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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

FRANK CANKO, Cross-complainant and Appellant, v. CHANTEL KING, Cross-defendant and Respondent.	B267202 (Los Angeles County Super. Ct. No. BC527897)

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Reversed.

The Maloney Firm, Patrick M. Maloney and Carl I. S. Mueller for Defendants and Appellants.

Valor LLP, Ramin Kermani-Nejad, Mohamad Ahmad and B. Makoa Kawabata for Plaintiff and Respondent.

INTRODUCTION

This is an appeal from an order striking a cross-complaint pursuant to California's anti-strategic lawsuit against public participation (anti-SLAPP) statute (Code Civ. Proc., § 425.16).[1]

Defendant and cross-complainant Frank Canko is the majority shareholder of Jegerman, Inc. Plaintiff and cross-defendant Chantel King is the company's sole minority shareholder. King filed a shareholder derivative action against Canko on behalf of nominal defendant Jegerman, alleging Canko breached his fiduciary duty by seeking repayment of loans he made to the company. In response, Canko filed a cross-complaint, alleging King fraudulently induced him to make the loans to Jegerman. King moved to strike the cross-complaint as a SLAPP arising from protected activity—namely, the filing of her derivative action. The trial court granted the motion to strike.

We conclude Canko's cross-complaint did not arise from protected activity. The cross-complaint's allegations and the relevant affidavits establish that the subject claims arose out of the same corporate loan transaction that gave rise to King's derivative suit. The cross-complaint therefore was not within the purview of the anti-SLAPP statute. We reverse.

FACTS AND PROCEDURAL BACKGROUND

1. *Bylaws and Corporate Governance of Jegerman*

Canko (defendant and cross-complainant) and King (plaintiff and cross-defendant) are respectively the majority and sole minority shareholders of Jegerman, Inc., which operates a bar in Redondo Beach. Canko and King also served as the

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[1] Statutory references are to the Code of Civil Procedure, unless otherwise designated.

company's president and secretary respectively, and both served as the sole directors on Jegerman's board.

Jegerman's bylaws generally obligate the company to indemnify agents against costs incurred in connection with legal proceedings, if the agent "acted in good faith and in a manner such person reasonably believed to be in the best interests" of the company. However, indemnification is available according to the bylaws "only if authorized" by a majority vote of the directors who are not party to the proceeding and approved or ratified by a majority of shares owned by persons who are not party to the proceeding.

2. *Canko's Loans to Jegerman*

In June 2010, two former employees of Jegerman filed a lawsuit charging Canko and the company with sexual and racial harassment. At a deposition taken in that suit, King testified that she was unaware of any sexual misconduct by Canko at the workplace.

After retaining a law firm to jointly represent them in the lawsuit, Canko agreed to loan Jegerman funds for their legal defense.[2] Canko made loans to Jegerman as legal fees were incurred and made a lump sum loan at the termination of the lawsuit to fund a settlement. During several of the company's regularly scheduled board and shareholder meetings, King acknowledged that Jegerman would repay the loans consistent with the company's indemnification obligation.

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[2] King signed a conflict waiver and retainer agreement on behalf of Jegerman in connection with the joint defense.

3. *King's Shareholder Derivative Action and Canko's Cross-Complaint*

In June 2013, Canko terminated King's employment with Jegerman.

In November 2013, King filed a shareholder derivative action against Canko on behalf of nominal defendant Jegerman. The complaint alleged that the company expended $100,000 to resolve the 2010 workplace harassment suit and that to pay the sum "Canko executed a loan against the [company] in the amount of $100,000.00, in debt to himself." Because the harassment charges constituted an intentional tort, King alleged the company was not obligated to indemnify Canko and "Canko breached his fiduciary duty by using the [company's] corporate assets for his personal pursuits."

In February 2015, Canko filed an answer and cross-complaint against King.[3] The cross-complaint alleged that Canko made a series of loans to Jegerman with the "full knowledge, consent, and ratification" of the company's only other director and shareholder, King, to fund the company's defense of the 2010 workplace harassment lawsuit. Canko charged King with a single count of fraud, alleging King made "a variety of representations to CANKO by which she confirmed that the loans

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[3] The parties do not explain, and the record does not disclose, why Canko filed his answer and cross-complaint more than a year after King initiated this action. Though King raises the cross-complaint's timeliness in her respondent's brief, she does not appear to have challenged its timeliness in the trial court. In any event, because we reverse the order under the anti-SLAPP statute's first prong, we do not consider the cross-complaint's merits or timeliness under the second prong.

CANKO made were and would be valid and authorized transactions that she and JEGERMAN would honor." Despite those representations, the cross-complaint alleged that "KING has now brought suit on behalf of JEGERMAN and against CANKO seeking to invalidate the loans by claiming that JEGERMAN had no obligation to indemnify CANKO and lawfully could not do so because CANKO had engaged in intentional torts."

4. *King's Special Motion to Strike*

In March 2015, King filed a special motion to strike the cross-complaint pursuant to the anti-SLAPP statute. With respect to the first prong of the anti-SLAPP analysis, King argued the cross-complaint arose out of protected activity, because the "gravamen" of the fraud claim was her decision to challenge Canko's right to indemnity via a shareholder derivative action. As for the second prong, King maintained Canko would not be able to establish the minimum elements of fraud.

In opposition, Canko argued the gravamen of his fraud claim was not King's shareholder lawsuit, but rather the underlying corporate action whereby King acknowledged Canko was entitled to indemnification in order to induce him to lend money to the company to fund their joint defense. With respect to the second prong, Canko offered a declaration describing shareholder meetings in which King approved the loan transactions, meeting minutes to the same effect, and King's deposition testimony wherein she denied that Canko had engaged in sexual misconduct at the workplace.

The trial court granted King's special motion to strike. With respect to the first prong of the anti-SLAPP analysis, the court concluded "[t]he gravamen of the cross-complaint is that King filed a derivative action on behalf of the company, notwithstanding certain prior representations or failures to disclose." Regarding the second prong, the court observed that Canko had alleged "two acts by King: [¶] 'a. KING voting to approve the acts of the officers and directors of JEGERMAN in June 2010, June 2011, and June 2012; and [¶] b. KING signing on behalf of JEGERMAN of the settlement agreement reached in the underlying action.' " The court concluded these acts were insufficient to establish a claim for fraud because King had no duty to "disclose an intent to later claim that [Canko] was not entitled to indemnification for the sums paid by Jegerman as a result of the harassment claims."

DISCUSSION

1. *The Anti-SLAPP Statute and Standard of Review*

The anti-SLAPP statute, section 425.16, provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

The first prong of the anti-SLAPP analysis requires the court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) "In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Id.* at p. 79, quoting § 425.16, subd. (b).) An " 'act in furtherance of a person's right of petition or free speech' " includes "any written or oral statement or writing made before a . . . judicial proceeding." (§ 425.16, subd. (e).)

If the court determines the defendant has made the threshold showing, the analysis proceeds to the second prong, under which the court "determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) To establish the requisite probability of prevailing, the plaintiff need only have " 'stated and substantiated a legally sufficient claim.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

2. *Canko's Cross-Complaint Did Not Arise Out of Protected Activity*

Canko argues the trial court erred in concluding his action arose out of protected activity. While he acknowledges King's shareholder derivative suit necessitated the filing of his cross-complaint, Canko maintains his claim is not based upon the suit itself. Rather, he argues his action arises from the same corporate loan approvals and indemnity obligation that gave rise to King's derivative claims. We agree.

Our Supreme Court's decision in *City of Cotati* is controlling. In that case, the owners of a mobile home park filed a federal court action challenging the constitutionality of a city ordinance establishing a rent stabilization program. (*City of Cotati, supra,* 29 Cal.4th at p. 72.) In response, the city filed a state court action against the owners seeking a declaratory judgment that the ordinance was constitutional and valid. The owners moved to strike the complaint as a SLAPP, arguing the city's "action arose from [the owners'] filing of their earlier federal action." (*Id.* at p. 73.) In support of the charge, the owners asserted the city's complaint " 'acknowledged that its only basis for alleging an actual controversy . . . was the fact that the park owners had previously sued the City in federal court.' " (*Id.* at

p. 79.) The trial court granted the motion. (*Id.* at p. 73.) The Supreme Court reversed.

The Supreme Court concluded the city's declaratory relief action arose from the parties' underlying controversy over the constitutionality of the ordinance—not the owners' federal court action itself. (*City of Cotati, supra,* 29 Cal.4th at p. 79.) Addressing the owners' principal contention, the court explained that the city's pleadings and affidavits showed "only that [the owners'] federal court action informed [the city] of the existence of an actual controversy justifying declaratory relief, not that [the owners'] federal action, itself, *constituted* that controversy." (*Ibid.*) Thus, while the owners' federal court action had admittedly triggered the city to file its complaint, the court concluded that "the actual controversy giving rise to both actions—the fundamental basis of each request for declaratory relief—was the same underlying controversy respecting [the city's] ordinance." (*Id.* at p. 80.)

The rule and reasoning of *City of Cotati* are entirely apposite to this case. As our Supreme Court explained, a moving party meets her burden under the first prong of the anti-SLAPP statute only if the relevant pleadings and affidavits show the challenged "cause of action itself was *based on* an act in furtherance of [the moving party's] right of petition or free speech." (*City of Cotati, supra,* 29 Cal.4th at p. 78.) Like the city's allegation regarding the actual controversy element in *City of Cotati*, Canko's cross-complaint references King's derivative lawsuit to establish the misrepresentation and intent elements of Canko's fraud claim. However, also like in *City of Cotati*, the pleadings and relevant affidavits make clear that the fraud claim is not *based on* King's lawsuit, but rather upon the

parties' underlying dispute about Jegerman's obligation to indemnify Canko and repay the loans King allegedly approved. Specifically, as the trial court recognized with respect to the anti-SLAPP statute's second prong, Canko's claim is based upon "two acts by King: [¶] 'a. KING voting to approve the acts of the officers and directors of JEGERMAN in June 2010, June 2011, and June 2012; and [¶] b. KING signing on behalf of JEGERMAN of the settlement agreement reached in the underlying action.' " Thus, while Canko's cross-complaint referenced King's lawsuit with respect to elements of the fraud claim, it was the underlying dispute over Jegerman's corporate obligations that gave rise to both King's shareholder derivative action and Canko's cross-complaint for fraud.

Notably, at the hearing on the anti-SLAPP motion, the trial court recognized that if King had simply refused to honor Jegerman's corporate obligations, without filing her derivative lawsuit, Canko's action to enforce those obligations would not have run afoul of the anti-SLAPP statute.[4] However, the court reasoned that Canko's action was necessarily based on protected activity because Canko filed his cross-complaint in response to King's lawsuit. The Supreme Court rejected precisely this reasoning in *City of Cotati*.

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[4] At the hearing, the trial court and Canko's counsel, Maloney, engaged in the following exchange: "MALONEY: . . . If we had gotten to the point where she had never sued my client, no lawsuit was ever filed, and then he called her up one day and said: we're ready to pay back the loans. And she said: No, you don't get to pay back the loans. And he said: Okay, then I'm going to bring a lawsuit, and I'm going to sue you to get my loans repaid. [¶] . . . [¶] . . . He would be entitled to do that; right? [¶] THE COURT: He would."

Addressing a near identical contention advanced by the owners in *City of Cotati*, the Supreme Court explained: "To construe 'arising from' in section 425.16, subdivision (b)(1) as meaning 'in response to,' as [the owners] have urged, would in effect render all cross-actions potential SLAPP's. We presume the Legislature did not intend such an absurd result. [Citation.] Absurdity aside, to suggest that all cross-actions arise from the causes of action in response to which they are pled would contravene the statutory scheme governing cross-complaints. (See Code Civ. Proc., § 426.10, subd. (c) [defining 'related cause of action']; *id*., § 426.30 [compulsory cross-complaints]; *id*., § 428.10 [permissive cross-complaints].) The Legislature expressly has provided that a cross-action may 'arise[] out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges' (*id*., § 426.10, subd. (c); see also *id*., § 428.10, subd. (b)(1)), rather than out of that cause of action itself." (*City of Cotati, supra,* 29 Cal.4th at p. 77.)

Like the owners in *City of Cotati*, the trial court reasoned that Canko's lawsuit must have been based on protected activity because King's derivative action triggered its filing.[5] In essence, this reasoning gives dispositive effect to the fact that King chose to challenge Jegerman's corporate obligations through a

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[5] The trial court used different terminology, observing, "[t]he problem with this cross-complaint is it's suing [King] for bringing a derivative action *for a finding regarding the indemnity*." (Italics added.) Nevertheless, as the italicized phrase tacitly recognizes, the gravamen of both actions was the dispute over the company's indemnity obligation—not the lawsuits that resulted from that dispute.

shareholder derivative suit, and that Canko was then compelled to respond by filing a cross-complaint to preserve his fraud cause of action. Given the statutory scheme governing cross-complaints, that logic does not withstand scrutiny. (See *City of Cotati, supra,* 29 Cal.4th at p. 77.) Here, because the gravamen of Canko's fraud claim was the same underlying dispute regarding Jegerman's corporate obligations that formed the basis for King's lawsuit, Canko was entitled to bring his action, irrespective of King's election to assert her shareholder rights via a derivative lawsuit.

The fact that Canko's cross-complaint arose from the corporate transaction with King, rather than King's lawsuit against Canko, distinguishes the instant case from *Navellier*—the case upon which King principally relies.

Navellier concerned an ongoing dispute regarding the management of an investment fund. In the first of two actions brought by the fund's original organizers, the organizers sued the fund's independent trustee in federal court, asserting claims under the Investment Company Act. (*Navellier, supra,* 29 Cal.4th at p. 85.) The parties reached a settlement with respect to one of the claims, and the trustee signed a general release of all claims against the organizers. (*Id*. at p. 86.) The organizers then filed an amended complaint reflecting the partial settlement. The trustee responded by filing counterclaims against the organizers, prompting the organizers to file a state court action alleging the trustee breached the release by filing his federal counterclaims. (*Id*. at pp. 86-87.) The Supreme Court concluded the organizers' state court action arose from protected activity.

Addressing the argument that the trustee's counterclaims merely " 'triggered' " the organizers' breach of contract claim, but did not serve as the claim's basis, the Supreme Court responded: "In alleging breach of contract, [the organizers] complain about [the trustee's] having filed counterclaims in the federal action. [The trustee], [the organizers] argue, 'counterclaimed for damages to recover money for the very claim he had agreed to release a year earlier' and 'was sued for that act.' . . . [¶] . . . [The trustee] is being sued because of the affirmative counterclaims he filed in federal court. In fact, *but for the federal lawsuit* and [the trustee's] alleged actions taken in connection with that litigation, [the organizers'] present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." (*Navellier, supra,* 29 Cal.4th at pp. 89-90, italics added.)

In contrast to *Navellier*, Canko's fraud claim is not dependent upon King's derivative lawsuit, because King's alleged liability is not based upon her filing a legal action. Rather, the claim is dependent upon King's conduct with respect to the corporate transaction, and King would have been equally subject to liability for fraud on Canko's theory had she simply refused to honor Jegerman's alleged corporate obligations, without filing suit. That is, it was King's refusal to honor the company's borrowing and indemnity obligations, despite her alleged promise to do so in prior board and shareholder meetings, that gave rise to Canko's fraud claim. The claim is not based upon protected activity.

In view of our conclusion that Canko's fraud cause of action did not arise from King's lawsuit, we do not reach the anti-SLAPP statute's secondary question of whether Canko established a probability of prevailing on his claim. (*City of Cotati, supra,* 29 Cal.4th at pp. 80-81; § 425.16, subd. (b)(1)). Because King failed to meet her threshold burden under the anti-SLAPP statute's first prong, the trial court erred in granting the special motion to strike.

DISPOSITION

The order is reversed. Cross-complainant and appellant Frank Canko is entitled to his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

LAVIN, J.

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