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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHRISTOPHER GOLECO,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION,

Defendant and Appellant.

B280591

(Los Angeles County
Super. Ct. No. BC588978)

APPEAL from an order of the Superior Court of
Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Xavier Becerra, Attorney General, Chris A. Knudsen,
Senior Assistant Attorney General, and Kenneth C. Jones,
Deputy Attorney General, for Defendant and Appellant.

Schimmel & Parks, Alan I. Schimmel and Michael W.
Parks, for Plaintiff and Respondent.

The California Department of Corrections and Rehabilitation (CDCR) appeals from the order denying its special motion to strike Christopher Goleco's first amended complaint for violation of Labor Code section 1102.5 et seq. (whistleblower retaliation) and for failure to comply with an order of the State Personnel Board (SPB) awarding him back pay and lost employee benefits as a result of his wrongful termination by CDCR. The trial court ruled neither of Goleco's claims, although related to his underlying lawsuit, arose from protected speech or petitioning activity within the meaning of Code of Civil Procedure section 425.16 (section 425.16). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Goleco's Dismissal and the Prior Litigation

Based on an incident that occurred approximately six months after he began working for CDCR as a medical technical assistant driving an ambulance, Goleco was dismissed, effective October 14, 2005, for his delay in administering cardiopulmonary resuscitation to an inmate who had been strangled and beaten. The administrative law judge who initially heard the matter recommended Goleco's dismissal be revoked. The SPB rejected the recommendation and sustained the dismissal. The superior court granted Goleco's petition for writ of administrative mandate, set aside the dismissal and directed the SPB to hold an evidentiary hearing to consider new evidence.

The SPB again upheld the dismissal; and the superior court granted a second petition for writ of administrative mandate, revoking the dismissal and ordering Goleco's reinstatement with full back pay. The court found there was no substantial evidence Goleco had neglected his duty because it was clear the inmate had been dead for some time when Goleco arrived at the scene.

We affirmed the superior court's judgment. (*Goleco v. State Personnel Board* (Aug. 20, 2013, B240755) [nonpub. opn.])

In September 2013, nearly eight years after his dismissal, the SPB issued a formal resolution revoking Goleco's dismissal, ordering CDCR to pay Goleco "all back pay, interest, and benefits, if any, that would have accrued to him had he not been dismissed," and referring the matter to the chief administrative law judge to set a hearing on the written request of either party in the event the parties were unable to agree as to the salary and benefits due Goleco.

2. The Current Lawsuit

Because the position of medical technical assistant had been eliminated in the intervening years, in September 2014, prior to his reinstatement, Goleco was required to attend a transitional academy program where he was taught to perform the duties of a corrections officer, a position CDCR considered comparable to the one from which he had been dismissed. In October 2014 Goleco was fully reinstated and began work as a corrections officer for CDCR.

On July 23, 2015 Goleco filed a complaint and on October 14, 2016 a first amended complaint for damages and equitable relief against CDCR, alleging causes of action for violation of Labor Code section 1102.5 (whistleblower retaliation) and violation of wage orders. In the operative pleading Goleco alleged CDCR had refused to promptly reinstate him as required and to pay him all undisputed wages he was owed, failed to credit him with undisputed benefits and seniority to which he was entitled and left him unassigned or assigned him to job tasks intended for lower seniority personnel once he had been reinstated, all in retaliation for his participation as a party and a

witness in legal proceedings involving CDCR. In addition, Goleco alleged CDCR had refused to provide him with complete and accurate wage statements or a timely accounting of salary and benefits he was owed.

3. The CDCR's Special Motion To Strike

CDCR moved to strike Goleco's first amended complaint pursuant to section 425.16, contending both causes of action alleged by Goleco were directly related to the litigation surrounding Goleco's dismissal and arose from CDCR's effort to comply with the SPB's order for reinstatement and back pay. As such, CDCR argued, the current lawsuit was based on its protected petitioning activity. CDCR also asserted Goleco could not meet his burden of demonstrating a probability of prevailing on the merits of his claims, contending with respect to his whistleblower claim he had not engaged in protected activity (that is, he had not disclosed any illegal activities) and had not been subject to any adverse employment action and that, in any event, any delay in complying with the SPB's order was due to Goleco's refusal to respond to CDCR's requests for information and not causally related to CDCR's actions. As to the second cause of action, CDCR argued public entity liability must be based on a statute, not a wage order. CDCR also argued both of Goleco's claims were barred by the litigation privilege. (Civ. Code, § 47, subd. (b)(2).)

The trial court denied CDCR's motion, ruling CDCR had not shown Goleco's first amended complaint arose from the CDCR's protected petitioning activity and thus was not subject to a section 425.16 motion to strike.

DISCUSSION

1. *Section 425.16, the Anti-SLAPP Statute,¹ and the “Arising From” Requirement*

Section 425.16 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 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.” (§ 425.16, subd. (b)(1).)

Pursuant to subdivision (e), an “act in furtherance of a person’s right to 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.” (§ 425.16, subd. (e).)

¹ SLAPP is an acronym for “strategic lawsuit against public participation.” (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 413, fn. 2.)

“A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, ‘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.’ [Citations.] ‘[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.’” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*); see *id.* at p. 1064 [in the first step of the anti-SLAPP analysis, care must be taken “to respect 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”].)

In ruling on a motion under section 425.16, the trial court engages in a two-step process. “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, italics omitted (*Navellier*).)

We review de novo an order granting or denying a special motion to strike under section 425.16 (*Park, supra*, 2 Cal.5th at

p. 1067), considering the parties' pleadings and affidavits describing the facts on which liability or defenses are predicated. (§ 425.16, subd. (b)(2); see *Navellier, supra*, 29 Cal.4th at p. 89; see also *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 94.)

2. *Goleco's Claims Do Not Arise From CDCR's Protected Petitioning Activity*

Asserting that “[t]he basis of Goleco’s lawsuit is CDCR’s participation in the dismissal litigation including its alleged failure to promptly comply with the court order and SPB resolution to reinstate Goleco and pay him back pay and benefits,” CDCR argues Goleco’s claims arise directly from CDCR’s litigation activity, satisfying the first prong of section 425.16. CDCR misapprehends the nature of the “arising from” requirement as applicable to this case.

As CDCR notes, a cause of action arising out of the defendant’s litigation activity directly implicates the right to petition and is subject to a special motion to strike. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [“[a] cause of action ‘arising from’ defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike”]; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 [malicious prosecution action by its very nature arises out of defendant’s constitutionally protected petitioning activity—the underlying lawsuit]; see *Navellier, supra*, 29 Cal.4th at p. 90.) But that the lawsuit being challenged was triggered by earlier litigation activity does not, without more, establish that it arises from, or is based on, protected petitioning activity. The companion cases *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (*City of Cotati*)

and *Navellier*, *supra*, 29 Cal.4th 82, discussed in the Supreme Court's recent *Park* decision, illustrate the difference.

In *City of Cotati* the Supreme Court held a declaratory relief action that was unquestionably prompted by, and related to, earlier litigation activity did not satisfy the first prong of the section 425.16 analysis. Owners of mobilehome parks had filed a declaratory relief action against the City of Cotati in federal court seeking a judicial determination that the City's rent stabilization ordinance constituted an unconstitutional taking. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 71-72.) In response, the City sued the park owners in state court, requesting a declaration the rent control ordinance was valid and enforceable. (*Id.* at p. 72.) The City "concede[d] that its purpose in filing the state court action was to gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance," and it intended "to seek to persuade the federal court to abstain from hearing [the owners'] suit." (*Id.* at p. 73.) The Supreme Court rejected the argument the filing of the City's action arose from the filing of the earlier federal action within the meaning of section 425.16. Although the City had acknowledged its only ground for alleging the existence of an actual controversy was the fact the park owners had sued it in federal court, because the basis for the City's request for relief was the underlying controversy respecting the rent control ordinance, the Court held the City's lawsuit was not subject to a special motion to strike. (*City of Cotati*, at pp. 79-80.)

In *Navellier*, in contrast, the Supreme Court held a claim for breach of a release clause in a contract was subject to section 425.16 because the alleged breach consisted of asserting claims in litigation (in a counterclaim in a federal lawsuit that

had been initiated prior to the release agreement) that had purportedly been released under the contract: “In alleging breach of contract, plaintiffs complain about Sletten’s having filed counterclaims in the federal action. Sletten, plaintiffs argue, ‘counterclaimed for damages to recover money for the very claim he had agreed to release a year earlier’ [¶] . . . Sletten is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletten’s alleged actions taken in connection with that litigation, plaintiffs’ present claims would have no basis.” (*Navellier, supra*, 29 Cal.4th at p. 90.)

As the Supreme Court explained in *Park, supra*, 2 Cal.5th at page 1064, while in both *City of Cotati* and *Navellier* “it could be said that the claim challenged as a SLAPP was filed *because of* protected activity,” specific elements of the *Navellier* plaintiffs’ claims depended upon the defendant’s protected petitioning activity: Filing the counterclaims constituted the alleged breach of contract. (See *Navellier, supra*, 29 Cal.4th at p. 87.) In *City of Cotati*, although the federal lawsuit provided evidence of the parties’ disagreement, the city’s entitlement to a declaratory judgment did not depend on the actions by the mobilehome park owners in the federal litigation.

Here, although the SPB and judicial proceedings following Goleco’s dismissal in 2005 are clearly part of the factual background of Goleco’s current lawsuit and led to CDCR’s alleged liability-creating activity (see *Park, supra*, 2 Cal.5th at p. 1064), Goleco’s claims are based, not on CDCR’s protected petitioning activity during those proceedings, but on its failure to provide back pay and benefits to which he is entitled. (See *id.* at pp. 1062-1063.) Goleco’s lawsuit is akin to a garden-variety

wage-and-hour/breach-of-contract action, albeit against a public, rather than private, employer.

Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc. (2008) 164 Cal.App.4th 1108, decided by our colleagues in Division Three of this court, involved a closely analogous situation and is instructive. The plaintiff, Applied Business Software, had sued Pacific Mortgage Exchange in federal court for copyright infringement and breach of contract. After mediation, the parties entered into a settlement agreement, and the lawsuit was dismissed. (*Id.* at pp. 1112-1113.) Applied Business Software ultimately sued Pacific Mortgage Exchange for breach of the settlement agreement. Pacific Mortgage Exchange filed a special motion to strike, arguing, much as CDCR does, that, because entering into a settlement agreement in a judicial proceeding is protected activity within the meaning of section 425.16, subdivision (e), a lawsuit brought by one of the signatories to the settlement agreement against the other signatory to enforce the agreement is necessarily based on the defendant's protected activity. (*Applied Business Software*, at p. 1117.) The court of appeal distinguished the Supreme Court's reasoning in *Navellier, supra*, 29 Cal.4th 82, and held the simple breach of contract, albeit of a settlement agreement resolving a judicial proceeding, did not arise from constitutionally protected petitioning activity. (*Applied Business Software*, at p. 1118; accord, *Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, 1053 [tenant's lawsuit not subject to special motion to strike; complaint was not directed at defendant's act of filing of an unlawful detainer action or the parties' act of settling the matter, but landlord's purported breach of the settlement agreement]; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307-

1308 [declaratory relief action seeking to define the parties’ obligations under a settlement agreement that had resolved a lawsuit for violation of civil rights did not arise from protected activities].)

To be sure, postjudgment enforcement activities, if necessarily related to an allegedly wrongful communicative act used to procure the judgment, may be protected by the litigation privilege (see *Rusheen v. Cohen*, *supra*, 37 Cal.4th at pp. 1062-1065 [obtaining writ of execution and levying on judgment debtor’s property protected by litigation privilege because judgment based on perjured declaration of service]) and may also constitute protected petitioning activity within the meaning of section 425.16, subdivision (e). (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323 [“[t]here 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, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2)”].) But it is Goleco, not CDCR, who is seeking to enforce the trial court’s and the SPB’s orders for reinstatement with full back pay and lost employee benefits. CDCR’s alleged failure to comply with its obligations as defined by those orders, inaction that prompted Goleco’s current lawsuit and that forms the basis for CDCR’s liability, like the alleged breaches of settlement agreements in the cases just discussed, is not protected petitioning activity.

Our first-prong analysis is not altered by the fact that, in its September 2013 resolution awarding back pay and lost employee benefits to Goleco, the SPB retained jurisdiction to set a hearing to resolve disputes between the parties if they were unable to agree as to the salary and benefits due Goleco. No such hearing has taken place;² and Goleco's first amended complaint does not contend CDCR's unsuccessful request for a back pay hearing, which CDCR correctly indicates would be protected petitioning activity, forms the basis for its continued liability to Goleco for unpaid salary and lost benefits—that is, it is not the conduct by which Goleco claims to have been injured. (See *Park, supra*, 2 Cal.5th at p. 1063.)

Finally, *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757 (*Crossroads*), upon which CDCR relies, does not suggest a different result. Crossroads Investors sued Federal National Mortgage Association (Fannie Mae) for wrongful foreclosure, breach of contract and related tort causes of action after Fannie Mae initiated nonjudicial foreclosure proceedings against property it owned following Crossroads's default on a \$9 million loan. The events in the operative allegations of Crossroads's complaint occurred after Crossroads had filed bankruptcy proceedings: Crossroads alleged Fannie Mae had violated Civil Code section 2924c by failing to provide a timely and accurate accounting of sums needed to reinstate the loan or to pay it off in response to Crossroads's requests, violated the same statute by

² In May 2015 CDCR requested a back pay hearing. That request was denied by the SPB because CDCR had failed to provide the descriptive information required by California Code of Regulations, title 2, section 61, subdivision (c).

refusing to accept Crossroads's tender of the amount required to cure the default or pay the loan in full and falsely stated it would provide Crossroads, once the bankruptcy stay was lifted, with advance notice of a trustee's sale. (*Crossroads*, at pp. 772, 777.) Fannie Mae moved to strike the complaint under section 425.16.

The court of appeal held Fannie Mae's misconduct as alleged by Crossroads constituted protected petitioning activity, but only because it had occurred within the context of the pending bankruptcy proceedings: "Had Crossroads made its requests when no bankruptcy action was pending, our analysis would be short. . . . [A] creditor's pursuit of a nonjudicial foreclosure and compliance with its statutory procedures do not involve the exercise of protected speech or petitioning activity. [Citation.] Crossroads, however, filed for bankruptcy. In this case, that makes all the difference." (*Crossroads, supra*, 13 Cal.App.5th at p. 778.) For example, Crossroads alleged Fannie Mae's responses to interrogatories propounded in the bankruptcy proceedings failed to provide full information about the amount to reinstate or pay off the loan and thus violated the Civil Code's disclosure requirements, conduct clearly within section 425.16, subdivision (e). (*Crossroads*, at p. 778.) Similarly, Fannie Mae's statements and omissions in response to requests for loan information while the bankruptcy action was pending and before the stay was lifted "were protected activity because they were made in connection with issues under review in the bankruptcy proceedings." (*Id.* at p. 779.) Crossroads's requests after the stay was lifted were part of settlement discussions, which are also protected under section 425.16. (*Crossroads*, at p. 782.)

Highlighting similarities between Crossroads’s charges of Fannie Mae’s misconduct and portions of Goleco’s pleading, CDCR emphasizes that Goleco alleged CDCR had refused to promptly provide full and complete wage statements and to timely account for back wages, benefits and interest. But CDCR fails to recognize two significant differences between the allegations in the two cases. First, Fannie Mae’s responses (and lack of response) took place within the context of the ongoing bankruptcy litigation and active settlement discussions, both types of protected petitioning activity. Here, CDCR’s conduct occurred after the wrongful discharge litigation was completed. As the *Crossroads* court explained, “In this case, that makes all the difference.” (*Crossroads*, *supra*, 13 Cal.App.5th at p. 778.) Second, Crossroads alleged Fannie Mae’s inadequate responses violated Civil Code section 2924c; those allegations formed the basis for Crossroads’s claims of liability. Goleco, on the other hand, alleges CDCR’s refusal to promptly provide wage statements and to fully account for back pay and benefits is evidence of its failure to comply with its obligations under the court’s and the SPB’s orders. Like the defendant in *Park*, CDCR fails “to respect 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.” (*Park*, *supra*, 2 Cal.5th at p. 1064.)

In sum, CDCR failed to establish that Goleco’s lawsuit arises from protected petitioning activity. The superior court properly denied the special motion to strike the first amended complaint.

DISPOSITION

The order denying CDCR's special motion to strike is affirmed. Goleco is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

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