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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

PATRICIA J. BARRY, Plaintiff and Appellant, v. ALLEN ALLEN et al., Defendants and Respondents.	B231913 (Los Angeles County Super. Ct. No. BC445628)

APPEAL from an order of the Superior Court of Los Angeles County. Abraham Khan, Judge. Affirmed.

Patricia J. Barry, in propria persona for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole and Susan S. Baker for Defendant and Respondent Robert Drescher.

Appellant Patricia Barry appeals the order granting Respondent Robert Drescher's motion to strike pursuant to Code of Civil Procedure section 425.16. Barry asserts that the motion was untimely and failed to demonstrate an entitlement to relief under the statute, and that she demonstrated a likelihood of prevailing on the merits. We affirm.

FACTUAL SUMMARY

This is but one chapter in a long battle between these lawyers, and the parties whom they represent, which has apparently led to the deep personal animosity reflected in the record. The record on appeal is replete with irrelevant material submitted by each party; we will consider and discuss only those portions of the record material to the disposition of this appeal.

Barry had, in previous litigation, represented Cytodyn of New Mexico, Inc. After her representation terminated, Cytodyn, represented by Drescher, filed a malpractice action against Barry in 2006. Barry filed an unsuccessful Code of Civil Procedure section 425.16[1] motion in that matter; the denial of that motion was affirmed on appeal.[2] After remand to the trial court, Barry successfully demurred to the complaint on the grounds that Cytodyn, a corporation in forfeiture in California, lacked capacity to sue. The judgment of dismissal of that action was entered in 2009.

Barry filed this action in 2010, alleging extortion (First Cause of Action), malicious prosecution (Second Cause of Action), violation of the Bane Act (Civ. Code, § 52.1) (Third Cause of Action), and Fraud (Fourth Cause of Action).[3] The alleged extortion related to a threat of sanctions in a related bankruptcy action, about which Barry asserted that Drescher had misled the court in the underlying litigation. The malicious

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[1] All further statutory references, unless otherwise noted, are to the Code of Civil Procedure.

[2] *Cytodyn of New Mexico v. Barry,* (March 10, 2008, B189399) [nonpub. opn.].

[3] The complaint also named Allen Allen, who has not been served and is not a party to this appeal.

prosecution action pertained to Cytodyn's malpractice action against Barry. The Bane Act claims related to the prosecution of that prior action, as well as the alleged acts of extortion. Finally, the fraud claim rested on claimed misrepresentations and concealment of facts and law in the malpractice action.

Barry filed her complaint on September 17, 2010. On November 23, 2010, she filed a request for entry of default; Drescher filed an answer to the complaint on November 24, 2010. On November 30, 2010, he filed a First Amended Answer, and on December 21, 2010, he filed a motion to strike under section 425.16. Barry filed a document entitled Notice of Default, seeking to strike those pleadings, on December 27, 2010. On January 3, 2011, Drescher sought relief from default. The court vacated the default and ordered the First Amended Answer and Motion to Strike deemed filed as of that date. On February 14, 2011, Barry filed, ex parte, to strike the motion as untimely. Drescher filed written opposition. While the record does not contain the ruling, a later minute order reflects the denial of Barry's motion on its date of filing.

Barry filed her opposition to the motion to strike, along with evidentiary objections, on February 25, 2011.[4] Drescher filed his reply and evidentiary objections on March 2, 2011. The court heard the matter on March 9, 2011, overruled Barry's evidentiary objections, sustained Drescher's, and granted the motion. Barry timely appealed.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Permitting the Filing of the 425.16 Motion*

Barry asserts that the filing of the section 425.16 motion after the court vacated Drescher's default was beyond the statutory period, and thus improper. Assuming, for purposes of discussion only, that she is correct that the time ran during the period of

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[4] Barry sought and obtained permission of the court for the late filing.

default, her argument ignores the discretion of the trial court to permit late filing of a motion to strike.

Section 425.16, subdivision (f) provides: "The special motion may be filed within 60 days of the service of the complaint, or, in the court's discretion, at any later time upon terms it deems proper." In keeping with the Legislature's admonition that the statute is to be construed broadly (§ 425.16, subd. (a)), courts have determined the time limit is not jurisdictional and may be extended by the trial court in the exercise of its discretion. (See *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 787; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840.)

Other than the irrelevant fact that, in the underlying case, the court had cited her late filing as part of the reason for awarding attorney's fees and costs, Barry asserts no basis for finding an abuse of discretion by the trial court. We find none.

2. *The Trial Court Properly Granted the Motion to Strike*

a. Respondent Met His Burden Under The First Prong

In ruling on a defendant's motion under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).) "'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los*

Angeles (2002) 95 Cal.App.4th 921, 928.) "We review the trial court's rulings on an anti-SLAPP motion independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).)" (*Scalzo v. Baker* (2010) 185 Cal.App.4th 91, 99.)

The preliminary question in addressing a motion under section 425.16 is whether the claims arise from protected activity. (*Equilon Enterprises, supra*, 29 Cal.4th 53 at p. 67) If a cause of action arises from litigation activity, it is generally protected and properly subject to a motion to strike; for these purposes, an act includes communicative conduct such as the filing, funding, and prosecution of a civil action. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17-19.) A malicious prosecution claim, the central claim in this case, is unequivocally within the scope of the statute. (*Jarrow Formulas v. LaMarche* (2003) 31 Cal.4th 728, 734-735.)

Barry asserts that the statute cannot apply here, because Drescher's client had no right to petition. She rests this argument on the assertion that, because Cytodyn lacked the capacity to sue, the lawsuit was "illegal and void ab initio." Barry, however, provides no authority for this proposition. As such, we need not consider it: "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)[5]

However, even if this argument were properly before us, it would provide no basis for a determination of error. The mere allegation of illegality is not sufficient to remove an action from the motion to strike procedure. It is only in the "narrow circumstance" (*Flatley, supra,* 39 Cal.4th at p. 316) in which the defendant "'concedes, or the evidence conclusively establishes'" (*ibid.*) that the conduct for which the defendant

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[5] Barry cites a case ordered depublished by the Supreme Court in clear violation of California Rules of Court, rule 8.115(a). She cites no authority that we can consider that there is a clear showing of illegality where a lack of capacity to sue is established during the litigation.

seeks protection is illegal as a matter of law that the defendant is precluded from using section 425.16 to strike the plaintiff's action. (*Id.* at pp. 316, 320.) (See also *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460 [where "the legality of [a defendant's] exercise of a constitutionally protected right [is] in dispute in the action, the threshold element in a section 425.16 inquiry has been established."].)

Here, Drescher does not concede illegality, nor has it been conclusively established. What is alleged to be extortion – the threat to seek sanctions in a related judicial proceeding – does not meet the statutory definition of the crime, nor is its assertion supported by relevant case law. Extortion, defined by Penal Code, section 518, requires a threat falling within the categories listed in Penal Code, section 519. Those threats, in essence, are to cause injury, accuse of a crime, or expose a secret. (*People v. Umana* (2006) 138 Cal.App.4th 625, 639.) None of the listed categories include, or suggest, a threat to seek civil sanctions in a judicial proceeding, as is alleged here.[6]

Drescher met his burden under the first prong, shifting to Barry the burden of showing the probability of prevailing on her claims.[7]

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[6] As discussed below, the litigation privilege would apply to such statements.

[7] Barry also asserts that her Bane Act claim is not subject to a motion to strike, as the activity involved is not protected. She cites no authority for the position that an allegation that this statute has been violated by Drescher's speech is not subject to section 425.16, and has waived this claim. In any event, the allegations made do not sufficiently allege a violation of the Bane Act. The threats alleged here are not within the class of threats that the statute was intended to reach; instead the act was intended to reach egregious conduct, as demonstrated by the multiple statutory references to violence or threats of violence in its language. (See *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843; *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947.)

b. Appellant Failed to Meet Her Burden Under the Second Prong

(1) Appellant Failed to Demonstrate Favorable Termination of the Prior Action Necessary to Prevail on the Malicious Prosecution Claims

To assert a claim for malicious prosecution, a plaintiff must allege that the litigation at issue was terminated in her favor, had been brought without probable cause, and had been initiated with malice. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 216 (*Daniels*).) Because Barry did not show that the prior action had been terminated in her favor, she failed to establish a probability of prevailing.[8]

The malpractice action, as described earlier, was dismissed because the court determined the plaintiff lacked the capacity to sue. While trial on the merits is not required to conclude that there was a favorable termination, "'the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.'" (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342.) Where the termination is unrelated to the merits, and thus does not demonstrate innocence or lack of responsibility for the wrongs alleged, it does not support a malicious prosecution action. (*Ibid*.)

In this case, the dismissal was based on the grounds of lack of capacity. In a related, but not identical situation, parties attempted to assert a malicious prosecution claim where the dismissal of the underlying action had been based on a lack of standing to sue. Because such a dismissal does not involve the merits of the claim, the court held it did not constitute a favorable termination. (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592.) While lack of capacity relates to some disability of a party to assert a claim, rather than the jurisdictional bar created by a lack of standing, in neither case does the court determine the merits of the controversy, nor establish that the defendant did not act wrongfully in the manner alleged; the determination relates solely to the plaintiff, and not to the acts of the defendant. As a result, we find that the dismissal on lack of capacity grounds did not constitute a termination on the merits in this case. (See *Ross v. Kish*

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[8] As a result, we do not address the other grounds asserted.

(2006) 145 Cal.App.4th 188, 198 (*Ross*) [in the absence of judgment on the merits, reviewing court must determine whether the disposition reflects a determination that the action would not succeed].)

Barry asserts that we should find favorable termination on other grounds: she alleges Drescher failed to conduct discovery; committed discovery abuse; and extorted her by his threat of a motion for sanctions in a related bankruptcy proceeding. Barry relies primarily on two cases as authority: *Ross, supra*, and *Daniels, supra*. Neither leads to a different result. In both cases, the discovery abuse resulted in dismissal as a discovery sanction. Under those circumstances, the courts found it appropriate to conclude that the prosecuting party, having by its actions allowed the court to reach that result, did not believe its action was meritorious. (*Ross, supra*, 145 Cal.App.4th at p. 198; *Daniels, supra*, 182 Cal.App.4th at p. 217 ["the circumstances surrounding the dismissal of an underlying case for discovery abuse may justify a conclusion that a favorable termination on the merits occurred."]) Here, while monetary sanctions were imposed, the plaintiff never allowed the case to get to the point of terminating sanctions; the facts here do not justify a conclusion that there was a favorable termination on the merits.

Finally, Barry appears to argue that Drescher's alleged acts of extortion demonstrate a lack of confidence in the case that should be read as a concession of no merit. As she cites no authority supporting this proposition, she has waived any argument she might have asserted. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]" (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

(2) Recovery For the Remaining Causes of Action is Barred by the Litigation Privilege

Barry asserts that all of her causes of action arise out of her malicious prosecution claim; if correct, the motion to strike was properly granted for the reasons already discussed. As they were separately alleged, however, there is an independent ground to affirm the grant of the motion: all of the remaining claims are barred by the litigation privilege, which applies to the torts alleged here. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960 ["the litigation privilege bars all tort causes of action except malicious prosecution."])

The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a "publication or broadcast" made as part of a "judicial proceeding" is privileged. (Civ. Code, § 47, subd. (b).) This privilege is absolute in nature, applying "to *all* publications, irrespective of their maliciousness." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 (*Silberg*).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." (*Id.* at p. 212.) The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen, supra*, 37 Cal.4th at p. 1057.)

"'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' (*Silberg, supra,* 50 Cal.3d at p. 213.) In order to achieve this purpose of curtailing derivative lawsuits, we have given the litigation privilege a broad interpretation. The litigation privilege 'derives from common law principles establishing a defense to the tort of defamation.' (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163.) 'Its placement in the Civil Code immediately following the statutory provisions defining the elements of the twin defamation torts of libel and slander [citations] makes

clear that, at least historically, the section was primarily designed to limit an individual's potential liability for defamation.' (*Ibid.*) Beginning with *Albertson v. Raboff,* which involved an action for defamation of title, we first extended the litigation privilege to apply to torts other than defamation. (*Albertson v. Raboff* (1956) 46 Cal.2d 375 (*Albertson*).) As we observed in *Silberg*, the litigation privilege has since 'been held to immunize defendants from tort liability based on theories of abuse of process [citations], intentional infliction of emotional distress [citations], intentional inducement of breach of contract [citations], intentional interference with prospective economic advantage [citation], negligent misrepresentation [citation], invasion of privacy [citation], negligence [citation] and fraud [citations].' (*Silberg, supra,* 50 Cal.3d at p. 215.)" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241-1242.)

3. *The Trial Court Did Not Abuse Its Discretion In Its Evidentiary Rulings*

Both parties filed written objections to the evidence submitted by the other in relation to the motion. The court denied all of Barry's objections, and granted all of Drescher's. We review such evidentiary rulings for abuse of discretion.

Turning first to Barry's objections, she asserted that Drescher's documents were not authenticated, and that certain statements in his declaration were hearsay, vague, and lacked foundation. Each of the statements in the declaration addressed Drescher's state of mind; accordingly they were properly admitted. (Evid. Code, § 1250.) The documents, in turn, were copies of court records, properly the subject of judicial notice. (Evid. Code, §§ 452, subd. (d), 1280.)

Drescher objected to 25 statements contained in Barry's declaration in support of her opposition to the motion. Seventeen of those objections, among other grounds, asserted that the statements were irrelevant. Each of the 17 pertained to actions taken by Barry either in representing her client who, represented by Drescher, sued her for malpractice, or in related litigation. None of those statements were relevant to the issues to be determined in the motion to strike. While the other objections were made on other

grounds, each of the statements objected to also failed to bear any relevance to the issues actually before the court on the motion to strike. Accordingly, the trial court did not abuse its discretion in excluding the statements.

DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.