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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAYMOND BEKERIS, Cross-complainant and Appellant, v. STANLEY DENIS et al., Cross-defendants and Respondents.	B251758 (Los Angeles County Super. Ct. No. YC068340)

APPEAL from an order of the Superior Court of Los Angeles County, Ramona G. See, Judge. Reversed.

Raymond Bekeris, in pro. per., for Cross-complainant and Appellant.

Stanley Denis, in pro. per.; and Law Offices of Stanley Denis for Cross-defendants and Respondents.

Raymond Bekeris (Bekeris) and John Bruce Nelson & Assoc., a general partnership (the partnership), filed a cross-complaint against Attorney Stanley Denis, individually and doing business as the Law Offices of Stanley Denis (hereinafter collectively referred to as Denis). Bekeris and the partnership alleged fraud involving a failed settlement agreement in which Denis represented the party adverse to Bekeris, and that Denis's breach of his duty of loyalty to Bekeris, a former client, caused that settlement agreement to fail when Denis used information he obtained while representing Bekeris to the advantage of his new client. The trial court granted Denis's special motion to strike the fraud claim pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP statute). [1] We reverse because the fraud claim in the cross-complaint did not arise out of actions in furtherance of rights of petition or free speech.

BACKGROUND

Prior actions and Denis's representation of Bekeris and other clients

We summarize below the facts set forth in the pleadings and the parties' declarations only for the purpose of deciding the merits of the anti-SLAPP motion.

Bekeris is a real estate broker. Bekeris alleged that from 2004 through 2006 Denis represented Bekeris and his corporation, John Bruce Nelson & Assoc., Inc., in two matters unrelated to the instant case. Bekeris further alleged that from 2006 through June 2010 Bekeris and Denis maintained a close working and friendly relationship, in which Bekeris referred clients to Denis, including Vivian Birndorf (Birndorf).

In November 2006, Denis represented Birndorf as the defendant seller in a lawsuit entitled *Pachulski v. Birndorf* (Super. Ct. L.A. County, No. SC091850), in which the plaintiffs sought specific performance of the sale of Birndorf's home on Mapleton Drive. Bekeris was a codefendant in that case, but was represented by separate counsel.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

According to Denis, in May 2010 when Birndorf subsequently wanted to sell Mapleton Drive, she listed her property with Cathy Ferraro of Ferraro & Associates and "agreed to name Mr. Bekeris, or more specifically, his real estate brokerage firm, John Bruce Nelson and Associates, as a co-listing agent."[2] In June 2010 Denis agreed to represent Birndorf against Bekeris in a dispute over the amount of commission Bekeris "was going to be paid as a result of his involvement in the sale of the Mapleton transaction."[3] Denis declared that he believed Bekeris to be litigious and that litigation over the commission against his new client, Birndorf, was "a serious possibility" at the time he was first engaged to represent Birndorf in her dispute with Bekeris.

On July 19, 2010, in connection with the sale of Birndorf's home and as a partial settlement of the commission dispute, amended instructions were submitted to escrow that provided: "From Seller's proceeds, escrow is instructed to pay to John Bruce Nelson & Associates the sum of $55,000 upon the close of escrow and to hold another $55,000 in escrow pending resolution of a commission dispute between Seller and John Bruce Nelson & Associates." The escrow instructions further stated: "This Agreement shall not be an admission by either side as to any facts or issues, and, notwithstanding this Agreement, Seller and John Bruce Nelson & Associates each reserve all rights they may have, if any, as to disputes regarding the amount of commission owed, or not owed, to John Bruce Nelson & Associates by Seller." The parties to these amended escrow instructions were Birndorf, then being represented by Denis, and the partnership, but not Bekeris.

On August 6, 2010, Denis sent a letter to Canon Escrow on behalf of Birndorf rescinding the prior instruction authorizing payment from the seller's proceeds of

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[2] The parties have spelled the name of the partnership inconsistently throughout the record, sometimes abbreviating "associates" and sometimes using "and" instead of "&."

[3] It is not entirely clear what the nature of the dispute was, but it appears that they differed over Bekeris's contention that he was owed a commission of $550,000 under the listing agreement, as opposed to a much smaller amount.

$55,000 to the partnership. Denis explained that the rescission was based on his understanding and confirmation from the California Department of Real Estate that the license for "John Bruce Nelson and Associates" had a status of "Licensed NBA," which meant that the partnership could not perform work requiring a real estate license.

Within days after the parties failed to resolve their dispute in a mediation in November 2010, Denis, now representing Birndorf, sued Bekeris and the partnership (Super. Ct. L.A. County, No. SC110230) for declaratory relief regarding the commission dispute. Bekeris cross-claimed for his commission and for legal services he alleged he provided to Birndorf in the *Pachulski* case. According to Denis, that case went to trial, and when Bekeris was "unsatisfied with the results," he filed another lawsuit against Birndorf (Super. Ct. L.A. County, No. BC476548), seeking the same damages asserted in his prior cross-complaint. After Birndorf was dismissed early in that lawsuit, Bekeris pursued claims against Canon Escrow and its escrow officer, Dup Pierce. The second lawsuit ended in a defense verdict against Bekeris in January 2013. Denis represented Birndorf and the escrow defendants in the lawsuits filed against them by Bekeris.

The current action

On December 17, 2012, Denis sued Bekeris (Super. Ct. L.A. County, No. YC068340) for declaratory relief as to whether Denis violated Penal Code section 630 et seq. in recording a number of telephone calls made during the earlier lawsuit. Denis's complaint also contained causes of action for assault and battery for Bekeris's conduct in connection with Denis's refusal to turn over a check payable to Bekeris, in which the Torrance Police Department was called to intervene.

In December 2012, Bekeris and the partnership filed a cross-complaint against Denis, and a first amended cross-complaint in May 2013, which included the first cause of action for invasion of privacy regarding the taped telephone conversations, and a second cause of action in two parts: "part A" for constructive fraud, and "part B" for fraud by concealment and/or intentional deceit.[4]

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[4] The first cause of action is not at issue in this appeal.

The fraud claims center around the following core allegations in the amended cross-complaint:

"During the 2004-2006 and during the subsequent years, Denis was more than aware that Bekeris was dissolving his corporation, and Denis was aware in 2008-2009 Bekeris had dissolved his corporation. Bekeris had discussed that dissolution with Denis at every juncture of the process."

Denis's misrepresentations caused "[c]ross-plaintiffs reluctantly, under financial distress, . . . to take only a portion of the commission . . . ."

"Denis . . . coaxed Bekeris into agreeing to only using the name John Bruce Nelson & Assoc. alone in an Agreement. That Agreement was to reduce the amount of commission held by escrow in return for releasing only a portion of the amount claimed [by] Bekeris. While coaxing Bekeris into that Agreement, which was dated July 19, 2010, Denis knew he would later cancel that Agreement after the close of escrow under the guise that Bekeris was fraudulently trying to collect a commission under a dissolved corporation license."

The anti-SLAPP motion

Denis argued that the fraud cause of action was subject to section 425.16 because it was predicated on statements and/or conduct that occurred while he was acting as counsel in litigation or in anticipation of litigation, thus implicating the right of redress protected by the anti-SLAPP statute. Denis also contended that the allegations of the first amended complaint established that he was Bekeris's counsel only from 2004 through 2006, while the alleged fraudulent representations regarding the July 19, 2010 agreement to amend the escrow instructions were made four years later. Thus, Denis contended, the burden shifted to Bekeris and the partnership to establish a probability that they would prevail on their fraud claims, a burden they could not meet.

To support his motion, Denis offered his own declaration, which we now summarize in pertinent part. In that declaration, Denis stated that he represented Bekeris from 2004, ending his representation of Bekeris in 2007. In June 2010, Birndorf contacted Denis to assist her in a dispute with Bekeris over a commission from the sale of

her home in which Bekeris or "specifically" his brokerage firm, "John Bruce Nelson and Associates," was a co-listing agent, and that when Birndorf contacted Denis in June 2010, he believed Bekeris and Birndorf would become embroiled in litigation.

Denis further declared that on July 9, 2010, he received an e-mail from the escrow company, which included printouts from the California Department of Real Estate. The printouts indicated that the license for "John Bruce Nelson and Associates" had expired. On July 12, 2010, Denis's office conducted an online investigation with the Department of Real Estate of records regarding Bekeris and "John Bruce Nelson and Associates." The investigation disclosed that the license for "John Bruce Nelson and Associates" had expired on November 12, 2006, and that a license was later issued for "John Bruce Nelson and Associates," which was still "'active.'" The later license was listed as "'licensed NBA,'" meaning the licensee could not perform acts for which a California real estate license was required. Bekeris had been the designated officer of record for that entity, but canceled his officer status as of April 5, 2010.

In May 2010, Bekeris, on behalf of "John Bruce Nelson and Associates," initialed an agreement to act as co-listing agent with Ferraro to sell Birndorf's home. Although Bekeris himself had a broker's license under various fictitious business names, "John Bruce Nelson and Associates" had not been registered with the Department of Real Estate under his personal license. Denis admitted that based on this information, as of July 12, 2010, he "had some serious questions as to how, and in what capacity, Mr. Bekeris could have initialed the listing agreement with Ms. Birndorf on behalf of John Bruce Nelson and Associates in May 2010."

Based on the aforementioned information, on July 12, 2010, Denis spoke with Birndorf and Ferraro, who agreed with his recommendation to withhold the information about these licensing issues until just before the close of escrow because Birndorf had previously advised Denis that Bekeris had threatened to interfere with the close of escrow.

"From July 12 or 13, 2010 forward," based on his "knowledge and familiarity of Mr. Bekeris's [his former client's] personality and his proclivity to take and press

untenable positions as well as threatening and pursuing litigation," Denis surmised that litigation between Birndorf and Bekeris over the commission was "inevitable and imminent." "After these July 12 or 13, 2010 discussions" with Birndorf, Denis began discussions with Bekeris about an escrow instruction regarding the disputed commission to address his new client's concern that Bekeris could interfere with the close of escrow. The conversations with Bekeris culminated in the July 19, 2010 amended escrow instructions concerning the disputed commission. At no time during these conversations did Denis disclose to Bekeris his concerns about the impact of John Bruce Nelson and Associates's dissolved status on its ability to be a listing agent; in fact, his declaration reveals that he agreed with his new client not to make any such disclosure.

On August, 6, 2010, Denis sent a letter by e-mail and facsimile to the escrow office, rescinding the July 19, 2010 escrow instructions and directing the escrow company to hold any commission due to "John Bruce Nelson and Associates." The escrow closed on the same date on which Denis sent the rescission letter with instructions to hold the commission. In this way, Denis achieved what he stated his new client wanted—for escrow to close—to the apparent detriment of his former client, who did not get paid.

In opposition, Bekeris argued that the anti-SLAPP motion does not protect an attorney who violates ethical obligations set forth in Business and Professions Code section 6068 and rule 3-310(E) of the State Bar Rules of Professional Conduct regarding confidential information and not using confidential information in accepting employment adverse to a former client. In support of this proposition, he cited *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*PrediWave*) and *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 (*Benasra)*, and proffered his own declaration, summarized immediately below. According to Bekeris, the confidential information at issue was advice he received from Denis when Denis was representing him regarding whether to dissolve the partnership and what, if any, detrimental effect such a dissolution would have on Bekeris's ability to do business.

From 2005 until July 2010, Bekeris believed that Denis was his attorney. Denis sent Bekeris an e-mail on May 27, 2010, in which Denis indicated that he was looking forward to working with Bekeris. Denis was the only attorney for the corporation, "John Bruce Nelson and Associates," which Bekeris started. Bekeris trusted Denis and referred other clients to him, including Birndorf, who was very wealthy. Bekeris and Denis collaborated for over three years while Denis was representing Birndorf in the *Pachulski* litigation.

Bekeris declared that, between 2005 and 2010, he "periodically discussed and informed Mr. Denis of the situation with my former corporation," including that Bekeris dissolved the corporation for financial reasons, specifically, the cost of hiring an attorney if the corporation were involved in litigation. Bekeris informed Denis that John Bruce Nelson, the individual, had obtained a broker's license so that the name could be used without being a corporation. Bekeris declared that, contrary to Denis's denials, Denis gave Bekeris legal advice on a regular basis and represented the corporation up until 2010.

Paragraph 24 of Bekeris's declaration provides in part: "Mr. Denis and I discussed on a number of occasions that I was in the process of dissolving John Bruce Nelson and Associates, a California corporation. Mr. Denis and I discussed the fact that partnerships may do business requiring a license as long as each partner is [a] licensed broker. So there was no need to register a partnership with the department of real estate and once my partner got his broker's license we dissolved the corporation as it was no longer necessary. I remember asking him what I needed to do to dissolve it. He had told me at one time his specialty was in business law as well as real estate. Besides, the [Department] of Real Estate does not issue partnership licenses."

When the commission dispute arose between Bekeris and Birndorf in June 2010, Bekeris was surprised that Denis took her side against him. Denis approached him about the escrow amendment, which would have offered Bekeris some much-needed funds. Denis "insisted" on Bekeris's name being excluded from the agreement. When Bekeris

questioned Denis about use of the partnership's name, Denis said that it was to protect Birndorf "from my company coming after her[.]"

In reply, Denis argued that Bekeris failed to produce admissible evidence establishing a probability of prevailing on his claims or to address the litigation privilege. Regarding the purported ethical violations, he contended that Bekeris failed to demonstrate that Bekeris disclosed confidential information to him. For that reason, rule 3-310(E) of the State Bar Rules of Professional Conduct and *Benasra* did not defeat the protected nature of his conduct in anticipation of litigation. Denis filed an additional declaration, denying that the May 2010 e-mail demonstrated that he was representing Bekeris in any matter, but instead, merely referenced cooperation with Bekeris as to a claim by Coldwell Banker regarding a settlement with Birndorf. He also denied obtaining any confidential information from Bekeris while representing him or his company.

On July 29, 2013, after taking the anti-SLAPP motion under submission, the trial court granted the motion. The trial court concluded that Denis's "statements and advice regarding entering into the subject escrow agreement to resolve the underlying dispute" demonstrated that Denis's "actions were in furtherance of the right to petition or free speech and are protected by the litigation privilege." The trial court further ruled that Bekeris had failed to make a prima facie showing of prevailing on the merits because he failed to state fraud with particularity, "providing only conclusory allegations that Cross-Defendant's conduct was intentional, willful, and fraudulent[.]" Finally, the trial court reasoned that the cross-complaint revealed that Denis was Bekeris's attorney only from 2004 to 2006 and the alleged fraudulent misrepresentations occurred well after, in July 2010. Bekeris filed a timely notice of appeal.[5]

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[5] Denis notes that the opening brief lists Bekeris and his business entity on the face page and in defining "appellants"; in contrast, the notice of appeal was brought in Bekeris's name only. Denis is also correct that the business entity, itself, did not file a notice of appeal.

DISCUSSION

Burden shifting under the anti-SLAPP statute

Section 425.16, subdivision (b)(1) 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 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) states: "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 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."

A trial court engages in a two-part analysis in deciding an anti-SLAPP motion. First, the trial court considers whether the defendant has satisfied the initial burden to establish a prima facie case that plaintiff's claim arises out of activity in furtherance of the right of petition or free speech. (§ 425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 (*Flatley*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) In making this determination, the trial court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." (§ 425.16, subd. (b)(2).) The pleadings and opposing affidavits are considered only for the purpose of ruling on the anti-SLAPP motion, and particularly, for the purpose of addressing the burden-shifting required by the case law.

Second, if the defendant satisfies this first prong, the burden shifts to the plaintiff to establish a legally sufficient claim and a probability of prevailing on the merits of that claim. (§ 425.16, subd. (b)(1); *Flatley*, *supra*, 39 Cal.4th at p. 314; *Rusheen*, *supra*, 37 Cal.4th at p. 1056.) Plaintiff meets this burden by making a prima facie showing, with admissible evidence, of facts that would sustain a favorable judgment if plaintiff's evidence were credited. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis West Realty*).) In considering the second prong of the anti-SLAPP analysis, the trial court cannot weigh evidence. (*Flatley*, *supra*, 39 Cal.4th at pp. 323, 326.) Instead, the trial court must accept as true evidence that is favorable to plaintiff; it may consider defendant's evidence only to determine if the cause of action fails as a matter of law. (*Ibid*.)

"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 merits—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Appellate courts review an order granting an anti-SLAPP motion de novo. (*Oasis West Reality*, *supra*, 51 Cal.4th at p. 820.)

The gravamen of the fraud cause of action is not protected activity, but instead breach of the duty of loyalty to a former client in violation of ethical and fiduciary duties

Denis argues, and the trial court apparently agreed, that because the amended escrow instructions were made in anticipation of litigation, his conduct in procuring the amended instructions was in furtherance of his free speech rights, and thus protected activity within the purview of the anti-SLAPP statute. We conclude that neither the pleadings and declarations nor the applicable legal authorities support that conclusion. In doing so, we disregard a claim's label and "examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies . . . ." (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–520.)

There were two parts of the fraud cause of action in the amended cross-complaint: constructive fraud in part A and fraud by concealment or intentional deceit in part B; part

B expressly incorporated the constructive fraud allegations in part A. Civil Code section 1573 defines constructive fraud as: "1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or [¶] 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." It applies when there is a fiduciary or confidential relationship such as an attorney-client relationship. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.) "Few precepts are more firmly entrenched than the fiduciary nature of the attorney-client relationship, which must be of the highest character." (*Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167.)

Bekeris alleges that Denis violated Business and Professions Code section 6068, subdivision (e)(1), which provides that attorneys have a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bekeris also alleges that Denis violated rule 3-310(E) of the State Bar Rules of Professional Conduct, which provides that an attorney "shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

Even though petitioning activity may be involved in a cause of action, the anti-SLAPP statute does not apply to claims against a former attorney when the gravamen of the claims is that the former attorney breached fiduciary obligations owed to the client. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702 (*Chodos*).) *Chodos* explained that "'California courts have held that when a claim [by a client against a lawyer] is based on a breach of the fiduciary duty of loyalty or negligence, it does not concern 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. The reason is that the lawsuit concerns a breach of duty that does not depend on the exercise of a constitutional right.' (4 Mallen & Smith (2012 ed.) Legal Malpractice, § 37:11, pp. 1460–1461, fns. omitted; see 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter

Group 2012) ¶ 7:644, pp. 7(II)-15 to 7(II)-16 (rev. #1, 2012).) Even though the 'petitioning activity is part of the evidentiary landscape within which [claimant's] claims arose, the gravamen of [claimant's] claims is that [the former attorney] engaged in nonpetitioning activity inconsistent with his fiduciary obligations owed to [claimant] . . . .' (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)" (*Chodos, supra*, at p. 702.)

We do not quarrel with the proposition that the conduct at issue here includes an escrow agreement made, from Denis's perspective, in anticipation of litigation adverse to his new client. While this is "'evidentiary landscape'" (*Hylton v. Frank E. Rogozienski, Inc., supra*, 177 Cal.App.4th at p. 1272), it is not the gravamen of Bekeris's fraud claim. The pleadings and declarations reveal that Bekeris's fraud claim does not arise from Denis's acts in furtherance of a right of petition or free speech, but instead from his alleged breach of his duty of loyalty to his former client in order to champion the adverse interests of his new client.

Denis stated in his declaration that before discussing the amended escrow instructions with Bekeris, Denis had agreed with his new client (Birndorf) to conceal from Bekeris (his former client) Denis's concerns that Bekeris's professional entity (also a former client) could not have legally entered into a listing agreement with Birndorf because of its dissolved status. Thereafter, Denis convinced Bekeris to make that very entity a party to the amended escrow instructions even when Bekeris expressly inquired into why his own name should not be used, and Denis believed that the dissolved status of Bekeris's professional entity gave Denis a basis for Birndorf's avoiding paying Bekeris a commission.

Shortly thereafter, on behalf of Birndorf, Denis canceled the very amended escrow instructions he urged his former client to sign, apparently while knowing that his former client needed money out of the escrow. A fair inference from this sequence of events is that Denis's strategy benefited his new client, who wanted the escrow to close without objection from Bekeris, but it did not benefit Bekeris or the partnership, who lost the protection of the escrow without getting paid the commission. The anti-SLAPP statute

does not protect such alleged conduct in derogation of a lawyer's duty of loyalty to his former clients.

This conclusion is consistent with a number of authorities. (*PrediWave*, *supra*, 179 Cal.App.4th at p. 1223 [fraud and other claims against attorneys for conflict of interest arising from prior representation of corporation and its former president and CEO were not subject to the anti-SLAPP statute]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1619–1620, 1627–1628 (*U.S. Fire*) [anti-SLAPP statute did not apply where law firm had a disqualifying conflict of interest based on representation of a new client in a case in which a former client was an opposing party]; *Benasra*, *supra*, 123 Cal.App.4th at p. 1187 [former client's lawsuit for breach of duty of loyalty for representing rival in subsequent arbitration did not arise out of a protected activity].)

Denis claims that these authorities are inapposite because Bekeris produced no evidence that Denis obtained or used Bekeris's or the partnership's confidential information. The record does not support Denis's argument. The record included Bekeris's declaration that when he was Denis's client, he consulted Denis, and Denis gave him legal advice, about the use of the name John Bruce Nelson and Associates when Bekeris was contemplating dissolving that entity, and that Denis led Bekeris to believe that Bekeris could still conduct his real estate business even if the corporation were dissolved. As set forth above, there was evidence that would support an inference that Denis then used the information he obtained while representing Bekeris about the status of the dissolved corporation in a manner that arguably was detrimental to Bekeris in favor of his new client, Birndorf. Under these circumstances, there was evidence showing Denis's use of confidential information to the detriment of his former clients. It bears repeating that in ruling on an anti-SLAPP motion, we are not the triers-of-fact. We make no factual finding and do not make any credibility determinations. We have reviewed the evidence only to determine whether Denis has made a prima facie showing under the first prong of the anti-SLAPP analysis.

In any event, "actual disclosure of confidences by a former attorney during litigation is not required to form the basis for the tort of breach of duty of loyalty. The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client." (*Benasra, supra,* 123 Cal.App.4th at p. 1189; see also *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891 ["actual use or misuse of confidential information is not determinative; it is the possibility of the breach of confidence which controls"].)

In *Benasra, supra,* 123 Cal.App.4th 1179, attorneys were sued by their former clients for breach of the duty of loyalty for representing a rival in a subsequent arbitration. *Benasra* concluded that section 425.16 was inapplicable because the former clients' claims were based on violations of State Bar rules rather than oral and written statements made during the course of the arbitration. (*Benasra, supra,* at pp. 1186–1187.) "[O]nce the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it. Evidence that confidential information was actually used against the former client in litigation would help support damages, but is not the basis for the claim." (*Benasra,* at p. 1189; accord, *U.S. Fire, supra,* 171 Cal.App.4th at p. 1627.)

Because Denis did not satisfy his threshold burden of demonstrating that the fraud cause of action in the amended cross-complaint arose from protected activity, the anti-SLAPP statute did not apply. Accordingly, we need not discuss whether Bekeris established a probability of prevailing on the merits.

DISPOSITION

The order granting the special motion to strike is reversed. Raymond Bekeris is awarded his costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

***** Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.