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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

JOSEPH FELIX MCNULTY, Plaintiff and Respondent, v. PAUL OTTOSI et al., Defendants and Appellants.	B229143 (Los Angeles County Super. Ct. No. LC088640)

APPEAL from the orders of the Superior Court of Los Angeles County, Bert Glennon, Jr., Judge. Affirmed.

Law Offices of Garry W. Williams and Garry W. Williams for Defendant and Appellant Paul Ottosi.

Law Offices of Walter K. Childers and Walter K. Childers for Defendant and Appellant Johanna Ramos.

Lewis Brisbois Bisgaard & Smith, Brad D. Krasnoff, Lance A. Selfridge, Caroline E. Chan, Scott Lee; Law Office of Ahtirksi & Nizinski and Loren Nizinski for Plaintiff and Respondent.

In this action for contractual fraud, on September 24, 2010, the trial court denied defendants and appellants Paul Ottosi's and Johanna Ramos's special motions to strike the complaint of plaintiff and respondent Joseph Felix McNulty under the anti-SLAPP[1] statute, Code of Civil Procedure section 425.16.[2] Defendants contend the trial court erred in denying the motions. We affirm.

PROCEDURAL BACKGROUND

Allegations of the Complaint

On October 28, 2008, McNulty and Ottosi, attorneys, entered into a written joint venture agreement for splitting the proceeds of all cases McNulty referred to Ottosi, no matter which attorney signed up the client. The agreement, annexed to the complaint, states that one of the referred cases was the "Ramos" case.

In the first cause of action, against Ottosi for breach of contract, McNulty alleged that in August 2009 Ottosi breached the agreement by repudiating it, converting the proceeds to his own use, refusing to provide McNulty with information about the cases, refusing to account for or pay McNulty his portion of the legal fees, and instructing the clients not to talk to McNulty. The second cause of action, against Ottosi for fraud, alleged Ottosi made a promise to share the fees with the intent to induce McNulty to bring clients to Ottosi, but Ottosi had no intent of performing, and McNulty brought clients to Ottosi in reliance on Ottosi's promise.

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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.)

[2] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The third cause of action, against Ottosi for conversion, alleged Ottosi retained McNulty's portion of the fees without McNulty's knowledge or consent. The fourth cause of action, against Ottosi and Ramos for intentional interference with economic relationships, alleged McNulty entered into a retainer agreement with Ramos in August 2007 to represent her in an employment discrimination case. Ottosi knew about this retainer agreement. In November 2007, Ottosi "falsely represented to [Ramos] that . . . Ottosi needed a separate retainer agreement than the one that had been entered into between [McNulty] and . . . Ramos . . . to induce [Ramos] . . . to breach [her] agreement with [McNulty]." When Ramos's employment discrimination case was settled in August 2009, no proceeds were distributed to McNulty.

McNulty alleged in the fifth cause of action, against Ottosi for breach of fiduciary duty, that Ottosi owed McNulty a duty to conduct the joint venture in good faith and fair dealing. Ottosi breached his fiduciary duty by repudiating the joint venture agreement and denying McNulty's interest. The sixth cause of action alleged Ottosi refused to render an accounting of the money received in the cases subject to the joint venture agreement or to pay McNulty the amount due him.

The seventh cause of action, against Ottosi for constructive trust, alleged Ottosi holds McNulty's portion of the attorney fees as a constructive trustee for McNulty's benefit. The eighth cause of action, against Ottosi for declaratory relief, sought a declaration whether the written agreement is valid and he is entitled to his portion of the attorney fees.

The ninth cause of action alleged breach of contract against Ramos. McNulty performed all his obligations under his August 2007 retainer agreement with her, but she breached the retainer agreement by failing to pay McNulty his fee upon the settlement of her case. The retainer agreement, attached to the complaint, provides that McNulty "may, at his discretion, associate other counsel, but compensation of such other counsel will be the sole responsibility of the attorney."

The tenth cause of action, against Ottosi for slander per se, alleged that on September 30, 2009, during a meeting of McNulty, Ottosi, and Dr. Bryan Ryles, Ottosi

falsely stated the following concerning McNulty: "How would you like that I tell the group that you beat your girlfriend."

Proceedings on Ottosi's and Ramos's Special Motions to Strike the Complaint

A. Ottosi's Special Motion to Strike

Ottosi filed a special motion to strike the complaint pursuant to section 425.16, subdivision (b), on the grounds that (1) the pleading is predicated on acts by Ottosi in furtherance of the right to petition the courts and right to free speech and (2) McNulty has no reasonable probability of prevailing on the merits of the causes of action.[3] The "acts in furtherance" consist of "any written or oral statement or writing made before a . . . judicial proceeding" or "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subd. (e)(1), (2).)

In a supporting declaration, Ottosi stated that in 2007 McNulty asked Ottosi to handle Ramos's sexual harassment case because McNulty did not have relevant experience. McNulty never informed Ottosi he provided written notice of the fee splitting agreement to any clients and never informed Ottosi any client consented in writing to the arrangement. Concerning the cause of action for slander per se, McNulty and Ottosi participated in weekly group therapy meetings of the State Bar Lawyers Assistance Program ("LAP"), conducted by Dr. Ryles, a group facilitator employed by the State Bar. During a meeting on September 23, 2009, McNulty accused Ottosi of stealing money from McNulty. Dr. Ryles asked McNulty and Ottosi to meet with him privately and discuss the dispute prior to the next week's meeting to

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[3] Because we hold section 425.16, subdivision (b) does not apply, we need not summarize the contentions concerning the probability of success.

avoid a repetition of the interruption of the group meeting. McNulty approached Ottosi in a threatening manner during a private meeting with Dr. Ryles on September 30, 2009. McNulty had once told Ottosi about a physical altercation McNulty had with his girlfriend.

B. Ramos's Special Motion to Strike

Ramos made a special motion to strike the pleadings on the ground that they are predicated on actions she took in pursuit of a sexual discrimination action, pursuant to section 425.16, subdivision (b)(1). The actions were that she entered into a retainer agreement with McNulty, Ottosi falsely represented to her that he needed a separate retainer agreement, and none of the proceeds of the case was disbursed to McNulty.

In a declaration in support of both Ottosi's special motion to strike and her own special motion to strike, Ramos stated she contacted McNulty to represent her in a sexual discrimination case. After filing an administrative complaint, McNulty told her that Ottosi would be handling her case. She was never notified of a fee-splitting agreement or asked to consent to it.

C. Opposition to Ottosi's Special Motion to Strike

McNulty contended Ottosi's conduct in failing to pay him the agreed fees is not protected under section 425.16, because it was not an activity in furtherance of Ottosi's right to petition. Ottosi's defamatory statements were not protected under section 425.16, because they were not made in connection with a matter of public interest.

In a declaration in support of his opposition to Ottosi's special motion to strike and opposition to Ramos's special motion to strike, McNulty stated he and Ottosi engaged in a joint venture to represent clients in civil litigation. McNulty would bring in the clients, Ottosi would manage the cases, and McNulty and Ottosi would share the

fees. Pursuant to their agreement, Ottosi issued numerous attorney fee payments to McNulty in several cases. In some cases, the client gave written consent to the fee splitting arrangement, but in other cases, Ottosi was to obtain written consent prior to the disbursement of funds. Ottosi failed to pay McNulty in part or in full on several cases that were subject to the agreement. Ramos agreed to the association of Ottosi pursuant to her retainer agreement with McNulty. Ottosi was to send her an association agreement to sign but instead, he sent her a new retainer agreement retaining him as her attorney. Ottosi "duped" Ramos into signing the new retainer. McNulty and Ottosi conferred with other attorneys regarding strategy. When Ramos's lawsuit was settled, Ottosi refused to talk to McNulty and advised Ramos not to talk to him. McNulty was never informed he was terminated from representing Ramos. In December 2005, Ottosi represented McNulty in a litigation between McNulty and another attorney. During that representation, McNulty asked Ottosi for legal advice so that McNulty could help his girlfriend who had been charged with domestic violence. Ottosi's defamatory statements were made outside the LAP session.

D. Opposition to Ramos's Special Motion to Strike

McNulty contended Ramos's conduct in failing to pay him pursuant to his retainer agreement after her lawsuit was over is not protected activity pursuant to section 425.16 because it was not an activity in furtherance of her case.

E. Ruling

On September 24, 2010, the trial court denied both special motions to strike, because "the conduct doesn't fall within the ambit of . . . section 425.16." "This is essentially, based on the papers, a fight over fee splitting, and the issue is not a matter of public interest. It isn't a matter of commentary on First Amendment rights." As to the slander per se cause of action, "Mr. Ottosi's statement[] doesn't even have a

limited interest to a private group, organization or community because it does not occur in the context of an ongoing controversy such that it warrants protection by the statute." "The statements here and the controversy involve a controversy over splitting of attorney's fees and a statement that was made in a private conversation, and I don't believe this thing has met the burden established by admissible evidence and the probability that the plaintiff will prevail. [¶] My frank opinion is it sounds to me like this is really more like a demurrer, a subject of a demurrer[,] than it is a motion to strike under the anti-SLAPP statute."[4]

DISCUSSION

Standard of Review

"The trial court engages in a two-step process to determine whether to grant or deny a section 425.16 motion to strike. [Citation.] The court first decides whether the defendant has made a threshold showing that the acts at issue arose from protected activity. (§ 425.16, subd. (b)(1) . . . .) Once the defendant meets this burden, then the court determines whether the plaintiff has demonstrated a probability that he or she will prevail on the claim. (§ 425.16, subd. (b)(1) . . . .) On appeal, we independently review whether section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits." (*Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 135.) In deciding whether the defendant has met the "arising from" requirement and whether plaintiff has met the probability of prevailing requirement, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b); *Oasis West Realty, LLC v.*

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[4] Ottosi had a demurrer pending before the trial court. McNulty stated his intention to file a first amended complaint.

Goldman (2011) 51 Cal.4th 811, 820; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

Section 425.16

In section 425.16, subdivision (a), the Legislature declared, "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.[5] To this end, this section shall be construed broadly."

Code of Civil Procedure, section 425.16, subdivision (b) provides in pertinent part: "(1) 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 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."

Section 425.16, subdivision (e) provides: "As used in this section, '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: (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

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5 "A SLAPP suit is a meritless lawsuit 'filed primarily to chill the defendant's exercise of First Amendment rights.' [Citation.] . . . 'The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans.' [Citation.] '[W]hile SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.' [Citations.]" (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 861-862.)

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."

"Speaking to the first prong, the California Supreme Court explains that 'the 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.] . . . [T]he 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 fits one of the categories spelled out in section 425.16, subdivision (e) . . . ."' (*City of Cotati v. Cashman*[, *supra*,] 29 Cal.4th][at p.] 78.)" (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.)

"'[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. (See *Paul v. Friedman*[, *supra*,] 95 Cal.App.4th [at p.] 866 ["[t]he statute does not accord anti-SLAPP protection to suits arising any act having any connection, however remote, with an official proceeding"].) . . . [I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies ([*City of*] *Cotati* [*v. Cashman*], *supra*, 29 Cal.4th at p. 79), 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.' [Citation.]" (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 63.)

Causes of Action Against Ottosi and Ramos for Attorney Fees

Ottosi and Ramos contend the first nine causes of action—stealing McNulty's client Ramos and violating the October 28, 2008 fee-splitting agreement—are subject to the anti-SLAPP statute because they are based on protected activity under section 425.16, subdivision (e)(1), as communications made before a court and communications in connection with an issue being considered by a court. We disagree with the contention.

The "principal thrust or gravamen" of the first nine causes of action against Ottosi and Ramos is a private dispute over payment of attorney fees in lawsuits subject to the fee-splitting agreement, including in Ramos's case. (*USA Waste of California, Inc. v. City of Irwindale*, *supra*, 184 Cal.App.4th at p. 63.) The lawsuit did not arise out of communications made before a court or in connection with an issue being considered by a court. (§ 425.16, subd. (e)(1), (2).)

Ottosi cites *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 485-486, 489 (*Taheri*) for the proposition that his conduct in "stealing" Ramos as a client is protected activity. In *Taheri*, a suit for improper solicitation of a client, the court held that section 425.16 applied, because the suit arose from the defendant lawyer's communications and actions in the litigation: "[The] complaint plainly shows it arose from [the defendant's] communications with [the client] about pending litigation [the defendant promised he could enforce the settlement agreement], and from [the defendant's] conduct in enforcing the settlement agreement on [the client's] behalf [the defendant waived the fees plaintiff had earned]." (*Id.* at p. 489.) Unlike the complaint in *Taheri*, McNulty's complaint did not arise from acts and communications in any of the litigations that were subject to the fee-splitting agreement, including Ramos's litigation.

Cabral v. Martins (2009) 177 Cal.App.4th 471, 482 (*Cabral*), relied on by Ramos for the proposition that entering into a retainer agreement is protected activity under section 425.16, is inapposite. In *Cabral*, "the will revision [by the defendant]

was of no effect in and of itself, but only insofar as it was later implemented through the probate proceedings. Accordingly, the will revision was also protected activity under the anti-SLAPP statute. Even if not, it was only incidental to the subsequent protected activity, thus rendering [the plaintiff's] entire cause of action subject to a special motion to strike." (*Id.* at p. 483.) Unlike the prelitigation conduct in *Cabral*, Ramos's entry into a retainer agreement with Ottosi had no substantive effect on the litigation, and, moreover, Ottosi was going to handle Ramos's litigation in any event.

We need not decide whether the litigation privilege[6] applies to defendants' acts, because the litigation privilege and section 425.16 are not coextensive. "[T]he litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes[.]" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322 (*Flatley*).) "There is, of course, a relationship between the litigation privilege and the anti-SLAPP statute. Past decisions of this court and the Court of Appeal have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivisions (e)(1) and (2) . . . by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivisions (e)(1) and (2)." (*Flatley*, *supra*, at pp. 322-323.) However, "'the litigation privilege . . . enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings [citation]; [section 425.16] is a procedural device for screening out meritless claims [citation].' [Citation.]" (*Flatley*, *supra*, at pp. 323-324.) "The litigation privilege . . . serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. . . . [¶] Section 425.16 is not concerned with

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6 Civil Code section 47 provides in pertinent part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding" (hereinafter, "litigation privilege"). The litigation privilege may apply to prelitigation conduct. (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1192, 1196 [the litigation privilege applied to prelitigation conduct facilitating settlement negotiations and promising to obtain large settlements to those who signed up as plaintiffs].)

securing for litigants freedom of access to the judicial process. The purpose of section 425.16 is to protect the valid exercise of constitutional rights of free speech and petition from the abuse of the judicial process (§ 425.16, subd. (a)), by allowing a defendant to bring a motion to strike any action that arises from any activity by the defendant in furtherance of those rights. (§ 425.16, subd. (b)(1).)" (*Flatley, supra* at p. 324.) As the private dispute over attorney fees in this matter does not implicate the rights of free speech and petition, section 425.16's legislative policy does not apply.

Cause of Action Against Ottosi for Slander Per Se

Ottosi contends his statement in count ten, the cause of action for slander per se, was protected activity, in that it was uttered in connection with a State Bar program (§ 425.16, subd. (e)(1)) and was made in connection with an issue under consideration by the State Bar Court (§ 425.16, subd. (e)(2)).[7] We disagree. The statement was not made before an official proceeding – it was made in a private meeting with a therapist. It was not made in connection with the LAP program that McNulty was required to participate in for substance abuse-related ethical violations. The statement was made during the course of a private meeting held to diffuse antagonism between McNulty and Ottosi.

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[7] Ottosi acknowledges he did not raise this issue in the trial court but, rather, contended in the trial court that the statement was protected under section 425.16, subdivisions (e)(3) (statement in a public forum in connection with an issue of public interest) and (4) (any conduct in furtherance of the right to petition or of free speech in connection with a public issue or issue of public interest).

DISPOSITION

The orders denying the motions to strike pursuant to section 425.16 are affirmed. Respondent is awarded his costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.