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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KIN HUI et al., Cross-Complainants and Respondents, v. PHOEBE HUANG, Cross-Defendant and Appellant.	B279426 (Los Angeles County Super. Ct. No. BC605477)

APPEAL from an order of the Los Angeles County Superior Court, Malcolm H. Mackey, Judge. Affirmed.

Lee Anav Chung White Kim Ruger & Richter, Bub-Joo S. Lee and Anna Novoruzyan, for Cross-Defendant and Appellant.

Curd, Galindo & Smith, Joseph D. Curd, Jeffrey B. Smith, for Cross-Complainants and Respondents.

INTRODUCTION

In general terms, the Anti-SLAPP statute (Code Civ. Proc.,[1] § 425.16) permits a cross-defendant to obtain an early dismissal of an action, provided (1) she demonstrates she was sued for engaging in certain "protected activity" and (2) the cross-complainants fail to demonstrate a probability of succeeding on the merits. In this case, the moving party, cross-defendant Phoebe Huang, unequivocally denied making the statements attributed to her, i.e., she denied engaging in "conduct in furtherance of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) The trial court concluded Huang's denial that she made the statements, coupled with her failure to demonstrate "'the alleged statements were protected as [concerning] a matter of public interest'" did not entitle her to relief under section 425.16, subdivision (e)(4) and denied the anti-SLAPP motion. Reviewing the issue do novo, as we must, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The main action involves a number of plaintiffs suing a number of defendants, alleging numerous irregularities in the operation of real estate development enterprises, investment opportunities, and transfers of real property.[2] Several defendants−Invest L.A. Regional Center, LLC; Singpoli Group, LLC; Singpoli (Hop Kin) Construction & Decoration (Nevada),

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1 All statutory references are to the Code of Civil Procedure.

2 The litigation is pending, but this appeal does not involve the main action.

Inc.; and Kin Hui (Hui), a principal of the Singpoli entities (collectively cross-complainants)—cross-complained against Phoebe Huang (cross-defendant), the spouse of one of the plaintiffs, for defamation.

Cross-complainants allege they "are all experienced and successful real estate developers with good reputations in the industry." They attract Chinese and other foreign investors, "particularly . . . for EB[-]5 projects."[3] Cross-defendant allegedly defamed Hui by making statements impugning his character and reputation. In particular, cross-defendant stated, "'Hui . . . has been spreading words that the project [belonged] to him. The mayor of the City of Arcadia was against [Hui] and said he always use[s] projects to raise fund[s] without putting down any money. He has discussed . . . he would like to make it an EB-5 project. I don't know if it is the reason that he has been saying this project was his, or he has been marketing this project as EB-5 project, there were EB-5 clients came to me (for project information).'" Cross-defendant allegedly made "similar comments" concerning the other cross-complainants.

The cross-complaint alleges "[t]he phrase, 'He always use[s] projects to raise fund[s] without putting down any money' has a negative connotation when said in Chinese. The expression is the equivalent of saying that one who uses projects without putting down his own money is akin to a 'charlatan,' 'dishonest,' 'con-artist,' 'grifter,' or someone who does not have money of his own and takes advantage of others."

Cross-defendant, represented by plaintiffs' counsel, filed an anti-SLAPP motion. She asserted the subject of the statements,

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[3] The EB-5 program enables foreign investors in qualifying projects to obtain permanent United States resident status.

Hui, is a person in the "public eye" and the "project" he was associated with concerned a matter of public interest. Huang supported her motion with a declaration unequivocally stating she "did not make the [alleged] statements."

The hearing on Huang's anti-SLAPP motion was reported, but the record does not include all the bases for the trial court's decision. Before the hearing, the trial court provided counsel with a six-page tentative ruling. At the hearing, the trial judge advised the parties the tentative ruling was his decision. On the record, he noted only that "moving party has denied making the statements" and then, quoting from his tentative ruling, added the motion was "'silent on the material questions, like what [the] real estate investment statements concerned, and does not reveal that the alleged statements were protected as about being a matter of public interest.'"[4]

DISCUSSION

The anti-SLAPP statute "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.) Resolution of an anti-SLAPP motion involves 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. When relief is sought based on allegations of

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[4] We do not have the benefit of the trial court's reasoning. For reasons not explained, the tentative ruling, which the trial court adopted as its decision, was not included in the appellate record. While statements of decision are not required in anti-SLAPP decisions (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 624), where the trial court has issued one, it is appropriately part of the record on appeal.

both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached." (*Id.* at p. 396.) A defendant who does not establish that she engaged in protected activity fails to clear the hurdle of the first step, and the trial court does not address the second step. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 110.)

We review an anti-SLAPP motion de novo. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.) Like the trial court, we are required to "consider the pleadings, and supporting and opposing [declarations] stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) Our review in this case focuses on whether Huang demonstrated the alleged statements concerned a matter of public interest and the effect, if any, of her denying that she made them.

Preliminarily, we note that defamation actions are "prime" targets for anti-SLAPP motions. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) However, not every defamation action may be stricken via an anti-SLAPP motion. As *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181 explained, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech . . . by the defendant." (*Id.* at p. 188.)

Nor can an individual accused of making defamatory statements by her "'own conduct, create [her] own defense by making the claimant a public figure.' (*Hutchinson v. Proxmire* [(1979)] 443 U.S. [111,] 135, 99 S.Ct. [2688,] 61 L.Ed.2d [411,]

431.) A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1133.) Moreover, "in order to satisfy the public issue/issue of public interest requirement of section 425.16, subdivision (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance. [Where] the allegedly defamatory statement [is] not made in such a context, it is not entitled to the statute's protection." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.) In other words, "a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. . . . [T]here should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a broad and amorphous public interest that can be connected to the specific dispute is not sufficient." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 481.)

Our review of the record does not persuade us either that Hui is a public figure or that there is any public interest in whether he solicits investors for real estate projects without putting in his own money. While we are not limited to the allegations in the cross-complaint to determine whether the "principal thrust or gravamen" of the pleading is protecting petitioning activity, the allegations are helpful for our analysis.

(*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 728 (*Freeman*); § 425.16, subd. (b)(2).) Cross-complainants allege Huang's husband had business conversations with Hui and shared those conversations with her. There is no allegation that she repeated those conversations to others; instead, she allegedly defamed Hui by telling people he does not use his own money when he solicits investors for real property projects. This is no more than an alleged garden variety defamation. Huang's statements concerning Hui as a public figure and the project a matter of public interest are conclusory and lack evidentiary support.

Additionally, Huang unequivocally denied that she engaged in any protected activity[5] and asserted, for that reason, she would prevail. This is a merits defense that ignores the first step in the section 425.16 analysis.

Freeman, supra, 154 Cal.App.4th 719 is instructive on this point. There, an attorney sued by his former clients sought to strike the complaint under section 425.16. He contended "the documents presented in support of his motion 'show that there is no truth to [plaintiffs'] allegations as to them individually. . . .' These merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity. Where [defendant] cannot meet his threshold showing, the fact he 'might be able to otherwise prevail on the merits under the "probability" step is irrelevant.'" (*Freeman, supra,* at p 733.)

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[5] At oral argument, Huang's counsel asserted Huang's denials were not unequivocal. But the denial in her declaration was absolute. And at the hearing on her anti-SLAPP motion, her counsel advised the court, "Yes, Phoebe Huang denies making the statements . . . ."

Although *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*) did not involve an anti-SLAPP motion to strike a defamation action, its perspective is also helpful. Citing *Freeman,* the *Gerbosi* court noted, that where the moving party "does not show that a 'protected activity' underpins plaintiff's claims, it is irrelevant whether the plaintiff has shown a 'probability of prevailing' on his or her claims[]. . . . [A moving party under section 425.16] may well have valid defenses to [the plaintiff's] claims], but a special motion to strike under the anti-SLAPP statute simply [is] not the proper procedural tool for presenting" them. (*Gerbosi, supra,* 193 Cal.App.4th at p. 445.)

Section 425.16 is designed to insulate defendants sued for engaging in protected activities from the time and expense of protracted litigation. "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.) As Huang herself notes, *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1388 held a defendant only needs to make a prima facie showing that she engaged in protected activity to be able to obtain relief under section 425.16. We agree. But one does not make a prima facie showing that she engaged in protected activity when one denies ever doing so.

DISPOSITION

The order is affirmed. Cross-complainants are awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.