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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 TWO

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| BEHROUZ FARZAD et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>SIAMAK MICHAEL RAHIMI,<br><br>Defendant and Respondent. | B279582<br><br>(Los Angeles County Super. Ct. No. SC122725) |

APPEAL from orders of the Superior Court of Los Angeles County. Lisa H. Cole, Judge. Affirmed.

Southern California Law Group and Ross K. Reghabi for Plaintiffs and Appellants.

Kjar McKenna & Stockalper and Albert E. Cressey for Defendant and Respondent.

Appellants Behrouz Farzad, Nasrin Farzad, Farbod Farzad, Elite Pros., Inc., and Lyons Capital Investments, LLC (appellants) appeal from an order dismissing their action against Siamak Michael Rahimi, doing business as Rahimi & Co. (respondent). The trial court dismissed the action pursuant to Code of Civil Procedure section 425.16, subdivision (a) (section 425.16 or anti-SLAPP statute).[1] Appellants also appeal from the trial court's fee award of $5,457.50 to respondent. We find no error, therefore we affirm the orders.

## FACTUAL AND PROCEDURAL BACKGROUND

### Production of documents

Respondent served as an accountant to appellants, preparing their tax returns from 2007 through tax year 2012.

In November 2013, respondent was served with a deposition subpoena for personal appearance in a matter in which appellant Behrouz Farzad was plaintiff. (Los Angeles County Superior Court Case No. LC100039, hereafter LASC No. LC100039). The subpoena was served by the defendants' attorney in LASC No. LC100039, Elizabeth Zareh. The subpoena stated that the matters upon which respondent would be examined were:

> "1. Any all business transactions provided by [respondent] to [Behrouz] Farzad for any purpose.
>
> "2. Any and all advice provided by [respondent] regarding transfer of funds from Iran to US.
>
> "3. Any and all alleged loans provided by Farzad to the alleged defendants.

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[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

"4. Source of any and all funds [Behrouz] Farzad acquired from any source.

"5. Any and all matters relating to [Behrouz] Farzad, his sons and his wife."

Appellant Behrouz Farzad's attorney, Ross Reghabi, was served with the document.

The deposition was held on December 3, 2013. Respondent brought certain tax returns to the deposition, and Zareh, who was conducting the deposition, demanded the records. Reghabi objected that the subpoena was solely for deposition, not for production of documents. He argued that a document request should have been provided. After a discussion between the attorneys, respondent provided the tax returns over Reghabi's objection.

**Original and first amended complaint**

On June 23, 2014, appellants filed a complaint against respondent for invasion of privacy; breach of fiduciary duty; and professional negligence. Appellants alleged that as a result of respondent's wrongful disclosure of their tax returns, appellants were required to incur attorney fees and costs in defending claims made against them in LASC No. LC100039.

Respondent filed a demurrer to appellants' complaint, which was sustained with leave to amend. On February 19, 2015, appellants filed a first amended complaint.

On December 28, 2015, respondent filed an anti-SLAPP motion to strike appellants' first amended complaint. The motion was denied on the ground of untimeliness.

On February 19, 2016, respondent filed a motion for judgment on the pleadings, arguing that his conduct at the deposition fell squarely within the litigation privilege. On June 3, 2016, the trial court granted the motion. The court reasoned

that the litigation privilege applied because the communication was made in the course of pending litigation proceedings and respondent was brought into the proceedings pursuant to a subpoena. The court rejected appellants' argument that the litigation privilege should not apply because the production of documents was voluntary. The court pointed out that the litigation privilege applies to communications required or permitted in the course of litigation. The court further rejected appellants' argument that illegal conduct is not protected, as there were no criminal allegations against respondent.

The trial court granted appellants 20 days leave to amend the complaint.

**Second amended complaint and anti-SLAPP motion**

On June 23, 2016, appellants filed a second amended complaint (SAC), which alleged only one cause of action for breach of contract against respondent. According to the SAC, an oral contract was formed between the parties in January 1995. Pursuant to the terms of the contract, appellants agreed to pay respondent for accounting and bookkeeping services. The SAC alleged that implied in the agreement was a covenant of good faith and fair dealing, as well as an obligation on the part of respondent to treat appellants' tax information confidentially. The SAC further alleged that on December 3, 2013, respondent breached the contract by delivering the contents of appellants' tax returns to Attorney Zareh and other individuals. According to the SAC, "[t]he documents were provided and disclosed without service of any subpoena requiring their production, without any notice to consumer, without advance notice to [appellants], over the objection of [appellants'] attorney, and without the consent of [appellants]." The SAC alleged that as a result of the breach, appellants have been and will be required to

incur attorney fees and costs incurred in defending claims brought against them in LASC No. LC100039.

On July 22, 2016, respondent filed an anti-SLAPP motion pursuant to section 425.16. Respondent argued that his act of turning over the documents at the deposition was protected as a pretrial statement in connection with pending litigation. He further argued that appellants had no probability of prevailing because respondent's conduct at the deposition was absolutely protected by the litigation privilege under Civil Code section 47, subdivision (b). Appellants opposed the motion, making two arguments: (1) even if the action were subject to the anti-SLAPP statute, appellants could show a probability of prevailing because the litigation privilege is inapplicable to an action based on breach of contract; and (2) even if respondent were to prevail, reasonable fees were limited to the present motion.

**Trial court ruling**

On September 14, 2016, the trial court granted respondent's anti-SLAPP motion. Respondent was awarded attorney fees in the amount of $5,457.50.

In granting the motion, the trial court found that appellants had conceded the issue of protected conduct by failing to argue that no protected conduct was at issue.

On the issue of probability of prevailing, the trial court found that there was absolutely no evidence that respondent's alleged breach caused any damage to appellants. Because the essential element of causation could not be established, appellants had no probability of prevailing. The court rejected appellants' argument that they had been damaged by the filing of a cross-claim in LASC No. LC100039. The court referenced the deposition of Zareh, in which she testified that the cross-complaint was filed for reasons completely unrelated to respondent's production of the tax documents. Because

appellants failed to establish a probability of prevailing, the trial court did not address appellants' arguments based on the affirmative defense of the litigation privilege.

On October 4, 2016, the trial court entered a judgment of dismissal. Notice of entry of judgment was served on October 20, 2016. On December 14, 2016, appellants filed their notice of appeal.

## DISCUSSION

### I. Applicable law and standard of review

A special motion to strike under section 425.16, also known as the anti-SLAPP statute, allows a defendant to seek early dismissal of a lawsuit involving 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 Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).)

Actions subject to dismissal under section 425.16 include those based on any of the following acts: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Trial testimony and pretrial statements made in deposition are considered communicative acts in furtherance of the right of

free speech or petition as defined in the anti-SLAPP statute. (*Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1580 (*Greka Integrated*) ["The declarations . . . demonstrate that Lowrey disclosed information about Greka to his counsel, to authorities and in deposition and trial testimony in response to subpoenas. These are all protected activities"].) In *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548 (*Haight Ashbury*), purported statements regarding how to testify in an upcoming deposition in a pending lawsuit were considered "statements made in connection with an issue under consideration by a judicial body," thus within the scope of the anti-SLAPP statute.

"A SLAPP is 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).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035 (*Nygard*).) "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute -- i.e., that arises from protected speech or petitioning *and* lacks even minimal merit -- is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

"'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygard, supra*, 159 Cal.App.4th at p. 1036.)

**II. Protected activity**

Respondent's act of providing documents in connection with a valid subpoena issued in pending litigation is protected activity. (*Greka Integrated, supra,* 133 Cal.App.4th at p. 1580; *Haight Ashbury, supra,* 184 Cal.App.4th at p. 1548.)

Appellants argue that the subpoena was served under Code of Civil Procedure section 2020.310, which commands only attendance and testimony of the deponent. Appellants point out that under section 2025.240, if a witness is commanded to produce personal records of a consumer, the consumer is entitled to notice of the deposition and a notice of privacy rights. Appellants argue that while respondent was required only to appear and speak, he in fact produced copies of confidential documents.

Respondent carried out his legal obligation by appearing for the deposition. Respondent had been informed that he would be interrogated on topics including financial matters concerning appellants. Respondent did not violate any discovery rules by appearing with certain records for reference, or by providing those documents upon demand to the attorney who served the subpoena. It was not respondent's responsibility to serve the appropriate subpoenas, nor was it his responsibility, under these circumstances, to provide notice to his clients.

Appellant Behrouz Farzad's attorney was aware of the deposition subpoena, appeared at the deposition, and objected to Zareh's request for copies of the documents. When Zareh

demanded the documents, respondent sat silently observing the exchange between Zareh and Farzad's attorney. Apparently believing that he was required to produce the documents, respondent noted that the records were related to the topics referenced in the deposition notice.[2] Zareh pointed out, "none of this was objected to. They have three days to object once a subpoena is served. They have never done that, so I am entitled to these records." The record shows that based on that statement, respondent provided the records.

Under the circumstances, appellants' argument that these actions were intentional violations of their right to confidentiality is not convincing.

Appellants cite *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 for the proposition that an inadvertent disclosure that is made without coercion does not necessarily result in waiver. The case is inapplicable, as appellants do not, in this proceeding, seek return of the documents, but liability against respondent.

Appellants further argue that respondent's conduct was illegal, therefore not protected by anti-SLAPP. Appellants cite *Flatley v. Mauro* (2006) 39 Cal.4th 299, 305 (*Flatley*) for the proposition that "a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint." Appellants assert that respondent's production of the documents was not required by the subpoena and was therefore illegal.

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[2] Respondent referred to the deposition notice as a "production."

Respondent points out that appellants did not raise this argument in the trial court, and thus it is forfeited. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776.) Appellants respond that they did not forfeit the *Flatley* argument, as they contended respondent breached his duty of confidentiality. Regardless of whether the argument was preserved for appeal, it fails. *Flatley* involved speech that constituted criminal extortion and was illegal as a matter of law. Thus, it was not protected by constitutional guarantees of free speech and petition. (*Flatley, supra,* 39 Cal.4th at p. 305.) In contrast, under the circumstances of this case, respondent's act of providing the tax records was not criminal. Appellants provide no authority that such conduct is not protected by section 425.16.

Subdivision (e) of section 425.16 protects "*any* written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." (Italics added.) While an exception exists where "'the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence,'" respondent does not concede that his acts were illegal and appellants have not shown that they were. (*Haight Ashbury, supra,* 184 Cal.App.4th at pp. 1549-1550.) Thus, respondent's act of providing financial records in connection with his deposition was protected.[3]

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[3] We reject appellants' claim that the documents were not connected to any litigation because four of the five parties were not yet named in the underlying suit. The deposition notice sought information related to Farzad's business transactions, as well as all matters related to his sons and wife. Thus, the deposition notice brought within its scope all parties whose records were provided at the deposition. As Zareh pointed out at the deposition, Farzad's attorney did not object to the scope of the deposition notice.

## III. Probability of prevailing

Because respondent has made the threshold showing that the challenged cause of action arises from an act in furtherance of the right of petition, we now consider the second prong of the anti-SLAPP test: whether appellants can demonstrate a probability of prevailing. (*Nygard, supra,* 159 Cal.App.4th at p. 1035.) This entails a "summary-judgment-like procedure." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) Appellants must demonstrate ""'that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the [appellants] is credited.'" [Citations.]" (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.)

### *A. Appellants have not established a prima facie case*

"'An essential element of a claim for breach of contract [is] damages resulting from the breach. . . .' [Citations.]" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352.) In other words, appellants must show they were harmed by the alleged breach. (*Ibid.*) Here, appellants cannot make out a prima facie case of breach of contract because they have no evidence establishing causation and damages resulting from respondent's alleged breach.

Appellants alleged that due to respondent's conduct in handing over the tax returns, a frivolous action was filed against them. As evidence in support of this argument, appellant Behrouz Farzad points to his declaration. In it, he presents the following conclusory statement: "[Respondent], in violation of his express and implied obligations under our 'accountant-client agreement,' produced our records, causing us to be subjected to suit by third parties and incur substantial fees and expenses." Appellant's self-serving statement does not constitute evidence establishing the element of causation. (*Brown v. Ransweiler*

(2009) 171 Cal.App.4th 516, 525 ["an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions'"].)

The record shows that respondent submitted evidence establishing that the cross-complaint in LASC No. LC100039 was not filed due to respondent's disclosure of tax returns. Deposition testimony of Attorney Zareh demonstrated that her clients had planned to initiate the cross-complaint all along, but declined to do so for strategic reasons in hopes that the matter would be quashed. As explained in the deposition, Zareh was "defending the case for a number of months; [and] brought a couple of motions to quash, which were successful." While they intended to file a cross-complaint, her clients did not want to initiate litigation unless they really had to. There came a time, after respondent's deposition, when Zareh told Farzad "'[i]f you don't dismiss it, I'm going to bring a cross-complaint.'" That is what her clients ended up doing.

This evidence defeats Farzad's conclusory statement regarding causation and damages as a matter of law. (*Nygard, supra,* 159 Cal.App.4th at p. 1036.) Appellants have failed to establish a prima facie case.

Although appellants admit that this theory was not raised in the trial court, they now raise the issue of unjust enrichment as an alternative remedy in restitution. Appellants cite *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 55-56 at length. The opinion provides that restitution is appropriate where there is a showing of "'what additions to the injured party's wealth (expected gains) have been prevented by the breach and what subtractions from his wealth (losses) have been caused by it.' [Citation.]" (*Ibid.*) However, appellants have not provided any such evidence in this matter. Appellants have failed to show that the remedy of restitution would be appropriate here.

Appellants have not affirmatively established a prima facie case for breach of contract. Thus, they have not shown a probability of prevailing.

***B. Litigation privilege***

Because appellants have failed to meet their burden of establishing a prima facie case, we need not reach the question of whether their case is barred under the litigation privilege. However, in the interests of addressing all issues on appeal, we briefly discuss it.

Civil Code section 47 (section 47) describes the litigation privilege. It makes privileged any publication or broadcast made in a judicial proceeding. Because respondent's production was made during a deposition that was undertaken pursuant to a subpoena in underlying, active litigation, it is privileged under section 47. As set forth below, appellants' arguments to the contrary fail to convince us otherwise.

Appellants argue that the litigation privilege does not apply because respondent's act of handing over the documents constituted an "'independent, noncommunicative, wrongful act.'" In support of this argument, appellants cite *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (*Rusheen*), which involved an attorney's act of executing on a default judgment. In response to the defendant's argument that this was not an act appropriately covered by the litigation privilege, the Supreme Court held: "we conclude that if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct, which in this case included acts necessary to enforce the judgment . . . ." (*Id.* at p. 1065.) Similarly, here, respondent's act of handing over the documents was necessarily related to the topics of his deposition testimony. Thus, appellants' argument fails.

Appellants further argue that the litigation privilege does not apply in an action arising from breach of contract.[4] We reject this argument. "[C]onduct alleged to constitute a breach of contract may also come within the statutory protections for protected speech or petitioning. [Citations.]" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1483-1484.) We must focus not on the label of the cause of action but the activity challenged in the complaint. (*Ibid.*) The activities allegedly giving rise to this cause of action were undertaken in a deposition. "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 have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Respondent's act of producing the subject documents meets these criteria.

As set forth above, appellants' argument that respondent's conduct was illegal under the precedent set forth in *Flatley*, also fails.

Because respondent's conduct in providing documents at his deposition is protected by the litigation privilege, appellants cannot show a probability of prevailing.

**IV. Attorney fees**

Appellants take issue with the amount of attorney fees and costs awarded to respondent in connection with the anti-SLAPP motion. Appellants' objection is based on their position that the anti-SLAPP motion was substantially similar to respondent's earlier motion for judgment on the pleadings. Thus, appellants

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[4] Appellants have inappropriately, and without proper citation to the record, referred the court to their trial court filing on this topic.

argue, respondent merely "copied and pasted" his anti-SLAPP motion, and should not recover fees for 23 hours of work.

An award of attorney fees is reviewed for abuse of discretion. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274.) Under this standard, the amount awarded by the trial court will not be set aside absent an affirmative showing that the award is """manifestly excessive in the circumstances."""" (*Ibid.*, fn. omitted.) The order of the lower court is presumed correct. (*Ibid.*)

Respondent sought, and was awarded, $5,457.50 as fees and costs. The fee award was based on 23 hours of work at $175 per hour, which was broken down as follows: 15 hours for research and preparation, 4 hours of opposition review and reply preparation, and 4 hours for appearance at the hearing. The trial court determined that the fees were reasonable in light of the complexity of the litigation privilege issue and the presentation of evidence on the causation issue. The record shows a careful review by the trial court.

Appellants have failed to carry their burden of showing that the trial court's award of $5,457.50 was an abuse of discretion. Appellants ask this court to review portions of the two motions and come to a conclusion different from that which the trial court reached. That is not our role. Under the abuse of discretion standard, """[a] decision will not be reversed merely because reasonable people might disagree."""" (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249.) The record shows that the trial court acted reasonably in reviewing the hours and rate applied to respondent's work on the motion. Appellants have failed to show that respondent reported excessive hours or that the award was arbitrary or irrational.

## DISPOSITION

The orders are affirmed. Respondent is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT