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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

WILLIAM CATES, Plaintiff, Cross-defendant and Respondent, v. CARLOS ALBERTO COELHO et al., Defendants, Cross-complainants and Appellants.	2d Civil No. B268453 (Super. Ct. No. 1459604) (Santa Barbara County)

Code of Civil Procedure section 425.16 "provides a procedure for weeding out, at an early stage, *meritless* claims" that chill a defendant's exercise of First Amendment rights.[1] (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) When protected speech or petitioning activity underlies a claim for recovery—and

[1] Unlabeled statutory references in this opinion are to the Code of Civil Procedure. Section 425.16 is the "anti-SLAPP" statute, the acronym for a Strategic Lawsuit Against Public Participation.

is not incidental or collateral—the offending allegations must be stricken. (*Id.* at p. 394.) The weeding out process may be deployed when a cause of action alleges both protected *and* unprotected activity. (*Id.* at pp. 393-396.)

We affirm a trial court order granting a special motion to strike under section 425.16. Tort claims made against respondent William Cates arise, in part, from Cates's filing of a complaint, abridging his constitutional right to participate in a judicial proceeding. (§ 425.16, subd. (e).) Appellants Carlos Alberto Coelho, H.V.P. U.S.A. (H.V.P.), and 4 C Management (4 C) cannot prevail on the merits of their claims, which are barred by the litigation privilege.

FACTS

The Pleadings

Respondent Cates founded Tantara Winery in Santa Barbara County. Under financial pressure, he accepted Carlos Alberto Coelho's offer to invest in and manage Tantara. Coelho's company H.V.P. purchased a stake in Tantara. 4 C was created to operate the winery. Respondent and his daughter Challen Cates had roles as a winemaking consultant and in marketing, respectively, while agreeing to assign Coelho their voting rights in Tantara. Coelho took control of Tantara and allegedly managed it in a way that benefitted himself, but damaged respondent. Respondent filed suit against appellants over Tantara, asserting 12 causes of action including breaches of contract and fiduciary duty and elder abuse (respondent is over 70 years old).

Appellants countered with a cross-complaint. It describes a 2013 "Confidential Settlement and Transfer Agreement" (Settlement), under which respondent and Challen

"terminated their participation in the wine business . . . including any relationship with respect to 4 C Management and H.V.P., in exchange for Three Hundred and Four Thousand Dollars ($304,000), certain barrels of wine, . . . 144 bottles of wine, 20 empty wine barrels, and 4 wooden fermentation bins." Appellants assert that respondent markets himself as the producer of Tantara wines, though the Settlement ended his interest in the winery.

Two causes of action in the cross-complaint are based, in part, on the Settlement. The first cause of action for breach of fiduciary duty alleges that respondent's lawsuit "is fraudulently seeking to extort monies that were previously paid by H.V.P. to Cates and Challen . . . pursuant to the Settlement[.]"

The third cause of action for fraud starts with "the claims asserted by Cates as part of the First Amended Complaint in this action have been resolved by a prior agreement." It repeats the allegation that the complaint seeks to "extort" money paid to respondent in the Settlement, adding, "[t]hrough his First Amended Complaint, Cates is also trying to be compensated for promissory notes owed by Tantara, LLC to himself that have already been paid[.]"[2]

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[2] The cross-complaint alleges that respondent breached his fiduciary duty, as an owner and member of Tantara, by attempting to usurp the management role delegated to Coelho and 4 C, and by expropriating Tantara's brand name without authorization. The motion to strike does not address those allegations, nor does it challenge seven causes of action in the cross-complaint that do not arise from respondent's complaint.

The Special Motion to Strike

In a motion to strike, respondent challenges allegations in the cross-complaint "that Mr. Cates is fraudulently pursuing his First Amended Complaint in an attempt to recover money that was already paid to him via a settlement agreement." Respondent asserts that claims based on the Settlement are barred, because they arise from his lawsuit against appellants and there is no probability that appellants can prevail on the merits.

Respondent contends that Challen negotiated the Settlement for herself, respondent "was excluded" from it, and he received no settlement payments. A glance at the Settlement reveals that the parties are Challen, Coelho, H.V.P., and another entity. The Settlement directs a $304,000 cash payment to Challen. It does not mention respondent at all.

Appellants deny that any part of the cross-complaint arises from respondent's petitioning activity, arguing that references in the cross-complaint to respondent's lawsuit "are merely a summary of events which are incidental[.]" Appellants maintain that they will prevail on the merits of their claims.

Appellants argue that the Settlement "was believed" to be respondent's and Challen's agreement "to sell their entire interest . . . and terminate their participation in the wine business" in exchange for $304,000. The consideration paid "was substantially higher based upon the understanding that this settlement was eliminating the entire interest of both Cates and Challen[.]" Had Coelho known that respondent did not intend to honor the Settlement, he would not have agreed to the consideration paid.

The Trial Court's Rulings

The trial court granted respondent's motion to strike portions of appellants' first cause of action for breach of fiduciary duty, and the entire third cause of action for fraud. Respondent was awarded attorney fees as the prevailing party. (§ 425.16, subd. (c)(1).) The court denied appellants' motion for reconsideration. The appeal is timely.

DISCUSSION

1. Appeal and Review

Appeal may be taken from an order granting a special motion to strike addressed to some (but not all) causes of action in a complaint or cross-complaint. (§ 425.16, subds. (h)-(i); *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.) Review is de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

We examine "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We do not weigh the evidence, but must accept as true all evidence favoring the challenged pleading. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45-46.) The statute is construed broadly. (§425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

2. Anti-SLAPP Statute Analysis

The courts must strike causes of action "arising from" the defendant's exercise of the right to petition or to free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) This involves a two-step analysis.

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, 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. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral v. Schnitt, supra,* 1 Cal.5th at p. 396.)

a. Respondent Has Shown that Appellants' Claims Arise From Protected Speech or Petitioning Activity

Respondent argues that the cross-complaint arises, in part, from his act of initiating this lawsuit. A statement or a writing made in a judicial proceeding is constitutionally protected activity. (§425.16, subd. (e)(1)-(2); *Soukup v. Law Offices of Herbert Hafif*, *supra,* 39 Cal.4th at p. 291 ["The filing of lawsuits is an aspect of the First Amendment right of petition."].) The focus "is not 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 (*Navellier*).)

The facts described in *Navellier* are barely distinguishable from those presented here. Sletten signed a "Release of Claims" then violated the Release by suing Navallier in federal court. (*Navallier*, *supra*, 29 Cal.4th at pp. 85-86.) Navallier, in turn, sued Sletten for fraud in state court, alleging that Sletten misrepresented his intention to be bound by the Release. Sletten brought an anti-SLAPP motion to strike Navellier's fraud claim. (*Id*. at p. 87.)

The Supreme Court found that Navellier's fraud claim involved Sletten's negotiation, execution, and repudiation of the Release. Sletten's federal lawsuit was "indisputably" a writing made in a judicial proceeding that attempted "'to recover money for the very claim he had agreed to release a year earlier.'" (*Navellier, supra,* 29 Cal.4th at p. 90.) Sletten showed, to the satisfaction of the Supreme Court, that he "is being sued because of the affirmative counterclaims he filed in federal court. . . . This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." [Citation.] (*Ibid.*)

Here, as in *Navellier,* respondent is being sued in tort for the act of filing a lawsuit. Appellants claim that respondent entered a settlement and release of his right to sue. In violation of his agreement, respondent filed this action to fraudulently "extort monies" already paid to him in the Settlement. The cross-complaint repeatedly challenges respondent's filing of this lawsuit. The first (breach of fiduciary duty) and third (fraud) causes of action in the cross-complaint arise from a pleading filed in a judicial proceeding. These claims are an attempt to chill respondent's First Amendment rights. (§ 425.16, subds. (a), (e)(1); *Navellier, supra,* 29 Cal.4th at p. 90.)

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.) Their cross-complaint must be legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

Only "minimal merit" is required to survive an anti-SLAPP motion. (*Navellier, supra,* 29 Cal.4th at p. 95.) Appellants cannot show minimal merit here because their claims challenging respondent's right to pursue his lawsuit are barred by the litigation privilege.

Publications in judicial proceedings are absolutely privileged. (Civ. Code, § 47; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) More specifically, a pleading is a privileged communication. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 770 (*Navellier II).*) The privilege immunizes litigants from liability for torts arising from communications made "to achieve the objects of the litigation" that have "some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Litigants are afforded "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" (*Id.* at p. 213.)

In *Navellier II*, on remand from the Supreme Court, the Court of Appeal had to decide whether Sletten's federal lawsuit, filed in violation of his agreement to release his

claims against Navellier, was protected by the litigation privilege. If Sletten's lawsuit was privileged, Navellier could not successfully demonstrate a likelihood of prevailing on the merits of his claim, the second prong of the anti-SLAPP analysis. The court determined that Navellier wanted "to impose tort liability for [Sletten's] federal counterclaims." (*Navellier II*, *supra*, 106 Cal.App.4th at p. 771.) "Thus, plaintiffs are challenging the *content* of the counterclaims—a classic example of communication" falling within the litigation privilege. (*Ibid.*) A communication furthering Sletten's interest in a case was plainly made to achieve the objects of litigation. The court concluded, "defendant's counterclaims were privileged for purposes of plaintiffs' fraud claim." (*Ibid.*)

As in *Navellier II,* appellants in this case seek to impose tort liability on respondent for filing a complaint on claims that he allegedly released in the Settlement. The court in *Navellier II* rejected Navellier's argument that the litigation privilege makes the release "unenforceable" by allowing Sletten to file suit, in violation of the release, then claim his suit is privileged. The court observed that the release is enforceable: it can be used defensively to defeat claims brought in violation of the release. (*Navellier II*, *supra*, 106 Cal.App.4th at p. 772.)

We agree with *Navellier II.* Appellants are entitled to assert the Settlement as a defense. A trier of fact could conceivably determine that claims made in respondent's complaint are covered by the Settlement, even though respondent is not a named party or signatory to the Settlement. By the same token, appellants are not entitled to use the Settlement on the offensive side, in tort claims challenging respondent's right to file suit.

Respondent's complaint furthers his interest in the parties' dispute over Tantara, and was plainly filed to achieve the objects of litigation. The filing of the complaint is the gravamen of appellants' fraud claim: if respondent had not filed a complaint, appellants would have no basis for alleging that they were misled or harmed by respondent's promise to honor the Settlement.[3] As a matter of law, the litigation privilege prevents appellants from prevailing on claims accusing respondent of committing a fraud by filing his lawsuit.

To conclude, appellants' fraud and breach of fiduciary duty causes of action are barred by section 425.16, to the extent they allege that the complaint itself violates the Settlement. Though allegations arising from protected activity must be eliminated from the cross-complaint, other allegations arising from unprotected activity remain. (*Baral v. Schnitt, supra,* 1 Cal.5th at p. 392.) Respondent acknowledges that he "only seeks to strike [theories of liability] relating to [his] pursuit of this lawsuit," because appellants have asserted mixed causes of action that challenge both protected and non-protected activity. As the prevailing party, respondent is entitled to recover his attorney fees and costs on appeal. (§ 425.16, subd. (c)(1); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

DISPOSITION

The judgment is affirmed. Respondent William Cates is awarded his costs and attorney fees on appeal, in an amount to

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[3] In the trial court, appellants argued that respondent is attempting "to defraud Defendants by filing this lawsuit and pursuing damages."

be determined by the trial court.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

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