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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

LOIS FRIEDMAN, as Trustee, etc., Plaintiff and Appellant, v. EDWIN C. SCHREIBER et al., Defendants and Respondents.	B258568 (Los Angeles County Super. Ct. No. SC121128)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Reversed.

Law Offices of Donald L. Cornwell and Donald L. Cornwell for Plaintiff and Appellant.

Klinedinst PC and Gregor A. Hensrude for Defendants and Respondents.

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This appeal follows the trial court's grant of a special motion to strike the causes of action against defendants Attorney Edwin C. Schreiber and his law firm Schreiber & Schreiber, Inc. (Schreiber) pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP statute).[1] The trial court held Schreiber met his burden to show the claims arose from protected activity, but in doing so the court appeared to have disregarded the allegations in the complaint, instead crediting Schreiber's declaration refuting those allegations and faulting plaintiff Lois Friedman, trustee of the Dennis Munjack Inter Vivos Trust (Friedman), for failing to produce her own evidence to rebut Schreiber's evidence. In doing so, the trial court conflated the two steps in the anti-SLAPP analysis and placed an improper burden on Friedman. Under the proper review, Schreiber failed to carry his burden to show Friedman's claims arose from protected activity, so we reverse.

BACKGROUND

1. Complaint

Drs. Dennis Munjack and John Murphy were equal shareholders in Southwestern Research, Inc. (SRI). Dr. Munjack died in 2008. A dispute arose among Friedman, Dr. Munjack's wife Debora Phillips, and Dr. Murphy over ownership of Dr. Munjack's shares, leading Friedman to file a probate petition in July 2008. In 2009, the probate court granted Friedman's petition, and after a court trial in 2012, rejected Dr. Murphy's and Phillips's cross-petitions. This court affirmed the judgment on appeal.

Friedman (along with another SRI director not party to this appeal) filed the present complaint against several defendants, including Dr. Murphy, SRI general manager Darrell Maag, and Schreiber. They asserted 13 causes of action, six of which

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[1] SLAPP is an acronym for strategic lawsuit against public participation.

All undesignated statutory citations are to the Code of Civil Procedure unless otherwise noted.

were alleged against Schreiber as derivative claims on behalf of SRI: breach of fiduciary duty, conversion and conspiracy to commit conversion, aiding and abetting breach of fiduciary duty and/or conversion, unfair competition pursuant to Business and Professions Code section 17200, unjust enrichment, and professional negligence/malpractice.

The complaint generally alleged Schreiber represented both Dr. Murphy and SRI throughout the probate litigation and on appeal and Dr. Murphy and Maag wrongfully caused SRI to pay $260,000 in legal fees to Schreiber that were incurred by Dr. Murphy, not SRI, which Schreiber knowingly accepted and retained. The complaint also alleged Schreiber represented SRI in various corporate matters, and Schreiber assisted the other defendants in withholding documents from Friedman, including during the probate litigation.

To support the breach of fiduciary duties and malpractice claims, the complaint further alleged Schreiber owed SRI fiduciary duties and breached those duties in 20 different ways, most of which involved failing to advise SRI in various corporate matters related to Dr. Murphy's actions regarding SRI. Five allegations referred to the probate litigation:

"A. Accepting receipt of and retaining without objection at least $260,000 in attorney's fees from SRI for the representation of Defendant Murphy in the probate litigation proceedings in violation of [various Corporations Code, Civil Code, Penal Code, and California Rules of Professional Responsibility provisions]."

"K. Failing to advise SRI that it must obtain independent counsel to represent SRI in connection with the probate litigation proceedings and the ongoing shareholder disputes."

"Q. Failing to advise SRI that the corporation could not lawfully pay for or reimburse Defendant Murphy's attorney fees in the probate litigation proceedings."

"R. Failing to advise SRI that the corporation could not legally deduct on its corporate tax returns the attorney's fees paid to [Schreiber] for representation of Dr. Murphy in the probate litigation proceedings."

"T. Affirmatively attempting to mislead the Los Angeles Superior Court in July of 2012 in violation of [the Business and Professions Code and California Rules of Professional Responsibility] by stating that [defendants] had never billed SRI for any services while omitting to disclose to the Court that [Schreiber] had been knowingly receiving payments from SRI for Dr. Murphy's personal legal fees in the probate litigation proceedings for the past four years."

Similarly, the claims for conversion, conspiracy to commit conversion, aiding and abetting Dr. Murphy's breach of fiduciary duties and conversion, unfair competition, and unjust enrichment all involved Schreiber wrongfully taking $260,000 in legal fees allegedly paid by SRI for Dr. Murphy's legal representation during the probate litigation.

2. Anti-SLAPP Motion

Schreiber filed a special motion to strike the claims against him pursuant to section 425.16, accompanied by his own declaration. Without addressing each of the specific claims, he argued the causes of action arose from protected activity of his representation of Dr. Murphy in the probate litigation. Citing his declaration, he reasoned the probate litigation "must be the basis [for the challenged claims] because it is the only conduct by [Schreiber] relevant to this case—he was litigation counsel, and undertook activities in furtherance of litigation. He was not general counsel, did not provide general advice or even business advice separate from the litigation. (Decl. Schreiber ¶ 3.)" He acknowledged the complaint's allegations related to other advice he gave or failed to give on other corporate matters, but he contended "no such advice ever occurred." In his view, all of the conduct attributed to him "consists of statements made 'in connection with or in preparation of litigation,' [citation], primarily because that is all [Schreiber] did."

In his declaration, he further explained he was retained only by Dr. Murphy and only for the probate litigation, not for any general corporate advice. He filed an answer on behalf of SRI in the probate litigation not taking any position on the ownership of SRI, and he only did so to protect Dr. Murphy's interests. After Friedman refused to allow the probate court to select independent counsel for SRI, Schreiber "fought" Friedman's "improper joint document demand" and related motion to compel directed at Dr. Murphy and SRI. Other than those "minimal actions necessary to protect SRI" in the probate litigation, he did no other work for SRI.

In opposition to the anti-SLAPP motion, Friedman argued Schreiber failed to analyze the specific claims in the complaint and argued the claims were based on transactional activities unrelated to the probate litigation. She acknowledged some allegations involving Schreiber's statements in the probate litigation constituted protected activity, but claimed they were merely evidence of Schreiber's breach of fiduciary duty.

In his reply, Schreiber argued Friedman conceded her claims arose from protected activity related to litigation funding and from Schreiber's representation during the probate litigation. He further argued Friedman could not rely on her complaint to demonstrate the claims did not arise from protected activity and she otherwise failed to submit evidence to rebut his declaration that his representation was limited to the probate litigation.

The trial court granted the motion. It recognized Schreiber bore the burden to show the claims against him arose from protected activity, but reasoned: "Although [Schreiber] submitted evidence pertinent to the determination of the 'arising from' prong, Plaintiffs did not: the Court will not treat the verified complaint as evidence." It held, "Upon a careful review of the allegations of the subject causes of action, the Schreiber declaration in support of the motion (which declaration states that [Schreiber was] litigation counsel and acted solely in that capacity, as opposed to acting as corporate counsel), and the arguments interposed by [the] respective sides, the Court

concludes that the gravamen of the claims concerns acts of alleged misconduct in the course of representing Murphy in the Probate Action. Thus, the claims fall within the ambit of the anti-SLAPP statute, notwithstanding Plaintiff's characterizations of same in the opposition brief."

The court entered judgment in Schreiber's favor and Friedman timely appealed.

DISCUSSION

A defendant may move 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).) "An anti-SLAPP motion involves a two-step process. First, the defendant must make a threshold showing that the challenged causes of action arise from protected activity. Then, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claims." (*Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387 (*Coretronic*).) If the defendant fails to carry its burden on the first step, the motion must be denied and the court should not address the second step. We review the grant of an anti-SLAPP motion de novo. (*Ibid.*)

"The question whether a cause of action arises from specified conduct for purposes of the statute depends on '"the *principal thrust* or *gravamen* of the plaintiff's cause of action."' [Citations.] It is not enough that the complaint refers to protected activity. '"[W]hen 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."'" (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 867-868.) "Where the defendant's protected activity will only be used as evidence in the plaintiff's case, and none of the claims are based on it, the protected activity is only incidental to the claims. [Citation.] Determining the gravamen of the claims requires examination of the specific acts of alleged

wrongdoing and not just the form of the plaintiff's causes of action." (*Coretronic, supra*, 192 Cal.App.4th at pp. 1388-1389.) In other words, we look at the "*wrongful, injurious act(s)* alleged by the plaintiff" and determine whether they constitute protected conduct. (*Old Republic, supra*, at p. 868.)

The anti-SLAPP statute defines 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" to include as relevant here "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "(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).) These provisions protect "any written or oral statement or writing" made by the moving party in litigation, which includes "communicative conduct such as the filing, funding, and prosecution of a civil action" and "qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; see *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1221.)

The trial court here made two procedural errors in its first-step analysis. First, although the court stated it had considered Friedman's allegations, it appeared to have disregarded them to determine whether the challenged claims arose from protected activity. A court must *necessarily* look to the face of the complaint to determine whether claims are based on protected activity.[2] The statute itself provides that the trial court must consider "the *pleadings*, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2), italics

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[2] This is true whether or not the complaint is verified, which may become relevant in the second step of the anti-SLAPP analysis in determining whether the plaintiff has shown a probability of prevailing. (See, e.g., *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289-1290.)

added; see *Drell v. Cohen* (2014) 232 Cal.App.4th 24, 29; *Coretronic, supra*, 192 Cal.App.4th at p. 1387.) A leading treatise agrees: "The anti-SLAPP statute should be interpreted to allow the court to consider the 'pleadings' in *determining the nature of the 'cause of action'*—i.e., whether the anti-SLAPP statute applies." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 7:1021.1, p. 7(II)-61 (rev. # 1, 2014); see *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 155 [quoting same].) The nonmoving party may also opt to rely *exclusively* on the allegations in the complaint to refute the moving party's first-step showing because nothing in the anti-SLAPP statute places a burden on the a nonmoving party to produce evidence at the first step, whether or not in response to evidence presented by the moving party.

Second, the court improperly credited Schreiber's declaration, which not only denied Friedman's specific allegations related to Schreiber's representation of SRI on corporate matters, but it did not address Friedman's allegations related to SRI's improper payment of Dr. Murphy's legal fees. While a court must consider declarations in addition to the pleadings to make its first-step determination, such declarations may only *elucidate* the allegations in the complaint at this step, not contradict them. "Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis." (*Coretronic, supra*, 192 Cal.App.4th at p. 1388.) "In the first step of the anti-SLAPP analysis, the court decides only whether the claims arise from protected activity. The court reviews the parties' pleadings, declarations and other supporting documents to determine what conduct is actually being challenged, not to determine whether the conduct is actionable. [Citation.] The court reviews the potential merit of the complaint only after the court has concluded the complaint challenges the defendant's exercise of free speech or petitioning activity." (*Id.* at pp. 1389-1390; see *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 849 ["The preliminary inquiry in an action like that before us is to determine exactly what act of the defendant is being challenged by plaintiff. In doing

so we review primarily the complaint, but also papers filed in opposition to the motion to the extent that they might give meaning to the words in the complaint."]; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630 [examining declarations and exhibits that reveal "facts that are implied in the complaint"].) In this circumstance, the trial court should have assumed Friedman's allegations were true when determining whether her claims were based on protected activity. (See *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 372 [moving parties "cannot meet their threshold showing in step one by pointing to the lack of evidence that the statements were made, the truth of the alleged statements, or affirmative defenses" and "evidence that the alleged 'statements were false does not determine whether they constitute protected activity for purposes of the SLAPP statute'"].)

Properly viewed, Friedman's claims did not arise from protected activity related to the probate litigation. For the breach of fiduciary duties and malpractice claims, none of the allegations about Schreiber's representation of SRI regarding corporate matters were based on protected conduct because they did not relate to the probate litigation. For the allegations alluding to the probate litigation, Friedman's claims are based on Schreiber's breaches stemming from SRI's alleged improper payment of legal fees to Schreiber for Dr. Murphy's representation, not any actions Schreiber took related to the litigation. These claims between SRI and Schreiber fall within the many cases refusing to apply the anti-SLAPP statute to strike clients' malpractice and related claims against their attorneys. (*Coretronic, supra,* 192 Cal.App.4th at pp. 1391-1392 [discussing cases].) In such cases, "it was the breach of the duty of loyalty owed to the clients that gave rise to liability, not protected speech or petitioning activity." (*Id.* at p. 1392; see *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 504 ["Where . . . a legal malpractice action is brought by an attorney's former client, claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest or other deficiency in the representation of the client, the action does not threaten to chill the exercise of protected rights and the first prong of the anti-SLAPP

analysis is not satisfied."]; *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 491 ["A growing body of case law holds that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background."]; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702 ["The authorities have established that the anti-SLAPP statute does not apply to claims of attorney malpractice" because those claims are "'based on a breach of the fiduciary duty of loyalty or negligence,'" not '"a right of petition or free speech, though those activities arose from the filing, prosecution of and statements made in the course of the client's lawsuit.'"].)

Similarly, Friedman's claims for conversion, conspiracy to commit conversion, aiding and abetting Dr. Murphy's breach of fiduciary duty and conversion, unfair competition, and unjust enrichment all relate to Schreiber's wrongful receipt of legal fees allegedly paid by SRI for Dr. Murphy's legal representation during the probate litigation. The gravamen of these claims was the misappropriation and corporate waste related to Schreiber's receipt of legal fees, not any acts Schreiber undertook related to the probate litigation. (See *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 273 [allegations relating to the payment of attorneys and filing a lawsuit were only examples of the mismanagement and misuse of corporate funds].)

Although Schreiber claims that litigation "funding" is protected conduct under the anti-SLAPP statute,[3] he did not engage in litigation "funding" by merely *receiving* legal fees. To "fund" means "[t]o furnish money to (an individual, entity, or venture), esp. to finance a particular project." (Black's Law Dict. (10th ed. 2014) p. 788, col. 2.) Under this definition, Dr. Murphy and (allegedly) SRI financed the litigation, not Schreiber. Nor were Friedman's claims based on litigation funding per se. Freidman takes no issue with the fact that Schreiber was paid for his services; she complains that

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[3] Friedman claims Schreiber forfeited this argument by raising it for the first time in his reply brief in the trial court. Because the parties have fully briefed the issue on appeal, we will consider it.

he took those fees from an improper source, SRI. We can conceive of no way in which receiving fees from the wrong source can be considered communicative conduct equivalent to a "written or oral statement" in connection with litigation as required by section 425.16, subdivision (e). Thus, the gravamen of Friedman's claims was not protected activity under the anti-SLAPP statute.

Because Schreiber failed to demonstrate the claims against him arose from protected activity, we have no occasion to address the merits of those claims. (*Loanvest, supra*, 235 Cal.App.4th at p. 505.)

DISPOSITION

The judgment is reversed. Appellant is entitled to costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.