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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LISA MAKI, Cross-complainant and Appellant, v. JOSEPH YANNY et al., Cross-defendants and Respondents.	B231712 (Los Angeles County Super. Ct. No. BC404598)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm Mackey, Judge. Affirmed.

Law Offices of Lisa L. Maki and Christina M. Coleman for Cross-complainant and Appellant Lisa Maki.

California Anti-SLAPP Project, Mark Goldowitz, Paul Clifford; Yanny & Smith and Joseph Yanny for Cross-defendants and Respondents Joseph Yanny and Yanny & Smith, P.C.

Emanuel Law and Raphael B. Emanuel for Respondent Jon Peters.

Lisa Maki appeals from the order granting the special motion to strike and judgment of dismissal entered in favor of Joseph Yanny, his law firm, Yanny & Smith, P.C., and his client, Jon Peters, on Maki's cross-complaint alleging Yanny and Peters had wrongfully interfered with her existing client relationships and defamed her. Maki also appeals from the order awarding Yanny attorney fees in the amount of $54,208.28. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Maki's Representation of Steve Burgin and Other Former Peters Employees*

In July 2006 Steve Burgin retained Maki on a contingent fee basis to pursue various claims against Peters, a Hollywood producer, arising from Burgin's employment by Peters. In November 2006, before Maki had filed a complaint on behalf of Burgin, Peters sued Burgin and his fiancée, Imelda Lara, for breach of contract. Burgin and Lara retained Maki on an hourly basis to defend the lawsuit. Maki obtained a full dismissal of the action on August 14, 2007 and collected $21,922.12 in costs from Peters. After credit for the cost recovery, however, Burgin and Lara still owed Maki $120,403.02 in attorney fees.

Meanwhile, Burgin had recommended Maki's services to other employees fired by Peters. In July 2006 Maki entered into a contingent fee agreement with Andrew and Adriana Silveira to prosecute their claims against Peters, and Bianca Hernandez retained Maki in August 2006 to represent her in claims against him.

At some point in 2007 Burgin was asked by Yanny to testify as a witness in an action against Ronald Grigg, a former officer and general counsel for Peters Entertainment. According to Yanny, he and Burgin became friends through this association; and during the fall of 2007 Burgin assisted Yanny in investigating the case. Yanny acknowledges he spoke with Maki during this period about the multiple cases filed by former employees against Peters. According to Maki, Yanny suggested they combine forces and pay referral fees to Burgin for securing additional plaintiffs. Maki refused. Concerned Yanny intended to steal her client, Maki asked Burgin for assurances

he had not entered into an agreement with Yanny. Burgin assured Maki he had not done so.

In late December 2007, however, Burgin told Maki he had settled his claims against Peters and no longer needed her services. According to Brian Quintana, another former employee of Peters,[1] he had been instructed by Yanny to contact Burgin and invite him to mediate his claims without the participation of Maki, who was then Burgin's counsel. Burgin met with Peters and Yanny. According to Quintana, Burgin was offered $50,000 and reinstatement in his old job with Peters in return for releasing his claims and encouraging other clients of Maki to terminate their actions against Peters.[2] As Yanny admits, he met with Peters and Burgin to mediate Burgin's as-yet-unfiled claims and subsequently represented Peters in numerous cases, including the Hernandez and Silveira matters. Yanny also later represented Peters in a lawsuit filed by Quintana, who claimed he had consulted with Yanny about his claims before Yanny, without Quintana's consent, began representing Peters.

Soon after Burgin settled his case, Maki filed a complaint on behalf of Hernandez. Hernandez, however, claimed she had not authorized the filing of the lawsuit and terminated her relationship with Maki. She, too, ultimately settled with Peters. The Silveiras, plaintiffs in two actions against Peters, told Maki Burgin had contacted them on several occasions urging them to drop their lawsuits against Peters. The Silveiras refused to terminate Maki or dismiss their claims.

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[1] The trial court sustained Yanny's objections to Quintana's declaration. We include his statements for context; they do not alter the outcome of the appeal.

[2] In an email sent on January 5, 2008 after he had terminated his relationship with Maki, Burgin blamed Maki for billing him $150,000 and encouraging him to litigate against Peters, his "brother." Burgin also stated, "Joe Yanny has offered you the opportunity to do what is decent and righteous. I strongly recommend you contact [him] as he had requested, because if you do not I fear you will lose everything, for though he is a decent man, he is not one to be trifled with. FRANKLY I THINK HIS PATIENCE IS RUNNING THIN. IT IS MY HOPE YOU WILL CONTACT HIM BEFORE IT IS TOO LATE." Maki understood this email to be a threat.

2. *The Instant Lawsuit*

On December 24, 2008 Burgin and Lara sued Maki for breach of fiduciary duty, malpractice and several other claims. On September 28, 2009 Maki filed a cross-complaint for breach of contract and quantum meruit against Burgin and Lara. She also sued Peters, Yanny and Yanny & Smith as additional cross-defendants, alleging claims for intentional and negligent interference with contract, intentional interference with prospective economic advantage and defamation.

On December 1, 2009 Yanny and his law firm filed a special motion to strike Maki's cross-complaint against them under Code of Civil Procedure section 425.16,[3] asserting all her claims arose from statements made in the context of litigation or potential litigation. Maki opposed the motion, contending Yanny's speech was not protected because no litigation was pending in December 2007 when Yanny interfered with Maki's relationships with her clients and section 425.16 does not protect unethical or illegal conduct of the sort engaged in by Yanny. In any event, Maki argued, she had demonstrated a probability she would prevail on her claims.

The trial court granted the motion, finding Maki's claims arose from statements Yanny made in the course of potential litigation; Maki had not demonstrated a probability she would prevail on her claims; her claims were untimely; and they were barred by the litigation privilege set forth in Civil Code section 47. The court sustained multiple objections to the declarations submitted by Maki in support of her claims, granted Peters's motion for joinder in Yanny's motion and entered a judgment of dismissal in favor of Yanny, his law firm and Peters. The court subsequently granted Yanny's motion for attorney fees and costs in the amount of $54,208.28.

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[3] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[4]

Section 425.16 provides, "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 or 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." (§ 425.16, subd. (b)(1).) Under the statute an "'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' includes: . . . (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 . . . ." (§ 425.16, subd. (e).)

In ruling on a 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.)

In terms of the threshold issue, the moving party's burden is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006)

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[4] SLAPP is an acronym for "strategic lawsuit against public participation." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8, fn. 1.)

135 Cal.App.4th 606, 616, fn. 10.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that 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. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e). . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Hylton v. Frank Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271.)

If the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus,* at p. 714; *Wilson,* at p. 821; *Zamos,* at p. 965.)

We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*); accord, *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

2. *Yanny's Statements and Conduct Fall Within the Scope of Section 425.16, Subdivision (e)(2)*

As a general rule, a cause of action arising out of the defendant's "litigation activity" directly implicates the right to petition and is subject to a special motion to strike. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-90 [action for breach of release clause in contract subject to special motion to strike because alleged breach consisted of filing action purportedly released under the contract]; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 [malicious prosecution action by its very nature arises out of defendant's constitutionally protected petitioning activity (the underlying lawsuit)].) Prelitigation communications are covered as well, if litigation is "'contemplated in good faith and under serious consideration.'" (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1128; *Flatley, supra,* 39 Cal.4th at p. 322, fn. 11 [prelitigation communications protected by § 425.16].) Counseling clients and other activities in anticipation of, or preparation for, litigation are also within the ambit of section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 ["'[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16'"].)

Maki argues Yanny's actions did not arise from litigation activity because, at the time of the alleged misconduct, there was no potential litigation sufficient to invoke the protection of the anti-SLAPP statute. This contention is belied by the allegations of Maki's complaint: "While the Peters Lawsuit was pending, Maki also worked on Burgin's claims against Peters . . . ; filed the requisite complaints with the Department of Fair Employment and Housing, and obtained the Right to Sue letters. Maki also continued investigating Burgin's claims, interviewing witnesses and gathering documents necessary to effectively prosecute the case. [¶] . . . At Burgin's request, Maki held off filing Burgin's lawsuit . . . ." Further, according to Maki, "Yanny initiated communications with Burgin specifically relating to the subject representation, and

attempted to persuade Burgin to hire Yanny, instead, to pursue those claims against Peters. . . . [¶] . . . Yanny contacted Maki directly and proposed a 'joint venture' . . . [to] represent Burgin and a number of other employees seeking to make claims against Peters, and to kick-back a portion of the fee to Burgin . . . . Maki declined and told Yanny that his proposed kick-back scheme was illegal and violated the Rules of Professional Conduct. . . . [¶] . . . Yanny then sought out Peters, told Peters that Burgin and other employees intended to bring claims against him, and apparently began representing Peters with respect to these anticipated claims. [¶] . . . Despite knowing Burgin was represented by counsel, and despite now representing Peters against whom Burgin was bringing claims, Yanny initiated his communications directly with Burgin, in disregard of Burgin's attorney-client relationship with Maki, and in violation of Rules of Professional Conduct, Rule 2-100." Maki further alleges Burgin fired her as his lawyer after settling his claims with Peters and that Yanny used threats and coercion to force Maki to forgive Burgin and Lara's debt to her and to discourage other clients of Maki to continue litigating their claims against Peters.

There is no merit, therefore, to Maki's contention Yanny's statements were not made in the context of prospective litigation. Even so, "[n]ot all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16." (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1037; see also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 ["'[a]lthough a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute'"]; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866 ["The statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding."].) "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.]

. . . [I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; see *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477-478.) "Accordingly, we focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279; see *Hylton v. Frank E. Rogozienski, Inc.*, *supra*, 177 Cal.App.4th at p. 1272 ["we assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim'"].)

Wrestling with this question in an action brought by a law firm against an attorney for "stealing" the firm's client, Division Eight of this court concluded the alleged interference arose from protected activity. (See *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 (*Taheri*).) The plaintiff law firm argued the defendant had induced the client to terminate his relationship with the firm by unethically and improperly promising the client that he, Evans, would be able to enforce a settlement agreement on behalf of the client. (*Id.* at pp. 485-486.) The firm had previously advised the client the settlement agreement was unenforceable because it had been repudiated. (*Id.* at p. 486.) The court rejected the firm's argument the gravamen of its complaint was "client stealing" and concluded its claims arose "directly from communications" between the client and Evans "about the pending lawsuits against [the client]." (*Id.* at p. 489.) The fact the law firm was still engaged as the client's counsel was irrelevant to whether Evans's statements fell within the scope of section 425.16, subdivision (e)(2). (*Ibid.*) The court explained, "[I]t is difficult to conjure a clearer scenario than the case before us of a lawsuit arising from protected activity." (*Ibid*.; see also *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908 [attorney's communication of settlement offer—even if made for improper purpose—"directly implicates the right to petition and thus is subject to a special motion to strike"].) In short, *Taheri* stands for the

not-so-surprising proposition that a second lawyer's advice to a client, even when that client is already represented by another attorney concerning pending or prospective litigation, is protected activity subject to a special motion to strike under section 425.16.

Maki's attempt to distinguish *Taheri* because the gravamen of her cross-complaint is not directed to Yanny's attempt to steal Burgin as a client, but instead to his use of Burgin to intimidate and threaten Maki's other clients is unpersuasive. Parsing the allegations of the complaint, we see little that supports Maki's claim of interference that does not flow from Yanny's offer to mediate Burgin's claims against Peters and statements he made to Burgin during the course of that mediation.[5] Whether Yanny, Burgin or Peters initiated the mediation is a disputed question, as is the timing of Peters's retention of Yanny as his lawyer and Yanny (or Peters's) alleged use of Burgin to discourage Maki's other clients from pursuing their claims. Evidently, as a result of the mediation, Burgin concluded his interests had not been adequately protected by Maki and her legal strategy. Whether that conclusion was justified is irrelevant. Under the circumstances of this case, and "because of the fundamental right of a client to choose and change his legal representation" (*Taheri, supra*, 160 Cal.App.4th at p. 492), we conclude the trial court correctly determined Yanny had made the required threshold showing his alleged conduct falls within the scope of section 425.16.

3. *No Exceptions to the Anti-SLAPP Statute Apply*

a. *The illegal acts exception*

Section 425.16 is concerned with lawsuits that "chill the *valid* exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a), italics added.) In *Flatley, supra*, 39 Cal.4th at page 320, the

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[5] As one court has explained, "It is indeed easy to confuse a defendant's alleged injury-producing conduct with the unlawful motive the plaintiff is ascribing to that conduct. This confusion will be less likely to occur, however, if on the first step of the anti-SLAPP inquiry the court's focus remains squarely on the defendant's activity that gave rise to its asserted liability, and whether that activity constitutes protected speech or petitioning, rather than on any motive the plaintiff may be ascribing to the activity." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 271.)

Supreme Court held, when the speech or petition activity upon which a defendant relies to support his or her section 425.16 special motion to strike "is conceded or shown to be illegal as a matter of law, such speech or petition activity will not support the special motion to strike." Maki contends this limitation applies to the case at bar because Yanny's conduct violated several provisions of the Code of Professional Responsibility, as well as Business and Professions Code section 6128, which provides: "Every attorney is guilty of a misdemeanor who either: [¶] (a) is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . ."

Many of the details of Yanny's activities are disputed, and his statements and conduct giving rise to Maki's claims are not "illegal as a matter of law." (*Flatley, supra*, 39 Cal.4th at p. 320; accord, *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 965 [factually disputed allegation of attorney fraud under Bus. & Prof. Code, § 6128 insufficient to meet *Flatley* standard of illegality].) In *Flatley* the plaintiff, a well-known entertainer, filed an action against an attorney, alleging causes of action for civil extortion, intentional infliction of emotional distress and wrongful interference with economic advantage. The plaintiff's causes of action were based on a letter from the lawyer threatening to make public a rape allegation unless the plaintiff paid a "'settlement of $100,000,000.00.'" (*Id.* at pp. 305-308.) The Supreme Court concluded the letter and related telephone calls constituted criminal extortion as a matter of law and held, where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law," the challenged activity will not support a special motion to strike. (*Id.* at p. 320.) However, the Court cautioned, "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, at p. 316; see also *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 446 ["[w]e understand *Flatley* to stand for this proposition: when a defendant's assertedly protected activity *may or may not be* criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law"]; *Mendoza v. ADP Screening &*

Selection Services, Inc. (2010) 182 Cal.App.4th 1644, 1654 [*Flatley*'s term "'illegal' was intended to mean criminal, and not merely violative of a statute"].) Such a factual dispute plainly exists here.

b. *The commercial speech exception*

Pursuant to section 425.17, a cause of action arising from commercial speech is not subject to a special motion to strike when "(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about the person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; (4) the intended audience for the statement or conduct meets the definitions set forth in section 425.17[, subdivision] (c)(2) [a customer or potential customer or one likely to repeat the statement to or otherwise influence a customer or potential customer]." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 30.)

In *Taheri, supra,* 160 Cal.App.4th 482, the plaintiff law firm, like Maki here, argued its "client stealing" claim was not subject to an anti-SLAPP motion under this commercial speech exception. Acknowledging the possibility lawyers might in some circumstances be able to invoke this exception, the *Taheri* court concluded, "[A] cause of action arising from a lawyer's conduct, when the conduct includes advice to a prospective client on pending litigation, does not fall within the statutory exemption to the anti-SLAPP statute. Any other conclusion would be inconsistent with the intent of the Legislature when it passed section 425.17, and would conflict with the client's fundamental right of access to the courts, which necessarily includes the right to be represented by the attorney of his or her choice." (*Taheri,* at p. 490.) The court found the conduct complained of was much more than "commercial speech" because it "was in essence advice by a lawyer on a pending legal matter." (*Id*. at p. 491.) Construing the exemption to apply to actions arising from advice given by a lawyer on a pending legal

matter would "serve to thwart the client's fundamental right . . . to the lawyer of his choice." (*Ibid*.; see also *Mendoza v. ADP Screening and Selection Services, Inc., supra,* 182 Cal.App.4th at p. 1652 [Legislature apparently enacted § 425.17, subd. (c), for "purpose of exempting from the reach of the anti-SLAPP statute cases involving comparative advertising by businesses"].)

The communications alleged here were intended to coerce settlement or abandonment of lawsuits filed by various ex-employees of Peters. These statements were not commercial speech within the meaning of section 425.17.

4. *Maki Has Failed To Establish a Probability of Prevailing on Her Claims*

Because the trial court properly ruled Maki's claims fall within the scope of section 425.16, subdivision (e)(2), the burden shifted to Maki to show she had a reasonable possibility of prevailing on those causes of action. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP, supra,* 193 Cal.App.4th at p. 447; see *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736 ["[t]he plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP"].) Like the trial court, we conclude she does not have a reasonable possibility of prevailing because Yanny's allegedly actionable statements to Burgin related to settlement of his claims against Peters, as well as those of other former employees of Peters, and were privileged under Civil Code section 47, subdivision (b).[6]

"The usual formulation [of the litigation] privilege [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 have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; see *Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [litigation privilege bars cause of action "provided that there is some reasonable connection between the act claimed to be privileged and the legitimate objects of the

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[6] Civil Code section 47 provides: "A privileged publication . . . is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding . . . ."

lawsuit in which that act took place"].) "The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] . . . [T]he privilege has been extended to . . . *all* torts other than malicious prosecution. [Citations.] . . . [¶] If there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law. [Citation.] Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.) Application of the privilege is not limited to statements made in a courtroom: "Many cases have explained that [Civil Code] section 47[, subdivision (b),] encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361; see *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115 ["communications preparatory to or in anticipation of the bringing of an action . . . are within the litigation privilege"].)

Maki contends Yanny's statements to Burgin were not made in furtherance of any litigation and thus were not privileged.[7] (See *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146 [to be protected by litigation privilege, statements must "function as a necessary or useful step in the litigation process and must serve its purposes"].) Discussing this factor in *Silberg v. Anderson, supra,* 50 Cal.3d at pages 219 to 220, the Supreme Court explained "[t]he requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action. [Citations.] The 'furtherance' requirement was never intended as a test of a participant's motives,

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[7] There is no merit to Maki's alternative argument the litigation privilege protects only litigants and not other participants, including attorneys, involved in the litigation. (See *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 956.)

morals, ethics or intent." (See also *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865 [for litigation privilege to apply "defamatory matter need not be relevant, pertinent or material to any issue before the tribunal; *it need only have some connection or some relation* to the judicial proceeding"]; *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 959 [a communication need not itself be "accurate" or "truthful" for privilege to attach but simply within "category of communication permitted by law"].)

The statements Yanny is alleged to have made—both in the course of the meeting with Burgin and Peters that resulted in the settlement of Burgin's potential claims and later in directing Burgin to urge other clients of Maki to resolve or dismiss their actions against Peters—unquestionably relate to anticipated or actual litigation. Accordingly, the privilege attaches to all such communications, even if made in a context that might give rise to an ethics violation. No matter what motivated these statements, they are all privileged; and Maki cannot demonstrate a reasonable possibility of prevailing were the instant litigation to proceed.

5. *The Special Motion To Strike Was Not Improperly Scheduled, and the Trial Court Did Not Abuse Its Discretion in Granting Peters's Request for Joinder*

Relying on the decisions in *Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1577-1578 and *Decker v. U.D. Registry Inc.* (2003) 105 Cal.App.4th 1382, 1389 (*Decker*), Maki contends the trial court lacked jurisdiction to grant the special motion to strike because it was heard more than 30 days after it was served. These courts, however, relied on a previous version of section 425.16, subdivision (f), which then provided a special motion to strike "shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing." The Legislature abrogated this rule by amending section 425.16, subdivision (f), on October 5, 2005, as an urgency statute effective immediately on that date. (Stats. 2005, ch. 535, §§ 1, 4.) Section 425.16, subdivision (f), as amended, now requires the court clerk to schedule a special motion to strike for a hearing no more than 30 days after the motion is served if such a hearing date is available on the court's docket, but does not require the moving party to ensure that the hearing is so scheduled and does

not justify the denial of a special motion to strike solely because the motion was not scheduled for a hearing within 30 days after the motion was served. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1349-1350; *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 685.) The Legislature amended subdivision (f) specifically to overrule *Decker* and a similar holding in *Fair Political Practices Commission v. American Civil Rights Coalition, Inc.* (2004) 121 Cal.App.4th 1171, 1174-1178. (Stats. 2005, ch. 535, § 3.) The record is clear the delay in scheduling the motion in this case was a matter of the court's discretion and was not improper.

Maki also challenges the court's exercise of its discretion in granting Peters's request for joinder in Yanny's special motion to strike, again relying on *Decker, supra,* 105 Cal.App.4th 1382. In *Decker* the court dismissed the appeal of a party who had been allowed to join a special motion to strike on the ground the party seeking joinder had made no request for relief on his own behalf and lacked standing to maintain an appeal from the order denying the special motion to strike. (*See id.* at pp. 1390-1391.) *Decker,* however, is not relevant here because the court granted the special motion to strike and Peters, as a respondent, has standing to defend the trial court's orders before this court. Allowing joinder in this case was not an abuse of discretion because Peters's interests were completely aligned with Yanny's, both factually and legally, and there was no need for Peters to present affirmative evidence on his own behalf. (See *Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 661.) Even though Peters's joinder was filed late, Maki suffered no prejudice, having had ample opportunity to rebut the evidence presented by Yanny.

6. *The Trial Court Properly Awarded Attorney Fees to Yanny*

Section 425.16, subdivision (c), provides, "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. . . ." The award of attorney fees to the party bringing a successful special motion to strike under section 425.16 is "mandatory." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

An order granting an award of attorney fees is generally reviewed for an abuse of discretion. (See *MHC Financing Ltd. Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397.) In particular, "[w]ith respect to the *amount* of fees awarded, there is no question our review must be highly deferential to the views of the trial court." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [recognizing trial court's broad discretion in determining amount of reasonable attorney fees because experienced trial judge is in the best position to decide value of professional services rendered in court].) An appellate court will interfere with a determination of "what constitutes the actual and reasonable attorney fees" "only where there has been a manifest abuse of discretion." (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228.)

Maki argues fees should not have been awarded because she offered to dismiss the claims against Yanny within two days of filing the cross-complaint. She claims Yanny did not respond to the offer and instead proceeded to file his anti-SLAPP motion. Yanny responds on appeal that Maki offered merely to dismiss the claims without prejudice and with a tolling agreement, contending it was reasonable for him to reject Maki's limited proposal.

The trial court considered this argument and rejected it. The court also considered and likewise rejected Maki's contention fees and costs incurred between the filing of the anti-SLAPP motion and the court's ruling could not be recovered. The court's ruling on Yanny's fee motion was well within its discretion, and we will not disturb it. (See *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752-753.)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.