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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAMES K. OLEN et al., Plaintiffs and Appellants, v. CARLY BRYAN et al., Defendants and Respondents.	B279152 (Los Angeles County Super. Ct. No. EC065536)

APPEAL from orders of the Superior Court of Los Angeles County. Ralph C. Hofer, Judge. Affirmed.

Ngozi E. Bolin, in pro. per., and for Plaintiffs and Appellants.

McFarlin LLP, Timothy G. McFarlin, Jarrod Y. Nakano, and Gary T. Dote for Defendants and Respondents.

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Tenants renting a hillside home reported a city building code violation, sued their landlord, and moved out without paying the full amount of rent after the landlord indicated a desire to sell the house. The landlord filed a cross-complaint for nonpayment of rent. The tenants moved to strike the cross-complaint under the anti-SLAPP[1] statute. (Code Civ. Proc., § 425.16.)[2] The trial court denied the tenants' motion, and awarded attorney's fees because their motion was frivolous. We conclude the trial court's rulings were correct, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Factual Background

In July 2013, plaintiffs James K. Olen and Ngozi E. Bolin (collectively, tenants) signed a one-year lease for a single-family home in the hills overlooking Glendale, California. Their landlord was defendants Carly and Zachery Bryan (collectively, landlord). An inspection completed in early August 2013, revealed several defects, including that the windows lacked screens and that the clothes dryer vented into the garage (rather than outdoors). Also, hot water was not available in portions of the house. Tenants nevertheless moved in and began paying the $5,200 monthly rent, and signed two further one-year extensions of the lease.

In June 2016, landlord informed tenants that it desired to sell the house and that the year-long lease set to expire at the

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1 SLAPP stands for strategic lawsuit against public participation.

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

end of July 2016 would thereafter convert to a month-to-month lease until the house sold. In August 2016, tenants demanded that landlord fix the hot water and re-vent the dryer. Tenants then reported the venting issue to the city authorities, who issued landlord a citation for noncompliance with the city's building code. Tenants also served landlord with a "Notice of Intent to Exercise Tenants' Rights for Landlords' Violations of [] Civil Code [section] 1941," notifying landlord that they would stop paying rent and could move out at any time due to landlord's failure to fix the dryer vent, the lack of hot water, and the absence of screens.

Tenants moved out of the house in mid-September 2016,[3] and paid no rent for that month.

II. Procedural Background

In mid-August 2016, and more than a month before they moved out, tenants filed a 40-page, 13-count civil lawsuit against landlord for (1) breach of the warranty of habitability, (2) retaliatory eviction, (3) constructive eviction, (4) constructive fraud, (5) nuisance, (6) negligence, (7) breach of the statutory duty to disclose code violations (Civ. Code, § 2079), (8) negligent infliction of emotional distress, (9) bad faith failure to account for security deposit, (10) breach of fiduciary duty, (11) negligent misrepresentation, (12) harassment, and (13) injunctive relief. Tenants sought unspecified amounts of compensatory damages, punitive damages, attorney's fees, and costs.

Landlord filed a cross-complaint. The sole claim in the cross-complaint was for breach of contract based on tenants' failure "to make their monthly rental payments" and "refus[al] to

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3 The move-out date is disputed. Tenants say they moved out on September 19; landlord says the date was September 23.

cooperate . . . in showing the [house] to prospective buyers."[4] The cross-complaint made no mention of tenants' pending lawsuit, of tenants' reporting the dryer vent to city authorities, or of tenants' "Notice of Intent."

Tenants moved to strike the cross-complaint under the anti-SLAPP statute. Following full briefing, the trial court denied the motion. The court ruled that landlord's cross-complaint alleged a "standard breach of contract action . . . to recover rent owed under a lease" and contained "no allegations at all referring" to any activity subject to the anti-SLAPP statute. The court acknowledged that the cross-complaint "may have been triggered by or filed in response to or even in retaliation for [tenants] filing their complaint and reporting habitability issues," but found the anti-SLAPP statute inapplicable because "the simple breach of contract allegations" in the cross-complaint "do not arise from that petitioning activity." Moreover, because "an ordinary review of established legal authorities would have disclosed the inadequacies of [tenants' anti-SLAPP] motion," the court concluded tenants' motion was one of the "rare motions[s] that is so lacking in merit even on its face" as to be "frivolous." The court awarded landlord $4,000 in attorney's fees.

Tenants filed a timely appeal.

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4 Landlord filed a first amended cross-complaint after the notice of appeal in this case was filed, and in response to the trial court's sustaining of a demurrer to the original cross-complaint, with leave to amend, for not "clearly alleg[ing]" that the lease was written and for not attaching a copy of the lease. The allegations in the first amended cross-complaint pertinent to this appeal are substantively identical to the allegations in the original cross-complaint.

DISCUSSION

Tenants appeal the trial court's (1) ruling that landlord's cross-complaint falls outside the anti-SLAPP statute, and (2) award of attorney's fees. We review the first issue de novo (*Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, 1276 (*Melamed*)), and the second for an abuse of discretion (*Olive Properties, L.P. v. Coolwaters Enteprises, Inc.* (2015) 241 Cal.App.4th 1169, 1177 (*Olive Properties*)).

I. Ruling on Anti-SLAPP Motion

"The anti-SLAPP statute . . . provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*), italics omitted.) Specifically, the anti-SLAPP statute protects—and thus "subject[s] to a special motion to strike"—any "cause of action . . . arising from any act of [a] 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." (§ 425.16, subd. (b)(1).)

When a litigant moves to strike a cause of action under the anti-SLAPP statute, a trial court has two tasks. First, the court must evaluate whether the litigant "has made a threshold showing that the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) A cause of action "arises from" protected activity when the "cause of action *itself* [is] *based on*" protected activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114 ["arises from" means "based upon"].) Whether a cause of action is itself based on protected activity turns on whether its ""principal thrust or gravamen"" is protected activity—that is,

whether the "'core injury-producing conduct'" warranting relief under that cause of action is protected activity. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 134.) Second, and only if the court concludes that the litigant has made this "threshold showing," the court must next examine whether the nonmoving party has "made a prima facie factual showing sufficient to sustain a favorable judgment." (*Baral*, *supra*, 1 Cal.5th at pp. 384-385; § 425.16, subd. (b)(2) [court must consider "the pleadings, and supporting and opposing affidavits"].) If the nonmoving party makes this showing, the anti-SLAPP motion is denied; otherwise, it must be granted.

In this case, the trial court correctly determined that landlord's cause of action for breach of contract was not itself based on protected activity. The sole "injury-producing conduct" underlying that cause of action was tenants' failure to pay rent and to cooperate with landlord's efforts to show the house to prospective buyers. The anti-SLAPP statute defines "protected activity" to include the making of statements "before" or "in connection with an issue under consideration or review" "by a legislative, executive, or judicial proceeding" or "other official proceeding authorized by law"; the making of statements "in a place open to the public or a public forum in connection with an issue of public interest"; or engaging in "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).) Under this definition, the failure to pay rent or to adhere to the other provisions of a lease is not itself "protected activity." (*Olive Properties*, *supra*, 241 Cal.App.4th at p. 1176 ["A tenant's

failure to pay rent and [maintenance] charges is not an act in furtherance of the lessee's right of petition or free speech"].)

Tenants make what amounts to two arguments to assail this logic.

First, they ask us to infer that the cross-complaint is aimed at protected activity because (1) landlord filed the cross-complaint *after* tenants filed their lawsuit and complained to city authorities, (2) tenants' filing of the lawsuit and complaints are what subjectively motivated landlord to sue, and (3) tenants' reasons for not paying their rent furthered their lawsuit. Each of these arguments lacks merit. It is well settled that *when* a litigant fending off an anti-SLAPP motion filed the challenged claim(s) and *why* it did so does not somehow convert unprotected activity into protected activity under the anti-SLAPP statute. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 76-77 ["the mere fact an action was filed after protected activity took place does not mean it arose from that activity"]; *id.* at p. 78 [the nonmoving party's "subjective intent . . . is not relevant under the anti-SLAPP statute"].) Thus, the fact that landlord filed its cross-claim for breach of the lease after tenants filed their action regarding the same lease does not render that cross-claim subject to the anti-SLAPP statute, regardless of landlord's subjective motivations; indeed, our Supreme Court found such a reading of the anti-SLAPP statute to be "absurd" (*id.* at p. 77). What is more, *tenants'* reasons for refusing to pay rent are of no consequence because "'causes of action do not arise from motives; they arise from acts.'" (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823; *Melamed*, *supra*, 8 Cal.App.5th at p. 1284.) What matters is the tenants' act in not paying their rent, not their motivation for that act.

Second, tenants assert that the trial court erred in ruling that cross-claims can *never* be grounded in protected activity. But the trial court made no such ruling. To be sure, causes of action asserted in a cross-complaint can sometimes constitute protected activity, such as when tenants sue a landlord because he filed an unlawful detainer lawsuit. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1475, 1478.) However, where a subsequently filed cross-claim is *not* based upon the prior litigation or other protected activity, it does not become protected activity just because it is filed later. (Accord, *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 933-934 ["the anti-SLAPP statute often will not apply to cross-complaints"].) *Olive Properties* is directly on point. There, a tenant filed an action for breach of a lease and the landlord thereafter cross-complained for nonpayment of rent and other charges. (*Olive Properties*, *supra*, 241 Cal.App.4th at p. 1172.) The Court of Appeal ruled that the tenant's anti-SLAPP motion to strike the landlord's cross-complaint was properly denied. (*Id.* at pp. 1175-1176.) The case before us is indistinguishable.

II. Attorney's Fees Award

The anti-SLAPP statute entitles a party who prevails in warding off an anti-SLAPP motion to recover "costs and reasonable attorney's fees" "[if] the court finds that [the] special motion to strike [was] frivolous or . . . solely intended to cause unnecessary delay." (§ 425.16, subd. (c)(1).) Such fees must be awarded pursuant to section 128.5, which requires the court to issue "[a]n order . . . in writing [that] recite[s] in detail the conduct or circumstances justifying the order" (§ 128.5, subd. (c)).

The trial court did not abuse its discretion in finding tenants' motion to be frivolous, and the court followed the proper procedures in making that finding. Landlord's claim for breach of contract was based on tenants' failure to pay rent and to cooperate in showing the house. As discussed above, these omissions are not protected activity. Also as discussed above, precedent has long rejected tenants' arguments that a cross-claim involving unprotected activity somehow becomes protected activity by virtue of the timing of the cross-claimant's filing, the cross-claimant's reason for filing, or the moving party's underlying reasons for engaging in their otherwise unprotected activity. In short, tenants' anti-SLAPP motion was foreclosed by a solid wall of precedent. Because "'any reasonable attorney would agree [the] motion [was] totally devoid of merit'" (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392, superseded on another ground by § 425.16, subd. (f)), it was frivolous. The trial court also "recite[d] in detail the conduct or circumstances justifying the order" when it discussed the merits of the motion under governing authority and then explained why that authority rendered tenants' motion "inadequa[te]."

For the first time in their reply brief, tenants suggest the amount of attorney's fees was excessive. Tenants have waived this argument. (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 789, fn. 10.) Even if they had not, the argument lacks merit because the trial court considered landlord's affidavit requesting a $6,600 fee award, found that the billing rate was too high "for the product filed," and exercised its discretion to award only $4,000.

DISPOSITION

The orders are affirmed. Defendants are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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