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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALFREDO DIAZ et al., Plaintiffs and Respondents, v. EAST WEST CONSORTIUM, INC., et al., Defendants and Appellants.	B233755 (Los Angeles County Super. Ct. No. SC111223)

APPEAL from an order of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

The Aftergood Law Firm and Aaron D. Aftergood for Defendants and Appellants.

Linzer & Associates; Hobart Linzer, Kenneth A. Linzer, Rachael L. Shinoskie and Elisha E. Weiner for Plaintiffs and Respondents.

* * * * * *

The parties in this case entered into a letter of intent for the purchase and sale of a bar and nightclub. When the negotiations stopped, plaintiffs sued defendants for breach of contract, fraud, interference and related claims. Pursuant to Code of Civil Procedure section 425.16, the "anti-SLAPP statute,"[1] defendants filed a special motion to strike two causes of action for declaratory relief and promissory estoppel. The trial court denied the motion and determined that plaintiffs were entitled to their attorney fees. We agree that defendants failed to demonstrate that the declaratory relief and promissory estoppel claims arose from activity protected under the statute. We therefore affirm the order denying the motion.

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 17, 2010, defendants and appellants East West Consortium, Inc. and Clifford Raymond Wilmot III (collectively East West) entered into a binding letter of intent (LOI) with plaintiffs and respondents Loaded Gun, LLC and Alfredo Diaz (collectively Loaded Gun), pursuant to which East West would sell to Loaded Gun a bar and nightclub called the East West Lounge (Lounge). The LOI provided that the purchase price for the Lounge and its assets, including a California Alcoholic Beverage Control liquor license (ABC license), "shall be equal to an amount as mutually agreed upon by Buyer and Seller, following Buyer's completion of its due diligence inquiries." Loaded Gun advanced $22,000 to East West for operating expenses and to satisfy a lien hold on the ABC license due to East West's payment default.

Before the LOI was signed, East West represented to Loaded Gun that it had the ability to assign its lease for the premises on which the Lounge was located. The LOI provided that a "condition[] precedent to the obligations of Buyer" included

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[1] SLAPP is an acronym for strategic lawsuits against public participation. An order granting or denying a special motion to strike under section 425.16 is directly appealable. (§ 425.16, subd. (i); § 904.1, subd. (a)(13).)

Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

"negotiat[ion] and execut[ion of] a new lease for the Premises in which the Lounge is located." Shortly after signing the LOI, Loaded Gun discovered that East West had failed to exercise its option to extend the lease, was in default on the rent, was in bad standing with the landlord, Larrabee Ventures, LLC (Larrabee), and had become a month-to-month tenant with nothing to assign.

On or about January 11, 2011, East West sued Larrabee and others for breach of the lease. East West indicated to Loaded Gun that it would be willing to dismiss its lawsuit if Larrabee would agree to enter into a lease directly with Loaded Gun. Loaded Gun was successful in its lease negotiations, and Larrabee agreed to lease the premises to Loaded Gun. Nevertheless, on or about January 25, 2010, East West informed Loaded Gun that it would not dismiss its lawsuit against Larrabee, and refused to honor the LOI or negotiate further. East West also threatened to sell the Lounge's assets, including the ABC license.

Loaded Gun filed a complaint against East West on January 27, 2011. The next day, Loaded Gun filed the operative first amended complaint (FAC), alleging ten causes of action for breach of contract, bad faith, intentional and negligent misrepresentation, intentional interference with contractual relations, intentional and negligent interference with prospective economic advantage, declaratory relief, promissory fraud, and promissory estoppel.

East West filed both a general demurrer and a special motion to strike that were directed to all causes of action except those based on fraud. Loaded Gun then voluntarily dismissed its interference claims, leaving the motion to strike applicable to only the sixth cause of action for declaratory relief and the tenth cause of action for promissory estoppel. The trial court denied the motion to strike, agreeing with Loaded Gun that its declaratory relief claim was "'based only on the LOI and [the] desire for a judicial determination of [its] rights thereunder,'" and that its promissory estoppel claim was "'based on the LOI, promises made in connection therewith, and [East West's] failure to honor those agreements.'" The court found that the motion to strike was frivolous under section 425.16, subdivision (c), and that Loaded Gun was entitled to its attorney fees in

opposing the motion. The court sustained the demurrer with leave to amend. This appeal from the order denying the motion to strike followed.

DISCUSSION

East West contends the trial court erred in denying its special motion to strike, arguing that because the declaratory relief and promissory estoppel causes of action incorporated by reference allegations of East West's protected litigation activity of suing its landlord, its declaratory relief and promissory estoppel claims "axiomatically" are subject to the anti-SLAPP statute. We disagree.

I. The Anti-SLAPP Statute and the Standard of Review.

The anti-SLAPP statute is aimed at curbing "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738–739.) The statute provides in relevant part: "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." (§ 425.16, subd. (b)(1).) An act "'in furtherance of'" the right of petition or free speech includes "any written or oral statement or writing made before a . . . judicial proceeding"; "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body"; "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 "any other conduct in furtherance of the exercise of the constitutional right of petition . . . of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(1)–(4).)

There are two components to a motion to strike brought under section 425.16. Initially, the party challenging the lawsuit has the threshold burden to show that the cause

of action arises from an act in furtherance of the right of petition or free speech. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Once that burden is met, the burden shifts to the complaining party to demonstrate a probability of prevailing on the claim. (*Zamos v. Stroud, supra,* at p. 965; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*).) To satisfy this prong, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568 [to establish a probability of prevailing, a plaintiff must substantiate each element of the alleged cause of action through competent, admissible evidence].) "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.)

We independently review the record to determine whether the asserted causes of action arise from the defendant's free speech or petitioning activity, and, if so, whether the plaintiff has shown a probability of prevailing. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) 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); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) We do not reweigh the evidence, but accept as true all evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105–106; *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573–574.) If the trial court's decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the

grounds on which the lower court reached its conclusion. (*Robles v. Chalilpoyil, supra,* at p. 573.)

II. The Declaratory Relief and Promissory Estoppel Claims Do Not Arise from Protected Activity.

The FAC alleges in the sixth cause of action for declaratory relief that "[a]n actual controversy exists between the parties concerning their respective rights and duties regarding the LOI because Plaintiffs contend, and Defendants, and each of them, dispute, Plaintiffs' rights under the LOI," and "[p]laintiffs desire a judicial determination of their rights and duties under the LOI, and therefore, they have been damaged because they have been prevented from exercising the rights and receiving the benefits of the LOI."

The FAC alleges in the tenth cause of action for promissory estoppel: "In the LOI, Defendants clearly promised to Plaintiffs to negotiate the sale of the Lounge and its assets to Plaintiffs. Additionally, Wilmot, on behalf of Defendants, promised to Plaintiffs that Defendants had an assignable lease to the Premises. Finally, Wilmot, on behalf of Defendants, promised that the requested operating capital was to run the bar and satisfy the lien hold of [the ABC license]." The FAC also alleges that "Plaintiffs relied on the above promises by Defendants, and based on that reliance signed the LOI and advanced Defendant $22,000 for operating capital," and that "[a]s a result of Defendants' failure to perform as required under the LOI, Plaintiffs have been damaged to the extent that Plaintiffs assumed the obligations imposed upon them by the LOI and [Defendants] failed to perform."

East West points out that the sixth and tenth causes of action incorporate by reference earlier allegations (first pled in the fifth cause of action for intentional interference with contractual relations) relating to East West's indisputably protected activity of suing its landlord. East West argues that because these two causes of action contain allegations of both protected and unprotected activity they are "mixed" claims, and the incorporated allegations of protected activity are not "merely incidental" to, but form "part of the basis" of, the claims at issue.

Our Supreme Court has explained: "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Cotati, supra*, 29 Cal.4th at p. 78.) "'"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." [Citation.]'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478.) "[I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472.) As Division One of this district recently noted: "In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.)

East West relies on the recent case of *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169 (*Wallace*), filed June 27, 2011, more than a month after the trial court's May 23, 2011 ruling at issue here. East West asserts that *Wallace* adopted a "new act-based" test for determining the "arising from" prong. We agree with Loaded Gun that *Wallace* did not create a new test, but merely confirmed the previously established

methods for determining whether the gravamen or injury-producing conduct of each cause of action is protected activity.

The plaintiffs in *Wallace* sued their landlords for discrimination and other acts after the landlords filed an unlawful detainer action against them. The landlords filed a section 425.16 special motion to strike two causes of action for wrongful eviction and retaliatory eviction. The plaintiffs opposed the motion on the ground that the gravamen of the lawsuit was discrimination and not an attack on any act of the landlords in filing or prosecuting the unlawful detainer action. (*Wallace, supra,* 196 Cal.App.4th at p. 1179.) In rejecting this argument and reversing the denial of the motion, the *Wallace* court confirmed that "the first prong of analysis under the anti-SLAPP statute focuses on the acts on which liability is based, not the gestalt of the cause of action." (*Id*. at p. 1175.) The *Wallace* court, like many courts before it, noted that for purposes of anti-SLAPP analysis, an alleged protected act that is merely incidental to a claim, and incidental to any unprotected activity on which the claim is based, does not subject the claim to the anti-SLAPP statute. (*Id*. at p. 1183.) Thus, with respect to the wrongful eviction claim, the *Wallace* court concluded that "[i]t makes no sense for [the plaintiffs] to argue that their cause of action for defendants' attempts to evict them wrongfully is not based on defendants' alleged attempt to evict them." (*Ibid*.) The court noted that the retaliatory eviction claim was based on both protected and unprotected activity. (*Id*. at p. 1187.) Because the three-day notice and unlawful detainer action were two of the primary acts on which liability was premised, those acts were not merely incidental or "collateral to a cause of action that seeks relief for causing a lessee to quit involuntarily or bringing an action to recover possession." (*Ibid*.)

Here, East West argues the trial court applied the incorrect "gestalt" test in denying its motion. But the trial court expressly stated the acts upon which it found each cause of action was based. The court correctly determined that the declaratory relief cause of action was "'based only on the LOI and [Loaded Gun's] desire for a judicial determination of [its] rights thereunder.'" The court also correctly determined that the promissory estoppel cause of action was "'based on the LOI, promises made in

connection therewith, and [East West's] failure to honor those agreements.'" In other words, the gravamen of the declaratory relief cause of action is an actual controversy not over protected litigation activity, but over the scope of the rights and benefits conferred by the LOI, a document that is not itself protected under the anti-SLAPP statute. Likewise, the gravamen of the promissory estoppel cause of action is not the protected litigation activity, but East West's alleged acts of making promises that it had an assignable lease and would negotiate the sale of the Lounge in good faith and then repudiating its promises and refusing to return Loaded Gun's money. Thus, it simply does not follow that just because the declaratory relief and promissory estoppel causes of action refer to protected litigation activity that formed the basis of liability for the now dismissed interference causes of action that such activity also forms part of the basis for the claims at issue.

This case is similar to *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, in which this Division held that the anti-SLAPP statute did not apply to the city's declaratory relief cause of action. In that case, the parties entered into a settlement agreement after the defendant sued the city for civil rights violations. As part of the settlement agreement, the defendant agreed not to participate in certain indisputably protected speech and petitioning activities against the city. (*Id*. at p. 1303.) After discovering the defendant had engaged in the prohibited activities, the city sued him for breach of contract and declaratory relief. We concluded that the city did not sue the defendant because he engaged in the protected activities, but because it believed he breached a contract and a dispute existed "as to the scope and validity of the contract." (*Id*. at p. 1308.)

In *City of Alhambra v. D'Ausilio,* we relied on *Cotati, supra,* 29 Cal.4th 69, in which mobile home park owners filed a lawsuit in federal court against the city challenging the legality of a rent stabilization ordinance. The city then filed a declaratory relief action against the owners in state court, seeking a declaration that the ordinance was valid. (*Id*. at pp. 72–73.) The city's complaint made no reference to the federal suit. The Supreme Court held that the city's action was not subject to a special motion to

strike, reasoning that the owners' lawsuit was not the actual controversy underlying the city's state court action for declaratory relief; rather, the underlying basis for both actions was the controversy regarding the legality of the city's ordinance. (*Id*. at p. 80.)

Similarly, in *Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th 181, the plaintiff's products liability complaint contained several references to the defendant's advertising speech. While the reviewing court acknowledged that the plaintiff's breach of express warranty and fraud claims required proof of the defendant's statements or representations concerning the product that allegedly caused the plaintiff's injuries, "the core of the wrongful injury-producing conduct alleged was that [the defendant] manufactured and sold a defective product." (*Id*. at p. 193.) Thus, the anti-SLAPP statute did not apply.

Because East West failed to show that Loaded Gun's declaratory relief and promissory estoppel claims arose from protected activity, we do not reach the second prong of the anti-SLAPP analysis of whether Loaded Gun can show a probability of prevailing on its causes of action.

III. Motion for Sanctions.

Loaded Gun has filed a motion for sanctions against East West, its counsel or both, in the sum of $28,500, with $20,000 payable to Loaded Gun and $8,500 payable to the Clerk of this Court, for filing a frivolous appeal that is being prosecuted soley for harassment and delay.

Code of Civil Procedure section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (See also Cal. Rules of Court, rule 8.276(a).)[2] "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper

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[2] Rule 8.276(a) of the California Rules of Court provides that an appellate court may impose sanctions on a party or an attorney for: "(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal's determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules."

motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.) "The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively." (*In re Marriage of Gong & Kwong*, *supra*, at p. 516.)

We believe any reasonable attorney would agree this appeal is totally frivolous and without merit. "Given the continuous flow of unambiguous case law in the past decade, any reasonable attorney should be aware that a business dispute that simply mentions incidental protected activity is not subject to the anti-SLAPP statute." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275.) Moreover, East West's appeal relies primarily on *Wallace*, *supra*, 196 Cal.App.4th 1169. Even had this case been decided prior to the trial court's order denying East West's special motion to strike, it did not set forth a "new" test for anti-SLAPP analysis, and East West's assertion that it did is disingenuous.

Nevertheless, it is also disputable whether the appeal was prosecuted in bad faith. We therefore decline to impose sanctions here, and deny respondent's motion for sanctions.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ