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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

LAUREN KATTUAH, Plaintiff and Respondent, v. THE LINDE LAW FIRM, a Professional Corporation et al., Defendants and Appellants.	B269560 (Los Angeles County Super. Ct. No. BC545577)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara Ann Meiers, Judge. Reversed.

Aren Kavcioglu for Defendants and Appellants.

Lauren Kattuah, in pro. per., for Plaintiff and Respondent.

Appellants Douglas A. Linde and The Linde Law Firm (the Linde attorneys) challenge the trial court's denial of their motion to dismiss, pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16),[1] a cause of action in respondent Lauren Kattuah's lawsuit against them. We reverse.[2]

FACTS AND PROCEEDINGS BELOW

Kattuah retained the Linde attorneys in February 2012 to replace her previous attorneys and represent her in at least three existing lawsuits. In one case, she sued her landlord for premises liability arising from injuries to her foot that she suffered when the shower door in her apartment shattered in 2009. She also sued the doctor who treated her for the foot injury for malpractice. In addition, she had one pending lawsuit from an injury she suffered in a car crash, and was seeking to file an additional suit for medical malpractice against the doctor who treated her after her auto accident.

The Linde attorneys agreed to represent Kattuah on a contingency basis. The retainer agreement between Kattuah and the Linde attorneys specified that the Linde attorneys were entitled to one-third of Kattuah's gross recovery through these suits. The agreement provided that, "[s]hould [Kattuah] elect to discharge [the Linde attorneys] at any time, [Kattuah] hereby grants [the Linde attorneys] a lien on all claims or causes of action that are the

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[1] Unless otherwise specified, subsequent statutory references are to the Code of Civil Procedure.

[2] After oral argument, Kattuah filed a supplemental reply brief, and the Linde attorneys filed a reply brief including a motion to strike Kattuah's supplemental brief. Because we reverse the judgment of the trial court, we deny the motion to strike as moot.

subject of the representation under this agreement. The lien will be for any sums owing to [the Linde attorneys] at the conclusion of our services, including costs expended, the contingency fee or a reasonable hourly fee (at the rate of $295/hour)."

In May 2013, after the Linde attorneys had represented Kattuah for more than one year, Kattuah substituted out the Linde attorneys in favor of other attorneys. The next day, the Linde attorneys filed a notice of attorney's lien with the trial court with respect to the premises liability and first medical malpractice cases. When Kattuah settled the premises liability claim for $180,000 in July 2013, the Linde attorneys sent a letter to Kattuah's new attorneys asserting a right to $69,146.55 of Kattuah's recovery under the lien.

In May 2014, Kattuah filed this case against the Linde attorneys. She alleged four causes of action, for declaratory relief, abuse of process, breach of fiduciary duty, and legal malpractice. In her cause of action for abuse of process, she alleged that the Linde attorneys "misused the attorney['s] lien by demanding payment of excessive and unreasonable compensation beyond the amount provided for and contrary to the terms of the . . . [r]etainer [a]greement . . . . The use of this process was not authorized in the regular course of the proceeding."

The Linde attorneys filed an anti-SLAPP motion to dismiss the abuse of process cause of action. They contended that the cause of action arose from the Linde attorneys' protected activity, and that Kattuah could not demonstrate a probability of prevailing in her claim. In November 2014, the trial court granted the motion to dismiss. A year later, in October 2015, the court reconsidered the motion to dismiss on its own motion and reversed its earlier

decision. In the same order, the trial court dismissed Kattuah's cause of action for abuse of process at Kattuah's request.[3]

DISCUSSION

The anti-SLAPP statute allows a defendant in a civil case to make a special motion to strike any cause of action "arising from any act of [the defendant] in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) The motion should be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*) Under the statute, the act in furtherance of a defendant's right of petition or free speech includes "any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law." (*Id.*, subd. (e).)

In ruling on a motion to strike pursuant to section 425.16, a court must employ a two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 . . . .) 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.)

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[3] The trial court's dismissal of Kattuah's cause of action for abuse of process does not render this appeal moot. A defendant who prevails on a special motion to strike pursuant to the anti-SLAPP law is entitled to an award of attorney fees, and the Linde attorneys' motion for attorney fees requires that we determine the special motion to strike on its merits. (See *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056.)

The denial of a motion to dismiss a cause of action under the anti-SLAPP statute is immediately appealable. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) We review a trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The Linde attorneys contend that the trial court erred in denying their motion to dismiss because, they argue, Kattuah's cause of action for abuse of process arose from the Linde attorneys' protected conduct, and Kattuah cannot show she has a probability of prevailing on her claim. We agree.

I. Arising from a Protected Activity

The first prong of the anti-SLAPP analysis requires us to determine whether Linde's cause of action for abuse of process arose from protected activity. We must first decide whether the Linde attorneys' actions in filing a notice of lien and sending a letter to Kattuah's new attorneys informing them of the existence of the lien constituted protected activity at all. If so, we then proceed to deciding whether the protected activity was the basis of the cause of action, or merely incidental to it. (See *Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.)

A. Attorney's Liens as Protected Activity

The anti-SLAPP statute includes, among the other kinds of activities it protects, "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1).) This includes statements made in, or in connection with, litigation, and "[c]ourts have taken a fairly expansive view of what constitutes litigation-related activity for purposes of section 425.16." (*Drell v. Cohen* (2014) 232 Cal.App.4th 24, 29 (*Drell*).) Thus,

" 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are . . . entitled to the benefits of section 425.16.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Demand letters from attorneys fall within this category and are ordinarily protected activity. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293.)

Kattuah's claim for abuse of process included two factual allegations regarding the Linde attorneys' conduct. First, Kattuah alleged that "[o]n or about May 7, 2013, [the Linde attorneys] asserted an attorney['s] lien . . . against Kattuah's recovery." Second, Kattuah alleged that "[o]n or about July 3, 2013, [the Linde attorneys] demanded payment of $69,146.55." We conclude that the Linde attorneys' letter demanding payment was protected activity and therefore we need not decide whether the filing of the notice of attorney's lien was also protected activity.[4]

In that letter, as Kattuah herself characterized it, the Linde attorneys "demanded payment of $69,146.55." Except in extreme cases, such as when a letter constitutes extortion as a matter of law, attorney demand letters are protected activity because they are

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[4] Whether or not the filing of the notice of attorney's lien was protected activity does not alter our analysis. If, as Kattuah alleges, the filing of the notice of lien was not protected activity, then Kattuah's claim for abuse of process was a mixed cause of action, based partly on protected and partly on unprotected activity. "When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded" at the first stage of the anti-SLAPP analysis. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 396.) In considering below (see Discussion part I.B, *post*) whether or not protected activity formed the gravamen of Kattuah's cause of action for abuse of process, we do not consider the filing of the notice of lien.

made in preparation for or in anticipation of litigation. (*Malin v. Singer*, *supra*, 217 Cal.App.4th at pp. 1293-1294.) There is nothing about the Linde attorneys' letter to suggest that it is anything other than an ordinary demand letter. Consequently, sending the letter constituted protected activity.

B. Gravamen of the Action

"[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. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) In making this determination, courts hold that a case falls within the ambit of the anti-SLAPP statute when protected activity is the gravamen of the claim, rather than being simply incidental to it. (*Drell*, *supra*, 232 Cal.App.4th at p. 29.) "Determining the gravamen of the claims requires examination of the specific acts of alleged wrongdoing and not just the form of the claim." (*Id.* at pp. 29-30.) "If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 (*Hylton*).)

Other cases involving efforts by attorneys to collect amounts owed to them illustrate how these principles apply. In *Drell*, when an insurer settled a case with its client, the client's former attorney sent a letter to the insurer asserting its attorney's lien right to

part of the proceeds. (*Drell*, *supra*, 232 Cal.App.4th at pp. 26-27.) The new attorney filed an action against the former attorney for declaratory relief, asking the court to determine the parties' rights to the fees. (*Id.* at p. 27.) The court rejected the former attorney's anti-SLAPP motion to dismiss, holding that although the case involved protected activity, the protected activity was not sufficiently central to the case: "[A] complaint is not a SLAPP suit unless the gravamen of the complaint is that defendants acted wrongfully by engaging in the protected activity. The complaint here did not allege defendants engaged in wrongdoing by asserting their lien." (*Id.* at p. 30.)

Hylton involved similar issues and produced a similar result. In that case, a client sued his former attorney in an attempt to rescind a contract the two had entered into regarding the sale of stock. (*Hylton*, *supra*, 177 Cal.App.4th at p. 1269.) The stock had been at issue in an earlier case in which the attorney represented the client, and the client alleged that the attorney had breached his fiduciary duties to the client and collected an unconscionable fee in connection with the contract. (*Ibid.*) The court affirmed that the case did not arise from protected activities: The client's "claims allude to [the attorney]'s petitioning activity, but the gravamen of the claim rests on the alleged violation of [the attorney]'s fiduciary obligations to [the client] by giving [the client] false advice to induce him to pay an excessive fee to [the attorney]." (*Id.* at p. 1274.)

This case differs from both *Drell* and *Hylton* because, unlike in those cases, Kattuah's cause of action did allege that the Linde attorneys "engaged in wrongdoing by asserting their lien." (*Drell*, *supra*, 232 Cal.App.4th at p. 30.) Indeed, all of the allegations in the cause of action for abuse of process point to the Linde attorneys' use of the attorney's lien as the source of the wrongdoing against

Kattuah, not merely something incidental to it. Kattuah alleged that the Linde attorneys "misused the attorney['s] lien by demanding payment of excessive and unreasonable compensation beyond the amount provided for and contrary to the terms of the . . . [r]etainer [a]greement . . . . The use of this process was not authorized in the regular course of the proceeding." According to Kattuah, the Linde attorneys wronged her by misusing the lien "to obtain a collateral advantage over [Kattuah] by leveraging and seeking compensation in excess of the amounts" they were entitled to. It is not surprising that protected activity would form the gravamen of an action for abuse of process: "[T]he essence of the tort of abuse of process [is] some misuse of process in a prior action . . . and it is hard to imagine an abuse of process claim that would not fall under the protection of the statute." (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370.) By contrast, in Kattuah's causes of action for declaratory relief and breach of fiduciary duty, the gravamen of the claim was that the Linde attorneys claimed more of the settlement than they were entitled to, or wrongly prevented Kattuah from obtaining the funds from her settlement. With these claims, the enforcement of the lien was only incidental to the allegation of wrongdoing. In the case of the abuse of process claim, however, the notification to Kattuah's new attorneys was at the heart of the allegations. Accordingly, the cause of action arises from protected activity for purposes of the anti-SLAPP statute.

II. Probability of Success

In the second 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*, *supra*, 1 Cal.5th at pp. 396.)

Kattuah has failed to meet this burden because the misdeeds she alleges the Linde attorneys committed are protected by the litigation privilege. (Civ. Code, § 47, subd. (b).) The litigation 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. [Citations.] [¶] The usual formulation is that the 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.' " (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) Actions protected by the litigation privilege provide absolute immunity from tort liability. (*Ibid.*) The privilege applies to causes of action for abuse of process, even if that means narrowing the scope of the tort of abuse of process (*id.* at pp.1064-1065), and it extends to cover actions taken prior to litigation. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1196; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19–20.)

"Because the litigation privilege protects only publications and communications, a 'threshold issue in determining the

applicability' of the privilege is whether the defendant's conduct was communicative or noncommunicative. [Citation.] The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1058.)

As we have already seen, the gravamen of the abuse of process cause of action was the letter to Kattuah's new attorneys asserting the Linde attorneys' right to the funds. This act was undeniably communicative in its nature. Furthermore, as we have explained above, it was made in anticipation of litigation. In general, the litigation privilege protects "demand letters and other prelitigation communications by attorneys." (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 919.) Consequently, the Linde attorneys' actions were absolutely privileged, and Kattuah cannot show a probability of success.

Because Kattuah has failed to show a probability of success in her cause of action for abuse of process, the trial court erred by denying the Linde attorneys' anti-SLAPP special motion to strike.

III. Attorney Fees

A prevailing defendant in a special motion to strike under the anti-SLAPP statute is "entitled to recover his or her attorney's fees and costs." (See § 425.16, subd. (c)(1).) By the terms of the statute, this award of attorney fees "is not discretionary but mandatory." (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215.) Consequently, we agree with the Linde attorneys' contention that they are entitled to an award of attorney fees and

costs. On remand, the trial court shall determine the amount to which the Linde attorneys are entitled.[5]

DISPOSITION

The judgment of the trial court is reversed. Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

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[5] In her supplemental reply brief filed after oral argument, Kattuah argues that the Linde attorneys are not entitled to an award of attorney's fees. This is an issue for the trial court to consider on remand, and we take no position on it.