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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT JAMES, Plaintiff and Respondent, v. HOWARD B. KECK, JR., Defendant and Appellant.	B282536 (Los Angeles County Super. Ct. No. BC646852)

APPEAL from an order of the Superior Court of Los Angeles County, Robert Hess, Judge. Affirmed.

Michaelis, Montanari & Johnson, Garry L. Montanari, James I. Michaelis, and John H. Moon, for Defendant and Appellant.

Robert James, in pro. per., for Plaintiff and Respondent.

In the 1980s, plaintiff Robert James (James) and defendant Howard Keck, Jr. (Keck) both owned land in Riverside County. When the local water district proposed building a sewage plant nearby, James rallied Keck and other neighbors to form a property owners' association that litigated and lobbied against the project, and the plant was ultimately built elsewhere. Decades later, James filed a lawsuit claiming Keck was unjustly enriched by James's efforts to relocate the sewage plant. Keck responded by filing an anti-SLAPP special motion to strike James's complaint, and we consider whether, as the trial court found in denying the anti-SLAPP motion, James's lawsuit did not *arise from* Keck's participation in the campaign against the sewage plant.

I. BACKGROUND

A. The Allegations in James's Complaint

James commenced this action in 2015, seeking "[a] restitution award no less than $225,000" based on a single cause of action for "Restitution Based on Unjust Enrichment." James's complaint included the following allegations.

James and Keck both owned land "in the south La Quinta area" of Riverside County in the early 1980's. When James learned that the Coachella Valley Water District (CVWD) planned to build a sewage plant in the area (including on a portion of his property), he organized the Coral Cove Property Owners Association (the association) to resist the project. Keck and several other neighbors joined. Keck expressed his opposition to the project in a letter to a CVWD official.

As part of their broader "litigation and political strategy," members of the association—including James and Keck—brought

an action to require CVWD to consider alternative sites for the sewage plant. The complaint explains "[t]his litigation was needed to delay construction of the sewer plant until James'[s] political efforts could cause the sewer plant to be relocated out of the La Quinta area . . . ." James persisted in these "political efforts" even after selling the portions of his property that would be impacted by the proposed sewage plant. He continued lobbying against the sewage plant "for the sole benefit of Keck with [Keck's] approval," and although James had "no contract or actual agreement . . . with [Keck]," he "anticipated compensation of some sort would be offered to him . . . ."[1]

CVWD settled on an alternative site for the sewage plant in late 1984, and Keck sent James a "memo" thanking him for his efforts. Keck's land is allegedly worth $3,750,000 more today than it would be had the sewage plant been built at the site originally proposed by CVWD.

B. Keck's Anti-SLAPP Motion

Keck filed a Code of Civil Procedure section 425.16[2] special motion to strike the complaint. As we will describe in greater detail, section 425.16 targets strategic lawsuits against public participation (SLAPPs) by permitting courts to strike meritless

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[1] As stated in the complaint, James "unilaterally decided" that "if [he] caused the sewer plant relocation" and "continued to monitor" threats to defendant's land, he should be compensated for any value added to defendant's land if and when neighboring lots were developed.

[2] Undesignated statutory references that follow are to the Code of Civil Procedure.

claims that arise from a defendant's protected speech or petitioning activity. Keck contended James's complaint arose from the campaign against the sewage plant. Keck further contended James could not show a likelihood of prevailing on the merits because he was not unjustly enriched by James's activism and, in any event, James's claim is time-barred. James opposed the motion, contending that his cause of action does not arise from the campaign against the sewage plant.

The trial court denied Keck's anti-SLAPP motion. The court reasoned the lawsuit "does not arise from [Keck's] acts in furtherance of free speech or his right to petition," but rather from "[Keck's] failure to pay [James] for his efforts to relocate the sewer plant and, supposedly, Keck's resulting unjust enrichment." As to Keck's argument that he "is alleged to have . . . participated in the lawsuit, which is protected activity [a]nd . . . is alleged to have sent a memo, which is the basis upon which [James] is seeking restitution," the court emphasized that "[Keck's] participation in the lawsuit is not the basis for the claim against him . . . ." Because the court determined that James's cause of action did not arise from Keck's protected activity, it did not decide whether James had shown a probability of prevailing on the merits.[3]

II. DISCUSSION

Keck's participation in the campaign against the sewage plant would constitute protected speech and petitioning activity.

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[3] The court did, however, "suggest" to James that, "you know, waiting from 1984, 30 years or more, to bring this suit raises serious questions."

But Keck has not satisfied his burden to establish the required nexus between this activity and James's action for restitution based on unjust enrichment. The allegedly wrongful act from which James's cause of action arises—Keck's retention of the full amount by which his property appreciated over the years after the sewage plant's siting—is not itself an act in furtherance of the right of petition or free speech.

A. The Anti-SLAPP Statute

The Legislature enacted section 425.16 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "The statute authorizes defendants to file a special motion to strike in order to expedite the early dismissal of unmeritorious claims." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416.) "'[T]o encourage continued participation in matters of public significance,' and to ensure 'that this participation should not be chilled through abuse of the judicial process,' the Legislature has specified that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*Ibid.*)

Our analysis of an anti-SLAPP motion proceeds in two stages: "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) "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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) We review the denial of an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

B. James's Complaint Does Not Arise From Protected Activity

Section 425.16, subdivision (e) defines four categories of protected activity, including the three categories at issue 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, (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, . . . 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." Keck contends he engaged in protected activity when he participated in the litigation against CVWD, wrote a letter to a CVWD official expressing his opposition to the sewage plant, wrote a memo thanking James for "saving" Keck and others from living next to a sewage plant, and "allegedly ha[d] [James] represent his [i.e., Keck's] interests" in the campaign against the sewage plant.

To satisfy its stage one anti-SLAPP burden, a moving party must do more than demonstrate a challenged claim has some connection to protected activity. The showing required is that the claim arises from protected activity, and "[a] claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062; see also *id.* at

p. 1063 [“‘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’”].) Thus, “‘[t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’ [Citations.] Instead, the focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation.]” (*Id.* at p. 1063.)

The analytical framework in *Park* requires courts to “consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.” (*Park*, *supra*, 2 Cal.5th at p. 1063.) In *Park*, for example, the Court held that a plaintiff’s discrimination claims against the university that denied him tenure did not arise from protected activity because the claims depended only on “the denial of tenure itself” and “not on the grievance proceeding, any statements, or any specific evaluations of [plaintiff] in the tenure process . . . .” (*Id.* at p. 1068.)

Here, James’s complaint seeks restitution based on the theory that Keck was unjustly enriched by his retention of benefits resulting from James’s efforts to relocate the proposed sewage plant. “The elements for a claim of unjust enrichment are ‘receipt of a benefit and unjust retention of the benefit at the expense of another.’” (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132.) Thus, under *Park*, Keck must be able to point to protected actions he took that help establish his asserted receipt of a benefit and his unjust retention of that benefit from James.

There are no such actions alleged in James's complaint. His single cause of action for unjust enrichment is based on the theory that he should be compensated for the lobbying and litigation efforts *he* undertook, allegedly on Keck's behalf; there is no suggestion Keck was unjustly enriched by his own speech and petitioning activity. Rather, Keck's liability depends on the retention of the increased equity in his property, and facts alleged in James's complaint concerning Keck's participation in the campaign against the sewage plant are incidental—relevant only as context to explain why Keck purportedly requested James's assistance in opposing the initial sewage plant proposal. The presence of such incidental allegations is immaterial for anti-SLAPP purposes. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 394 ["Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute"]; see also *Park*, *supra*, 2 Cal.5th at p. 1064 [emphasizing "the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim"].)

Indeed, insofar as Keck articulates any relationship between James's unjust enrichment claim and Keck's protected activity, it is that James would have no cause of action "[b]ut for [Keck] allegedly having [James] represent his interests" in the sewage plant campaign. Keck suggests our Supreme Court held in *Navellier* that this sort of "but for" causal relationship is sufficient to establish an "arising from" relationship for purposes of section 425.16. That, however, is a misreading of the *Navellier* decision.

In *Navellier*, the Supreme Court considered whether an "action based on the defendant's having filed counterclaims in a

prior, unrelated proceeding in federal court" was a SLAPP. (*Navellier*, *supra*, 29 Cal.4th at p. 85.) The *Navellier* plaintiffs alleged the filing of federal counterclaims constituted fraud and breach of contract because the defendant had previously released those claims. (*Id.* at p. 87.) The Supreme Court held that the state court action arose from protected activity because "but for the federal lawsuit and [defendant's] actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Id.* at p. 90.) Crucially, however, the Court emphasized that the defendant's action in filing the counterclaims was "alleged to *constitute* breach of contract." (*Id.* at p. 92, italics added.) As our Supreme Court explained in *Park*, "specific elements of the *Navellier* plaintiffs' claims depended upon the defendant's protected activity. The defendant's filing of counterclaims *constituted* the alleged breach of contract." (*Park*, *supra*, 2 Cal.5th at p. 1064, italics added.) Here, there is no sense in which Keck's speech and petitioning activities constitute an element of James's cause of action. The elements of James's unjust enrichment claim turn on Keck's allegedly unjust retention of benefits secured by James's lobbying, not Keck's or James's lobbying itself.

Our conclusion that James's cause of action does not arise from Keck's protected activity resolves the issue we must decide on appeal. We therefore exercise restraint and forgo any discussion of whether James's lawsuit has any merit.

DISPOSITION

The judgment is affirmed. James shall recover his costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.