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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ESOS RINGS, INC. et al.,

Plaintiffs, Cross-defendants
and Respondents,

v.

JOSEPH PRENCIPE et al.,

Defendants, Cross-
complainants and Appellants.

B287875

(Los Angeles County
Super. Ct. No. BC652020)

APPEAL from an order of the Superior Court of
Los Angeles County. Malcolm H. Mackey, Judge. Affirmed in
part and reversed in part.

Stephen G. Larson, R.C. Harlan, Steven A. Haskins,
Andrew J. Bedigian, Suzie Vardanyan; Zweiback, Fiset &
Coleman, Rachel L. Fiset and Erin C. Coleman for Defendants,
Cross-complainants, and Appellants.

Mintz Levin Cohn Ferris Glovsky and Popeo, Andrew D. Skale, Ben L. Wagner and Heather J. Silver for Plaintiffs, Cross-defendants and Respondents.

Cross-complainants McLear & Co. (McLear) and Joseph Prencipe (Prencipe) challenge a trial court order granting cross-defendants Esos Rings, Inc. (Esos) and Michelle Silverstein's (Silverstein)¹ motion to strike portions of the cross-complaint pursuant to Code of Civil Procedure section 425.16,² California's anti-SLAPP statute.³ We agree with cross-defendants that the cross-complaint is not exempt from the anti-SLAPP procedure under the commercial speech exemption of section 425.17, subdivision (c). But, we conclude that cross-complainants' claim for conversion does not fall within the scope of the anti-SLAPP statute and should not have been stricken. Accordingly, we

¹ Our review of the appellate record reveals that the anti-SLAPP motion was brought only by Esos. But the parties seem to agree that the motion applies to both Esos and Silverstein. Tracking the parties' briefs, we treat the motion as having been filed by both Esos and Silverstein.

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

³ SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

reverse the trial court's order striking the fourth cause of action for conversion from the cross-complaint, and we reinstate that cause of action only.

FACTUAL AND PROCEDURAL BACKGROUND

Factual background

On April 12, 2016, the United States Patent and Trademark Office issued U.S. Patent No. 9,313,609 (the '609 Patent) to Prencipe as its sole inventor. The "Contract Information Social Exchange Method and Systems" patent covers, without limitation, a near-field communications ring that, when worn on the consumer's finger, can replace his or her credit card and/or house key.

On May 1, 2016, Prencipe incorporated McLear as its sole incorporator. Silverstein was hired as McLear's chief operations officer. Approximately five months later, on October 10, 2016, Prencipe executed an Intellectual Property Assignment Agreement that purported to assign the '609 Patent to McLear.

At some point, the relationship between Prencipe and Silverstein soured. According to Silverstein, Prencipe was acting as the attorney for the individuals who would ultimately form Esos, including herself. The parties had apparently agreed that Silverstein and her business partner, Rex Scates, should own the '609 Patent. Acting on behalf of himself, as principal of McLear, and as an attorney for Silverstein, Prencipe told Silverstein that McLear was not a valid party to receive the assignment; thus, he advised that corrected assignments be executed to transfer the '609 Patent from Prencipe to Silverstein's business.

For months, Silverstein believed that Prencipe was doing what needed to be done to effectuate the transfer of the '609

Patent. At some point, she learned that Prencipe was continuing to exploit the '609 Patent and had not done what he promised.

Prencipe tells a different story. He asserts that towards the end of her tenure as McLearn's chief operating officer, Silverstein engaged in a "plan to destroy McLearn, steal the '609 Patent, and use it to start a competing business." Prencipe claims that Silverstein not only attempted to steal the '609 Patent, but she also attempted to steal his customers. According to Prencipe, Silverstein, on behalf of herself and Esos, told Prencipe's customers that he was dishonest and that Esos owned the '609 Patent. "One of these current customers that Silverstein has contacted is Visa. In fact, Silverstein and her counsel have *repeatedly* contacted Visa claiming that [McLearn and Prencipe] have no rights to the '609 Patent, threatening litigation if Visa continues to do business with [McLearn] and disparaging [Prencipe and McLearn]." In support of this assertion, Prencipe offered a copy of an e-mail from Silverstein to Visa, in which she stated: "All future information should flow through Andrew Skale. He will be suing VISA on our behalf."

The pleadings

On February 27, 2017, Esos filed the instant action against McLearn and Prencipe, alleging claims for breach of contract, declaratory relief, quiet title, fraudulent transfer, fraud, breach of fiduciary duty, and intentional interference with prospective economic relations.

On April 18, 2017, McLearn and Prencipe filed a cross-complaint against Esos and Silverstein, asserting claims for breach of contract, interference with business relations, defamation, conversion, quiet title/declaratory relief, and unfair business practices.

Cross-defendants' anti-SLAPP motion

Cross-defendants filed an anti-SLAPP motion, asking that the trial court strike four of the causes of action pled in McLearn and Prencipe's cross-complaint. They argued that the defamation and interference causes of action arose from acts in furtherance of Esos's rights of petition and free speech. And, McLearn and Prencipe could not show a probability of prevailing because the litigation privilege applied.

Regarding the conversion cause of action, Esos asserted that because McLearn's "conversion claim is expressly premised on Esos'[s] filing with the [United States] Patent and Trademark Office [(USPTO)] its own claims of ownership to the '609 Patent, supposedly 'causing the USPTO to incorrectly record these false assignments in the chain of title for the '609 Patent,'" the conversion claim arose from protected activity.

Last, Esos argued that the unfair business practices claim was subject to the same deficiencies as the other alleged torts. Thus, this claim should be stricken as well.

Cross-complainants' opposition to the anti-SLAPP motion

Cross-complainants opposed the anti-SLAPP motion, asserting that the commercial speech exemption set forth at section 425.17, subdivision (c), applied. Alternatively, cross-complainants argued that they had a probability of prevailing on their claims.

Trial court order; appeal

After entertaining oral argument, the trial court granted cross-defendants' anti-SLAPP motion, striking cross-complainants' second (interference), third (defamation), fourth (conversion), and seventh (unfair business practices) causes of action. In so ruling, it specifically rejected cross-complainants'

reliance upon section 425.17, finding that cross-complainants failed to establish a requisite element of that exemption, namely that the challenged statements be made for the purpose of obtaining business for the speaker. Instead, the trial court found that “the alleged communications [were made] to assert claims to rights.”

Cross-complainants’ motion for reconsideration was denied, and this timely appeal ensued.

DISCUSSION

I. *Standard of review*

“We review the trial court’s rulings on a SLAPP motion independently under a de novo standard of review. [Citation.]” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.) Similarly, “[w]e review the applicability of the commercial speech exemption independently.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 26 (*Simpson*).)

II. *Section 425.17 does not apply*

Because section 425.17 shields from the anti-SLAPP statute a cause of action stemming from commercial speech, we must first determine whether the commercial speech exemption applies before assessing the merits of cross-defendants’ anti-SLAPP motion.

A. Relevant law

“In 2003, concerned about the ‘disturbing abuse’ of the anti-SLAPP statute, the Legislature enacted section 425.17 to exempt certain actions from it.” (*Simpson, supra*, 49 Cal.4th at p. 21; see also *Northern Cal. Carpenters Regional Council v. Warmington Hercules Associates* (2004) 124 Cal.App.4th 296, 299.) Specifically, “[s]ection 425.16 does not apply to any cause of

action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer," (§ 425.17, subd. (c).)

Section 425.17, subdivision (c), exempts "from the anti-SLAPP law a cause of action arising from commercial speech when (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2)." (*Simpson, supra*, 49 Cal.4th at p. 30.) This "commercial speech exemption" is a statutory exception to section 425.16, and plaintiffs (or, in this

case, cross-complainants) bear the burden of proving each of its elements. (*Simpson*, *supra*, 49 Cal.4th at pp. 22, 26; see also *JAMS, Inc. v. Superior Court* (2016) 1 Cal.App.5th 984, 992.) As a statutory exemption, it must be narrowly construed.⁴ (*Simpson*, at p. 22.)

B. Analysis

At issue in this appeal is whether cross-complainants' causes of action arise from conduct for the purpose of securing commercial transactions with a third party. As pointed out by cross-defendants, there is no evidence that Esos and/or Silverstein's statements were made "for the purpose of obtaining . . . commercial transactions in [Esos's] goods." (§ 425.17, subd. (c)(1).) Thus, cross-complainants did not establish that this exemption applies.

In urging reversal, cross-complainants point to Prencipe's declaration in which he purports to recount what third parties told him that Silverstein said. But, those statements were rightly stricken as inadmissible hearsay. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3 ["we . . . review a

⁴ In their respondents' brief, cross-defendants rely heavily upon *Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54, particularly in regards to the standard of review on appeal for the commercial speech exemption. In July, after respondents' brief was filed, our Supreme Court reversed the Court of Appeal decision. (See *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 797.) In so doing, the Supreme Court did not address section 425.17 or the commercial speech exemption, let alone the Court of Appeal's discussion of that exemption. We conclude, without any reference to *Monster Energy*, that pursuant to *Simpson* the commercial speech exemption does not apply.

ruling on an evidentiary objection in connection with a special motion to strike for abuse of discretion”].)

Cross-complainants also point to the first two sentences of Silverstein’s e-mail to Visa. Those sentences state: “All further information should flow through Andrew Skale [cross-defendants’ counsel]. He will be suing VISA on our behalf.” Apart from asking Visa to work with cross-defendants, Silverstein warned Visa “not [to] enable a Ring in the United States.” This evidence shows that cross-defendants were asserting their ownership interest in the ‘609 Patent to stop a third party from infringing its rights; it does not show that cross-defendants were merely trying to drive business in their direction.

The fact that there may have been some incidental benefit to Esos as a result of its communications is insufficient. (See, e.g., *JAMS, Inc. v. Superior Court*, *supra*, 1 Cal.App.5th at p. 998 [“[T]he statements or conduct from which [the] causes of action arise is more ‘commercial speech’ than anything else. Whether or not the statements may be used for other purposes does not change the analysis”].)

Finally, we note that cross-complainants seek reversal in part on the grounds that the trial court erred in its analysis and application of the commercial speech exemption. In light of our de novo review and consideration of the commercial speech exemption before we turn to the merits of the anti-SLAPP motion, any alleged error by the trial court in its approach to these issues would have been harmless as a matter of law. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Having determined that the commercial speech exemption is inapplicable, we turn to the merits of cross-defendants’ anti-SLAPP motion.

III. *The anti-SLAPP statute*

“A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so.” (*Simpson, supra*, 49 Cal.4th at p. 21.) “In 1992, out of concern over a ‘disturbing increase’ in these types of lawsuits, the Legislature enacted section 425.16, the anti-SLAPP statute.” (*Ibid.*; see § 425.16, subd. (a).) Section 425.16, subdivision (b)(1), provides: “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.” The statute “posits . . . a two-step process for determining whether an action is a SLAPP.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the defendant bringing the special motion to strike must make a *prima facie* showing that the anti-SLAPP statute applies to the claims that are the subject of that motion. (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th at p. 819.) Once a moving defendant has met its burden, the motion will be granted (and the claims stricken) unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567–568.)

In order to establish a probability of prevailing, a plaintiff must *substantiate* each element of the alleged cause of action through competent, admissible evidence. (*DuPont Merck Pharmaceutical Co. v. Superior Court, supra*, 78 Cal.App.4th at p. 568; see also *Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88–

89 [reiterating that “the plaintiff “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””].) “This requirement has been interpreted to mean that (1) when the trial court examines the plaintiff’s affidavits filed in support of the plaintiff’s *second step* burden, the court must consider whether the plaintiff has presented sufficient evidence to establish a prima facie case on his causes of action, and (2) when the trial court considers the defendant’s opposing affidavits, the court cannot weigh them against the plaintiff’s affidavits, but must only decide whether the defendant’s affidavits, as a matter of law, defeat the plaintiff’s supporting evidence.” (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184.) Only if he fails to meet this burden is the motion properly granted. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188–1189.)

IV. *The trial court erroneously granted cross-defendants’ motion to strike the conversion cause of action*

Notably, on appeal, cross-complainants only challenge that portion of the trial court’s order striking their fourth cause of action for conversion. Thus, we deem any objection to any other aspect of the trial court’s order forfeited (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852) and affirm the trial court’s order regarding the other three causes of action.

As for the conversion cause of action, we conclude that the trial court erred. A claim is only subject to a motion to strike if it “aris[es] from” protected activity. (§ 425.16, subd. (b)(1).) Cross-defendants bore the burden of showing that the challenged conversion claim “aris[es] from” protected activity. To do this,

cross-defendants were required to demonstrate that “the speech or petitioning activity *itself* [was] the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.) In evaluating whether that requirement is met, courts consider “the principal thrust or gravamen of a plaintiff’s cause of action” and determine whether the acts underlying that cause of action were acts in furtherance of the right of petition or free speech. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–520.)

Nothing in the nature of cross-complainants’ conversion claim suggests that it falls within the scope of the anti-SLAPP statute. ““Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages. . . .” [Citation.]’ [Citations.]” (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) That is exactly what is alleged here, namely that cross-defendants used forged documents to interfere with McLear’s ownership of the ‘609 Patent.

Certainly, the cross-complaint alleges that cross-defendants went “so far as to record these [forged] documents with the USPTO thus causing the USPTO to incorrectly record these false assignments in the chain of title for the ‘609 Patent.” For that reason, cross-defendants assert because their claims of ownership over the ‘609 Patent include the filing and maintaining of the patent assignments, anti-SLAPP protection applies. We disagree. The filing of the patent paperwork may constitute

protected activity. (See, e.g., *Mindys Cosmetics, Inc. v. Dakar* (9th Cir. 2010) 611 F.3d 590, 596–597 [holding that the act of filing trademark applications was a protected activity within the meaning of § 425.16].) But that is not the gravamen of cross-complainants’ claim here. Rather, the allegations relating to the filing of paperwork for the chain of title to the ‘609 Patent provide context. And, “[a]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394.)

DISPOSITION

The order granting cross-defendants’ anti-SLAPP motion to strike the fourth cause of action for conversion is reversed. In all other respects, the order is affirmed. The parties to bear their own costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT