Filed 8/7/17 A-Ju Tours v. Zimny CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

A-JU TOURS, INC., et al., Cross-complainants and Appellants, v. MARK ZIMNY, et al., Cross-defendants and Respondents.	B270059 (Los Angeles County Super. Ct. No. BC521491)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller, Judge. Reversed in part and remanded with directions and affirmed in part.

Rogari Law Corporation and Ralph Rogari for Cross-complainants and Appellants.

Henry M. Lee Law Corporation and Henry M. Lee for Cross-defendants and Respondents.

Cross-complainants and appellants A-Ju Tours, Inc. (A-Ju) and Henry Bahk (Bahk) appeal an order granting special motions to strike brought by cross-defendants and respondents Mark Zimny (Zimny), Juyeon Lee (JL), Chapel Consulting Associates, LLC (Chapel), Henry M. Lee and Henry M. Lee Law Corporation (Lee).[1] (Code Civ. Proc., (§ 425.16.) The order eliminated the second, third and fourth causes of action of the cross-complaint.

We conclude the second cause of action, alleging intentional interference with economic advantage, did not arise out of protected activity; therefore, that cause of action must be reinstated. The third and fourth causes of action, alleging fraud in the negotiation of a settlement agreement, did arise out of protected activity. On the merits, the two fraud claims are barred by the litigation privilege and were properly stricken.

Therefore, the order is affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events leading up to the filing of the cross-complaint.*

Attorney Bahk represented Zimny in a prior case and negotiated a substantial monetary settlement for him. Zimny and his wife, JL, then sued Bahk for legal malpractice (L.A. Super. Ct. case no. BC521491) (the instant action). Zimny and JL were represented in the malpractice action by Attorney Lee. Their second amended complaint, filed in October 2014, added a new plaintiff, Chapel, as well as a new defendant, A-Ju. As

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[1] An order granting or denying an anti-SLAPP motion is appealable pursuant to Code of Civil Procedure section 425.16, subdivision (*i*) and section 904.1, subdivision (a)(13). All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

against A-Ju, the gravamen of the lawsuit was a claim for misappropriation of trade secrets.

Zimny, JL, and Chapel served an offer to compromise (§ 998) on A-Ju, offering to settle the matter for a mutual release of all claims, including a waiver of all fees and costs. A-Ju accepted the offer on June 8, 2015, and forwarded the acceptance to Lee with a letter asking that plaintiffs file a dismissal with prejudice of the causes of action against A-Ju.

Lee then drafted a settlement agreement and mutual release (the settlement agreement). The parties to the settlement agreement were Zimny, JL, and Chapel, as plaintiffs, and A-Ju, as defendant. As of June 18, 2015, all parties had signed the settlement agreement, which required "Plaintiff[s'] counsel," i.e., Lee, within five court days, to file a request for dismissal with prejudice of the lawsuit against A-Ju.

However, Lee did not dismiss the lawsuit against A-Ju. Instead, Lee began using the settlement agreement in an attempt to secure for himself relief from a debt that Lee owed to A-Ju for actions taken by Lee in representing a client in a different case.

On July 8, 2015, Lee filed an ex parte application to enter judgment, purportedly in conformity with the section 998 settlement. Lee asserted that despite A-Ju's acceptance of the section 998 offer and entering into the settlement agreement, which contained a mutual release of *all* claims the parties had against each other and their agents, including attorneys, A-Ju "has refused to release [Lee], Plaintiffs' agent and attorney, from claims [in L.A. Super. Ct. case no.] BC401329 [*Chang v. A-Ju*]." A supporting declaration indicated that in the *Chang* matter, following an appellate reversal of a $300,000 attorney fee award, Lee had been ordered to pay $69,544.25 in restitutionary interest

to A-Ju, and in the ex parte application, Lee sought to be released from that debt. The ex parte application was denied that same day.

Lee then filed another ex parte application to enter judgment, which was denied on July 10, 2015. The trial court ruled "the settlement does not provide for entry of judgment as request[ed] by plaintiff[s]."[2]

2. *The cross-complaint*.

On July 10, 2015, A-Ju and Bahk filed a cross-complaint against Lee, as well as Zimny, JL, and Chapel, alleging causes of action for breach of contract (first cause of action), intentional interference with economic advantage (second cause of action), and fraud (third and fourth causes of action).

In the first cause of action, A-Ju alleged that Zimny, JL, and Chapel had breached the settlement agreement by not dismissing the action as to A-Ju. The second cause of action, by A-Ju against Lee, alleged A-Ju was in a beneficial economic relationship with Zimny, JL, and Chapel, that Lee knew of the economic relationship, and he engaged in wrongful conduct to disrupt the relationship by causing Zimny, JL, and Chapel to fail to perform their duty under the settlement agreement to dismiss the action against A-Ju. The third cause of action, by A-Ju against all the cross-defendants, alleged that in entering into the settlement agreement, cross-defendants did not disclose their secret intention not to perform unless Lee could obtain a release of his unrelated obligation to A-Ju in the *Chang* matter. The

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[2] Lee filed yet another ex parte application to specially set a motion to enter judgment on the settlement agreement and mutual release, which was denied on July 23, 2015.

fourth cause of action, by Bahk against all the cross-defendants, similarly alleged that cross-defendants did not disclose their secret intention not to perform their promise to dismiss the lawsuit unless Lee could obtain a release of his separate obligation to A-Ju in the *Chang* matter.

3. *Special motions to strike the cross-complaint.*

Lee filed a special motion to strike the second, third and fourth causes of action, which were directed against him. Lee contended the claims arose out of his protected activity in negotiating and enforcing a settlement agreement, and the cross-complainants could not prove a probability of prevailing on their claims because negotiating and enforcing a settlement are absolutely privileged under the litigation privilege.

Zimny, JL, and Chapel (the Zimny cross-defendants) separately moved to strike the entire cross-complaint. They similarly alleged the cross-complaint arose out of their attorney's, Lee's, protected activity in negotiating and attempting to enforce the settlement, and that the cross-complaint was barred by the litigation privilege.

4. *Opposition to the special motions to strike.*

In opposition to Lee's special motion to strike, A-Ju and Bahk argued the anti-SLAPP statute did not apply to their claims against Lee because Lee was not being sued for oral or written statements on behalf of a client. However, even if the court were to conclude the claims against Lee arose out of Lee's protected activity, the claims were not barred by the litigation privilege and had the requisite minimal merit to withstand Lee's special motion to strike.

Similarly, in opposing the Zimny cross-defendants' special motion to strike, A-Ju and Bahk asserted the Zimny cross-

defendants were not being sued for oral or written statements made in this litigation; however, even if the court were to conclude that the injurious conduct constituted protected activity, the claims had minimal merit, requiring denial of the special motion to strike.

5. *Trial court's ruling and appeal.*

On November 23, 2015, the trial court ruled on the pending motions. The court granted Lee's special motion to strike in its entirety, and deferred ruling on Lee's request for attorney fees.

The trial court denied the Zimny cross-defendants' motion to strike the first cause of action for breach of contract, and granted their motion to strike the balance of the cross-complaint, i.e., the second, third and fourth causes of action. The trial court also deferred ruling on their request for attorney fees.

In addition, the trial court granted Bahk leave to amend the cross-complaint to allege a claim for breach of contract.

On January 21, 2016, A-Ju and Bahk filed a notice of appeal from the November 23, 2015 order. On March 1, 2016, the trial court entered a judgment awarding Lee attorney fees in the sum of $19,270 plus costs of $180 to be paid by A-Ju and Bahk.[3]

CONTENTIONS

A-Ju and Bahk contend: the anti-SLAPP statute did not apply to the second cause of action (intentional interference with economic advantage) or the third and fourth causes of action (claims for common law fraud and rescission of settlement agreement based upon fraud); and even if the claims implicated

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[3] We construe the notice of appeal from the November 23, 2015 order as a premature appeal from the judgment, which included an award of attorney fees pursuant to section 425.16. (Cal. Rules of Court, rule 8.104(d).)

the anti-SLAPP statute, the claims had the requisite minimal merit.[4] In addition, the attorney fee award in favor of Lee should be reversed.

DISCUSSION

1. *General principles*.

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. 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. [The Supreme Court has] 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. [Citation.] '[C]laims with the requisite minimal

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[4] The first cause of action for breach of contract, as to which the trial court denied the Zimny cross-defendants' special motion to strike, is not before us. The Zimny cross-defendants did not file a cross-appeal. Therefore, the contention in the respondents' brief that the breach of contract claim is infirm is beyond the scope of this appeal.

merit may proceed.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted.)

Our review of the trial court's order granting the special motion to strike is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

2. *Second cause of action for interference with economic advantage, based on Lee's failure to dismiss the lawsuit against A-Ju, did not arise out of protected activity and should not have been stricken.*

The second cause of action alleged that A-Ju's settlement agreement with Zimny, JL, and Chapel constituted an economic relationship which would have resulted in an economic benefit to A-Ju, and that Lee intentionally interfered in the economic relationship by "fail[ing] to perform [Lee's] clerical duty to dismiss the action against [A-Ju]."[5] Thus, the substance of the second cause of action is that after the parties settled the matter, Lee failed to file a dismissal of the action with prejudice, in accordance with the parties' settlement agreement.

In approaching the issue, we are guided by the principle that "a cause of action arises from protected conduct if the *wrongful, injurious act(s)* alleged by the plaintiff constitute

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[5] The elements of the tort of intentional interference with prospective economic advantage "are usually stated as follows: ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1153.)

protected conduct." (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 868 (*Old Republic*).) Section 425.16'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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) Here, the wrongful, injurious act alleged by A-Ju was Lee's interference with the settlement agreement *by failing to dismiss the action* – not Lee's activity in negotiating and enforcing the settlement agreement, which is Lee's characterization of his conduct.

Section 425.16, in subdivisions (e)(1) through (e)(4), identifies four categories of petitioning and free speech activity and conduct that constitute an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue,' " to wit: "(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), italics added.)

Lee's failure to file a request for dismissal with prejudice was not a written or oral statement of any type. Therefore, Lee's

alleged conduct does not constitute protected activity within the meaning of subdivisions (e)(1), (e)(2), or (e)(3) of the statute.

Nor does Lee's failure to dismiss the action against A-Ju constitute "conduct" within the meaning of subdivision (e)(4) of the statute. Although a failure to dismiss a lawsuit plainly is conduct, in moving to strike the second cause of action, Lee did not address the public issue limitation in subdivision (e)(4). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 [subdivision (e)(4) includes the limitation that the conduct relate to an issue of public interest].) It was Lee's burden to do so. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384 [moving defendant has initial burden to establish that the challenged claim arises from activity protected by section 425.16].) Accordingly, Lee failed to establish that his conduct in failing to dismiss the lawsuit constituted protected activity.

The court similarly concluded in *Old Republic*, *supra*, 230 Cal.App.4th 859. There, defendants allegedly wrongfully withdrew settlement funds which were deposited into a trust pursuant to a stipulation requiring plaintiff's consent to any withdrawal. (*Id*. at p. 862.) The withdrawal of funds was not protected conduct because it was neither communicative nor connected with an issue of public interest. (*Id*. at p. 870.) Merely because the funds which were withdrawn were settlement funds subject to a stipulation entered into in litigation was insufficient to bring the cause of action within the ambit of the anti-SLAPP statute. (*Id*. at p. 869.) *Old Republic* reasoned, "If the protected status of an underlying agreement furnished sufficient ground to invoke the anti-SLAPP statute against a claim for breach of that agreement, it would follow that *every* suit to enforce a settlement agreement would be subject at the threshold to a SLAPP motion.

Such a regime would significantly diminish the utility of such agreements, reduce the incentive for parties to enter into them, and thereby magnify the workload on courts, with attendant delay and expense for those who must resort to them. It follows that merely citing a settlement agreement as the basis for a duty allegedly breached by the defendant is not enough, by itself, to bring a cause of action for the breach within the statute." (*Id*. at p. 870.)

In sum, because Lee failed to establish that the second cause of action arose from his protected activity within the meaning of section 425.16, the second cause of action was not subject to anti-SLAPP scrutiny and should not have been stricken.

3. *Trial court properly struck the third and fourth causes of action, alleging fraud in the negotiation of the settlement agreement.*

a. *The third and fourth causes of action did arise out of protected activity.*

In the third and fourth causes of action, A-Ju and Bahk, respectively, alleged they were defrauded by all the cross-defendants. Specifically, on May 5, 2015, Zimny, JL, Chapel and Lee made a promise to dismiss the lawsuit against A-Ju in exchange for a waiver of costs and a mutual release of claims. However, the cross-defendants did not intend to perform the promise when it was made. They harbored a secret intention not to perform unless Lee could obtain a release of his obligation to A-Ju in *Chang v. A-Ju*, which was a completely unrelated matter.

These allegations of fraud relate to communications in the course of settlement negotiations. "Communications in the course of settlement negotiations are protected activity within

the scope of section 425.16. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963; *GeneThera, Inc. v. Troy & Gould Professional Corp*. (2009) 171 Cal.App.4th 901, 907.) The protection [of the anti-SLAPP statute] applies, even against allegations of fraudulent promises made during the settlement process. (*Navellier*, *supra*, 29 Cal.4th at p. 90; *Navarro v. IHOP Properties, Inc*. (2005) 134 Cal.App.4th 834, 842.)" (*Suarez v. Trigg Laboratories, Inc*. (2016) 3 Cal.App.5th 118, 123 (*Suarez*).)

"Misrepresentation or failure to disclose can [also] be protected petitioning activity for purposes of section 425.16." (*Suarez*, *supra*, 3 Cal.App.5th at p. 124.) The right to freedom of speech under the First Amendment to the United States Constitution and under article I, section 2 of the California Constitution, "encompasses what a speaker chooses to say, and what a speaker chooses not to say; it is a right to speak freely and also a right *to refrain from doing so at all*." (*Suarez*, *supra*, at p. 124, italics added.)

In *Suarez*, the plaintiff sued for rescission of a settlement agreement, asserting that defendant had fraudulently concealed material information which should have been disclosed, and that plaintiff was induced to settle his claims in a prior lawsuit for a fraction of their value. (*Suarez*, *supra*, 3 Cal.App.5th at pp. 121–123.) On appeal from the grant of defendant's special motion to strike, plaintiff contended that his action was "not premised on [defendant's] statements, but its active concealment and nondisclosure of [an] anticipated letter of intent" from a prospective buyer of the company. (*Id*. at p. 123.) In affirming the lower court's decision, *Suarez* held: "The activity upon which appellant premises this action is respondent's concealment of and failure to disclose the letter of intent from Ansell prior to the time

appellant agreed to settle *Suarez I*. This claim arises from respondent's litigation activity—to keep this information within the attorney-client privilege . . . . And it arises from respondent's protected right of free speech—the right not to speak. The first prong of the anti-SLAPP statute has been satisfied." (*Id*. at p. 125.)

Here, the cross-defendants' negotiation and execution of the settlement agreement involved statements or writings, as well as alleged omissions, made in connection with an issue under consideration by a judicial body (§ 426.16, subd. (e)(2)), i.e., the superior court, in the action by Zimny, JL, and Chapel against A-Ju. Accordingly, the third and fourth causes of action, which alleged fraudulent concealment and fraudulent inducement to enter into the settlement agreement, arose out of cross-defendants' protected activity within the meaning of the statute.

Having determined that the third and fourth causes of action arose out of cross-defendants' protected activity, we examine whether A-Ju and Bahk met their burden in opposing the special motions to strike those causes of action.

b. *A-Ju and Bahk failed to make a prima facie showing of a reasonable probability of success on their fraud claims, which are barred by the litigation privilege*.

As indicated, in the third and fourth causes of action, A-Ju and Bahk, respectively, alleged they were defrauded by the cross-defendants, who promised to dismiss the lawsuit against A-Ju in exchange for a waiver of costs and mutual release of claims, but they "did not intend to perform their promise when made." Instead, they harbored a secret intention not to perform unless Lee could obtain a release of his obligation to A-Ju in the unrelated *Chang* matter.

The cross-defendants contend the fraud claims are barred by the litigation privilege. [6]

A-Ju and Bahk, in turn, assert their fraud claims are not barred by the litigation privilege. They contend the trial court erred in concluding that the basis of their fraud-based rescission and damage claims was the negotiation of the settlement agreement; once the settlement agreement was entered into, any right to rely upon the litigation privilege as a defense to claims based on that contract was waived. In support, A-Ju and Bahk rely on *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1494 (*Wentland*), and *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 774 (*Navellier II*). Their reliance on these decisions is misplaced.

Navellier II held the litigation privilege did not bar plaintiffs' cause of action for breach of contract. (*Navellier II*, *supra*, 106 Cal.App.4th at pp. 773–774.) That is consistent with the principle that the litigation privilege bars derivative tort actions (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193; *Silberg v. Anderson, supra*, 50 Cal.3d at p. 213), not liability for breach of contract.

As for *Wentland*, it determined that "whether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege." (*Wentland*, *supra*, 126 Cal.App.4th at p. 1492.) *Wentland* concluded the litigation privilege "should not apply in

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[6] The litigation 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. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)

this breach of contract case." (*Id.* at p. 1494.) It reasoned: "The policies behind the litigation privilege are not furthered by its application in this case. Unlike in the usual derivative tort action, application of the privilege in the instant case does not serve to promote access to the courts, truthful testimony or zealous advocacy. *This cause of action is not based on allegedly wrongful conduct during litigation* . . . . Rather, it is based on breach of a separate promise independent of the litigation . . . . This breach was not simply a communication, but also wrongful conduct or performance under the contract . . . ." (*Ibid.*, italics added.)

Wentland added, "Where the gravamen of the cause of action sounds in tort, not contract, the litigation privilege applies. (*Edwards v. Centrex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 40 [(*Edwards*)] [rejecting argument that privilege did not apply to action for rescission of contract based on fraud].)" (*Wentland*, *supra*, 126 Cal.App.4th at pp. 1494–1495.)

In *Edwards*, *supra*, 53 Cal.App.4th 15, the appellants contended "the litigation privilege is inapplicable to the cause of action to rescind the releases because that cause of action assertedly sounds in contract and is therefore not the kind of derivative tort cause of action which the privilege is intended to prevent." (*Id.* at p. 40.) The *Edwards* court found the "contention is meritless. *Appellants' cause of action for rescission seeks to void the releases based upon respondents' fraud. The gravamen of the action therefore sounds in fraud, not in contract*." (*Ibid.*, italics added.)

Edwards is directly on point. The third and fourth causes of action by A-Ju and Bahk sought to rescind the settlement agreement based upon cross-defendants' alleged fraud in the

settlement negotiations; these claims sounded in tort, not in contract, and thus are subject to the litigation privilege. (*Edwards*, *supra*, 53 Cal.App.4th at p. 40.) The third and fourth causes of action were based on cross-defendants' "allegedly fraudulent conduct during litigation," as opposed to a post-litigation breach of a settlement agreement. (*Wentland*, *supra*, 126 Cal.App.4th at p. 1494.) We reject A-Ju and Bahk's attempt to recharacterize the fraud claims in the third and fourth causes of action as contractual claims for breach of the settlement agreement.

A-Ju and Bahk also argue that the litigation privilege does not apply to noncommunicative conduct; A-Ju and Bahk's theory seems to be that cross-defendants *concealed* their true intentions, which was noncommunicative, rather than making affirmative misrepresentations. The argument is unavailing because the alleged concealment by cross-defendants of their true intent during settlement negotiations does not amount to "noncommunicative" conduct.

To be sure, the "litigation privilege protects only publications and communications; it does not protect noncommunicative conduct. [However, t]he threshold issue in determining the applicability of the privilege 'is whether the defendant's conduct was communicative or noncommunicative.' (*Rusheen* [*v. Cohen* (2006)] 37 Cal.4th [1048,] 1058.) [¶] The distinction between communicative and noncommunicative conduct 'hinges on the gravamen of the action.' (*Rusheen*, *supra*, 37 Cal.4th at p. 1058.) '[T]he key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.' (*Ibid*.) The privilege 'extends to noncommunicative acts that are necessarily

related to the communicative conduct.' (*Id*. at p. 1065.) In short, 'unless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies.' [Citation.]" (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 616, fn. omitted.)

Rusheen illustrates the principle that "where the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Rusheen*, *supra*, 37 Cal.4th at p. 1052.) There, "because the claim for abuse of process was based on the communicative act of filing allegedly false declarations of service to obtain a default judgment, the postjudgment enforcement efforts, including the application for writ of execution and act of levying on property, were protected by the [litigation] privilege." (*Ibid*.)

Here, the third and fourth causes of action allege that cross-defendants fraudulently induced them to enter into the settlement agreement by concealing their true intent. However, such silence by cross-defendants was necessarily related to communicative conduct in the negotiation and execution of the settlement agreement. Stated another way, in the context of settlement negotiations, affirmative representations, as well as omissions or concealment, constitute communicative conduct. Accordingly, the litigation privilege extends to cross-defendants' alleged omissions and concealment which were necessarily related to their communicative conduct.

Thus, on the record before us, with respect to the third and fourth causes of action alleging fraudulent concealment in settlement negotiations, all four elements of the litigation privilege are satisfied: (1) the settlement negotiations were made

in a judicial proceeding; (2) they were negotiated by the parties, through their respective attorneys; (3) to achieve the goal of settling the litigation; and (4) clearly had a connection or logical relation to the litigation. (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212.)

In view of the bar of the litigation privilege, A-Ju and Bahk failed to establish a reasonable probability of prevailing on their fraud claims.

4. *Award of attorney fees on special motion to strike.*

When a defendant prevails on a special motion to strike, an award of attorney fees is mandatory under section 425.16, subdivision (c). (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141–1142.) Here, Lee sought attorney fees in the sum of $92,650 for cross-defendants having partially prevailed on the special motion to strike the cross-complaint. The trial court deemed Lee's request excessive and exercised its discretion in awarding attorney fees in the reduced sum of $19,270.

A-Ju and Bahk contend that if the order granting the special motion to strike the third and fourth causes of action is reversed, the attorney fee award to Lee should also be reversed. In view of our determination that the trial court properly struck the third and fourth causes of action, we leave the attorney fee award undisturbed.

DISPOSITION

The November 23, 2015 order is reversed insofar as it struck the second cause of action of the cross-complaint, and is otherwise affirmed. The $19,270 award of attorney fees is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, J.*

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