arose from [the landlord's] alleged acts of failing to accommodate [the tenant's] disability. The letters, email and filing of unlawful detainer actions constituted DFEH's *evidence of* [the landlord's] alleged disability discrimination." (*Ibid.*)

The court acknowledged the "suit might have been 'triggered by' [the landlord's] filing, serving and processing the paperwork necessary to remove its residential units from the rental market in accordance with applicable laws. However, it is not true [the landlord] was sued because it filed these notices in the official municipal and state statutory removal process, or because it communicated with [the tenant] in connection

with the process, or even because it filed the unlawful detainer actions against her.”  
(*1105 Alta Loma Road, supra*, 154 Cal.App.4th at pp. 1287-1288.)

Here, like in *1105 Alta Loma Road, supra*, the special motion to strike was properly denied by the trial court, because the conversion claim was not based on, and did not arise out of protected activity, even though it was “triggered” in part by the filing of the unlawful detainer action. (*1105 Alta Loma Road, supra*, 154 Cal.App.4th at pp. 1287-1288.) Since we conclude the conversion claim does not arise from protected activity, we need not consider whether tenant demonstrated a probability of prevailing on the merits of its conversion claim.

### **DISPOSITION**

The order is affirmed. Respondent is to recover its costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.