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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANDRE' PERRY et al., Plaintiffs and Appellants, v. XENON INVESTMENT CORP. et al., Defendants and Respondents.	B265949 (Los Angeles County Super. Ct. No. EC063250)

APPEAL from an order of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

DorenfeldLaw, David K. Dorenfeld and Brad D. Citron for Plaintiffs and Appellants.

Citron & Citron, Thomas H. Citron and Katherine A. Tatikian for Defendants and Respondents.

INTRODUCTION

Plaintiffs Andre' and Tiffany Perry (plaintiffs) appeal from the trial court's order granting defendant-landlords' special motion to strike plaintiffs' cause of action for retaliatory eviction as a strategic lawsuit against public participation (Code Civ. Proc., § 425.16 (the anti-SLAPP statute).[1] Plaintiffs contend that their cause of action did not arise from defendants' protected activity of serving a notice to quit and filing an unlawful detainer action, but instead was based on defendants' unlawful, retaliatory motive for evicting plaintiffs. Plaintiffs further contend that they carried their shifted burden to demonstrate a likelihood of prevailing on the merits. We discern no trial court error and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

a. *factual predicate*

The record, viewed as required by the statute (§ 425.16, subd. (b)(2); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*)), shows that defendants, Xenon Investment Corp. (Xenon), LS2 Properties, LLC (LS2), Westside Habitats, LLC (Westside), Rohit Mehta and Loren Medina, were sued variously as co-owners, co-managers, and agents of an apartment complex in Los Angeles (together, defendants). Plaintiffs leased apartment 204 and two storage units from property manager Westside beginning on May 5, 2012. After expiration of the one-

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[1] SLAPP is the acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

All further undesignated statutory references are to the Code of Civil Procedure.

year term, plaintiffs remained in possession on a month-to-month basis under all of the lease's terms and conditions, as set forth in paragraph 4.

b. *plaintiffs' civil complaint*

Plaintiffs' complaint, filed on November 6, 2014, asserted causes of action for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200), (4) negligence, (5) negligent retention and supervision, (6) negligent misrepresentation, (7) conversion, and (8) retaliatory eviction.

In the complaint's "Background Facts" section, plaintiffs alleged they notified defendants of various maintenance issues in the building and their unit in March, April, and May 2014, but defendants did not make many of the requested repairs. On July 15, 2014, Westside served plaintiffs with a 60-day notice to quit (60-day notice). "On or around July 2014," plaintiffs and eight other tenants in the building signed a petition requesting the eviction of another tenant who kept a vicious dog (the tenants' petition). In August 2016, plaintiffs discovered that personal property had been removed from their storage unit. Defendants' agents Mehta and Medina admitted they unlawfully entered the storage unit and discarded the belongings. Plaintiffs filed a criminal report with the Los Angeles Police Department allegedly triggering a grand larceny investigation. On September 16, 2014, co-owner and co-manager Xenon filed an unlawful detainer (UD) action against plaintiffs to recover possession of the premises (case No. 14R09613).

The only portion of plaintiffs' civil complaint at issue in this appeal is the eighth cause of action for retaliatory eviction alleged

against defendants Westside, co-owner LS2, and Xenon. Plaintiffs incorporated the previous paragraphs of the complaint and alleged they were "informed and believe[d]," that Westside served the 60-Day notice "in retaliation for Plaintiffs' involvement of [*sic*] the [tenants' petition], and the many complaints they had regarding the unsafe and unsanitized [*sic*] condition of the rental Property including their Rental Unit." Plaintiffs then alleged they were "informed and believe[d] . . . that Defendants" were "evicting Plaintiffs in retaliation to [*sic*] the numerous complaints for repairs needed on the premises, for Plaintiffs' involvement of [*sic*] the [tenants'] petition . . . , as well as the criminal investigation for Grand Larceny against [defendants] Medina and Mehta that occurred as a result of Plaintiffs' stolen property, in violation of California *Civil Code* §789.3(3) and California *Civil Code* § 1940.2."

Two months later, the parties resolved the UD action by stipulated judgment, under which plaintiffs forfeited their rights under the lease and Xenon regained possession of the premises. Plaintiffs moved out in December 2014.

c. *the special motion to strike*

Defendants brought their anti-SLAPP motion on the ground that the eighth cause of action arose from defendants' protected petitioning activity because it was targeted at defendants' acts of serving the 60-day notice for plaintiffs' nonpayment of rent increases after multiple requests, and filing the UD complaint. Defendants also argued that plaintiffs could not establish the merits of this cause of action because it was barred by the litigation privilege (Civ. Code, § 47, subd. (b)) and by the doctrines of res judicata and collateral estoppel, and because plaintiffs could not make a prima facie showing of the

essential elements. Defendants included the declaration of their property supervisor, Scott Mossler, who stated he received the tenants' petition on July 31, 2014, which was after Westside served the 60-day notice to quit.

Plaintiffs opposed the anti-SLAPP motion arguing, inter alia, that they would prevail on the merits. As evidence of the notices of unaddressed repair and maintenance issues, plaintiffs cited their complaint's allegations. Plaintiffs also submitted Andre' Perry's declaration that he sent defendants an e-mail identifying each required repair on March 16, 2014, but "[*u*]*pon information and belief*, Defendants subsequently served me with the 60-day notice to Quit in retaliation for my many demands for repairs." (Italics added.) Perry admitted plaintiffs did not pay the rent increase, although they were always ready and willing to do so, because they were unaware of the date the latest increase was to take effect and Perry had been "negotiating a more fair increase" in rent given the outstanding repairs.

Plaintiffs attached to Perry's declaration defendants' discovery responses confirming that defendants filed the UD action because plaintiffs failed to pay the monthly rent "increase after multiple requests." The declaration also included notices of rent increases sent on March 25, 2013, July 26, 2013, and February 26, 2014 and Perry's March 16, 2014 e-mail, attaching "my response to the proposed rent increase." The record does not contain the e-mail's attachment.

The trial court granted defendants' special motion to strike. Plaintiffs' timely appeal ensued.

CONTENTIONS

Plaintiffs contend the order granting the special motion to strike was error.

DISCUSSION

1. *anti-SLAPP principles and standard of review*

Section 425.16 supplies an expedited procedure for the early dismissal of unmeritorious lawsuits brought to chill or inhibit the valid exercise of a party's constitutionally protected rights of petition or free speech. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).)

A special motion to strike involves two steps: First, the defendants must make a threshold showing that the cause of action arises from an act in furtherance of their constitutional rights of petition or free speech. (*Navellier*, *supra*, 29 Cal.4th at p. 88, citing § 425.16, subds. (b)(1) & (e).) If the defendants make such a showing, then the burden shifts to the plaintiffs to demonstrate a probability of prevailing on the claim. (*Navellier*, *supra*, at p. 88.)

Appellate review of an order granting or denying a special motion to strike under section 425.16 is de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) We consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Navellier*, *supra*, 29 Cal.4th at p. 89.) "However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. *Defendants satisfied the first prong of the section 425.16 analysis.*

"The prosecution of an unlawful detainer action indisputably is protected activity within the meaning of section 425.16. [Citations.]" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 (*Birkner*); *Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 133 (*Moriarty*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1182-1183 (*Wallace*), disapproved on another point in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11; *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1479 (*Feldman*); see also *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1521 ["Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit"].) The service of a notice to quit likewise is protected petitioning activity when, as here, it is a legal prerequisite to bringing an unlawful detainer action. (§§ 1161 & 1162; Civ. Code, § 1946; see *Birkner*, *supra*, at p. 282.)

The question then, is whether defendants have satisfied their burden in this first step of the anti-SLAPP analysis to demonstrate that the eighth cause of action arose from, or was based on, the 60-day notice and UD action. (*Moriarty*, *supra*, 224 Cal.App.4th at p. 133; *Navellier*, *supra*, 29 Cal.4th at p. 89.)

When analyzing the defendant's burden, " 'the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' [Citation.] 'The anti-SLAPP statute's definitional 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.' [Citation.]" (*Birkner*, *supra*, 156 Cal.App.4th at p. 281, quoting from *Navellier*, *supra*, 29 Cal.4th at pp. 89 & 92.)

To determine whether the lawsuit arose from protected activity, we consider "the *principal thrust or gravamen* of the plaintiff's cause of action." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*); *Olive Properties, L.P. v. Coolwaters Enterprises, Inc.* (2015) 241 Cal.App.4th 1169, 1175.) "The ' "meaning of 'gravamen' is clear; 'gravamen' means the 'material part of a grievance, charge, etc.' [Citation.]" [Citation.] [¶] In the context of the anti-SLAPP statute, the "gravamen is defined by the *acts on which liability is based*." . . . i.e., *the allegedly wrongful and injury-producing conduct* that provides the foundation for the claims. [Citations.]" [Citation.]' [Citation.]" (*Olive Properties, L.P. v. Coolwaters Enterprises, Inc.*, *supra*, at p. 1175.)

In contrast, "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*Id.* at p. 78.) "[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez*, *supra*, 113 Cal.App.4th at p. 188.) Instead, "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." (*City of Cotati*, *supra*, at p. 78.)

This case is similar to *Birkner*, *supra*, 156 Cal.App.4th 275, where the tenants sued their landlord after he served a notice to

terminate the tenancy to enable his mother to occupy the apartment, and later refused to rescind the notice. (*Id.* at pp. 278-279.) The *Birkner* court held that the tenants' lawsuit "indisputably arose from 'activity protected under the anti-SLAPP statute[,]' [[c]itation]" because the " 'sole basis for liability' " of the defendant landlord alleged in each cause of action " 'was the service of a termination notice' " and later " 'refusal to rescind it.' " (*Id.* at p. 283; accord, *Wallace*, *supra*, 196 Cal.App.4th at pp. 1182, 1186-1187 [claims in two causes of action arose from the landlord's acts of serving a notice and filing an unlawful detainer action, which constituted protected activity]; *Feldman*, *supra*, 160 Cal.App.4th 1467, 1483 [the filing of an unlawful detainer complaint, service of notice to quit, and threats to evict were not simply *evidence* of wrongdoing or conduct triggering the subtenants' cross-complaint but were the activities on which the cross-complaint was based].) Thus, when "the sole basis of liability asserted in the tenant's complaint is the filing and prosecution of the unlawful detainer action, the tenant's action [is] targeted at protected activity. [Citation.]" (*Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, 1051-1052 (*Ben-Shahar*).)

Here, the gravamen of plaintiffs' eighth cause of action was that defendants served the 60-day notice and filed the unlawful detainer action in retaliation for plaintiffs' lawful complaints about repairs, their police report about defendants' alleged theft, and the tenants' petition. Thus, defendants' alleged *wrongful activity was precisely* serving the 60-day notice and filing the unlawful detainer suit. Plaintiffs' argument that the 60-day notice was not based on a failure to pay rent is irrelevant. The asserted *conduct* giving rise to defendants' liability was their

eviction of plaintiffs. Without the allegations of the 60-day notice and unlawful detainer action, the complaint would not state a cause of action for retaliatory *eviction*. "It makes no sense for [plaintiffs] to argue that their cause of action for defendants' attempt to evict them wrongfully is not based on defendants' alleged attempt to evict them." (*Wallace*, *supra*, 196 Cal.App.4th at p. 1183.) As the only basis for liability alleged in the eighth cause of action was the 60-day notice and UD suit, the claim clearly arose from protected petitioning activity.

Likening their complaint to that of the plaintiff in *Moriarty*, *supra*, 224 Cal.App.4th 125, plaintiffs contend their eighth cause of action was not based on the eviction process. The tenant in *Moriarty* moved out of the rental premises to enable the landlord to make repairs. (*Id*. at p. 129.) After the landlord refused to allow him to return (*ibid*), the tenant sued for wrongful eviction. (*Id*. at pp. 129-130.) The appellate court in *Moriarty* affirmed the denial of the landlord's anti-SLAPP motion holding with respect to the wrongful eviction cause of action, that the landlord "fails to demonstrate that Moriarty's cause of action for violation of [San Francisco's Rent Ordinance] (or any other cause of action) is based in whole or in part on an unlawful detainer default suit *that is nowhere referenced in the complaint*." (*Id*. at p. 139, italics added.) *Moriarty* is thus distinguished because the tenant did not allege that his eviction was the result of a lawsuit by the landlord and so his complaint did not arise from protected activity. (*Id*. at pp. 139-140.)

Plaintiffs cite a raft of cases denying anti-SLAPP motions in the context of landlord tenant disputes. (See, e.g., *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 157-158, 160 [complaint was triggered by the filing and service of notices but

sought declaratory relief about parties rights under the Ellis Act]; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1287 [complaint triggered by filing and serving paperwork to remove units from rental market and evict tenant but was based on disability discrimination]; *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286-1287 [complaint was based on violation of rent control laws and not on landlord's UD action]; *Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 948 & 953 (*Delois*) [complaint was based on defendants' breach of tenancy termination agreement and not on petitioning activity as "no unlawful detainer action was ever filed" and "no litigation [was] ever commenced" by the defendant-landlords]; *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1240 & 1247 [complaint sought declaration of rights and duties under a ground lease, sublease, trust deed, quitclaim deed, and duties to repair, and did not arise from unlawful detainer action]; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1271, 1281-1282 (*Ulkarim*) [complaint based on breach of lease and underlying decision to terminate the tenancy and evict the tenant and not on service of notice of termination and filing unlawful detainer suit]; *Ben-Shahar*, *supra*, 231 Cal.App.4th at pp. 1048, 1053 [complaint based on breach of the unlawful detainer settlement agreement and not on the act of filing unlawful detainer suit or settling that matter].)

These authorities are distinguished because, as we explained in *Ulkarim*, *supra*, 227 Cal.App.4th 1266, their complaints were "based on the decision to terminate or other conduct in connection with the termination [citations]" and not on

the termination of the tenancy itself. (*Id*. at pp. 1276 & 1279.)[2] Indeed, no unlawful detainer action was alleged in *Delois, supra,* 177 Cal.App.4th at page 948, or *Moriarty*, *supra*, 224 Cal.App.4th at page 139. In none of the cases plaintiffs cite was the sole basis for the challenged cause of action the commencement of legal eviction proceedings. (*Ben-Shahar*, *supra*, 231 Cal.App.4th at p. 1051.)

"We are mindful that the lines drawn in these cases are fine ones. However, we are reminded by our Supreme Court . . . that the 'focus' of the statute 'is not the form of plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability . . . .' " (*Feldman*, *supra*, 160 Cal.App.4th at p. 1483, quoting from *Navellier*, *supra*, 29 Cal.4th at p. 92.)

Plaintiffs argue that their complaint is "a classic habitability case" and so their eighth cause of action did not arise from the "eviction proceedings."[3] We are not concerned with the

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[2] *Ulkarim* declined to follow *Birkner*, *supra*, 156 Cal.App.4th 275 and *Feldman*, *supra*, 160 Cal.App.4th 1467, to the extent that the complaints in those cases might have been aimed at the underlying decision to evict – not protected activity – rather than at the eviction itself – which is protected activity. (*Ulkarim*, *supra*, 227 Cal.App.4th at pp. 1279 & 1281.) However, the concern in *Ulkarim* is inapplicable here because, as explained, the sole basis for liability asserted in plaintiffs' complaint was the acts of serving the 60-day notice and prosecuting the unlawful detainer action, and not the decision to evict.

[3] We do not dispute plaintiffs' contention that they "had the right to sue for retaliatory eviction based on [a] claim of breach of habitability . . . . ," violation of Civil Code sections 1942.5 and 789.3, subdivision (c). But, "[t]he anti-SLAPP statute does not

first through seventh causes of action. While the habitability allegations permeate the complaint and may have provoked the eviction, the "motive the defendant may have had in undertaking its activities [in the eighth cause of action], or the motive the plaintiff may be ascribing to the defendant's activities" are irrelevant in the anti-SLAPP context. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 269.) Plaintiffs' retaliatory eviction cause of action, the only portion of the complaint subject to defendants' special motion to strike, was targeted solely at the protected activity of evicting plaintiffs and so it is a SLAPP action. (§ 425.16, subd. (b)(1).) The trial court did not err in ruling that defendants carried their burden under the first prong of the analysis.

3. *Plaintiffs did not satisfy the second prong of the section 425.16 analysis*.

A plaintiff opposing a special motion to strike has the burden to "state[ ] and substantiate[ ] a legally sufficient claim." (*Navellier*, *supra*, 29 Cal.4th at pp. 88 & 93.) " 'Put another way, 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

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insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) Any cause of action that arises from defendants' valid exercise of their constitutionally protected rights of petition or free speech (*Simpson*, *supra*, 49 Cal.4th at p. 21) is subject to the anti-SLAPP procedure. (§ 425.16, subd. (b)(1).)

the plaintiff is credited." ' [Citations.]" (*Navellier*, *supra*, 20 Cal.4th at pp. 88-89.)

To that end, the plaintiff must present competent evidence, "that would be admissible at trial." (*HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 212.) "[D]eclarations may not be based upon 'information and belief' [citation]" and documents submitted without the proper foundation will not be considered. (*Ibid.*) The complaint, even if verified, is insufficient to carry the plaintiff's shifted burden. (*Roberts v. Los Angeles County Bar Assn*. (2003) 105 Cal.App.4th 604, 614; *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 354 ["pleadings do not constitute evidence"].)

As noted, plaintiffs' eighth cause of action alleges that defendants served the 60-day notice and filed the UD action to retaliate against plaintiffs for lawfully (1) complaining about habitability issues, (2) signing the tenants' petition, and (3) reporting defendants' theft to the police, in violation of Civil Code sections 1940.2 and 789.3, subdivision (b)(3).[4]

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[4] Civil Code section 1940.2 makes it "unlawful for a landlord," "for the purpose of influencing a tenant to vacate a dwelling," to engage in conduct that violates Penal Code sections 484, subdivision (a) and 518, or to "[u]se, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person." (Civ. Code, § 1940.2, subd. (a)(1)-(4).)

Civil Code section 789.3, subdivision (b)(3) prohibits a landlord "with intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant as his or her residence," from "willfully

Preliminarily, plaintiffs presented no evidence of retaliation. The record contains only allegations in the complaint and one sentence from Perry's declaration, both of which asserted simply that, *on information and belief*, defendants commenced the eviction in retaliation for plaintiffs' lawful activity. Averments on information and belief do not make the required showing. (*Contreras v. Dowling* (2016) 4 Cal.App.5th 774, 785; *HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 212.)

Turning to the first alleged reason for defendants' retaliation, habitability, it is not addressed in either Civil Code sections 1940.2 or 789.3. Civil Code section 1942.5, subdivision (c), raised in plaintiffs' opposition below, prohibits landlords from retaliating against tenants for "lawfully organiz[ing] or participat[ing] in a lessees' association or an organization advocating lessees' rights or [for] lawfully and peaceably exercis[ing] any rights under the law." (*Ibid.*) However, plaintiffs cited to no evidence, other than their complaint's allegations, to show that they made habitability complaints to defendants. Such a showing is insufficient. (*HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 212.)

Second, plaintiffs alleged defendants evicted them in retaliation for the tenants' petition. Their opposition again relied on Civil Code section 1942.5, subdivision (c), quoted above, as the basis for this claim. Defendants' property supervisor Mossler declared that he received the tenants' petition on July 31, 2014,

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[¶] . . . [¶] Remov[ing] from the premises the tenant's personal property, the furnishings, or any other items without the prior written consent of the tenant . . . ."

some two weeks *after* defendants served the 60-day notice. Plaintiffs responded by citing the complaint's allegations on *information and belief*, that the eviction was in retaliation for the tenants' petition. As explained, such allegations are insufficient to make the required showing. (*Contreras v. Dowling*, *supra*, 4 Cal.App.5th at p. 785.)

The third alleged cause for defendants' retaliation was plaintiffs' theft report. Civil Code sections 1940.2 and 789.3 do prohibit landlords from taking or removing tenants' property for the purpose of terminating a tenancy. (Civ. Code, §§ 1940.2, subd. (a)(1) & 789.3, subd. (b)(3).) Plaintiffs' *evidentiary* showing consisted solely of Perry's declaration and its five attached exhibits. That declaration does not discuss the theft, plaintiffs' police report, or any ensuing police investigation. References to the theft are found only in the complaint, which is not evidence. Thus, plaintiffs did not make a prima facie showing that the eviction process was commenced in retaliation for the police report.

Plaintiffs observe that after the anti-SLAPP proceeding under review here, the trial court overruled defendants' demurrer and motion to strike the new 11th cause of action in the first amended complaint entitled, "Unlawful removal of tenants property – violation of California Civil Code § 789.3(b)(3)." Plaintiffs argue that "[i]f one cause of action is able to survive a Motion to Strike, it was able to survive a Special Motion to Strike." The argument is both factually and procedurally inaccurate.

Factually, the motion to strike was aimed solely at plaintiffs' allegations related to punitive damages. The trial

court overruled defendants' *demurrer* to the remainder of the 11th cause of action's allegations.

Procedurally, plaintiffs' argument misunderstands that " '[a]n anti-SLAPP motion is an *evidentiary* motion.' " (*Contreras v. Dowling*, *supra*, 4 Cal.App.5th at p. 785, italics added.) To successfully defend against a special motion under section 425.16, the plaintiff must *state and substantiate* the cause of action with *a prima facie showing* of facts. (*Navellier*, *supra*, 29 Cal.4th at pp. 88 & 93.) By contrast, all that is required to withstand a demurrer is to " ' " '*state*[ ] facts sufficient to constitute a cause of action. [Citation.]' " ' " (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1424, italics added.)

We conclude therefore that plaintiffs did not demonstrate the likelihood of prevailing on their claim that they were evicted in retaliation for their habitability complaints, the tenants' petition, or their police report.

In sum, the trial court properly granted defendants' special motion to strike. Defendants demonstrated that plaintiffs' eighth cause of action arose from protected petitioning activity as it was targeted solely at the 60-day notice and UD action. In opposition, plaintiffs failed to satisfy their shifted burden to present prima facie evidence that they engaged in any lawful activity that provoked the eviction. (§ 425.16, subd. (b)(1).)[5]

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[5] Based on our resolution of this appeal, we need not address plaintiffs' further contentions that their eighth cause of action was not barred by the litigation privilege of Civil Code section 47, subdivision (b) or by the doctrine of res judicata. Plaintiffs forfeited any challenge to the attorney fee award under the anti-SLAPP procedure for failure to raise the argument in their

DISPOSITION

The order is affirmed. Defendants are to recover costs on appeal.

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BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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opening brief and support it with authority. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1322, fn. 5.)

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