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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MATHESON TRI-GAS, INC., et al.,

Plaintiffs, Cross-defendants
and Appellants,

v.

DAVID JOHNSON et al.,

Defendants, Cross-
complainants and Respondents.

B277705

(Los Angeles County
Super. Ct. No. BC576924)

APPEAL from an order of the Superior Court of Los
Angeles County. Marc Marmaro, Judge. Affirmed.

LeclairRyan, Clint D. Robison, Angeli C. Aragon, and
Robert Harrison for Plaintiffs, Cross-defendants and Appellants.

Sheppard Mullin Richter & Hampton, Fred R. Puglisi,
Sascha Henry, and Juthamas J. Suwatanapongched for
Defendants, Cross-complainants and Respondents.

Plaintiffs, cross-defendants and appellants Matheson Tri-Gas, Inc. (Matheson) and Sims Welding Supply Co., Inc. (Sims) (collectively, plaintiffs) appeal from the trial court’s order denying their special motion to strike, pursuant to Code of Civil Procedure section 425.16,¹ the cross-complaint filed by defendants, cross-complainants and respondents David Johnson (Johnson), Joshua Drury, Melissa Johnson, Joel Giacomino, Allen “AC” Goins, Catrinus “Dutch” Vandervelde, Steve Prickett (collectively, the individual defendants), and Westair Gases & Equipment, Inc. (Westair).² We affirm the trial court’s order.

BACKGROUND

The parties

Matheson is a manufacturer and supplier of gases to various industries, including semiconductor manufacturers, welders, hospitals, and others. Matheson acquired Sims, a long-standing customer and distributor of Matheson’s, in February 2015. The individual defendants are former Sims employees who left their employment and went to work for Westair after Matheson acquired Sims.

Matheson’s acquisition of Sims

Matheson expressed an interest in purchasing Sims in March of 2014. Between March 2014 and February 2015, Matheson and Sims engaged in a protracted sales process, and Sims’s employees, including the individual defendants, were

¹ All further statutory references are to the Code of Civil Procedure, unless stated otherwise. A motion brought pursuant to section 425.16 is commonly referred to as an anti-SLAPP motion. SLAPP is an acronym for a strategic lawsuit against public participation. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.)

² Westair and the individual defendants are referred to collectively as defendants.

uncertain about their future employment. Matheson extended an offer of employment to Johnson, but Matheson made no employment offers to any of the other individual defendants. None of the individual defendants ever received a paycheck from Matheson.

Matheson acquired Sims on February 11, 2015. The individual defendants resigned from their employment at Sims in March 2015 and went to work for Westair.

The instant action and cross-action

Plaintiffs commenced this action against defendants in March 2015. In their operative second amended complaint, plaintiffs asserted causes of action for breach of fiduciary duty, breach of the duty of loyalty, fraud -intentional misrepresentation, fraud--deceit, violation of the Uniform Trade Secrets Act, interference with prospective economic advantage, interference with contractual relations, and unfair competition in violation of Business and Professions Code section 17200.

Plaintiffs allege that prior to Matheson's acquisition of Sims, the individual defendants conspired to leave their employment at Sims in order to work at Westair, a competitor. Plaintiffs allege that Johnson, Sims's former Vice President of Sales and General Manager, falsely represented to Matheson that he would remain with the company after Matheson acquired Sims. Plaintiffs further allege that Johnson and the other individual defendants committed various tortious acts before leaving their employment with Sims, including accessing and misappropriating Sims's confidential business information, removing customer files from Sims's premises, and performing unauthorized cylinder audits.

Defendants filed their answer to the second amended complaint. At the same time, defendants filed a cross-complaint for indemnity under Labor Code section 2802, indemnity under

Corporations Code section 317, and equitable indemnity, seeking reimbursement of their fees and costs in defending against plaintiffs' action.

The anti-SLAPP motion

Plaintiffs filed their anti-SLAPP motion on May 27, 2016, arguing that all of the causes of action asserted in the cross-complaint arose from plaintiffs' filing of the instant action -- a protected activity under section 425.16. Plaintiffs further argued that defendants could not meet their burden of establishing a probability of prevailing on the merits of their claims because, as a matter of law, they are not entitled to indemnity for fees and costs incurred in defending against the instant action and because their claims are barred by the litigation privilege.

Defendants opposed the anti-SLAPP motion, arguing that their indemnity claims are based on their prior employment relationship with Sims, and not the filing of plaintiffs' action against them. Defendants further argued that they have a reasonable probability of prevailing on their claims. In support of their opposition, defendants presented documentary evidence and the deposition testimony of several witnesses.

Following a July 14, 2016 hearing at which the parties presented argument, the trial court denied the anti-SLAPP motion. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

Section 425.16, subdivision (b)(1) 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 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.” Subdivision (e) of section 425.16 defines 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 include “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” (§ 425.16, subd. (e)(3)), or “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)(4).)

Determining whether the statute bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action “aris[es] from any act . . . in furtherance of the [moving party’s] right of petition or free speech.” (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.) If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a “probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 “““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.” [Citation.]” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. omitted.)

A trial court’s order granting a special motion to strike under section 425.16 is reviewed de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

II. Arising out of protected activity

A. *Applicable legal principles*

Plaintiffs contend all of the claims asserted in defendants' cross-complaint arise out of the filing of the instant action -- protected petitioning activity under section 425.16. Filing a lawsuit is an exercise of a party's constitutional right of petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*); *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 (*Chavez*).) “[T]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.” [Citations.]” (*Briggs, supra*, at p. 1115.) Thus, “a cause of action arising from a defendant’s alleged improper filing of a lawsuit may appropriately be the subject of a section 425.16 motion to strike. [Citation.]” (*Chavez, supra*, at p. 1087.)

“But the mere fact an action was filed after protected activity took place does not mean it arose from that activity.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78 (*Cotati*).) “[T]hat a cause of action arguably may have been ‘triggered’ by protected activity does not entail that it is one arising from such. [Citation.]” (*Navellier, supra*, 29 Cal.4th at p. 89.) Under the anti-SLAPP statute, “the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity. [Citations.]” (*Ibid.*)

To determine whether the causes of action asserted in defendants' cross-complaint arise from acts in furtherance of plaintiffs' right of petition, we must “consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) In doing so, we “examine the *principal thrust or gravamen*” of those causes of action to determine whether the anti-SLAPP statute applies. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135

Cal.App.4th 510, 519-520.) We assess the gravamen of defendants' claims by identifying "[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim." [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) As our Supreme Court has explained, “[t]he 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.” (*Navellier, supra*, 29 Cal.4th at p. 92.) A court considering an anti-SLAPP motion must therefore examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed. (*Id.* at pp. 92-93.) We apply these principles to the causes of action asserted by defendants against plaintiffs.

B. Defendants’ cross-claims do not arise out of protected activity

Defendants’ causes of action for statutory indemnity are based on their prior employment relationship with Sims, not on the filing of plaintiffs’ lawsuit against them. Defendants’ cause of action under Labor Code section 2802 seeks indemnity for plaintiffs’ claims, “the majority of which arise out of [defendants’] employment with Sims.”³ Defendants’ cause of action under Corporations Code section 317 similarly seeks indemnity against claims that they “committed various torts by continuing to

³ Labor Code section 2802 requires employers to indemnify its employees for “all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.” (Lab. Code, § 2802, subd. (a).)

perform their job duties until they resigned from the employment at Sims.”⁴

Defendants specifically allege in their cross-complaint that the claims asserted against them are based on the individual defendants’ performance of normal job duties during their employment with Sims. For example, defendants allege that Johnson, as Sims’s Vice President of Sales and General Manager, regularly received and reviewed reports on various aspects of Sims’s finances, including confidential information such as spreadsheets listing Sims’s current accounts and customers. Johnson’s duties also included negotiating sales contracts with Sims’s customers and communicating regularly with customers about their needs. Because plaintiffs’ breach of duty, fraud, and other claims against Johnson are premised largely on his performance of these same job duties, defendants claim that Sims is legally obligated to defend them against those claims.

Defendants further allege that Joshua Drury and Joel Giacomino, while working as sales representatives for Sims, routinely took customer files from Sims’s offices to customer site visits or to work on the files while out of the office, and that neither Drury nor Giacomino were required to seek or obtain permission from Sims before doing so. Giacomino regularly emailed business documents to his personal email account in order to facilitate communications with and sales to Sims’s customers. As part of his normal job duties, Giacomino would

⁴ Corporations Code section 317 obligates California corporations to indemnify “any person who was or is a party or is threatened to be made a party to any proceeding . . . by reason of the fact that the person is or was an agent of the corporation” if that person is successful on the merits in defense of the proceeding. (Corp. Code, § 317, subds. (b), (d).)

also conduct periodic cylinder audits. The results of these cylinder audits were provided to Melissa Johnson, who, as part of her normal job duties, would reconcile those results with information contained in Sims's computer system. Performance of these job duties is the basis for many of plaintiffs' claims, and defendants contend they are entitled to indemnity from Sims against those claims.

In their cause of action for equitable indemnity, defendants allege that they were never employees of Matheson, and that they had no duty to inform Matheson that they were considering other employment options. Defendants further allege that to the extent there was a duty to inform Matheson that they were considering leaving, that duty belonged to Sims and not to them. Defendants allege that Sims knew that defendants were considering other employment options while the sale to Matheson was pending, and that Sims had actual knowledge that Johnson was contemplating leaving Sims. Plaintiffs themselves admit that Sims's founder, Kelly Sims, Sr. (Sims Sr.), knew that that Johnson was considering leaving Sims, and that Sims Sr. paid Johnson a substantial sum of money in exchange for Johnson's agreement to remain at Sims until the sale to Matheson closed. Plaintiffs further admit that Sims Sr. never disclosed these facts to Matheson.

The pleadings and evidence submitted by the parties show that defendants' indemnity claims do not arise out of activity protected under the anti-SLAPP statute. (*Cotati, supra*, 29 Cal.4th at pp. 76-78.) Although plaintiffs argue that defendants' cross-complaint repeatedly references the second amended complaint and the allegations contained therein, such references alone are insufficient to trigger the protection of the anti-SLAPP statute, without any meaningful showing that defendants' causes of action are based on plaintiffs' filing of the second amended

complaint. (See *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931-932.) Plaintiffs' burden of establishing that defendants' cross-claims arise from the protected right of petition is not satisfied by showing that the cross-complaint followed the filing of plaintiffs' action, or even that it was in response to or motivated by the filing of the action. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. [Citation.]" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) A court must instead focus on the substance of the claims in analyzing the first prong of a motion to strike. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669-670.)

The gravamen of defendants' cross-claims is (1) that they are entitled to indemnity by Sims because they are being sued for actions taken in the course and scope of their employment with Sims, and (2) that to the extent plaintiffs suffered any damages, Sims itself is responsible for those damages. The acts on which defendants' cross-claims are based consist of Sims's alleged breaches of its statutory and equitable obligations of indemnity, not the filing of plaintiffs' complaint. Defendants' cross-claims for indemnity accordingly do not arise from the protected right of petition. (See *Drell v. Cohen* (2014) 232 Cal.App.4th 24, 30 [declaratory relief action to determine the status of an attorney fee lien "did not allege [the] defendants engaged in wrongdoing by asserting their lien," but rather "asked the court to declare the parties' respective rights to attorney fees"].)

The cases on which plaintiffs rely in support of their position are distinguishable. For example, *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363 involved an employer's action for misappropriation of trade secrets against a former employee, who in turn counter-sued for malicious prosecution and

abuse of process, among other claims. (*Id.* at p. 1367.) In affirming the order granting the employer’s anti-SLAPP motion, the court in *Raining Data* held that the causes of action for malicious prosecution and abuse of process “by definition” arose from the protected activity of the employer’s filing of its complaint. (*Id.* at p. 1368.) The employee’s remaining causes of action alleged both protected and unprotected activity but included only a single specific allegation of conduct by the employer that was not directly tied to the filing of the complaint-- a communication that occurred after the filing of the complaint and that was arguably protected by the litigation privilege. (*Id.* at p. 1371.) Here, in contrast, the allegations on which defendants’ indemnity claims are based concern either acts that predate the filing of plaintiffs’ complaint -- e.g., Sims’s failure to disclose to Matheson that Johnson and the other individual defendants were contemplating leaving Sims while the merger was pending -- or that arise from Sims’s employment relationship with the individual defendants rather than from any protected activity by Sims or Matheson. Defendants’ cross-claims do not allege that plaintiffs’ filing of the instant action constituted wrongful conduct; rather, they allege that Sims breached its legal duty to reimburse them for costs incurred after Matheson sued them.

Fremont Reorganizing Corp. v. Faigin (2011) 198 Cal.App.4th 1153 is equally distinguishable. In that case, the challenged cross-claim for equitable indemnity was based on allegations that the plaintiff had breached fiduciary duties by making statements to the Insurance Commissioner, who was acting as a court-appointed liquidator in a pending liquidation proceeding. (*Id.* at pp. 1162-1163, 1167.) The statements arose from protected activity because they were made in connection

with an issue under consideration in a judicial proceeding. (*Ibid.*) No similar protected speech or activity is at issue here.

Plaintiffs seek to equate the concept of “arising from” protected activity under the anti-SLAPP statute with the broad causation concept of “but for.” They argue that “‘but for’ the main action, and Plaintiffs’ alleged actions in connection with the litigation of the main action, Defendants’ claims of indemnity would have no basis whatsoever.” This argument contradicts the rule requiring analysis of the gravamen of the challenged causes of action and ignores the principle that a cause of action does not arise from protected activity merely because it “may have been ‘triggered’ by protected activity.” (*Navellier, supra*, 29 Cal.4th at p. 89.)

Courts have rejected similar attempts to invoke the protections of the anti-SLAPP statute simply because a lawsuit “trigger[ed] the chain of events that caused” a plaintiff to file a claim. (*State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974, 977.) In *Majorino*, State Farm’s insureds were sued for assault by third parties. State Farm brought a declaratory relief action against its insureds and the third parties to determine if it had a duty to indemnify the insureds for liability resulting from the alleged assault. The third parties filed an anti-SLAPP motion, arguing that State Farm’s claim arose from the personal injury action they had filed against State Farm’s insureds. (*Id.* at p. 976.) The court rejected the argument, reasoning: “[The third parties’] personal injury suit against [State Farm’s insureds] did trigger the chain of events that caused State Farm to seek a judicial declaration of its coverage obligations. And the nature of the claims in the underlying personal injury case frames the scope of coverage under the State Farm policy. But the action for declaratory relief *arose* from the tender of defense and the terms of an insurance

policy issued well before the underlying litigation commenced, not from the litigation process itself. [Citation.]” (*Id.* at p. 977; accord, *Olive Properties, L.P. v. Coolwaters Enterprises, Inc.* (2015) 241 Cal.App.4th 1169, 1175 [no relief warranted under the anti-SLAPP statute merely because tenant’s prior lawsuit “arguably ‘triggered’ the unlawful detainer complaint”].)

The trial court did not err by concluding that plaintiffs failed to meet their threshold burden of establishing that defendants’ cross-claims arise from activity protected under the anti-SLAPP statute. Because we conclude that plaintiffs failed to meet their threshold burden, we need not reach the issue of whether defendants demonstrated a probability of prevailing on their cross-claims.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed.
Defendants are awarded their costs on appeal.

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_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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