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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HIRBOD ETESSAMI, Plaintiff and Respondent, v. HOSSEIN FARZAM BERENJI, Defendant and Appellant.	B235818 (Los Angeles County Super. Ct. No. BC458841)

APPEAL from an order of the Superior Court of Los Angeles County, Zaven V. Sinanian, Judge. Reversed in part with directions, dismissed in part.

Tabatabai & Blonstein, Farzad Tabatabai and Robert S. Blonstein for Plaintiff and Respondent.

Trope & DeCarolis, Michael L. Trope, Andrew M. Stein; Information Law Group and Tanya L. Forsheit for Defendant and Appellant.

INTRODUCTION

Defendant and appellant Hossein Farzam Berenji appeals an order denying his special motion to strike the complaint of plaintiff and respondent Hirbod Etessami (Hiri) pursuant to Code of Civil Procedure section 425.16,[1] the anti-SLAPP statute. Berenji is an attorney who represented Pegah Etessami (Pegah) in an underlying marital dissolution action (the dissolution action) against her husband Rambod Etessami (Rami). Hiri is Rami's brother and former business partner.

In the dissolution action Berenji obtained an order permitting him and his associates to inspect and copy financial records in the dental office maintained by Rami and Hiri. The essence of Hiri's complaint is that Berenji exceeded his authority in enforcing the court order and, in doing so, committed various torts. We shall conclude that Berenji's alleged misconduct was activity protected by the anti-SLAPP statute and that Hiri did not meet his burden of showing a probability of prevailing on his causes of action. Accordingly, we shall reverse the trial court's order denying Berenji's anti-SLAPP motion.[2]

FACTUAL AND PROCEDURAL BACKGROUND

1. *Commencement of the Dissolution Action*

Rami and Pegah were married in 1991. According to Pegah, she was "predominantly a house wife" and the mother of three children. Pegah did not have much knowledge about Rami's professional and business affairs.

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[1] SLAPP is an acronym for strategic lawsuit against public participation. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] The order also overruled, in part, Berenji's demurrer to the complaint. To the extent Berenji challenges the court's decision to overrule the demurrer, the order is not appealable. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 668, fn. 5 (*Peregrine*).)

In February 2010, Pegah commenced the dissolution action by filing a petition for marital dissolution in Los Angeles County Superior Court (Case No. BD520144). The case was assigned to the Family Law Division of the court. (See Super. Ct. L.A. County, Local Rules, rules 2.1(c) & 2.7(d).) Pegah's first attorney in the dissolution action was Evan Sussman.

2. *Hiri and Rami's Partnership*

When Pegah and Rami married, Rami had his own dental practice. In 1993, Rami formed a general partnership with his brother Hiri. Both Rami and Hiri are endodontists, that is, dentists who specialize in root canals and root canal surgery. The brothers were "50-50" partners. Their dental office was located on Sunset Boulevard in West Hollywood (the dental office).

3. *Rami's Alleged Failure to Disclose Income and Assets*

After the dissolution action commenced, Pegah and her attorney suspected that Rami did not fully disclose his assets or his earnings from the partnership he had with Hiri. Without telling Rami, Pegah went to the dental office when it was closed and copied financial records.[3] Pegah claims that she always had full access to the keys to the dental office and that she found financial documents either on top of the bookkeeper Manoucher Lari's desk or in unlocked cabinets. Hiri and Rami contend that Pegah wrongfully took the keys to the office from Rami and "stole" the documents from a locked drawer.

[3] The record does not indicate the precise date Pegah copied financial records. It is undisputed that she did so in 2010 before October 7, 2010, and prior to Berenji becoming her attorney in the dissolution action.

In early October 2010, Pegah filed an application in the dissolution action accusing Rami of failing to disclose information concerning the partnership's pension plan and diverting his income into Hiri's account at Hanmi Bank.[4] The application, prepared by attorney Sussman, was supported by documents Pegah copied at the dental office. In response to the application, the court issued an order prohibiting withdrawals from certain bank accounts held by Rami and Hiri.

4. *Berenji Becomes Pegah's Counsel*

On November 1, 2010, Berenji was retained by Pegah to serve as her lawyer in the dissolution action. Hiri alleges that Pegah gave the documents she obtained from the dental office to Berenji.

5. *The Alleged Dissolution of the Partnership*

Hiri claims that he dissolved his partnership with Rami on November 2, 2010. Hiri signed a letter on that date to Rami stating that he had decided to "immediately dissolve and begin winding up [their] general partnership." According to Hiri, he dissolved the partnership to "protect" his assets and income. After the alleged dissolution, Hiri and Rami continued to work in the same dental office. There is no evidence in the record indicating that Hiri or Rami advised Pegah, Berenji or the judge presiding over the dissolution action about the alleged dissolution of the partnership at any time in 2010.

6. *The December 8, 2010, Order*

After being retained by Pegah, Berenji reviewed the documents Pegah obtained from the dental office, as well as Rami's discovery responses. Based on this review, Berenji believed Rami had significantly higher income than he reported to the court and was concealing relevant documents.

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[4] Hiri disputes that Rami wrongfully diverted income and assets from Pegah. He contends that because his "production and collection in the practice" was greater than Rami's, the brothers decided to deposit funds in a separate account in Hiri's name at Hanmi Bank "to make up the difference."

On or about December 7 or 8, 2010, Berenji filed on Pegah's behalf an ex parte application in the dissolution action, without giving notice to Rami or his counsel. In the application, Pegah sought an order allowing Berenji and his consultant, OnlineSecurity, Inc. (Online), to inspect and copy financial records in the dental office.

On December 8, 2010, the superior court issued an order granting the application. The order provided that Berenji and Online were granted "full access" to the dental office, including access to physical books and records and the computer system, "to conduct a thorough investigation of the true extent and nature of the Practice's income from 4:00 p.m. Thursday December 9, 2010 to 4:00 p.m. Friday December 10, 2010."

The order further provided that Rami, Hiri and their employees were "barred from locking or removing any items from any storage spaces inside the office or in the building in which the office is located." Additionally, the order required Berenji and Online to observe certain protocols designed to preserve the privacy interests of Rami, Hiri and their patients, and to prevent the destruction or alteration of original records.

7. *Berenji's First Attempt to Inspect and Copy Records*

On December 8, 2010, Berenji and two employees of Online, Ronald Lavender and Richard Gralnik, entered the dental office. Berenji contends he entered the dental office at 4:00 p.m. Hiri contends Berenji arrived at about 3:40 or 3:45 p.m.

When Berenji arrived, Hiri and Rami stopped treating their respective patients and approached Berenji. Berenji had a camera in one hand, which he used to videotape part of the events of that day. In the other hand, he had the December 8, 2010, order, which he gave to Hiri and Rami. Hiri and Rami demanded that Berenji stop videotaping. They also demanded that Berenji leave the dental office. Berenji refused to leave or stop videotaping. The brothers then went into a separate room away from the patient treatment area, and attempted to close the door. Berenji, however, did not allow them to do so.

One of Hiri's patients (Patient X) approached Berenji and demanded that Berenji leave. Berenji refused. Hiri claims that Berenji "shoved" Patient X. Berenji denies this claim.[5] Patient X left the dental office after this confrontation.

In response to telephone calls by Hiri and Rami, a security guard employed by the building, about five sheriff's deputies, and Rami's lawyer arrived at the scene shortly after Berenji appeared. After prolonged negotiations, Berenji was unable to inspect and copy documents that day. Pursuant to an agreement with Rami's lawyer, however, Berenji caused seals to be placed on the dental office doors after all of its occupants left.

Because Rami was very upset about Berenji's arrival, he was unable to finish an endodontic procedure he was performing on his patient Kent Mirkhani. Mirkhani returned the next day to complete the procedure.[6]

8. *The December 10, 2010, Order and Berenji's Inspection and Copying of Records*

At 7:00 a.m. on December 10, 2010, Gralnik of Online confirmed that the seals to the dental office were not broken. At 7:30 a.m., however, the building management required Gralnik to leave the building.

Later that day, Rami and Pegah, through their respective counsel, appeared in superior court. Pursuant to an agreement of the parties, the court entered a new order superseding the December 8, 2010, order. This order granted Berenji and Online access to "all" files and computers at the dental office which contain any financial records of Rami and Hiri. The order also included protocols for protecting the privacy of the brothers' patients.

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[5] The videotape Berenji recorded captured the moment Berenji allegedly shoved Patient X. Patient X stated, "You hit me." Berenji immediately denied he had done so. Berenji contends that the videotape conclusively supports his version of events. Hiri contends that Berenji shoved Patient X with one hand, outside the view of the camera. Although we find no evidence in the videotape that Berenji shoved Patient X, we cannot conclude as a matter of law that Berenji's version of this encounter is accurate.

[6] Unfortunately, due to the delay in completing the procedure, Rami was unable to fully anesthetize Mirkhani. Mirkhani thus suffered a great deal of pain.

Pursuant to the new order, at about 1:00 p.m. on December 10, 2010, Berenji, Gralnik and Lavender began inspecting and copying documents and computers at the dental office. They continued their efforts, with an overnight break, until the afternoon of Saturday, December 11, 2010.

Later that day, Hiri and his wife went to the dental office. Hiri claims he found papers and boxes left everywhere and fast food bags and half-eaten food all over the office. He also alleges that the backup hard drive to his personal laptop was no longer in the dental office. He and his wife searched for the hard drive for about half an hour, but could not find it.

On Monday, December 13, 2010, Hiri and his staff again looked for Hiri's backup hard drive to no avail. They also allegedly found that significant data on their computer system was missing. Hiri's computer expert, Roderick McLeod, was able to retrieve much of the data. However, McLeod was allegedly unable to retrieve about 15,000 X-rays and computer files relating to about $150,000 of accounts receivables.

In a declaration in support of his anti-SLAPP motions, Berenji stated that he "never touched, accessed, or in any way damaged or took any computer or hard drive." Instead, he instructed Online to access and copy electronic records from the partnership's computers. In their declarations in support of Berenji's anti-SLAPP motion, Lavender and Gralnik denied seeing or removing an external backup hard drive from Hiri's office, damaging the partnership's computer system, or losing any data on that system.

9. *Further Proceedings in the Dissolution Action*

On March 7, 2011, Pegah filed a motion to join Hiri as a party to the dissolution action and a proposed complaint for joinder against Hiri and other defendants. The proposed complaint set forth causes of action for conversion, fraudulent transfer and conspiracy. The gravamen of the complaint is that Hiri conspired with Rami to convert Pegah's community property and to fraudulently transfer the community income and assets to Hiri.

On April 6, 2011, the court granted Pegah's motion to join Hiri as a party to the dissolution action. At the hearing on the motion, the court stated that it appeared the documents Berenji obtained from the inspection of the dental office indicated Rami had failed to disclose hundreds of thousands of dollars of income. The court further stated: "I was very queasy about [issuing the December 8 and 10, 2010, orders] in part because I anticipated that it could easily erupt into the kind of fracas that both parties refer to, although from different perspectives when it actually happened. But now good thing I did. Who knows what records we never would have seen or known about if there hadn't been the ability to just go in and get them by surprise."

10. *Hiri's Complaint in this Action*

On April 4, 2011—two days before Hiri was made a party in the dissolution action—Hiri filed the complaint in this action against Pegah and Berenji. The complaint is primarily based on Pegah's purported wrongful taking of documents from the dental office and the Berenji's conduct at the dental office on December 9, 10, and 11. The complaint set forth causes of action for (1) conversion, (2) declaratory relief, (3) false imprisonment, (4) abuse of process, (5) intentional infliction of emotional distress, (6) negligence, (7) trespass to personal property, (8) trespass to real property, (9) intentional interference with economic relationship, (10) negligence interference with economic relationship, and (11) invasion of privacy. We shall discuss the factual and legal claims of the complaint in greater detail *post*.

11. *Berenji's Demurrer, Motion to Strike and Special Motion to Strike in This Action*

On May 20, 2011, Berenji filed a demurrer to the complaint and a motion to strike portions of the complaint in this action. In his demurrer, Berenji argued that the court had no "jurisdiction" over the complaint in this action "because the Family Law Court has already asserted jurisdiction over the parties and issues raised therein" (§ 430.10, subd. (a)); the action should be stayed because there is another action pending between

the same parties on the same causes of action (§ 430.10, subd. (c); and the complaint does not contain sufficient facts to state a cause of action (§ 430.10, subd. (e).)

On June 6, 2010, Berenji filed a special motion to strike the complaint pursuant to the anti-SLAPP statute.[7] Berenji's motion was supported with declarations by Pegah, Berenji, Lavender and Gralnik, and a request for judicial notice of documents in the dissolution action.

Hiri's opposition to the anti-SLAPP motion was supported with declarations by Hiri, Rami's patient Kent Mirkhani, bookkeeper Manoucher Lari, computer specialist Roderick McLeod, dental office receptionist Sylvedra Harris, and Olaf Muller, the attorney who drafted documents relating to the alleged dissolution of the partnership.

12. *The Superior Court's Denial of Hiri's Notice of Related Cases*

On May 20, 2011, Berenji filed a notice of related cases, claiming that this action and the dissolution action were related. On June 23, 2011, Department 1 of Los Angeles County Superior Court entered an order denying Pegah's request to deem this action and the dissolution action as related cases.

13. *The July 26, 2011, Order*

On July 26, 2011, the trial court entered an order denying Berenji's anti-SLAPP motion. The order also sustained Berenji's demurrer with leave to amend with respect to the first cause of action and overruled the demurrer as to the remaining causes of action. Additionally, the order granted Berenji's motion to strike allegations regarding attorney fees but denied the remainder of the motion. Berenji filed a timely notice of appeal of the July 26, 2011, order.

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[7] Pegah also filed a demurrer, motion to strike and special motion to strike, which the trial court adjudicated. Because Pegah is not a party on appeal, we shall not discuss her demurrer or motions.

DISCUSSION

A. *The Demurrer and Motion to Strike*

Berenji contends that the superior court presiding over this action did not have "jurisdiction" over Hiri's complaint. Alternatively, he argues the trial court should have stayed this action pending the resolution of the dissolution action. These arguments were raised in Berenji's demurrer to the complaint in this action but were not raised in his anti-SLAPP motion. Because an order overruling a demurrer is not appealable (*Peregrine, supra,* 133 Cal.App.4th at p. 668, fn. 5), we do not reach the merits of these arguments. We instead on our own motion dismiss the appeal to the extent it challenges the trial court's ruling overruling Berenji's demurrer.

Berenji makes no arguments with respect to the trial court's ruling on his motion to strike portions of the complaint. This opinion thus does not address that ruling.

B. *The Anti-SLAPP Motion*

Section 425.16, the anti-SLAPP statute, is designed to "nip SLAPP litigation in the bud" by striking causes of action which chill the free exercise of speech or petitioning rights. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042.) To accomplish its purposes, the anti-SLAPP statute must be "construed broadly." (§ 425.16, subd. (a).)

In determining whether to grant an anti-SLAPP motion, the court engages in a two-step process. "First, the court decides whether the defendant has made the threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right to petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

We review the denial of an anti-SLAPP special motion to strike de novo. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*); *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845.)

1. *Each Cause of Action Arises From Protected Activity*

In determining whether a plaintiff's cause of action arises from any act in furtherance of the defendant's right to petition or free speech, we do not focus on "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."[8] (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) We review the gravamen of a cause of action to see if it is based on defendant's protected activity. (*McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 177; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) If the cause of action alleges both protected and unprotected activity, it will be subject to a section 425.16 motion unless the protected conduct is merely "incidental" to the unprotected conduct. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 614.)

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[8] Section 425.16, subdivision (e) provides: "As used in this section, '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' *includes*: (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." (Italics added.) Because the categories enumerated are not all-inclusive, the defendant's activity need not neatly fit into these categories to be protected by the anti-SLAPP statute. (*Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1041-1042; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 283; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175.)

" 'A cause of action "arising from" defendant's *litigation activity* may appropriately be the subject of a section 425.16 motion to strike.' [Citations.] 'Any act' includes communicative conduct such as the filing, funding, and prosecution of a civil action. [Citation.] This includes qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen*, *supra*, 37 Cal.4th at p. 1056, italics added [obtaining a writ of execution and levying on a judgment debtor's property was protected activity]; accord *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489 (*Taheri*) [an attorney's alleged improper solicitation of a client and wrongful enforcement of a settlement agreement was protected activity]; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 (*Chavez*) ["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"]); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 (*Dowling*) [attorney's letter regarding a dispute her client had with a third party was subject to an anti-SLAPP motion].)

In the present case, Hiri's complaint alleged that Berenji engaged in the following activity:

- On December 9, 2010, while in the dental office pursuant to a court order, Berenji "improperly confined" Hiri by telling Hiri that "under a court order" he "could not leave the premises."
- On December 9, 2010, Berenji videotaped, abused and harassed two patients, namely Patient X and Kent Mirkhani.
- On December 9, 2010, Berenji and his agents "entered the [dental] office, including the private patient area, at about 3:40 p.m., even though the order of December 8, 2010, permitted them to enter only at 4:00 p.m." In addition, on December 11, 2010, Berenji and his agents "stayed at the office past the time that the order of December 10, 2010, had permitted."

- On or about December 10 or 11, 2010, while Berenji and Pegah were inspecting and copying documents in the dental office pursuant to a court order, defendants "took" Hiri's personal backup hard drive, destroyed "most of the data that was on the office's computer system," and failed to follow the order's protocols to preserve patient privacy.
- On dates unknown in 2010, Pegah "entered the office and stole various financial documents relating to [Hiri] or the practice." "[B]y reading and disseminating" Hiri's private financial records, Berenji violated Hiri's reasonable expectation of privacy.

The gravamen of each cause of action in Hiri's complaint is that Berenji acted tortuously while inspecting and copying documents pursuant to a court order, or by using "stolen" documents in the dissolution action. This litigation activity is subject to an anti-SLAPP motion. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1056; *Taheri*, *supra*, 160 Cal.App.4th at p. 489; *Chavez*, *supra*, 94 Cal.App.4th at p. 1087; *Dowling*, *supra*, 85 Cal.App.4th at p. 1420.)

Hiri argues that Berenji's actions were "illegal" and thus do not qualify for protection under the anti-SLAPP statute. In *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), we addressed a similar argument. There, the defendants conceded that, as a matter of law, their conduct was illegal and a violation of the rules prohibiting money laundering set forth in the Political Reform Act. (*Id.* at p. 1367.) We held that under those circumstances, the defendants' conduct was not protected by the anti-SLAPP statute. (*Ibid.*) We emphasized, however, that "had there been a factual dispute as to the legality of defendants' actions, then we could not so easily have disposed of defendants' motion." (*Ibid.*)

In *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), our Supreme Court agreed with *Paul*'s conclusion that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law.[9] (*Flatley*, at p. 317.) The defendant in *Flatley* was an attorney who sent a letter to the plaintiff demanding a seven-figure payment. The court concluded that the defendant's "communications constituted criminal extortion as a matter of law and, as such, were unprotected by the constitutional guarantees of free speech or petition." (*Id.* at p. 305.) In coming to this conclusion, the court stated that "where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the [anti-SLAPP] motion must be denied." (*Id.* at p. 316.)

In *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644 (*Mendoza*), the plaintiff alleged that the defendant sold information to plaintiff's prospective employer it obtained from the Megan's Law website in violation of a statute, Penal Code section 290.4, subdivision (d)(2)(E).[10] In opposition to the defendant's anti-SLAPP motion, the plaintiff argued that the defendant's "illegal" conduct was not protected activity. (*Mendoza*, at p. 1653.) The court, however, rejected this argument. It stated: "Our reading of *Flatley* leads us to conclude that the Supreme Court's use of the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute." (*Id.* at p. 1654; accord *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 616 (*Intelligator*) [failure to redact information in violation of a court rule was "not the type of criminal activity addressed in either *Flatley* . . . or *Paul*"].)

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[9] *Paul* was disapproved on other grounds by *Equilon*. (*Equilon*, *supra*, 29 Cal.4th at p. 68, fn. 5.)

[10] This statute prohibits the use of information regarding sex offenders posted by the Department of Justice on a web site for purposes relating to employment. (Pen. Code, § 290.4, subd. (d)(2)(E).)

Here, Berenji does not concede he engaged in illegal activity, and Hiri has not conclusively shown by evidence that Berenji's conduct was "illegal." Berenji's activity thus does not fall into the narrow exception for illegal activity discussed in *Paul*, *Flatley*, *Mendoza*, and *Intelligator*.

Hiri contends that, as a matter of law, Berenji's use of a camcorder constituted "criminal eavesdropping" in violation of Penal Code section 632. We disagree. Penal Code section 632 prohibits the recording of "confidential communication" without consent. (Pen. Code, § 632, subd. (a).) Berenji openly and over Hiri's objection recorded communications between Hiri and others. There was nothing "confidential" about the communications because Hiri knew he was being recorded while he was speaking.[11]

Hiri also argues Berenji's use of a camcorder violated Penal Code 647, subdivision (j)(1).[12] This statute addresses the misdemeanor of being a "Peeping Tom." (*People v. Hobbs* (2007) 152 Cal.App.4th 1, 8.) We cannot conclude, as Hiri urges, that Berenji violated this statute as a matter of law because there was evidence that all of the people videotaped in the office understood they were being filmed during the course of a court-sanctioned inspection.

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[11] "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto but excludes . . . any . . . circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Pen. Code, § 632, subd. (c).)

[12] The statute provides that "[a]ny person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a . . . camcorder, . . . the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside" is guilty of disorderly conduct, a misdemeanor. (Pen. Code, § 647, subd. (j)(1).)

Additionally, Hiri argues that by using documents Pegah obtained from the dental office, Berenji committed the crime of receiving "stolen" property in violation of Penal Code section 496. There was evidence, however, that Pegah only obtained documents concerning the Hiri-Rami partnership by entering the office with Rami's implied consent. As the spouse of one of the two partners, Pegah had a right to copy such documents. (See Family Code, § 721, subd. (b)(1) [spouses have a duty to provide each other access to books and records regarding community property]; Corp. Code, § 16403, subd. (b) [a partnership shall provide partners access to books and records pertaining to the period during which they were partners].) Based on this record, we cannot conclude, as Hiri urges, that Pegah "stole" the documents as a matter of law.

Moreover, Berenji cannot be guilty of the crime of receiving stolen property unless he knew the property was stolen. (Pen. Code, § 496, subd. (a).) Hiri did not present evidence conclusively establishing that Berenji had such knowledge.

In sum, virtually all of Berenji's alleged wrongful conduct arose from his litigation activity in the dissolution action and none of it was, as a matter of law, illegal. Berenji therefore has made the threshold showing that Hiri's causes of action are subject to an anti-SLAPP motion.

2. *Hiri Has Not Demonstrated a Probability of Prevailing on Any of His Causes of Action*

Having determined that Berenji's alleged conduct falls within the scope of the anti-SLAPP statute, we turn to the issue of whether Hiri established a probability that he will prevail on his causes of action. "To establish a probability of prevailing, 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.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).) Although we do not weigh the evidence, we must grant the motion " 'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' " (*Ibid.*)

We cannot, however, strike a cause of action if the plaintiff establishes a probability that he or she will prevail on any part of it, even if other parts are without merit. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 (*Mann*); accord *Oasis West Realty, LLC* (2011) 51 Cal.4th 811, 820.)

Berenji argues that Hiri cannot demonstrate a probability of success on the merits with respect to any of his causes of action because Berenji's conduct is absolutely privileged under the litigation privilege. The litigation privilege, as codified by Civil Code section 47, subdivision (b), " ' "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 [has] some connection or logical relation to the action." [Citation.] The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." [Citation.]' " (*Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333.) The privilege also applies to conduct outside the courtroom. (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134.) " 'Any doubt as to whether the privilege applies is resolved in favor of applying it.' " (*Tom Jones Enterprises, Ltd. v. County of Los Angeles* (2013 212 Cal.App.4th 1283, 1294.)

"Because the litigation privilege protects only publications and communications, a 'threshold issue in determining the applicability' of the privilege is whether the defendant's conduct was communicative or noncommunicative. [Citation.] The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen, supra*, 37 Cal.4th at p. 1058; accord *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 45 (*Brown*) ["The litigation privilege applies only to torts arising from communicative acts; it does not protect purely noncommunicative tortious conduct"].)

In *Brown*, the plaintiff alleged that the defendant, an attorney, wrongfully caused a writ of execution to be levied upon his exempt funds. As a preliminary matter, the court noted that "judgment enforcement efforts, as an extension of a judicial proceeding and related to a litigation objective, are considered to be within the litigation privilege." (*Brown*, *supra*, 94 Cal.App.4th at pp. 49-50.) The court then held that the privilege not only protects the communicative act of applying for a writ of execution, "it also extends to the act of carrying out the directive of the writ. To hold otherwise would effectively strip the litigation privilege of its purpose." (*Id.* at p. 50, fn. omitted.) The court further stated that "the policy underlying the litigation privilege of encouraging free access to the courts by discouraging derivative litigation simply outweighs the policy of providing [the plaintiff] with a tort remedy for an allegedly wrongful enforcement of a judgment." (*Id.* at p. 50.)

In *Rusheen*, the California Supreme Court approved of and refined the holding in *Brown*. The high court concluded 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.)

In *Rusheen*, attorney Barry Cohen obtained on behalf of his client a default judgment against Terry Rusheen. Cohen permitted his client to take steps to collect on the judgment, such as obtaining a writ of execution and levying on Rusheen's property in Nevada. (*Rusheen*, *supra*, 37 Cal.4th at pp. 1053-1054.) Rusheen subsequently sued Cohen for abuse of process. He claimed that Cohen obtained the default judgment by filing false and perjurious declarations. (*Id.* at p. 1054.)

Rusheen argued that the wrongful act of levying on property in execution of judgment was a noncommunicative act and thus unprivileged. (*Rusheen*, *supra*, 37 Cal.4th at p. 1061.) The California Supreme Court, however, held that even if levying on property involved noncommunicative conduct, "the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly

perjured declarations of service." (*Id.* at p. 1062.) The court further held that because the gravamen of the complaint was a privileged communication, the privilege extended to "necessarily related noncommunicative acts (i.e., act of levying)." (*Ibid.*)

Turning to the complaint in this action, we shall discuss whether Hiri has met his burden of establishing a probability that he will prevail on each cause of action. This discussion will often include an analysis of whether Hiri's claim is barred by the litigation privilege.

a. **Conversion and Trespass to Personal Property**. Hiri's first cause of action is for conversion. " ' "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." ' " (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) A cause of action for conversion can be based on either the taking of property or its intentional destruction or alteration. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 710, 711, pp. 1034-1035 (Witkin Summary).)

Hiri's seventh cause of action is for trespass to personal property. "Trespass to personal property often arises in circumstances where a defendant's interference with another's property falls short of that required for a conversion cause of action. Thus, cases have described this tort as 'the "little brother of conversion." ' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1607.) A trespass to personal property occurs when the plaintiff injures but does not wholly destroy the defendant's property. (6 Witkin Summary, *supra*, § 1718, p. 1252.)

The complaint alleged that Berenji committed conversion and trespass to personal property by (1) destroying certain data stored on the dental practice's computer system and (2) taking a backup hard drive for Hiri's personal laptop.[13] In support of his allegations regarding the data on the computer system, Hiri filed declarations essentially stating that prior to the inspection conducted by Berenji and his associates from Online, the practice's computer system contained certain data, but after the inspection some of that data was destroyed.

Berenji, however, stated in his declaration that he did not touch the practice's computer system. Instead, according to Berenji, pursuant to a court order he directed Lavender and Gralnik of Online to inspect and copy information stored on the system. Lavender and Gralnik stated in their declarations that they did so. Hiri offered no evidence contradicting these facts.

It is thus undisputed that Berenji's only conduct in connection with the alleged destruction of the data on the computer system was to instruct Lavender and Gralnik to inspect and copy the data pursuant to a court order. This communicative conduct was protected by the litigation privilege. Hiri thus did not meet his burden of showing he would prevail on his conversion and trespass to personal property causes of action to the extent they are based on the destruction of data stored on the practice's computer system.[14]

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[13] Although the complaint alleged that Pegah converted certain financial documents, Hiri's conversion cause of action against Berenji is not based on Pegah's conduct.

[14] Arguably Hiri cannot base his conversion cause of action on the destruction of data in the computer system because it consists of intangible property. (See 5 Witkin Summary, *supra*, § 702, p. 1025; but see *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1565-1566; *Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1033-1034.) We do not reach this issue because we conclude Hiri's claim that Berenji converted data in the computer system is barred by the litigation privilege.

By holding that the litigation privilege bars Hiri's claim against Berenji, we do not suggest that Hiri was prohibited from seeking any remedy for the alleged destruction of data in the dissolution action. (*Rusheen, supra,* 37 Cal.4th at p. 1063 ["modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit"].) We merely conclude that the policy underlying the litigation privilege outweighs the policy of providing Hiri with a tort remedy against Berenji. (*Brown, supra,* 94 Cal.App.4th at p. 50.)

Hiri's second basis for his conversion and trespass to personal property causes of action is that Berenji allegedly stole his back up hard drive to his personal laptop. He failed, however, to file substantial evidence to support this claim.

In his declaration, Hiri stated the following. Pursuant to a court order, Berenji, Pegah and seven or eight associates inspected and copied records in the dental office on Friday, December 10, 2010 and in the early hours of Saturday, December 11, 2010.[15] Although Hiri was not in the office on December 10, his staff, Rami, and Rami's patient were there. On December 11, at about 2:00 p.m., Hiri and his wife Jackie arrived at the office. Shortly thereafter, Hiri noticed that his backup hard drive to his personal laptop "was gone." He and his wife looked for the hard drive for about 30 minutes but could not find it.

Hiri then came back to the dental office on the morning of Monday, December 13, 2010. He and his staff looked for the hard drive on that day and over the next few weeks, but they never found it. Hiri claimed: "I have reason to believe that Berenji and/or Pegah took it, but I will not broach the subject further now." Berenji, Pegah, Lavendar and Gralnik, conversely, each stated in their respective declarations that they never saw a back up hard drive and did not take it.

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[15] Hiri's declaration did not state what time Berenji and his associates left the office. Berenji's declaration stated that he was there until 1:15 a.m. on December 11, 2010.

Hiri did not establish he could prevail on his conversion and trespass to personal property causes of action to the extent they are based on Berenji's alleged taking of his hard drive. He conceded that in addition to Berenji, many people were in the dental office before, during and after Berenji's inspection. Further, Hiri was not in the office when the inspection took place or at any time on December 12. His "belief" that Berenji and/or Pegah stole the hard drive is nothing more than speculation.

b. **Declaratory Relief**. Hiri's second cause of action is for declaratory relief. This equitable action is limited to certain subjects. A person with an interest in a contract or other written instrument, for example, may seek a declaration regarding his or her rights and duties under the contract or written instrument. (§ 1060; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 858, pp. 273-274 (Witkin Procedure).) Declaratory relief is also available to any person "who desires a declaration of his or her rights or duties . . . in respect to, in, or over or upon property, or with respect to the location of the natural channel of a watercourse . . . ." (§ 1060.) Additionally, the construction or validity of a statute, ordinance or regulation is also a proper subject for declaratory relief. (5 Witkin Procedure, § 859, pp. 274-275.)

Here, the complaint sought a declaration that Berenji "unlawfully accessed information, data, or property" belonging to Hiri or his patients and that Berenji "damaged the data for the office's computer." Hiri, however, has cited no authority—and we have found none—that these are proper subjects for declaratory relief.

Hiri's reliance on *Coronado Cays Homeowners Assn. v. City of Coronado* (2011) 193 Cal.App.4th 602, 608 (*Coronado*), *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1012, fn. 6 (*Tashakori*) and *Wollenberg v. Tonningsen* (1935) 8 Cal.App.2d 722, 726 (*Wollenberg*) is misplaced. In each of those cases, the plaintiff sought a declaration regarding the rights and duties of the parties with respect to property, which is a subject of declaratory relief under the plain language of section 1060. (*Coronado*, at p. 605 [declaration regarding which party is responsible for maintaining a berm that laterally supports bulkheads located on real property within a subdivision]; *Tashakori*, at p. 1012,

fn. 6 [declaration regarding whether plaintiffs had an equitable easement over certain real property]; *Wollenberg*, at p. 726 [declaration regarding rights of parties with respect to the stock of the corporation].) In *Coronado*, the plaintiff's declaratory relief claim also required an interpretation of written instruments, namely a special use permit and a recorded map concerning certain real property. (*Coronado*, at pp. 605, 609.)

By contrast, in this case, Hiri does not seek a declaration regarding the rights and duties of the parties with respect to property or a written instrument. He seeks declaratory relief regarding factual issues underlying alleged torts committed by Berenji. This is not a proper subject for declaratory relief. Hiri therefore failed to demonstrate the legal sufficiency of the complaint with respect to his declaratory relief cause of action. Accordingly, the trial court should have granted Berenji's special motion to strike this claim.

c. **False Imprisonment**. The gravamen of Hiri's third cause of action for false imprisonment is that Berenji allegedly made erroneous statements to Hiri about the scope of the court order, namely that the order prohibited Hiri from leaving the dental office.[16] This was communicative conduct in connection with the December 8, 2010, order. Berenji therefore is immune from liability for false imprisonment under the litigation privilege. Accordingly, the trial court erroneously denied Berenji's special motion to strike Hiri's false imprisonment cause of action.

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[16] Berenji contends that he only advised Hiri and others in the dental office that under the court order, they could not take financial documents out of the office. Hiri stated in his declaration that Berenji said that "he had a court order, that nobody was allowed to leave with anything, and that no one could take anything." Hiri further stated: "Due to Berenji's actions, I felt extremely intimidated and that I was being held in my office against my will." Hiri's receptionist, Sylvedra Harris, stated in her declaration that "Berenji told Hiri that he had a court order to be there, that no one could leave the office *or* take anything . . . ." (Italics added).

d. **Abuse of Process**. Hiri's fourth cause of action is for abuse of process. In order to prevail on an abuse of process cause of action, the plaintiff must establish that "the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.) Hiri cannot establish either element.

As to the first element, the complaint alleged that Berenji's ulterior motives in abusing process were to "punish" Hiri, to harm his practice, and to use Hiri as a "pawn to obtain leverage against his brother Rami" in the dissolution action. Hiri, however, cited no evidence in his brief to support these allegations.

With respect to the second element, the complaint alleged that Berenji misused the December 8 and 10, 2010, orders by (1) failing to observe the required protocols, (2) falsely imprisoning Hiri, (3) "videotaping and abusing" Hiri's and Rami's patients, (4) destroying data on the practice's computer system, and (5) stealing Hiri's backup hard drive. As explained *ante*, however, Hiri cannot establish his false imprisonment or conversion claims. Further, he presented no evidence that Berenji failed to comply with the required protocols or that he sustained any damages as a result.[17]

This leaves Hiri's claim that Berenji videotaped and abused his patient and Rami's patient. Hiri, however, has no standing to pursue a claim for alleged injuries sustained by third parties. (See § 367.) Further, as we shall explain *post*, Hiri did not present any evidence that he was damaged by an alleged interference with his economic relationship with his patient. Hiri therefore did not meet his burden of showing a probability that he would prevail on his abuse of process cause of action.

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[17] The complaint alleged that the protocols required, among other things, giving the documents to a third-party attorney and then to Rami and Hiri, so that the documents could be redacted to protect the privacy interests of patients and Rami and Hiri could object to the admission of the documents in court. Berenji, however, allegedly failed to produce documents to Rami and Hiri for objection for almost four months.

e. **Intentional Infliction of Emotional Distress**. Hiri's fifth cause of action is for intentional infliction of emotional distress (IIED). The elements of IIED are (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 (*Hughes*).)

A defendant's conduct is "outrageous" only when it is " ' "so extreme as to exceed all bounds of that usually tolerated in a civilized community." ' " (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 (*Potter)*.) "Severe emotional distress means ' "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' " (*Id.* at p. 1004.)

Liability for IIED " ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." ' " (*Hughes*, *supra*, 46 Cal.4th at p. 1051.) Additionally, except for narrow circumstances not applicable here, the law limits IIED to egregious conduct directed *toward the plaintiff*. (*Potter*, *supra*, 6 Cal.4th at p. 1002.)

Here, Hiri bases his IIED cause of action on Berenji's acts of (1) videotaping two patients and "assaulting and battering one of them and harassing the other"; (2) taking Hiri's backup hard drive; and (3) destroying data on the practice's computer system. As explained *ante*, however, he cannot prevail on any of these claims. Hiri does not have standing to sue for alleged torts committed against third-party patients. There is no substantial evidence that Berenji converted Hiri's hard drive. And Berenji is protected by the litigation privilege against Hiri's claim regarding alleged destruction of data on the practice's computer system.

Additionally, we conclude that as a matter of law, Berenji's alleged conduct *toward Hiri* was not sufficiently "outrageous" to support an IIED claim. Berenji's alleged interactions with Hiri's patients were not directed *toward Hiri*, and thus cannot be the basis for an IIED claim by Hiri. This leaves Berenji's alleged theft of a hard drive and the failure of Berenji's associates to preserve certain data on a computer system. While this alleged conduct is certainly reprehensible, it is not the stuff of IIED.

Hiri also failed to plead and prove sufficient facts to support his assertion he suffered from "severe emotional distress" as a result of Berenji's alleged conduct. Hiri claims that he has not "slept well" since Berenji conducted his "raid" on the dental office.[18] He also claims that he has lost a noticeable amount of weight and looks skinny since the incident. This does not constitute the type of severe emotional distress that no reasonable person in a civilized society should be expected to endure. (See *Hughes*, *supra*, 46 Cal.4th at p. 1051 [holding that plaintiff's assertions that she suffered discomfort, worry, anxiety, upset stomach, concern and agitation as a result of the defendant's conduct were insufficient].) Hiri therefore did not meet his burden of showing that he would prevail on his IIED cause of action.

f. **Negligence**. Hiri's sixth cause of action is for negligence. He bases this claim on Berenji's alleged (1) assault and battery of one patient and harassment of another patient, (2) failure to observe the protocols required by the December 8 and 10, 2010, orders, (3) conversion of Hiri's backup hard drive, and (4) destruction of data on the practice's computer system. As explained *ante*, however, Hiri did not meet his burden of establishing the merits of any of these claims.

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[18] Hiri also stated in his declaration: "Patients and staff members, and other doctors, mention to me that I look sad and quiet. Many times Sylvia, my receptionist, has said, 'I want my old Dr. Hiri back.' . . . Even my two young sons, eleven and thirteen, have told me many times, 'Daddy, what happened to you? Why are you so sad and quiet.' " Berenji objected to this testimony as inadmissible hearsay. This objection was well taken. (Evid. Code, § 1200.)

g. **Trespass to Real Property**. Hiri's eighth cause of action is for trespass to real property. Trespass to real property is an "unlawful" interference with its possession. (5 Witkin Summary, *supra*, § 693, p. 1018; *Girard v. Ball* (1981) 125 Cal.App.3d 772, 788.) "A peaceable entry on land by consent is not actionable." (5 Witkin Summary, § 696, p. 1021; accord *Girard v. Ball*, at p. 788.)

In the present case, Berenji lawfully entered the dental office pursuant to court orders. Hiri contends that Berenji violated the December 8, 2010, order and thus committed the tort of trespass by arriving 15-20 minutes too early on December 9, 2010.[19] We reject this argument.

Although an action for trespass will support an award of nominal damages where actual damages are not shown (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406), a trespass action cannot be based on a mere trifle (Civ. Code, § 3533). In this case, at the time Berenji entered the dental office on December 9, 2010, neither Hiri nor Rami stated that he was not permitted to be there because he came too early. Rather, they objected to Berenji's presence in the office at any time. The dispute was resolved the following day when the trial court issued a second order permitting Berenji to conduct the inspection.

Hiri has not produced any evidence indicating that Berenji's entry into the dental office at about 3:45 p.m., instead of at 4:00 p.m., on December 9, 2010, made any difference whatsoever to Hiri. Indeed, the videotape of Berenji's initial entry into the dental office indicates that Berenji's alleged early entry was not an issue at the time.

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[19] The complaint also alleged that Berenji "stayed at the office past the time that the order of December 10, 2010, had permitted." Hiri, however, does not cite any evidence to support this allegation. Further, the December 10, 2010, order did not clearly state when the inspection was to cease. Hiri thus did not establish he would probably prevail on his trespass claim to the extent it is based on Berenji's alleged failure to leave the dental office on time on December 11, 2010.

In reaching our conclusion that Hiri has not established the probability of prevailing on his trespass claim we take into account the context of the alleged trespass. Berenji, an attorney, went to the dental office pursuant to a discovery order. If we ruled that each time an attorney commenced a court-sanctioned document inspection or deposition a few minutes too early, he or she were subject to a collateral suit for "trespass," we would open the doors to precisely the type of litigation the anti-SLAPP statute is designed to prohibit. We decline to do so.

h. **Intentional and Negligent Interference With Economic Relationship**. Hiri's ninth and tenth causes of action are for intentional interference with economic relationship and negligent interference with economic relationship. These causes of action are based on Berenji's alleged interference with Hiri's relationship with Patient X.

An essential element of both intentional and negligent interference with economic relationship is actual economic harm caused to the plaintiff proximately caused by the acts of the defendant. (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [intentional interference]; *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [negligent interference].) Although the complaint alleged that Hiri suffered damages as a result of Berenji's conduct, Hiri presented no evidence to support this claim. Hiri's evidence merely indicated that Patient X left the office on December 9, 2010. He presented no evidence, however, that Patient X did not pay Hiri for his services or that Patient X was no longer Hiri's patient. Hiri therefore did not meet his burden of showing that he was likely to prevail on his intentional and negligent interference with economic relationship causes of action.

i. **Invasion of Privacy**. Hiri's eleventh and final cause of action is for invasion of privacy. This cause of action is based on two acts. The first is Berenji's alleged taking of Hiri's hard drive, which allegedly contained Hiri's "personal data," as well as confidential communications between Hiri and his lawyers and Hiri and his patients. Hiri, however, did not present substantial evidence to show that Berenji took his hard drive.

The second basis for this cause of action is Berenji's alleged dissemination of documents Pegah allegedly "stole" from Hiri. Hiri, however, did not cite any evidence indicating that Berenji "disseminated" such documents to third parties other than the court presiding over the dissolution action. It appears that Hiri contends Berenji's act of filing documents in the superior court constituted an invasion of privacy. If that is the basis for his cause of action, then Berenji is protected by the litigation privilege. (See *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 961 [litigation privilege applies even to a constitutionally based privacy cause of action].)

Hiri's reliance on *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290 (*Susan S.*) is misplaced. There, a health care provider mistakenly sent confidential mental health records of an alleged victim of sexual assault to the criminal attorney representing the man accused of committing the assault. (*Id.* at p. 1294.) The attorney, "*knowing the private and confidential nature of the documents*, read them, transmitted them to the defense psychiatrist and used them in cross-examining [the sexual assault victim.]" (*Ibid.*, italics added.) In the present case, by contrast, Hiri filed no evidence that Berenji knew documents he received from Pegah included confidential financial information that she was not entitled to obtain. *Susan S.* thus lends no support to Hiri's claim.

Hiri did not meet his burden of establishing a probability of prevailing on his invasion of privacy cause of action. The trial court thus erroneously denied Berenji's special motion to strike this claim.

DISPOSITION

The order dated July 26, 2011, denying Berenji's special motion to strike the complaint is reversed and the trial court is directed to enter a new order granting the motion. To the extent Berenji is appealing the July 26, 2011, order overruling his demurrer to the complaint, we dismiss the appeal on our motion. Respondent Berenji is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.