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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

JEANNETTE MARTELLO, Plaintiff, v. JOSHUA M. MERLISS, Defendant.	B277570 (Los Angeles County Super. Ct. No. BC 589157) (Consolidated with BC 617999)
STELLA MADRID, Plaintiff and Respondent, v. JEANNETTE MARTELLO, Defendant and Appellant.	(Los Angeles County Super. Ct. No. BC 617999) (Consolidated with BC 589157)

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

Crawford Law Group and Daniel A. Crawford for Defendant and Appellant Jeannette Martello.

Gordon, Edelstein, Krepack, Grant, Felton & Goldstein and Joshua Merliss for Plaintiff and Respondent Stella Madrid.

Defendant and appellant Jeannette Martello challenges the trial court's denial of her special motion to strike a cause of action pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Martello performed surgery on plaintiff and respondent Stella Madrid to repair injuries Madrid suffered from a faulty garage door. After Madrid filed suit against her landlord and the garage door manufacturer, Martello filed a notice of lien against the proceeds of the lawsuit. Madrid, represented by her attorney, Joshua Merliss, then sued Martello for intentional interference with prospective economic advantage (IIPEA), and Martello filed an anti-SLAPP motion. Martello alleges that the trial court erred in finding that Madrid had shown a probability of succeeding on the merits of her claim.[1] We affirm.

FACTS AND PROCEEDINGS BELOW

In 2010, the garage door of the house Madrid was renting malfunctioned, severing the tip of one of Madrid's fingers. Martello performed two operations and successfully reattached the finger. As a condition of operating on her, Martello required Madrid to handwrite and sign a statement acknowledging that Martello was an independent contractor, and that Madrid was financially responsible for any of Martello's bills that her insurance did not pay.

On May 15, 2012, Madrid filed a personal injury suit against her landlord and the manufacturer of the garage door. In July 2014, Martello filed a notice of lien in Madrid's personal injury suit, declaring that Madrid had failed to pay Martello's bills, and that Martello had "an outstanding medical lien in the amount of $32,130." The case settled in May 2015, and the insurance company gave Merliss a separate check in the amount of $32,130, payable to "Jeannette Martello, MD and Attorney Joshua Merliss." Merliss asked Martello to endorse the check so

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[1] Martello has filed a request for judicial notice of certain documents pertaining to the case. We grant the motion.

that he could deposit the funds in a trust account, but Martello declined to do so.

In July 2015, Martello filed a complaint against Merliss, alleging that Merliss wrongfully prevented Martello from collecting the funds payable to her from her lien. In April 2016, Madrid filed a complaint against Martello, alleging two causes of action: one for declaratory relief, and another for IIPEA. Madrid alleged that Martello had harmed her by filing a notice of lien despite knowing that there was no basis for claiming a lien.

Martello filed a special motion to strike Madrid's cause of action for IIPEA pursuant to the anti-SLAPP statute. The trial court denied the motion. The court concluded that, although the filing of the notice of lien was protected activity under the anti-SLAPP statute, Madrid had shown a probability of prevailing on her claim.

DISCUSSION

I. Anti-SLAPP Statute Background

The anti-SLAPP statute allows a defendant in a civil case to make a special motion to strike any cause of action "arising from any act of [the defendant] in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) The motion should be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*) Under the statute, the act in furtherance of a defendant's right of petition or free speech includes "any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law." (*Id.*, subd. (e).)

In ruling on a motion to strike pursuant to section 425.16, a court must employ a two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 . . . .) If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' " (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

The denial of a motion to dismiss a cause of action under the anti-SLAPP statute is immediately appealable. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) We review a trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

II. Madrid Showed a Probability of Success on the Merits of Her Anti-SLAPP Claim

In this case, Madrid concedes that the trial court correctly concluded that Martello's filing of a notice of lien constituted protected activity under the first step of the anti-SLAPP statute. Consequently, we consider only the second step of the analysis, whether Madrid has shown a probability of success on the merits of her IIPEA claim. In the second step of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 396.)

Martello contends that the trial court erred in finding that Madrid had shown a probability of succeeding on the merits. She argues that the filing of a notice of lien can never constitute the independently wrongful conduct necessary for a claim of IIPEA. Next, Martello argues that the trial court erred in finding that

there was at least minimal merit in Madrid's claim that Martello did not have a lien on the proceeds of Madrid's personal injury suit. Finally, Martello contends that the litigation privilege absolutely protects her from liability arising from the filing of the notice of lien. We disagree with all of these contentions.

A. The Filing of a Notice of Lien Can Constitute Wrongful Conduct for IIPEA.

Martello contends that the trial court erred in finding that Madrid had shown a probability of success on her claim for IIPEA. In order to sustain a claim for IIPEA, a plaintiff must prove five elements: " ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." ' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) Martello's argument focuses on the third of these five elements. To satisfy the third element, a plaintiff must show "that the defendant's conduct was 'wrongful by some legal measure other than the fact of interference itself.' " (*Ibid.*) Our Supreme Court has held that "[a]n act is not independently wrongful merely because defendant acted with an improper motive." (*Id.* at p. 1158.) Instead, "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Id.* at p. 1159.)

Martello contends that the filing of a notice of lien can never be independently wrongful under this standard. Consequently, because Madrid's primary allegation is that Martello filed an improper notice of lien against her, Martello

argues that Madrid's claim cannot succeed even if she can prove all the facts she alleges.[2]

We are not persuaded. In support of the proposition that the filing of a notice of lien can never be independently wrongful, Martello relies almost entirely on one case: *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326 (*LiMandri*). The plaintiff in that case, Charles LiMandri, was an attorney who represented certain homeowners in state and federal lawsuits regarding the contamination of the homeowners' real property. (*Id.* at p. 334.) The defendant, Greg Judkins, represented a company that loaned two of LiMandri's clients money in anticipation that they would obtain a settlement. In return, the clients granted a lien to the Judkins's company against their share of any judgment or settlement proceeds. (*Ibid.*) While the case was still pending, Judkins filed a notice of lien in the case under LiMandri's name, but without LiMandri's knowledge. LiMandri filed suit against Judkins and other attorneys who represented Judkins's company to recover more than $110,000 that he claimed he expended to obtain his share of the funds covered by the lien. (*Id.* at p. 335.)

The court held that LiMandri had stated a claim for intentional interference with contractual relations, but not for

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[2] We disagree with Madrid's contention that Martello has forfeited her argument regarding the lack of independently wrongful conduct by failing to raise it in the trial court. Although it is true that, in general, a party must present an argument at the trial court in order to preserve it on appeal, " '[a]n exception to the general rule may be presented . . . where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence. [Citation.] And whether the general rule shall be applied is largely a question of the appellate court's discretion.' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1187.) The issue of whether the filing of a notice of lien can constitute independently wrongful conduct is a legal question.

IIPEA. (*LiMandri*, *supra*, 52 Cal.App.4th at p. 339.) The court reasoned that the primary wrongdoing that LiMandri alleged was interference with the contractual relationship between LiMandri and his homeowner clients: "The gravamen of LiMandri's interference cause of action [was] that Judkins, with knowledge of LiMandri's superior contractual lien rights in the [homeowners'] settlement proceeds, created a security interest in those proceeds on behalf of [Judkins's bank] and asserted it as superior to LiMandri's contractual lien. Judkins's alleged conduct was not 'wrongful' apart from constituting intentional interference with LiMandri's contractual relationship with the [homeowners]." (*Id.* at p. 341.)

"Judkins's filing of the notice of lien was collateral to his alleged interference with LiMandri's prospective advantage. The act of filing [the] notice of lien did not create the competing lien which interfered with LiMandri's economic advantage or contractual relations; it merely gave notice that [Judkins's bank] was asserting the lien. Since Judkins's filing of the notice of lien bearing LiMandri's misappropriated name did not constitute the essential interference with LiMandri's prospective economic advantage, it does not satisfy [the] requirement [in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393] that to be actionable, the *interference* must be wrongful by some legal measure other than the fact of interference itself." (*LiMandri*, *supra*, 52 Cal.App.4th at p. 342.)

The *LiMandri* court did not hold that the filing of a notice of lien could never constitute independently wrongful conduct for purposes of IIPEA. Rather, the court held that under the facts of the case, the filing of the notice of lien was not the primary source of wrongdoing. Because the alleged wrongdoing was aimed at interfering with an existing contract, the court held that LiMandri had instead stated a claim for intentional interference with contractual relations. (See *LiMandri*, *supra*, 52 Cal.App.4th at pp. 343-344.)

There is a crucial distinction between this case and *LiMandri*. In *LiMandri*, it was undisputed that Judkins's lien was legitimate. By filing the notice of lien, Judkins merely called attention to the fact that he was asserting priority of his lien over LiMandri's. The alleged wrongdoing was that, in doing so, he was interfering with LiMandri's contractual relationship with the homeowners. In this case, by contrast, Madrid's claim is that Martello has attempted to assert a lien that does not exist. The filing of the notice of lien is the primary manner in which she has done so.

This allegation, if true, would meet our Supreme Court's standard for independently wrongful conduct, in that it would be "unlawful, that is, . . . proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1159.) In this case, the determinable legal standard is the tort of abuse of process.[3] Abuse of process requires "that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner." (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 792.) If Madrid's allegations are true, then Martello filed a false claim—thus satisfying the second element—and did so for an ulterior motive—namely, to tie up the funds from Madrid's lawsuit so that she would feel pressure to pay the funds that Martello claimed she owed.

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[3] In her reply brief, Martello claims that Madrid may not raise a claim of abuse of process because she did not plead it in her complaint. This is beside the point. Madrid does not accuse Martello of abuse of process. Instead, she raises abuse of process as a relevant legal standard to show that she has alleged independently wrongful conduct sufficient to support a claim of IIPEA. If she makes this argument for the first time on appeal, it is because Martello made her challenge regarding independently wrongful conduct for the first time on appeal.

B. There is Sufficient Merit to Madrid's Claim that Martello Did Not Have a Lien.

Martello also contends that the trial court erred by concluding that there was "at least minimal merit" to Madrid's claim that Martello did not have a lien against the settlement proceeds of Madrid's personal injury lawsuit. According to Martello, the status of Martello's lien was not before the trial court in ruling on the anti-SLAPP motion. We disagree. As we have seen, the gravamen of Madrid's claim is that Martello filed a notice of lien against Martello when no such lien existed. We do not see how the trial court could perform the second step of the anti-SLAPP analysis without considering the merits of Madrid's claim that Martello did not actually have a lien against the proceeds of the lawsuit. Of course, as with any anti-SLAPP motion, the trial court determines only whether the plaintiff has "establish[ed] a probability of success . . . as a 'summary-judgment-like procedure.' " (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) The trial court's determination at this stage does not prejudice Martello in her efforts later in the case to show that she did in fact have a lien against the proceeds of Madrid's personal injury suit.

We agree with the trial court that Madrid has produced sufficient evidence to call into question whether Martello had a lien on the proceeds of Madrid's personal injury lawsuit at the time Martello filed the notice of lien. A lien may be created by operation of law or by contract of the parties. (Civ. Code, § 2881.) Martello admitted during discovery that she did not have a statutory lien against the proceeds of the personal injury lawsuit. Madrid denies that she ever agreed to a contractual lien, and Martello has been unable to produce evidence to the contrary. Martello has submitted a handwritten document in which Madrid "accept[ed] financial responsibility for any portion of Dr. Martello's bill that is not covered by my insurance," but this document does not indicate that the proceeds of her personal

injury suit would serve as security for payment of Martello's bills. Indeed, the document does not mention the personal injury suit at all. The Civil Code defines a lien as "a charge imposed in some mode other than by a transfer in trust upon specific property *by which it is made security* for the performance of an act." (See Civ. Code, § 2872, italics added.) At this stage, we fail to see how this document can create a lien.

In support of her position, Martello cites *Nicoletti v. Lizzoli* (1981) 124 Cal.App.3d 361, in which the court held that a doctor need not perfect her lien in order to maintain preference in payment over a subsequent statutory lienholder. (See *id.* at pp. 369-370.) But in that case, the question before the court was the order of preference between lien-holding creditors, not whether, as here, a doctor creditor who had an outstanding bill had a lien on the proceeds of a future personal injury recovery.

Martello also contends that she may have had an equitable lien on the proceeds of Madrid's personal injury suit. An equitable lien "is imposed by the court as an equitable remedy." (*County of Los Angeles v. Construction Laborers Trust Funds for Southern California Admin. Co.* (2006) 137 Cal.App.4th 410, 416.) Regardless of whether Martello may be able to obtain an equitable lien in the future, Madrid has made a prima facie showing that Martello had no such lien at the time she filed her lien in this case.

C. The Litigation Privilege Does Not Protect Martello.

Martello contends that, even if Madrid's claim fulfills all the elements of IIPEA, it nevertheless fails because Martello's conduct was protected by the litigation privilege. (Civ. Code, § 47, subd. (b).) We agree with Madrid that Martello waived this claim by stating explicitly in her opening brief that she did "not challenge" the trial court's ruling that the litigation privilege did not apply. She then reversed course and argued in her reply brief that the filing of her notice of lien was protected by the litigation

privilege. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

In any case, Martello's claim regarding the litigation privilege would fail on the merits. The litigation privilege " 'applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

Martello's conduct in filing the notice of lien was not privileged because she was not a litigant or participant in Madrid's personal injury lawsuit. As the court explained in *LiMandri*, a "stranger to a civil action does not become a 'litigant or other participant' in the action merely by filing a notice of lien against any judgment or settlement proceeds the plaintiff might realize in the action." (*LiMandri*, *supra*, 52 Cal.App.4th at p. 345.) Furthermore, even if Martello were a litigant or other participant in Madrid's personal injury suit, "the litigation privilege still would not apply because none of [her] alleged conduct was connected or logically related to that litigation or engaged in for the purpose of achieving its objects." (*Id.* at p. 346.)

DISPOSITION

The trial court's order is affirmed. Respondent is awarded her costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.