Filed 6/26/18 Urological Medical Associates v. Yamauchi CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

UROLOGICAL MEDICAL ASSOCIATES, Plaintiff, Cross-Defendant and Respondent, GEORGE L. YAMAUCHI et al., Cross-Defendants and Respondents; v. MARK W. TAMARIN et al., Defendants, Cross-Complainants and Appellants.	B271303 (Los Angeles County Super. Ct. No. BC505912)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Khouri Law Firm, Michael J. Khouri, Andrew B. Goodman for Defendants, Cross-complainants and Appellants Mark W. Tarmarin et al.

Law Offices of Steven Goldsobel, Steven Goldsobel, Mark S. Sedlander and Komal J. Mehta for Plaintiff, Cross-defendant and Respondent Urological Medical Associates.

Doll Amir & Eley, Michael M. Amir and Lloyd Vu for Cross-defendants and Respondents George Yamauchi et al.

INTRODUCTION

This is the second appeal arising out of a medical partnership dispute. The partnership, respondent Urological Medical Associates (UMA), filed a complaint against one of its partners, appellant Dr. Mark Tamarin, alleging that Tamarin had engaged in Medicare fraud and seeking to remove him from the partnership. Tamarin filed a cross-complaint against UMA; his partners, respondents Drs. George Yamauchi, Nickolas Tomasic, and Sameer Malhotra (collectively, the Respondent Partners); and two of UMA's attorneys, Steven Goldsobel and Jeremy Miller. Tamarin's cross-complaint denied that he committed Medicare fraud and alleged that the Respondent Partners had fabricated the claim to expel him from the partnership. The cross-defendants moved to strike the cross-complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] In our prior opinion, we concluded that UMA and the Respondent Partners (together, respondents) had met

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[1] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. All further statutory references are to the Code of Civil Procedure unless stated otherwise.

their burden under the first step of the statute to establish that Tamarin's cross-complaint arose from protected activity.[2] We remanded to allow the court to consider the second step of the anti-SLAPP analysis, whether Tamarin demonstrated a reasonable probability of prevailing on the merits of his claims.

Upon remand, the trial court found that the litigation privilege barred Tamarin's claims and accordingly granted the anti-SLAPP motions in favor of respondents. On appeal, Tamarin asserts this was error. He further argues that the trial court abused its discretion in refusing to consider new evidence he submitted upon remand. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts are discussed in detail in our prior unpublished opinion, *Urological Medical Associates v. Yamauchi* (July 30, 2015, B251750) (nonpub. opn.), of which we take judicial notice. We summarize those facts herein as relevant to the current appeal.

A. *UMA's Complaint and Tamarin's Cross-Complaint*

UMA was formed in 2001 pursuant to a Restated Partnership Agreement (RPA) by three urologists, Tamarin, Yamauchi, and Tomasic. UMA added Malhotra as a partner in 2008.[3] The RPA provides that a partner may be expelled by

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[2] The trial court granted the anti-SLAPP motions filed by Goldsobel and Miller; thus, they are not parties to either appeal.

[3] Each doctor has an associated corporation bearing his name (e.g., Mark Tamarin, M.D., Inc.); along with the individuals, these corporations were partners in UMA and parties in the lawsuits herein. We refer to the doctor and his corporation collectively by his last name. Similarly, attorneys Goldsobel and Miller, together with their respective law offices, are referred to by their last names.

unanimous vote of the Senior Partners (Tamarin, Yamauchi, and Tomasic) or by judicial determination because of certain enumerated types of misconduct. In the event of a partnership dispute, the RPA requires the parties to first meet and confer "to attempt to informally resolve such dispute," next to engage in "nonbinding mediation," and then, if those efforts are unsuccessful, "any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by litigation in any appropriate court in Los Angeles County, California."

UMA filed a complaint against Tamarin on April 15, 2013 seeking a judicial determination for his expulsion from the partnership and further alleging claims for breach of contract, breach of fiduciary duty, and indemnification. UMA alleged that Tamarin "engaged in wrongful conduct in connection with the practice of medicine, including performing medically unnecessary procedures, falsifying medical records and billing [Medicare] and other health care services payors for services that were medically unnecessary and/or did not warrant the amount billed." As a result, in late 2012, UMA barred Tamarin from handling any requests for urological consultations from a nearby hospital, refused to bill for Tamarin's recent consults to that hospital, began to review Tamarin's patient charts prior to any billing, and refunded "certain improperly billed amounts" to Medicare.

On March 12, 2013, UMA requested that Tamarin "voluntarily withdraw from the partnership." According to UMA, Tamarin (through counsel) refused to withdraw and also refused to meet and confer or engage in mediation as required by the RPA. Tamarin's counsel said he intended to assert "a multitude of claims against [UMA] and others." UMA therefore alleged that

a judicial determination was necessary to expel Tamarin from the partnership based on his "wrongful conduct." UMA further alleged Tamarin's conduct had put UMA and the Respondent Partners at risk of civil and criminal liability, required UMA to make repayments to Medicare, and had caused UMA to incur "substantial expenses in connection with investigating and remedying" Tamarin's conduct.

Tamarin filed his cross-complaint on April 30, 2013. Tamarin alleged causes of action for fraud (against the Respondent Partners and attorneys Goldsobel and Miller), breach of contract, conversion of partnership assets, breach of fiduciary duty, and indemnification (all against the Respondent Partners), partnership dissolution (against the Respondent Partners and UMA), and legal malpractice (against Goldsobel and Miller). In essence, Tamarin's cross-complaint alleges that respondents and their attorneys fabricated an investigation into Medicare payments in order to "intimidate" and "build a case against" him and force him out of the partnership.

Tamarin alleged the following events leading up to UMA's lawsuit. First, in late 2012, the Respondent Partners began holding "secret meetings" without him. In October 2012, Yamauchi and Malhotra attended a conference and received an offer for them and Tomasic to join another urology group. The partners mentioned this proposal at a partnership meeting and suggested it "would be beneficial to break up the Partnership." In January 2013, the Respondent Partners requested that they have a meeting "about Medicare." All four partners, as well as Goldsobel and Miller, were present at the meeting, which was run by Goldsobel. Goldsobel "mentioned that the FBI was looking around the Partnership's office around November of 2012,

and even approached the Partnership's office manager about wearing a wire." Tamarin alleged that Goldsobel was in possession of all of Tamarin's records (without Tamarin's authorization) from a local hospital, and reviewed the billing entries during the meeting "to determine if anything needed to be paid back to Medicare." Tamarin claims he explained "a number" of the documents and his partners agreed with "his assessment." Goldsobel "emphasized that any money owed to Medicare would need to be paid back as soon as possible."

A second meeting was held by the same parties on March 12, 2013. Tamarin alleged that between the first and second meeting, the Respondent Partners, Goldsobel, and Miller reviewed Tamarin's bills "without consulting him, and in an attempt to build a case against him." During the second meeting, Tamarin "was accused of wrongful conduct involving his billing at an area hospital, and was asked to leave the Partnership within thirty days." Goldsobel and Miller then sent a check to Medicare in early April 2013, without Tamarin's consent.

Tamarin's first cause of action for fraud alleges that the statements made in the two meetings—that the FBI was investigating and that Tamarin had engaged in wrongful conduct—were false. Tamarin claims that the FBI was not investigating and did not approach anyone at UMA about wearing a wire, and further, that he did not engage in any billing misconduct. He asserted that respondents made these statements to intimidate him and "eventually have him expelled from the Partnership, while holding him solely responsible for any Medicare payments, penalties, and fees associated with the Partnership's internal investigation." In addition, Tamarin has

not received a salary since March 2013, "and continues to lose profits in his practice."

In his second cause of action for breach of written partnership agreement, Tamarin alleges that the Respondent Partners breached the RPA by holding "secret meetings" during which they made "numerous actions and decisions without [Tamarin's] approval, vote, or written consent." They also "converted the Partnership's assets to their own use," including by causing UMA to "incur attorneys' fees and coding consultant fees associated with an internal investigation" against Tamarin. This same alleged conduct forms the basis for Tamarin's third through sixth causes of action for conversion of partnership assets, breach of fiduciary duty, express contractual indemnification, and partnership dissolution.

B. *The Anti-SLAPP Motions*

1. *Motions and supporting evidence*

UMA, the Respondent Partners, Miller, and Goldsobel all moved to strike Tamarin's complaint pursuant to section 425.16, arguing that the cross-complaint was retaliation for UMA's complaint and was based on statements made in connection with the investigations by UMA and the FBI. The moving parties submitted declarations and other evidence in support of their motions.

Deanna Williams, UMA's practice manager, submitted a declaration stating that she was contacted by the FBI in late October 2012. She met with two Special Agents in early November 2012, who informed her "that the FBI was conducting an investigation regarding allegations of Medicare fraud" by Tamarin. Shortly thereafter, the FBI asked if Williams "would be willing to cooperate with the investigation by wearing a wire."

Similarly, Malhotra declared that in November 2012, he learned that two UMA employees had been interviewed by the FBI regarding Tamarin.

Respondents contacted Miller, UMA's longtime transactional counsel. With Miller's assistance, UMA retained Goldsobel to "represent UMA in connection with what we understood to be a criminal investigation by the FBI regarding allegations of Medicare fraud by Dr. Tamarin."

Goldsobel submitted a declaration stating that he was retained in November 2012 by UMA "in connection with an investigation being conducted by the FBI into allegations of Medicare fraud" allegedly committed by Tamarin. He understood that he was being retained to represent UMA "in connection with the FBI's investigation to ensure that UMA complied with its statutory obligations as a Medicare provider and to determine whether it had any rights and remedies against [Tamarin] in the event it was determined that he had committed Medicare fraud and/or other wrongful conduct." Goldsobel then "supervised an internal investigation to confirm the allegations and issues raised by the FBI investigation." Goldsobel confirmed his understanding that, if Tamarin had committed Medicare fraud and refused to withdraw from UMA and reimburse any losses, "litigation would be filed against him."

Respondents also submitted as evidence the grand jury subpoena received by UMA in May 2013. The subpoena sought Tamarin's practice records, including hospital billing records and correspondence "concerning the preparation and submission of claims or supporting documentation to Medicare for or by" Tamarin.

2. *Tamarin's opposition*

In opposition to the motions to strike, Tamarin argued that his complaint was based on conduct unrelated to any official proceeding and that, in any event, no FBI investigation or Medicare fraud occurred. In support of his opposition, Tamarin filed a declaration in which he largely echoed the allegations made in his complaint. Tamarin also included a declaration from Gary Morley, a former FBI special agent. Morley, who retired in 2002 and thus was not involved in the FBI investigation at issue here, stated that he was not aware of any FBI agent "working on a healthcare fraud matter being authorized to confirm, with individuals or counsel not a party to the criminal investigation … [t]he existence of or results of an investigation."

Tamarin also submitted a letter sent by Miller to Tamarin's counsel on April 3, 2013, in which Miller requests that the parties meet and confer and submit to mediation pursuant to the RPA. Miller's letter also states that, "[t]o date, [UMA] has not formally taken any adverse action against Dr. Tamarin" beyond the request that Tamarin voluntarily withdraw, but that "there is ample evidence" Tamarin engaged in conduct that would allow UMA to expel him from the partnership pursuant to the RPA.

3. *Trial court's ruling*

On August 1, 2013, the trial court issued its ruling denying the motions by respondents.[4] After ruling on the parties' evidentiary objections, the court found respondents had not met their burden on the first step of the anti-SLAPP statute to show

[4] The court granted the motions to strike filed by Goldsobel and Miller.

that Tamarin's claims arose out of protected activity. The court therefore did not reach the second step as to respondents.

4. *First appeal*

Respondents appealed the denial of their motions to strike. In considering the first step of the analysis, we concluded that respondents' conduct was protected as communications made in anticipation of litigation under section 425.16, subdivision (e)(2). We noted that "the evidence and the allegations of the parties' complaints supports [respondents'] claim that they began their investigation into Tamarin's conduct in anticipation of, and in preparation for, litigation." Specifically, we pointed to evidence that Tamarin could only be involuntarily expelled from the partnership through a judicial determination, per the terms of the RPA; that Goldsobel and respondents declared that they retained him for the express purpose of conducting the investigation and filing any necessary litigation; and Tamarin's own allegations in his cross-complaint that respondents conducted the internal investigation in order to "build a case against him," culminating in UMA's lawsuit. We also noted the evidence establishing the existence of the FBI investigation into Tamarin, contrary to Tamarin's claims of fabrication.

We also concluded that Tamarin's claims arose out of the protected activity. Based on the allegations of the cross-complaint, the core-injury producing conduct identified by Tamarin was the collusion by respondents and their counsel "to fraudulently claim he was the subject of an FBI investigation and to accuse him of Medicare fraud, with the goal of forcing him to leave the partnership while remaining responsible to pay the costs of the pretextual investigation." As such, Tamarin's claims were directly premised on the investigation and related

accusations. Thus, we concluded that respondents had met their burden on the first step of their motions to strike. However, because the trial court had not considered the second step, we remanded to enable to court to reach that issue.

C. *Renewed Anti-SLAPP Motions*

1. *Supplemental briefing*

Upon remand, respondents filed supplemental memoranda in support of their motions to strike. With respect to the second step of the anti-SLAPP analysis, they argued that "because all of the conduct and communications complained of by Tamarin was done in preparation for and anticipation of litigation, it is privileged under Civil Code section 47(b)."

Tamarin also filed a supplemental memorandum, arguing that "[t]he majority of Dr. Tamarin's cross-complaint pertains to non-communicative conduct that falls outside of the litigation privilege—namely, that his partners are wantonly taking his money without contacting or consulting him, in breach of the partnership agreement."

Along with his brief, Tamarin submitted supplemental declarations from himself, his attorneys, and an expert on forensic accounting, as well as numerous exhibits. Respondents objected to this evidence arguing, among other things, that it should be excluded as "an improper attempt to expand the allegations in the cross-complaint using evidence obtained after the cross-complaint was filed," citing section 425.16, subdivisions (b)(2) and (g). Respondents also argued the evidence was irrelevant and prejudicial under Evidence Code section 352.

2. *Trial court's ruling*

The court heard argument on the motions to strike on February 25, 2016 and then adopted its tentative ruling as the

final order. The court sustained the objections by respondents to all of the supplemental evidence filed by Tamarin. The court stated that it "permitted the parties to submit supplemental argument on the pending motions; it did not permit or contemplate new evidence. The Court of Appeal remanded the case for a ruling on the original motions, and consideration of new evidence - particularly newly developed evidence - is neither proper nor within the scope of the remand order."

Turning to the second step of the anti-SLAPP motions, the court noted declarations submitted by Goldsobel and respondents "stating that their internal investigation into Tamarin's Medicare billings began as a result of an FBI investigation which raised issues of their liability," and that "their subsequent conduct was taken based on the results of their internal investigation revealing Tamarin's Medicare fraud." The court concluded that evidence was "sufficient to establish that the conduct by UMA and the [Respondent] Partners is subject to the litigation privilege." The court also noted that "the Court of Appeal's observations certainly reinforce this conclusion."

The court further found that Tamarin failed to "submit any admissible evidence as to his claims against UMA and the [Respondent] Partners; . . . that the investigation into Tamarin's Medicare billings or [resulting conduct] were false or improper; [or] . . . that Tamarin was not the subject of a Medicare investigation by the FBI." Finally, the court rejected Tamarin's argument that his claims were based on non-communicative conduct, finding that "[t]o the extent there is any such conduct, it was merely incidental and does not restrict the privilege."

The court entered judgment on the cross-complaint in favor of the Respondent Partners on April 8, 2016.[5] The court also granted respondents' motions for attorney fees and costs pursuant to section 425.16, subdivision (c).

Tamarin timely appealed from the court's order granting the anti-SLAPP motions, the entry of judgment for Respondent Partners, and the order awarding attorney fees in favor of Respondent Partners.[6] The court granted the parties' stipulation to consolidate the appeals for purposes of briefing, argument, and decision.

DISCUSSION

A. *Section 425.16 and Standard of Review*

Analysis of a motion to strike pursuant to section 425.16 involves a two-step process. (*Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).) "First, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.' (§ 425.16, subd. (b)(1).) If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish 'a probability that the plaintiff will prevail on the claim.' [*Ibid.*]" (*Simpson, supra*, 49 Cal.4th at p. 21, fn. omitted.) Here, because we previously found that

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[5] UMA's original complaint against Tamarin remained active.

[6] Tamarin did not directly appeal the award of attorney fees to UMA, as no judgment has been entered in that case. He asks us to review it along with the order granting UMA's anti-SLAPP motion. We need not reach this issue, as we affirm the underlying order granting the motion to strike. Tamarin does not otherwise challenge the trial court's award of fees to respondents.

respondents met their burden on step one, we move directly to step two.

We review the ruling on a special motion to strike de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) We consider "the pleadings, and supporting and opposing affidavits stating the facts 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.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) To 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 expressly provided that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*Simpson, supra*, 49 Cal.4th at p. 21; see also *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5 ["Both section 425.16 and Civil Code section 47 are construed broadly, to protect the right of litigants to '"the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions."'"].)

B. *Step Two: Likelihood of Success*

Once defendant satisfies the first step of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be

sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) "The showing must be made through 'competent and admissible evidence.'" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.) A plaintiff "'cannot simply rely on the allegations in the complaint.'" (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.)

Respondents contend, and the trial court found, that Tamarin could not meet his burden on this step because the statements at issue were protected by the litigation privilege. We agree.

The litigation privilege is codified in Civil Code section 47, subdivision (b) (section 47(b)). As relevant here, section 47(b)(2) defines a "privileged publication or broadcast" as one made in "any judicial proceeding." "[T]he 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." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) The privilege applies "'to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.'" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*), quoting *Silberg, supra*, 50 Cal.3d at p. 212.) The privilege is not limited to statements made during trial or other proceedings, "but may extend to steps taken prior thereto, or afterwards." (*Rusheen, supra*, 37 Cal.4th at p. 1057.)

"'The principal purpose of section 47(b) is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' (*Silberg* [,*supra*,] 50 Cal.3d [at p.] 213.) Additionally, the privilege promotes effective judicial proceedings by encouraging ""open channels of communication and the presentation of evidence"" without the external threat of liability (*ibid*.), and 'by encouraging attorneys to zealously protect their clients' interests.' (*Id*. at p. 214.) "'Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result.' (*Ibid*.)"" (*Flatley, supra,* 39 Cal.4th at pp. 321-322.)

"To accomplish these objectives, the privilege is 'an "absolute" privilege, and it bars all tort causes of action except a claim of malicious prosecution." (*Flatley, supra*, 39 Cal.4th at p. 322.) "Any doubt as to whether the privilege applies is resolved in favor of applying it." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.) To be privileged under section 47, a statement must be "reasonably relevant" to pending or contemplated litigation. (See *Silberg, supra,* 50 Cal.3d at p. 220 [communication must have some "reasonable relevancy to the subject matter of the action"].) While the protections under the litigation privilege and the anti-SLAPP statute are not identical (see *Flatley, supra,* 39 Cal.4th at pp. 324-325), cases construing the scope of the litigation privilege have read the reasonable relevancy requirement of section 47 as analogous to the "in

connection with" standard of section 425.16, subdivision (e)(2). (See, e.g., *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266). "The litigation privilege is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley, supra,* 39 Cal.4th at p. 323.)

Here, Tamarin contends the conduct by respondents was insufficiently linked to the subsequent litigation to come within the protection of the privilege. We disagree.

"Many cases have explained that section 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 361, citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195.) As the Supreme Court further stated, "'it is late in the day to contend that communications with "some relation" to an anticipated lawsuit are not within the privilege.' [Citation.] Rather, the privilege applies to 'any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation. . . .'" (*Hagberg, supra*, 32 Cal.4th at p. 361.) To that end, the court has applied the privilege to "communications with 'some relation to a proceeding that is . . . under serious consideration;' to 'potential court actions;' and to 'preliminary conversations and interviews related to contemplated action,' and we also have determined that the privilege applies to communications made, prior to the filing of a complaint, by a person 'meeting and discussing' with potential parties the 'merits of the proposed . . . lawsuit.'" (*Ibid*., citing *Rubin v. Green, supra*, 4 Cal.4th at p. 1194–1195.)

Tamarin's attempt to distance some of respondents' conduct from the litigation are unavailing. His own allegations demonstrate that respondents' actions, including initiating the investigation against him and hiring Goldsobel to handle it, were related to contemplated action by respondents to "build a case against him" and ultimately, bring a lawsuit to force him out of the partnership. These communications were therefore logically related to, and furthered the objects of, the litigation. Tamarin's reliance on *Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456 (*Ruiz*) is misplaced. In *Ruiz*, the plaintiff homeowners sued their homeowners' association after the architectural committee refused to approve plans to rebuild their home. (*Id.* at p. 1461.) Ruiz alleged that two letters defamed him; the letters had been written by the association's attorneys in response to letters by Ruiz complaining about the committee's decision and requesting additional information. (*Id.* at pp. 1461, 1463.) Noting that "[i]n the present litigious society, there is always at least the *potential* for a lawsuit any time a dispute arises between individuals or entities," the court held that "[t]he litigation privilege does not retroactively protect any and all communication preceding the litigation; the privilege applies from the point the contemplated litigation is seriously proposed in good faith for purposes of resolving the dispute." (*Id.* at p. 1473.) At the time the letters were written, "litigation had not been seriously considered, the dispute had not ripened into a proposed proceeding, and the parties were not negotiating under the actual threat of litigation." (*Ibid.*) Here, by contrast, the pleadings and evidence suggest that litigation was contemplated by respondents when they initiated the investigation into Tamarin's purported misconduct, as the procedures under the

RPA contemplate legal proceedings in the event the partners needed to expel Tamarin from UMA. (See, e.g., *Neville v. Chudacoff, supra,* 160 Cal.App.4th at p. 1268 [prelitigation letter to customers regarding former employee's improper contact and disclosure of trade secrets protected]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [protecting prelitigation statements].)

We also reject Tamarin's suggestion that his cross-complaint focuses on "fundamentally noncommunicative" conduct by respondents. Tamarin focuses on acts such as respondents causing UMA "to incur unauthorized attorneys' fees and coding consultant fees" associated with the internal investigation, and argues that these noncommunicative actions are not protected. But as we previously found, the gravamen of Tamarin's claims involves respondents' investigation into his potential Medicare fraud. The litigation privilege "extends to noncommunicative acts that are necessarily related to the communicative conduct." (*Rusheen, supra*, 37 Cal.4th at p. 1065.) "[U]nless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies." (*Ibid*.; see also *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 616.) Respondents' act of incurring fees, which Tamarin admits were associated with the investigation, along with other investigation-related conduct, are therefore protected as well.

Because the alleged conduct by respondents is protected under the litigation privilege, Tamarin cannot demonstrate a likelihood of success on the merits of his claims. As such,

Tamarin failed to meet his burden on the second step of the anti-SLAPP motion.[7]

C. *Consideration of New Evidence*

Finally, Tamarin argues that the trial court erred in refusing to consider the new evidence he submitted upon remand. We review evidentiary rulings of the trial court for an abuse of discretion. (See, e.g., *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

Tamarin contends that the trial court was not restricted in the scope of materials it could consider under section 425.16, subdivision (b)(2). Respondents, on the other hand, argued below that section 425.16, subdivisions (b)(2) and (g) limits the evidence and allegations presented in opposition to an anti-SLAPP motion to events occurring before the complaint at issue. But whether the trial court *could* have exercised its discretion to consider the additional evidence is immaterial here. Even if it could have done so, there is no showing that it was an abuse of discretion for the court to decline to consider the evidence.

When ruling on an anti-SLAPP motion, the trial court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) The trial court adhered to this requirement. It was not an abuse of discretion for the court to refuse to allow additional evidence obtained in the three years between the filing of the original briefing on the motion to strike and remand. Tamarin's citation to *Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1021 is inapposite, as that case addressed a trial court's consideration of events occurring after

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[7] Thus, we do not reach Tamarin's arguments as to the substance of each claim.

the complaint was filed, but submitted as evidence with the original opposition to the motion to strike, which is not at issue here.

To the extent Tamarin suggests the court was unaware of its discretion or thought it was constrained by this court's direction to "determine whether Tamarin met his burden under the second prong of the anti-SLAPP analysis," that suggestion is not supported by the record. The trial court made clear that it did not find it appropriate to consider newly-developed evidence outside of the scope of the original motions to strike, including an expert declaration and numerous exhibits, and that its conclusion was bolstered by this court's language remanding the case. It was well within the court's discretion to reach that conclusion. Indeed, the court's ruling was consistent with the purposes of the special motion to strike, "i.e., to minimize the costs and burdens of unmeritorious litigation directed at free speech rights." (*Slauson Partnership v. Ochoa, supra,* 112 Cal.App.4th at p. 1021; see also § 425.16, subd. (g) [staying discovery absent good cause pending ruling on motion to strike]; *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1190 ["not only did the Legislature desire early resolution to minimize the potential costs of protracted litigation, it also sought to protect defendants from the burden of traditional discovery pending resolution of the motion"].)[8]

[8] We also note that the trial court stated it had examined Tamarin's proffered supplemental evidence and, even if admitted, "nothing in there would change [its] ruling."

DISPOSITION

The judgment entered in favor of Respondent Partners is affirmed. We also affirm the orders granting UMA's motion to strike pursuant to section 425.16 and awarding attorney fees to respondents. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.