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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

DANA BERRY et al., Plaintiffs and Appellants, v. ROBERT B. LOCKE et al., Defendants and Respondents.	2d Civil No. B284410 (Super. Ct. No. 17CV00001) (Santa Barbara County)

Respondent Robert B. Locke served appellants Dana and Patricia Berry with three-day notices to pay rent and quit their space at Rivergate RV Park in Santa Maria. Rivergate is a client of Locke and his law firm. Appellants filed this putative class action against Locke, alleging that the notices violated the federal and California Fair Debt Collection Practices (FDCP) Acts and the California Consumer Legal Remedies Act (CLRA).

Locke moved to strike appellants' lawsuit as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc.,

§ 425.16.)[1] The anti-SLAPP law directs courts to strike causes of action arising from a defendant's exercise of First Amendment rights to petition or to free speech, unless the plaintiff shows a likelihood of prevailing on the claim. (*Id.*, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The trial court granted Locke's motion.

We conclude that appellants' complaint is barred by section 425.16. Locke's notices were sent in anticipation of an unlawful detainer action or action to recover unpaid rent. This is protected petitioning activity. Appellants did not carry their burden of showing that they can prevail. Locke is not a "debt collector" under the FDCP Acts and he did not sell or lease goods or services to appellants under the CLRA. We affirm.

FACTS

Appellants signed an agreement to occupy an RV space at Rivergate for two weeks, starting October 13, 2016. After their agreement expired on October 27, appellants remained at Rivergate, without paying rent, as holdover occupants.

On November 15, 2016, Locke served appellants with a 72-hour notice to quit and pay rent, a first step toward eviction. In response, appellants paid some of the delinquent rent. They continued to occupy a space at Rivergate but paid no further rent. Locke served appellants with a second notice to quit. After receiving the second notice, appellants left Riverpark, owing $4,598 in rent.

Appellants joined a pending lawsuit against Rivergate, claiming violations of the Recreational Vehicle Park Occupancy Law. Rivergate cross-complained, alleging that appellants signed

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[1] Unlabeled statutory references are to the Code of Civil Procedure.

an agreement requiring them to vacate on October 27, 2016. They refused to vacate, pay rent, or remove their RV even after they were served with notices. Among other claims, Rivergate sought to recover unpaid rent and costs incurred in its effort to remove appellants' RV.

In January 2017, appellants filed this lawsuit against Locke. They sought certification of a class composed of persons who were served notices of unpaid rent by Locke. They allege that the notices violated the FDCP Acts and the CLRA. The complaint seeks declaratory and injunctive relief, monetary damages, and attorney fees.

Locke moved to strike appellants' lawsuit under section 425.16, asserting that his acts are protected speech undertaken on behalf of a legal client. In support of his motion, Locke declared "'it is not my business practice and routine to seek out delinquent payments of space site rent.'" Locke has sent out such notices only a few times. He is not a "debt collector" and has never sued to enforce a debt, in 40 years of legal practice. The sole reason he sent notice to appellants was in contemplation of an unlawful detainer action.

In opposition, appellants argued that the anti-SLAPP law does not apply to debt collection or class actions. They asserted that they are likely to prevail because Locke's notices are not protected by the litigation privilege and Locke is a "debt collector" who must comply with the FDCP Acts. At the hearing on the motion, appellants argued that Locke's notices invoked a summary, non-judicial procedure pertaining to RV parks, and requiring Locke to comply with the FDCP Acts does not chill his First Amendment rights.

The trial court granted Locke's motion to strike the entire complaint. Appellants sought reconsideration of the ruling and

opposed Locke's request for an award of attorney fees and sanctions. The court denied appellants' untimely motion for reconsideration and ordered them to pay Locke $16,240 in attorney fees and $602 in costs.[2]

DISCUSSION

The anti-SLAPP law "provides a procedure for weeding out, at an early stage, *meritless* claims" that chill a defendant's exercise of First Amendment rights. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) The trial court's ruling on a motion to strike under the anti-SLAPP law is appealable, and is reviewed de novo. (§ 425.16, subd. (i); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

A two-step analysis applies here. First, the defendant must show that the pleading arises from protected activity. Once this showing is made, the second step shifts the burden to the plaintiff to demonstrate a probability of prevailing. The court determines whether the plaintiff's showing, if accepted by a 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.) The law is "construed broadly." (§ 425.16, subd. (a).)

a. Locke Has Shown that Appellants' Claims Arise From Protected Activity

A statement or writing made in a judicial proceeding is protected activity. (§425.16, subd. (e)(1)-(2).) Further, "'communications preparatory to or in anticipation of the bringing of an action or other official proceeding . . . are equally entitled to the benefits of section 425.16.' [Citations]." (*Briggs v. Eden Council For Hope & Opportunity* (1999) 19 Cal.4th 1106,

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[2] Appellants do not challenge here the amount of the attorney fees and costs awarded.

1115 [counseling tenants about anticipated litigation against a landlord is protected activity].) Prelitigation communications are "in furtherance of [a] person's right of petition or free speech." (§ 425.16, subd. (b)(1).)

Our focus "is not [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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; *Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 393 ["The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation"].)

The activity underlying appellants' claim—Locke's legal representation of Rivergate in efforts to evict holdover tenants and collect unpaid rent—is constitutionally protected. "[A]ll communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479-481 [attorney's acts on behalf of a client are protected, even if they violated child support evasion statutes, because the actions are not inherently criminal or outside the scope of routine legal services]; *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 806-807, 811 [attorney's representation of a client is protected unless the acts amount to criminal conduct]; *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 408-409.)

Locke's notices to appellants to remove their RV from Rivergate and pay delinquent rent cite the Recreational Vehicle Park Occupancy Law (Civ. Code, § 799.20 et seq.); 72-hour written notices are required by that law (*Id*, §§ 799.55, 799.56),

which states that RV park management may exercise all legal rights against a defaulting occupant (*Id*, § 799.40), and specifically incorporates the unlawful detainer statutes (*Id,* §§ 799.67, 799.71.) Sending a notice to quit and pay rent is not "expressly illegal" activity, as appellants suggest, because giving notice is a prerequisite to removing an occupant of an RV park who is in default.

The notices sent by Locke were a preamble to an unlawful detainer action or action to collect unpaid rent; as such, it is protected activity under section 425.16. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1480 [service of a three-day notice is protected activity because it is a prerequisite to an unlawful detainer action]; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281-282.)[3] Attorneys cannot be sued "for the sole 'crime' of representing their clients." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 204-205.) Because appellants' lawsuit attacks the attorney's service of three-day notices on behalf of a client, Locke has established the first prong of the SLAPP analysis.

b. Appellants Did Not Show A Probability of Prevailing on the Merits

Appellants must demonstrate a probability of prevailing on their claims to defeat the motion to strike. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) This means a showing 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

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[3] Though an unlawful detainer action was planned, it was not filed because appellants vacated Rivergate after receiving Locke's second notice to quit; still, Locke sued appellants for unpaid rent on behalf of Rivergate.

credited.'" [Citations]." (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 820.) "The prima facie showing of merit must be made with evidence that is admissible at trial. [Citation.] Unverified allegations in the pleadings or averments made on information and belief cannot make the showing. [Citations.]" (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289; *Contreras v. Dowling*, *supra*, 5 Cal.App.5th at p. 405.)

Though "minimal merit" is required to survive an anti-SLAPP motion (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89), appellants did not make the minimal merit showing here.

Appellants' causes of action based on alleged violations of the FDCP Acts lack merit.[4] The Rosenthal FDCP Act applies to consumer credit transactions, "in which property, services or money is acquired on credit . . . primarily for personal, family, or household purposes." (Civ. Code, § 1788.2, subd. (e).) Appellants' pleading does not allege that they "acquired on credit" any property, services or money. Instead, they challenge Locke's "communications seeking overdue and unpaid rent."

The state and federal FDCP Acts apply to "debt collectors," defined as persons who "regularly" engage in debt collection. (Civ. Code, § 1788.2, subd. (c) [debt collector is someone who regularly engages in debt collection, but does not include an attorney]; 15 U.S.C.S. § 1692a(6).) Locke declares that he does not regularly serve notices to collect unpaid rent, having done so only a few times in the past four years. In 40 years of practice, Locke has never filed an action to enforce a debt.

Appellants did not rebut Locke's declarations with admissible evidence of regular debt collection. Instead, they

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[4] Appellants' request for declaratory and injunctive relief is based on the alleged violation of the FDCP Acts; this claim must be dismissed because the FDCP claims do not withstand scrutiny.

offered unsupported allegations that Locke sought unpaid rent from themselves and others as "his business practice and routine." They asserted that Locke is a "debt collector" because he served five eviction notices in four years.

To show that an attorney is a "debt collector," the plaintiff in a FDCP action must prove that that the attorney's debt collection practice is steady, usual, and customary, encompassing a pattern of collection activity and personnel dedicated to it. (*James v. Wadas* (10th Cir. 2013) 724 F.3d 1312, 1316-1319.) This showing is not made if the attorney handled six to eight debt collection cases in 10 years. (*Id.* at pp. 1318-1319. Accord: *Schroyer v. Frankel* (6th Cir. 1999) 197 F.3d 1170, 1173, 1176-1177 [law firm handling 50-75 collection cases annually was not a "debt collector" because the work was less than two percent of the firm's practice, personnel was not dedicated to it, and it was incidental to the firm's work].)

Appellants did not make a prima facie showing that Locke is a "debt collector." Sending five eviction notices in four years does not make Locke a "debt collector," when there is no evidence that collecting debts is a steady, customary part of his practice. Appellants unavailingly rely on a factually distinguishable case in which an attorney's dunning letter stated that he is "'acting as a debt collector'"; this admission showed that the attorney fell within the FDCP Acts. (*Welker v. Law Office of Daniel J. Horwitz* (S.D. Cal. 2009) 626 F.Supp.2d 1068, 1072. See also *Welker v. Law Office of Daniel J. Horwitz* (S.D. Cal. 2010) 699 F.Supp.2d 1164, 1166 [defendant attorney's business is collecting unpaid debts for creditors].)

Appellants' cause of action based on the CLRA (Civ. Code, § 1750 et seq.) lacks merit. The law proscribes unfair competition and deceptive acts in "a transaction intended to result or that

results in the sale or lease of goods or services to any consumer." (Civ. Code, § 1770, subd. (a).) Locke did not sell or lease goods or services to appellants, nor did he provide the "well known package of goods and services" (heat, ventilation, plumbing, windows, doors, etc.) that constitutes residential housing, contrary to appellants' argument. (See *Green v. Superior Court* (1974) 10 Cal.3d 616, 623 [allowing a habitability defense in an unlawful detainer action].)

In the trial court, appellants offered a cursory, two-sentence argument regarding the applicability of the anti-SLAPP law to their class action lawsuit. They wrote, "Class actions are not subject to the Anti-SLAPP matter [*sic*]. CCP 425.17(b). This matter is a class action and seeks the same relief for plaintiffs as it does for everyone else." Appellants did not secure a ruling from the trial court regarding the applicability of the section 425.17, subdivision (b) exception for actions brought in the public interest.

Section 425.17, subdivision (b) provides that "[s]ection 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public *if all of the following conditions exist*:" (1) the plaintiff does not seek any relief greater than or different from the relief sought for the general public, (2) the action enforces an important right affecting the public interest and confers a significant benefit on the public or large class of persons, and (3) private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter. (Italics added.) Appellants had to show the applicability of the class action exception, with admissible evidence. (*San Diegans For Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622, 627-630.)

Appellants offered no evidence in the trial court supporting their position, nor did they discuss each element of the exception in their opposition. Appellants did not inform the trial court that "all" of the conditions to the exception exist. (§ 425.17, subd. (b).) They mentioned one condition (regarding relief), while ignoring the others (a significant public benefit, the need for private enforcement, and disproportionate financial burden). The record does not show a significant public benefit, in any event, because Locke established that he is not a "debt collector" subject to the FDCP Acts; this evidence was unrefuted.

DISPOSITION

The judgment is affirmed. Respondent Locke is entitled to recover his costs and attorney fees on appeal from appellants. (Code Civ. Proc., § 425.16, subd. (c)(1); *Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 123.)

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Law Offices of Ron Bochner and Ron Bochner for Plaintiffs and Appellants.

Sumalpong & Sumalpong and Joanne S. Sumalpong for Defendant and Respondent.