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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ROBERT L. FROME, Plaintiff and Respondent, v. SUSAN BERKOWITZ et al., Defendants and Appellants.	B270435 (Los Angeles County Super. Ct. No. PC056540)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin Sandvig, Judge. Affirmed.

Franceschi Law Corporation and Ernest J. Franceschi, Jr., for Defendants and Appellants.

Shapero & Shapero, Martin M. Shapero and Steven J. Shapero for Plaintiff and Respondent.

Defendants Susan Berkowitz (aka Susan Berkowitz-Townley), CanDoAll Consultants, Inc., and CCI TaxPros appeal from the trial court's denial of their motion under Code of Civil Procedure section 425.16 (section 425.16, the so-called anti-SLAPP statute) to strike the complaint filed against them by plaintiff Robert. L. Frome, dba Frome & Associates. We affirm.

BACKGROUND

The Complaint

Plaintiff Robert Frome is in the business of tax preparation as an enrolled agent (meaning he has the privilege of representing taxpayers before the Internal Revenue Service), doing business as Frome and Associates in Valencia, California (collectively, Frome). In August 2015, he filed a verified complaint against defendant Susan Berkowitz (aka Susan Berkowitz-Townley) (Berkowitz), and two corporations she owns, CanDoAll Consultants, Inc., and CCI TaxPros, alleging causes of action for misappropriation of trade secrets and unfair competition, and seeking damages and injunctive relief.

According to the complaint, over the past 30 years Frome developed and maintained a confidential customer list of approximately 2,100 continuing customers, containing their file names, home telephone numbers, and (for some customers) e-mail addresses. Beginning in August 2004, Berkowitz worked for Frome as an independent contractor until she left in June 2015 to run a competing business across the street. While she worked for Frome, she had access to Frome's customer list and secretly copied it, downloaded Frome's proprietary tax preparation software to her own computer, and stole hard files of Frome's clients. While working on her own behalf and setting up her competing business, Berkowitz told customers that she was on vacation from Frome. She filed tax returns for Frome's clients

using Frome's tax PIN number and signed Frome and Associates' title as the tax preparer. She billed Frome and Associate customers, but misappropriated the accounts receivables through her personal credit card, and "wiped off" Frome's Quickbooks the records of customers she had serviced. Upon leaving Frome and starting her own business, she contacted persons on Frome's customer list and requested that they do business with her and her new businesses, CanDoAll Consultants, Inc., and CCI TaxPros. As to clients of Frome who sent paperwork and a check for tax preparation to Frome, she contacted them, solicited their business, and told them to ask Frome for their money back.

Frome alleged that Berkowitz's acts constituted misappropriation of trade secrets under Civil Code section 3426.1, subdivision (b), and unfair competition under Business and Professions Code section 17203. He sought compensatory and punitive damages, an award of attorney fees, and injunctive relief.

Special Motion to Strike

Berkowitz filed a special motion to strike the complaint under section 425.16. According to the motion, the precipitating event leading to the lawsuit was Berkowitz's e-mailing an announcement to her clients that she had left Frome and had opened her own tax preparation office. She argued that that the suit arose from her right of free speech, in that it was brought to prevent her from telling clients whom she had personally cultivated and for whom she had performed work that she had left Frome and had established her own competing business.

In support of the motion, Berkowitz filed a declaration, in which she stated that in 2010 she became an enrolled agent, after which she was not an

employee of, or contractor for, Frome. Rather, she and Frome entered an oral agreement whereby he would provide office space so that she could build her own tax preparation service. In lieu of rent, she would split fees with Frome for any client she produced and for whom she worked, and would contribute some funds for office expenses.

Berkowitz denied stealing Frome's customer list or related hard files. Rather, she took a list of clients whom she had cultivated and serviced, along with their related hard drives. She also denied taking Frome's tax preparation software (she purchased her own), and denied diverting receivables through her merchant credit card (she processed the receivables with Frome's knowledge and paid him his share). She admitted sending an announcement to advise clients that she had opened a new office under the name of CCI TaxPros. She stated that the announcement was not intended to solicit any clients, but merely to inform them that she had opened her own office.

In the motion, Berkowitz argued that because Frome's claims against her arose from her e-mailing an announcement to her clients notifying them of her new business, it therefore it fell within the anti-SLAPP statute as targeting an act of free speech. She also argued that Frome could not show a reasonable probability of prevailing on the merits.

Opposition

In opposition to the motion, Frome argued that Berkowitz had not met the first prong of the anti-SLAPP statute, which as here relevant requires a showing that Frome's claims for misappropriation of trade secrets and unfair competition arose from "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in

connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) Frome relied extensively on *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561 (*World Financial*), which we discuss below.

In support of his opposition, Frome lodged a prior declaration he had earlier filed to obtain a temporary restraining order and preliminary injunction.[1] In that declaration, Frome reiterated and amplified the allegations of his verified complaint. Besides detailing Berkowitz's alleged stealing of his client list and account receivables, he stated that he learned from one of his clients that the client had received an e-mail from Berkowitz announcing her new office. In the e-mail, she referred to the recipients as "my valued clients," and stated, among other things, that "[i]n order to better serve each of you, I have brought with me an experienced team of professionals that will bring the highest level of customer service that you deserve." Further, he stated that Berkowitz sent an e-mail to Robert Housman, an attorney who previously represented Frome. The content of the e-mail discussed Berkowitz's continuing work for "her" clients, whom Frome claimed were actually his clients.

Reply

In reply, Berkowitz argued that Frome mischaracterized the reasoning and holding of *World Financial,* and reiterated her argument that because

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[1] It appears from statements made in Berkowitz's declaration in support of her motion and in her reply to the opposition that the court issued a temporary restraining order against her, but later denied a preliminary injunction. However, neither order appears in our record on appeal.

the precipitating factor in bringing the lawsuit was her announcement of her competing business, the suit was covered by the anti-SLAPP statute.

Ruling

The trial court denied the motion. Relying on *World Financial*, the court concluded that Berkowitz failed to establish that her announcement of her new business involved a matter of public interest under section 425.16, subdivision (e)(4).

DISCUSSION

Berkowitz contends that the trial court erred in concluding under *World Financial* that she failed to meet the first prong of the anti-SLAPP statute. We disagree. Indeed, although *World Financial* is compelling authority governing this case, Berkowitz makes no meaningful attempt to distinguish the decision, and does not argue that it was wrongly decided.

"Section 425.16, subdivision (b)(1), provides: 'A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' The analysis of an anti-SLAPP motion thus involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] '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.' [Citation.] We review an order granting or denying a motion to strike under section 425.16 de novo." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.)

In the instant case, the relevant category of protected activity under the anti-SLAPP statute is section 425.16, subdivision (e)(4): "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." As Frome argues, the decision in *World Financial* disposes of Berkowitz's assertion that her conduct meets this standard. Therefore, because Berkowitz fails to meet the first prong of the anti-SLAPP statute, we need not consider the second prong.

In *World Financial, supra,* 172 Cal.App.4th 1561, HBW Insurance & Financial Services, Inc. (HBW) and six of its agents were sued by World Financial Group, Inc. (WFG) for, among other claims, misappropriation of trade secrets and unfair competition based on their alleged soliciting of WFG agents and customers and using WFG's confidential information and trade secrets, including customer lists. (*Id.* at pp. 1564, 1565-1566.) The defendants filed an anti-SLAPP motion, contending that WFG's claims fell within their exercise of free speech in connection with a public issue under section 425.16, subdivision (e)(4), in that the claims were premised on "'the pursuit of lawful employment pursuant to Bus. & Prof. § 16600' as well as 'workforce mobility and free competition,' all of which are matters 'of public interest and protected public policy.'" (172 Cal.App.4th at p. 1567.)

On the defendants' appeal from the trial court's denial of the motion, relying on established principles, the court of appeal held that the defendants

failed to show that WFG's claims fell within section 425.16, subdivision (e)(4). As here relevant, the court rejected the notion that an abstract public interest in employee mobility and compensation was sufficient to trigger the anti-SLAPP statute: "'The fact that "a broad and amorphous public interest" can be connected to a specific dispute is not sufficient to meet the statutory requirements' of the anti-SLAPP statute. [Citation.]" (*World Financial, supra*, 172 Cal.App.4th at p. 1570.) Rather, "'the focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it. [Citation.]'" (*Id.* at p. 1572.) The court noted that the communications at issue were not about the broad topics of workforce mobility and free competition or designed to inform the public about these topics, but "were merely solicitations of a competitor's employees and customers undertaken for the sole purpose of furthering a business interest." (*Id.* at p. 1572.)

Further, focusing on the specific speech at issue, the court noted that the statements were made in a flyer and power point presentation which certain defendants "forwarded to WFG associates as part of their effort to recruit those associates to join HBW. According to defendants, information in these materials 'mirrored ongoing public discussions about WFG, including criticism of its restrictive associate agreements, the fact that recruiting is required for promotions, WFG's claim that it owns associate clients, and the fact that WFG's products are coming under scrutiny by the Financial Industry Regulatory Authority . . . .' Defendants ignore, however, that these communications were not made in the context of any public discussion. '[I]n order to satisfy the public issue/issue of public interest requirement in situations where the issue is of interest only to a limited, but definable portion of the public, such as a private group, organization, or community,

"the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." [Citation.]' [Citation.] [¶] The documents at issue here were not disseminated in the context of any purported ongoing controversy regarding WFG's business practices, nor were they directed at encouraging others to participate in the discussion. [Citation.] Rather, the information was part of a competitor's pitch to WFG associates, and was motivated solely by the competitor's desire to increase its sales ranks. Because the information was contained in solicitations that were designed solely for the purpose of commercial activity, it is not entitled to protection under the anti-SLAPP statute." (*World Financial, supra*, 172 Cal.App.4th at pp. 1572-1573.)

Finally, the court held that even if certain specific statements would qualify as protected speech, those statements still would not be protected by the anti-SLAPP statute because they were merely incidental to the gravamen of the complaint. The court observed that "[a] claim does not arise from constitutionally protected activity simply because it is triggered by such activity or is filed after it occurs. [Citation.] Rather, the focus is on the substance of the lawsuit. '[T]he 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. [Citations.]' [Citation.] In other words, ""the act underlying the plaintiff's cause' or 'the act which forms the basis for the plaintiff's cause of action' must *itself* have been an act in furtherance of the right of petition or free speech." [Citation.]' [Citation.] To determine whether the 'arising from' requirement is met, we look to 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability

or defense is based.' [Citations.]" (*World Financial, supra*, 172 Cal.App.4th at pp. 1568-1569.)

The court acknowledged that "'[a] cause of action is subject to a motion to strike under the anti-SLAPP statute even if it is based only in part on allegations regarding protected activity. [Citation.] However, "it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when 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." [Citation.]' [Citation.]" (*World Financial, supra*, 172 Cal.App.4th at p. 1574.)

In *World Financial,* WFG's complaint alleged that the defendants "used WFG's confidential information and trade secrets to solicit WFG associates to join HBW and to induce WFG customers to replace WFG products or services. . . . The statements for which defendants seek protection, i.e., specific references in the flyer and PowerPoint presentations that accompanied the . . . solicitations of WFG associates, are irrelevant to all of WFG's claims . . . . Those statements, which relate to specific aspects of WFG's business practices, are also essentially irrelevant to the claims . . . . WFG is not suing defendants for criticizing their business practices. As defendants acknowledged below, 'Plaintiff is not challenging the content of the statements made but rather the very fact such communications occurred . . . .' Because the statements at issue are merely incidental to WFG's claims, they are insufficient to subject any cause of action, much less the entire complaint, to the anti-SLAPP law." (*World Financial, supra*, 172 Cal.App.4th at p. 1574.)

Here, all of these points made in *World Financial* apply to Berkowitz's anti-SLAPP motion. The purportedly protected speech — the e-mailed announcement of Berkowitz's new tax preparation business — was done for a commercial purpose, either to recruit Frome's clients (according to Frome) or to inform and retain Berkowitz's clients (according to Berkowitz). That the speech might be broadly connected to an abstract public interest in free competition and making tax preparation services more available to the public, like the broad connection between the speech in *World Financial* and the abstract public interest in workforce mobility and free competition, does not elevate the announcement of Berkowitz's new business to protected speech under section 425.16, subdivision (e)(4) as having been made in connection with a public issue or an issue of the public interest. In any event, even if the announcement were protected (it is not), it was incidental to the real conduct at issue as alleged in the complaint – stealing Frome's client list, downloading Frome's proprietary tax preparation software, stealing hard files of Frome's clients, and taking accounts receivables belonging to Frome, all in an attempt to build Berkowitz's competing business by taking money that belonged to Frome and by taking away Frome's clients. To the extent the announcement forms a potential basis of liability, it does so not because Frome challenges the content of the announcement, but because the announcement was sent at all, to clients Frome claims as his own.

Berkowitz does not acknowledge these points, and makes no meaningful effort to distinguish *World Financial*. She asserts, without elaboration, that the trial court "ignored the fact that the precipitating factor in bringing this litigation was the e-mail announcement that [she] sent to her clients," and that the e-mail is therefore "'inextricably intertwined' with non-protected conduct, thus rendering the entire cause of action subject to the

[anti-]SLAPP statute." However, as *World Financial* and many other decisions make clear, the "statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77.) That the announcement may have precipitated the lawsuit shows neither that the lawsuit arises from protected activity, nor that, assuming the announcement is protected, the announcement is inexplicably intertwined with the other non-protected conduct from which the suit arises. Rather, as we have stated, it is clear that the gravamen of the lawsuit is Berkowitz's allegedly unlawful conduct—stealing Frome's client list, downloading Frome's proprietary tax preparation software, stealing hard files of Frome's clients, taking accounts receivables belonging to Frome.

Berkowitz asserts that "Frome's claims are based upon protected communications in connection with the right of all persons to choose their own tax preparer, a matter of public interest under the required broad reading of the statute." But Berkowitz makes no attempt to articulate any distinction between this amorphous public interest and the amorphous public interest asserted in *World Financial*—the pursuit of lawful employment, workforce mobility, and free competition. Further, Berkowitz's announcement was sent to recruit or retain clients for her new business, not to educate the public on the supposed public interest of having the right to choose one's tax preparer. Nor was the announcement part of an ongoing controversy about that subject. Indeed, in its empty generality, Berkowitz's purported public interest is even more amorphous than that in *World Financial.*

Berkowitz asserts that Frome's declaration lodged in opposition to the motion shows that his claims arise out of protected conduct. In the declaration, Frome referred to Berkowitz's communications with Frome's clients and an e-mail Berkowitz sent attorney Robert Housman describing her work for persons she described as "her" clients, but whom Frome alleged were actually "his" clients. But this evidence does nothing to bolster Berkowitz's anti-SLAPP motion. The statements referred to by Frome did not concern a public issue or an issue of public interest within the meaning of section 425.16, subdivision (e)(4), and in any event are merely incidental to the core of Frome's lawsuit.

In short, *World Financial* clearly governs Berkowitz's anti-SLAPP motion, and Berkowitz mounts no credible argument to the contrary. Thus, we conclude that the trial court properly denied the motion.

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DISPOSITION

The order denying Berkowitz's motion under section 425.16 is affirmed. Frome shall recover costs on appeal.[2]

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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[2] Frome moved for sanctions on the ground the appeal is frivolous and taken for purposes of delay. Although we determine that the appeal lacks merit, we do not conclude that it is frivolous, and therefor deny sanctions.