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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CROSS CREEK VILLAGE
HOMEOWNERS ASSOCIATION,

Plaintiff, Cross-defendant and
Appellant,

v.

PETER BRUNNER,

Defendant, Cross-complainant and
Respondent.

B295069

(Los Angeles County
Super. Ct. No. YC072541)

APPEAL from an order of the Superior Court of
Los Angeles County, Stuart M. Rice, Judge. Reversed and
remanded with directions.

Kulik Gottesman Siegel & Ware and Glen Kulik for
Plaintiff, Cross-defendant and Appellant.

Law Office of Steven E. Wohn and Steven E. Wohn for
Defendant, Cross-complainant and Respondent.

INTRODUCTION

Cross Creek Village Homeowners Association appeals the trial court's order denying Cross Creek's special motion to strike Peter Brunner's cross-complaint under Code of Civil Procedure section 425.16. We reverse and remand with directions to grant the motion to strike in part and deny it in part.

FACTUAL AND PROCEDURAL BACKGROUND

Brunner owns a condominium in a common interest development managed by Cross Creek, a homeowners' association. In December 2017 Cross Creek filed this action against Brunner alleging that Brunner made false and disparaging remarks about Cross Creek to its bank and financial management company and that Brunner wrongfully directed those companies to stop doing business with Cross Creek.

Brunner filed a cross-complaint against Cross Creek for negligence, breach of fiduciary duty, breach of contract, declaratory relief, and an accounting. Brunner alleged Cross Creek wasted "homeowner funds" on "frivolous and sham lawsuits" and sought to harass and intimidate him "into silence by the use of this expensive and time-consuming lawsuit." Brunner also alleged Cross Creek "failed to maintain the common area" of the development, used "homeowner funds on unnecessary repairs and frivolous legal matters," conducted "sham" board of director elections, and physically threatened homeowners.

Cross Creek filed a special motion to strike under Code of Civil Procedure section 425.16.¹ Cross Creek argued that, because the “principal thrust” or “gravamen” of each of Brunner’s causes of action was Cross Creek’s filing of its complaint in this action, Brunner’s entire cross-complaint was subject to a special motion to strike. Cross Creek also argued Brunner could not meet his burden of showing a probability of prevailing on the merits of his causes of action because the litigation privilege barred all of them. In opposition to the motion, Brunner filed a two-page declaration stating Cross Creek’s board of directors engaged in wrongful conduct.

The trial court denied the special motion to strike in its entirety. The court ruled Brunner’s causes of action were mixed causes of action that included allegations of both protected petitioning activity and unprotected activity. The court ruled Cross Creek had shown the filing of its complaint was protected petitioning activity under section 425.16, but had not shown the remainder of its allegedly wrongful conduct was protected petitioning activity. The trial court also ruled that Brunner had established a probability of prevailing on his causes of action and that Cross Creek had not shown the litigation privilege barred Brunner’s causes of action. Cross Creek timely appealed.

¹ Undesignated statutory references are to the Code of Civil Procedure.

DISCUSSION

A. *Applicable Law and Standard of Review*

Section 425.16, subdivision (b)(1), provides that “[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.” Courts evaluate special motions to strike under section 425.16 “through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims ‘aris[e] from’ protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least ‘minimal merit.’” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

We review the trial court’s order granting or denying a special motion to strike under section 425.16 de novo. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788, 796.) “We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based.” (*Park, supra*, 2 Cal.5th at p. 1067.)

B. *Brunner’s Causes of Action Arise in Part, but Not Entirely, from Protected Litigation Activity*

When a plaintiff includes allegations of protected petitioning activity and unprotected activity within a cause of action, a defendant may bring a special motion to strike “specific allegations of protected activity which constitute claims for relief but do not constitute an entire cause of action as pleaded.” (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48.) In that situation, “the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).)

A claim for relief, however, does not necessarily “arise[] from” all activity a plaintiff alleges in support of a claim. A claim for relief arises only from activity that “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.’” (*Park, supra*, 2 Cal.5th at pp. 1062-1063.) In determining whether a claim for relief arises from a defendant’s petitioning activity, courts distinguish “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.” (*Id.* at p. 1064.) “[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of

liability or a step leading to some different act for which liability is asserted.” (*Id.* at p. 1060.)

The trial court ruled Brunner’s causes of action arise in part from Cross Creek’s filing of its complaint in this action, which the court determined was protected petitioning activity under section 425.16. Brunner does not dispute that some of his claims arise from Cross Creek’s filing of its complaint. Nor does Brunner dispute that the prosecution of a lawsuit generally constitutes protected petitioning activity under section 425.16. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*) [for purposes of section 425.16, “[t]he constitutional right to petition . . . includes the basic act of filing litigation”]; *Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1083 [“Filing a lawsuit is an exercise of a party’s constitutional right of petition.”].)

Instead, Brunner argues section 425.16 does not apply because Cross Creek “started the legal suit, made all of its allegations without having to face a special motion to strike only to try to cutoff Brunner’s right to complain about his treatment at the hands of the existing Cross- Creek Board.” (*Sic.*) Section 425.16, subdivision (h), however, allows a cross-defendant to bring a special motion to strike a cross-complaint. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [section 425.16 “treats complaints identically with cross-complaints”]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1373 [“a cross-complaint may be subject to a section 425.16 motion”].)

Brunner also argues section 425.16 does not apply because Civil Code section 5975 authorizes a homeowner in a common interest development to bring an action to enforce the governing documents of the homeowners’ association. Section 425.16,

however, applies to any “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.” (§ 425.16, subd. (b).) There is no exception for causes of action by homeowners under Civil Code section 5975.

Cross Creek argues section 425.16 applies to Brunner’s entire cross-complaint because Cross Creek’s petitioning activity of filing the complaint in this action is the gravamen of each of Brunner’s claims. Cross Creek argues the other activities alleged in the cross-complaint were just the “steps leading to” the filing of this action. Cross Creek is partially correct: Some of Brunner’s claims arise from petitioning activity. Others, however, do not.

To determine whether a claim arises from a defendant’s protected activity, we “consider the elements of the challenged claim” and whether the defendant’s activities “supply those elements.” (*Park, supra*, 2 Cal.5th at p. 1063.) Brunner’s cross-complaint asserted causes of action against Cross Creek for negligence, breach of contract, and breach of fiduciary duty. In addition to alleging Cross Creek filed this action to harass and intimidate him, Brunner alleged that Cross Creek was negligent in “fail[ing] to properly administer” its Declaration of Covenants and Rights (Declaration) and “related Rules” and that Cross Creek breached its fiduciary duties and the Declaration by failing to maintain common areas, wasting homeowners’ funds on unnecessary repairs, conducting sham elections, and physically threatening homeowners.²

² Brunner based his causes of action for declaratory relief and an accounting on these same alleged breaches. In addition, an accounting is not an independent cause of action, but a type of remedy that depends on the validity of underlying claims. (*Batt*

Which of these actions (other than initiating this lawsuit) were protected petitioning activities? Cross Creek contends that its petitioning activities included allegedly wasting money on “frivolous and sham lawsuits,” wasting money on “frivolous legal matters,” “engag[ing] in the enforcement of the Declaration to silence, punish, and otherwise stifle” complaining homeowners, and breaching its fiduciary duties when “responding to the complaints” of homeowners. Of these, however, only spending money on frivolous and sham lawsuits was protected petitioning activity. This is because “the filing, funding, and prosecution of a civil action” is protected petitioning activity under section 425.16 (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056), regardless of the merits of the action. (*Briggs, supra*, 19 Cal.4th at p. 1115; see *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1521) [“Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit.”].) Thus, Brunner’s allegation Cross Creek spent association money funding frivolous litigation was subject to section 425.16.

In contrast, Cross Creek did not establish that its alleged funding of “frivolous legal matters” is protected petitioning activity. Section 425.16 applies to “litigation-related activities,” such as “the filing of lawsuits, . . . statements and pleadings

v. City and County of San Francisco (2007) 155 Cal.App.4th 65, 82, disapproved on another ground in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626; *Duggal v. G.E. Capital Communications Services, Inc.* (2000) 81 Cal.App.4th 81, 95; see *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 833 [“an accounting is derivative; it must be based on other claims”].)

made in or in preparation for civil litigation,” and “[s]ettlement discussions made in connection with litigation” (*ValueRock TN Properties, LLC v. PK II Larwin Square SC LP* (2019) 36 Cal.App.5th 1037, 1046.) Section 425.15 does not apply to all activity relating to “legal matters.” (See, e.g., *ValueRock*, at p. 1048 [landlord’s refusal to consent to a proposed assignment under a lease agreement was not protected petitioning activity]; *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 314, 319-20 [negotiations and exchange of demands between property owners were not protected petitioning activities, even though the property owners’ attorneys participated in the communications].) Cross Creek’s alleged spending of money on “frivolous legal matters” is broad enough to include activity unrelated to litigation. Indeed, one of the “frivolous legal matters” Brunner alleged Cross Creek wasted money on was retaining counsel “to accomplish personal objectives.” Cross Creek does not argue retaining counsel for personal objectives is protected petitioning activity. Similarly, Cross Creek did not show or explain how its alleged “enforc[ing] of the Declaration” or “responding to the complaints” of homeowners are protected petitioning activities.

C. *Brunner Did Not Demonstrate a Probability of Prevailing on Claims Arising from Cross Creek’s Litigation-related Activity*

In the second step, “the burden shifts to the plaintiff [or, as here, the cross-complainant] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.” (*Baral, supra*, 1 Cal.5th at p. 396.) The Supreme Court “described this second step as a ‘summary-judgment-like procedure.’ [Citation.] The court does not weigh

evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384-385.) At the second step, "a plaintiff seeking to demonstrate the merit of the claim[s] 'may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.'" (*Monster Energy Co. v. Schechter, supra*, 7 Cal.5th at p. 788.) "[C]laims with the requisite minimal merit may proceed." (*Baral*, at p. 385.) Where, as here, "the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity." (*Id.* at p. 392.)

As discussed, the only allegations subject to section 425.16 are that Cross Creek filed this action to harass, humiliate, and silence Brunner and that Cross Creek wasted association funds on meritless lawsuits. The only evidence Brunner submitted in opposition to Cross Creek's special motion to strike was his declaration. In his declaration, however, Brunner barely discussed the factual allegations in Cross Creek's complaint; Brunner stated only that Cross Creek "claim[ed] that I interfered with a vendor (Union Bank) when I could not obtain information from [Cross Creek] itself on about twenty occasions between 2003 and 2018." And Brunner's declaration said nothing about spending association money on frivolous litigation.

Brunner's declaration did not make a prima facie showing sufficient to sustain a favorable judgment on the claims arising from Cross Creek's protected petitioning activity. Those claims

are based on Brunner's allegation Cross Creek's complaint against him was frivolous or intended to harass or intimidate him (and, in the case of funding other frivolous lawsuits, to quiet "objecting homeowners"). Even crediting the statement in Brunner's declaration that he attempted to obtain information from Cross Creek on multiple occasions before Cross Creek filed its complaint, Brunner's declaration did not show that Cross Creek's complaint against Brunner lacked merit or that Cross Creek spent homeowner funds on frivolous litigation. (See *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1172 [plaintiff failed to demonstrate a probability of prevailing on a claim the defendants "breached their fiduciary duty to her by filing and maintaining a *frivolous lawsuit* against her" where the plaintiff "ha[d] not factually substantiated her claim that the lawsuit [was] *frivolous*"].)

The only other lawsuit Brunner discussed in his declaration was a prior action between him and Cross Creek that resulted in a settlement. Brunner also stated Cross Creek's attorneys threatened legal action against homeowners who opposed the conduct of Cross Creek's board of directors. But Brunner provided no facts to show that either the prior lawsuit or Cross Creek's threats of legal action were frivolous, or even meritless. And Brunner submitted no other evidence in support of his allegations Cross Creek intimidated or harassed him by filing this action or wasted homeowner funds pursuing litigation.

DISPOSITION

The order denying Cross Creek's special motion to strike is reversed. The matter is remanded to the trial court with directions to enter a new order granting the motion to strike Brunner's allegations that Cross Creek spent money on frivolous and sham lawsuits and that Cross Creek brought this action to harass, intimidate, and silence him, and otherwise denying the motion. Each side is to bear its costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.