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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE ex rel. ALLSTATE INSURANCE COMPANY et al., Plaintiffs and Respondents, v. KELLY L. CASADO et al., Defendants and Appellants.	B288742 (Los Angeles County Super. Ct. No. BC541477)

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

The Severo Law Firm and Michael V. Severo for Defendants and Appellants.

Knox Ricksen, Thomas E. Fraysse and Maisie C. Sokolove for Plaintiffs and Respondents.

INTRODUCTION

Kelly L. Casado and the Casado Law Firm (collectively, Casado) appeal from an order denying their special motion to strike the complaint in this action under Code of Civil Procedure section 425.16 (section 425.16). They argue that their conduct in representing clients with claims against insureds of Allstate Insurance Company, including sending demand letters to Allstate, constituted protected prelitigation activity under section 425.16, subdivision (e)(1) or (e)(2). Because Casado failed to show he prepared those letters in anticipation of litigation contemplated in good faith and under serious consideration, Casado's conduct fell outside the scope of section 425.16. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Allstate Sues Casado for His Involvement in an Allegedly Fraudulent Insurance Scheme*

Allstate and related entities[1] filed a qui tam action against Casado, two other law firms, several chiropractic clinics, and other individuals, alleging violations of Insurance Code section 1871.7 and Business and Professions Code section 17200. Allstate alleged the defendants owned and controlled "sham law offices and sham health care practices" that created fraudulent documents to support false insurance claims for personal injury

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[1] Plaintiffs include Allstate Insurance Company, Allstate Indemnity Company, Allstate Fire & Casualty Insurance Company, Allstate Property & Casualty Insurance Company, and Allstate Vehicle & Property Insurance Company.

clients and patients. Allstate alleged the defendants unlawfully employed "runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits and/or by procuring clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer."

Allstate alleged that, as part of the defendants' fraudulent scheme, "false and fraudulent writings have been prepared and submitted by defendants in support of claims on policies of insurance written by plaintiffs," including "billing records, medical records, correspondence, demand letters, corporate documents, and other records." Allstate also alleged the "[d]efendants aided, abetted, and assisted each other with full knowledge that the false and fraudulent documents and records would be submitted to insurance companies, including plaintiffs, for payment, but persisted in engaging in such conduct for financial gain."

Allstate initially named as law firm defendants the Law Offices of Sunmin Lee & Associates and the Northwest Law Firm, Inc. Allstate amended the complaint to substitute Casado and his law firm as Doe defendants.

B. *Casado Files a Special Motion To Strike*

Casado filed a special motion to strike the complaint under section 425.16 and argued the allegedly fraudulent demand letters and correspondence Casado sent to Allstate were prelitigation activities subject to section 425.16, subdivisions (e)(1) and (e)(2). Casado argued he sent Allstate correspondence, "primarily in the form of representation and demand letters preceding any litigation" and "pertaining to legitimate, legally

viable claims." He asserted "these letters were sent in good faith since [he] believed that [his] clients were entitled to compensation for the tortious conduct of Allstate's insureds." Casado also argued "the communications were undoubtedly in serious contemplation of litigation [because] if the demands for settlement did not lead to a compromise, [Casado] would institute litigation. . . . In summary, [Casado's] practice was to pursue a settlement of . . . cases whenever it was fairly feasible but also [to] pursue litigation . . . if the matter could not be settled. All communications with Allstate were consistent with this practice."

In support of his motion Casado submitted a declaration detailing his "policy regarding the handling of . . . personal injury claims." Casado stated in his declaration: "Once a case is received, I analyze the potential for recovery and if I decide to accept representation of the clients, I cause to be sent to the party causing the injury or his/her/its insurance company a letter of representation. The letter of representation is normally created by the use of a template which I wrote and approved." Casado explained that, after he or others in his office compiled documents relating to the client's medical condition and followed up with the client, Casado would "personally analyze each case and determine the amount to be demanded from the defendant or its insurance company. . . . A demand letter is then created. The demand letter may be created by means of the use of a template for simpler cases. The amount to be demanded is arrived at in good faith and in light of the nature and extent of injuries and my experience in dealing with personal injury cases. The demand for settlement is made with the lawful intent to compromise potential future litigation."

Casado's declaration continued: "It is my policy to create and send the demand letter to the insurance company in good faith. While the demand is made under serious consideration of litigation, it is provided to the insurance company to explore the possibility of settlement prior to the filing of a complaint in the California Superior Court. . . . My communications with the insurance company prior to the filing of a complaint are made in an effort to attempt a compromise of any potential future litigation. . . . If the matter cannot be reasonably compromised, then I will pursue litigation on behalf of my clients."

Casado further stated: "I have communicated with Allstate on numerous claims. In every instance, I followed the procedure set forth above. Many of the cases have settled prior to the filing of a complaint. Some did not and are currently in litigation." Casado also stated some claims submitted on behalf of his clients were assigned to Allstate's Special Investigations Unit, which handles claims that may be fraudulent. "In many cases," Casado stated, "I have had claims assigned to [the Special Investigations Unit] returned to the regular adjuster for handling and ultimately settled. In other instances, I have, on behalf of my clients, filed a complaint to commence litigation. On a few occasions, I have dropped cases where, after further investigation, I have concluded that the claim was not legitimate." Casado did not provide any templates from which he or others in his office created representation or demand letters, nor did he provide any exemplars of any actual letters he sent to Allstate.

C. *The Trial Court Denies the Special Motion To Strike, and Casado Appeals*

The trial court denied Casado's special motion to strike. Under the first step of the section 425.16 analysis the trial court found Casado's statements to Allstate were not prelitigation activities under section 425.16, subdivision (e)(1) or (e)(2), because Casado sent Allstate his representation and demand letters as "'contractual claims for payment in the regular course of business.'" The trial court found Casado's practice of sending demand letters in "circumstances in which litigation is only a *possibility* if the claim is denied" did not satisfy the requirement that the defendant make the prelitigation statements "under serious consideration of litigation." Because the trial court concluded Casado's conduct was not protected activity under the first step of the section 425.16 analysis, the court did not proceed to the second step of the analysis and consider whether Allstate was likely to succeed on the merits. The trial court also denied Allstate's request for attorneys' fees under section 425.16, subdivision (c)(1). Casado filed a timely appeal; Allstate did not file a cross-appeal.

DISCUSSION

A. *Section 425.16*

"A strategic lawsuit against public participation . . . is one which 'seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances.'" (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 404; see *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619 (*Rand Resources*) ["participation in matters of public

significance . . . should not be chilled through abuse of the judicial process"].) Section 425.16 "provides a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Contreras*, at p. 404; see *Rand Resources*, at p. 619.) "The statute 'authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue.'" (*Contreras*, at p. 404; see *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321 (*Barry*).)

"The procedure made available to defendants by [section 425.16] has a distinctive two-part structure. [Citations.] A court may strike a cause of action only if the cause of action (1) arises from an act in furtherance of the right of petition or free speech 'in connection with a public issue,' and (2) the plaintiff has not established 'a probability' of prevailing on the claim." (*Rand Resources*, *supra*, 6 Cal.5th at pp. 619-620; see *Barry*, *supra*, 2 Cal.5th at p. 321.) "A defendant satisfies the first step of the analysis by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation], and that the plaintiff's claims in fact *arise* from that conduct [citation]." (*Rand Resources*, at p. 620; see *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063; *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 775.)

The second step requires a "'summary-judgment-like'" analysis. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384; accord, *Monster Energy Company v. Schechter* (2019) 7 Cal.5th 781, 788.) "The court does not weigh evidence or resolve conflicting factual

claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." (*Baral*, at pp. 384-385; see *Barry*, *supra*, 2 Cal.5th at p. 321.) "[A] trial court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based' in evaluating the plaintiff's probability of success." (*Barry*, at p. 321; see § 425.16, subd. (b)(2).) We review de novo an order granting or denying a special motion to strike under section 425.16. (*Park v. Board of Trustees of California State University*, *supra*, 2 Cal.5th at p. 1067; *Monster Energy Company*, at p. 788.)

B. *Allstate's Causes of Action Do Not Arise from Protected Petitioning Activity*

Section 425.16, subdivision (e), "sets forth four types of communications or conduct which are considered acts in furtherance of a person's right of speech or petition. At issue in this case are subdivisions (e)(1) and (e)(2), which describe as an act in furtherance of the right of petition any written or oral statement or writing made 'before' a judicial proceeding or 'in connection with' an issue under consideration or review by a judicial body." (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823-824 (*Anapol*).) "Communications preparatory to, or in anticipation of, bringing an action are within" the of scope section 425.16. (*Anapol*, at p. 824; see *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 940 (*Bel Air Internet*).) "If a prelitigation statement concerns the subject of the dispute and is made in anticipation of litigation contemplated in good faith and under serious consideration, it

falls within the scope of . . . section 425.16." (*Anapol*, at p. 824; see *Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789-790.)

"The requirement to show that litigation is seriously contemplated ensures that prelitigation communications are actually connected to litigation and that their protection therefore furthers [section 425.16's] purpose of early dismissal of meritless lawsuits that arise from protected petitioning activity." (*Bel Air Internet*, *supra*, 20 Cal.App.5th at p. 941; see *Anapol*, *supra*, 211 Cal.App.4th at p. 824 [the good faith and serious consideration requirement "focuses on whether the litigation was genuinely contemplated"].) "Thus, for example, when a cause of action arises from conduct that is a 'necessary prerequisite' to litigation, but will lead to litigation only if negotiations fail or contractual commitments are not honored, future litigation is merely theoretical rather than anticipated and the conduct is therefore not protected prelitigation activity." (*Bel Air Internet*, at p. 941; see *Olivares v. Pineda* (2019) 40 Cal.App.5th 343, 357-358.)

In the insurance context, submitting an insurance claim in the usual course of business does not constitute prelitigation conduct unless circumstances show litigation is more than theoretical. Those circumstances may exist where, for example, an attorney submits a claim after negotiations with an insurance company have been unsuccessful or an attorney submits a demand letter threatening to file a lawsuit after an insurance company has denied a claim. (*Anapol*, *supra*, 211 Cal.App.4th at p. 827.) In either case, there must also be evidence the insured has decided to sue the insurance company for failing to pay a claim as demanded. (*Ibid.*; see *id.* at p. 830 [submitting an insurance claim was not protected activity under section 425.16

where there was "no evidence that the *insureds* anticipated litigation at the time [their attorney] submitted their claims"].) In general, circumstances indicating the submission of an insurance claim rises to the level of protected prelitigation activity "are the exception, rather than the rule." (*Id*. at p. 827.) This is because, "[i]n most cases, the insurer is not aware that the insured will be making a claim until the claim is made; thus, the insured will have no reason to believe the claim will be denied and litigation will follow." (*Id.* at pp. 827-828; see *Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 703-704 [letter communicating a decision to terminate a contract was not protected pre-arbitration activity because the sender "had 'no reason to believe' that arbitration 'will follow' from its letter because [the parties] could well have negotiated a settlement and obviated any need for arbitration"].)

The circumstances here fall within the rule, not the exception. Casado admitted in his declaration he sent Allstate letters of representation and demand letters before knowing whether Allstate would comply with the demand or pay any amount on the claim. He said he sent demand letters "with the lawful intent to compromise potential future litigation," not to threaten present litigation. Indeed, Casado did not submit a single representation or demand letter that threatened litigation in the event Allstate failed to pay a particular request. Casado said that, only "[i]f the matter [could] not be reasonably compromised," would he "pursue litigation on behalf of my clients." Casado also admitted twice in his declaration that many of the demands he submitted to Allstate on behalf of his clients were resolved by settlement before Casado had to file a complaint, and Casado submitted no evidence any of his clients

anticipated litigation at the time Casado sent Allstate a representation or demand letter on their behalf. Nor did Casado submit evidence Allstate ever informed Casado it would deny any particular request for payment.

Based on this evidence, Casado's unsupported statement that all of the representation and demand letters he submitted to Allstate were "made under serious consideration of litigation" does not, without more (and there was no more), bring his communications with Allstate within section 425.16. (See *Anapol*, *supra*, 211 Cal.App.4th at p. 829 ["an insurance claim cannot be transformed from a simple claim for payment submitted in the usual course of business into protected prelitigation conduct solely on the basis of the subjective intent of the attorney submitting the claim"].) Casado's "self-serving declaration that, in his own mind, at the time he submitted the [letters] . . . litigation would be necessary" is "insufficient to establish a prima facie showing" of protected activity. (*Id.* at p. 830.) Instead, the circumstances Casado described in his declaration indicate Casado sent Allstate representation and demand letters while litigation was "merely theoretical" and not under serious consideration. (See *Bel Air Internet*, *supra*, 20 Cal.App.5th at p. 941.)

Casado argues the trial court's reliance (and any reliance by this court) on *Anapol* is misplaced because the claims submitted by attorneys in *Anapol* demanded performance under the terms of the insurance policies of the attorneys' clients, which required the court in that case to determine whether the attorneys submitted the claims in the ordinary course of business or as a prerequisite to anticipated litigation. (See *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95

Cal.App.4th 921, 932 ["The submission of contractual claims for payment in the regular course of business before the commencement of litigation . . . is not an act in furtherance of the right of petition or free speech within the meaning of [section 425.16]."].) Casado explains he did not submit claims to Allstate based on his clients' insurance policies, but sent letters to Allstate demanding Allstate pay Casado's clients on behalf of Allstate's insureds who caused injuries to Casado's clients. Thus, Casado argues, all of the correspondence he sent to Allstate were "communications in an effort to compromise potential future litigation" and not requests for payments under an insurance contract in the regular course of business.

Although Casado submitted so-called "third-party claims" to Allstate and the attorneys in *Anapol* submitted "first-party claims" to the insurer in that case, the process Casado described in his declaration was a routine and usual course of business that may or may not result in litigation. (See *Anapol*, *supra*, 211 Cal.App.4th at p. 827.) Unless and until informal negotiations with Allstate failed or Allstate denied payment, litigation was purely theoretical. Indeed, prior to receiving correspondence from Casado, Allstate may not have had any knowledge of his clients' injuries or claims against one of its insureds. Merely sending a representation or demand letter as part of the process described by Casado did not demonstrate litigation was imminent or impending. (Cf. *Strawn v. Morris, Polich & Purdy, LLP* (2019) 30 Cal.App.5th 1087, 1096 ["'Although "[t]he classic example of an instance in which the [litigation] privilege would attach to prelitigation communications is the attorney demand letter threatening to file a lawsuit if a claim is not settled," it is not the mere *threat* of litigation that brings the privilege into play, but

rather the actual good faith contemplation of an imminent, impending resort to the judicial system for the purpose of resolving a dispute.'"]; see also *Bailey v. Brewer*, *supra*, 197 Cal.App.4th at p. 790 ["In determining whether a statement was made in anticipation of litigation contemplated in good faith and under serious consideration, [courts] may look to how this test has been applied in cases involving the litigation privilege of Civil Code section 47."].)

Casado also argues "the California Supreme Court unequivocally held that [section] 425.16 will bar an action where 'the gravamen of plaintiff's complaint is not that the claims . . . of the litigants are themselves groundless, but that the methods employed by the law firm' whose conduct is violative of State Bar rules in being retained as counsel for claimants, amounted to solicitation." Casado cites *Rubin v. Green* (1993) 4 Cal.4th 1187, which held the litigation privilege under Civil Code section 47, subdivision (b), barred an action against an attorney for meeting and discussing the merits of a proposed lawsuit with potential plaintiffs, eventually filing the complaint, and filing pleadings in the litigation. (*Rubin v. Green*, at p. 1195.) Like section 425.16, the litigation privilege under Civil Code section 47, subdivision (b), applies to prelitigation communications only where such communications have "'some relation to a proceeding that is actually contemplated in good faith and under serious consideration by . . . a possible party to the proceeding.'" (*Rubin v. Green*, at pp. 1194-1195; see *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 [the policy underlying the litigation privilege of affording "'the utmost freedom of access to the courts'" is furthered only if litigation is "seriously considered"]; *Olivares v. Pineda*, *supra*, 40 Cal.App.5th

at pp. 357-358 ["a threat to file a lawsuit is insufficient to activate the [litigation] privilege if it is merely a negotiating tactic and not a serious proposal made in good faith contemplation of going to court"].) The Supreme Court in *Rubin v. Green* held the acts of the attorney defendant in that case were privileged prelitigation acts. Nothing in *Rubin v. Green* suggests Casado's acts of sending representation and demand letters were related to litigation contemplated in good faith and under serious consideration.

Finally Casado cites an unpublished decision holding that specific demand letters sent to Allstate in connection with that case demonstrated protected prelitigation conduct under section 425.16. Casado explains he cited the case because he "believe[s] it has collateral estoppel effects." (See Cal. Rules of Court, rule 8.1115(b)(1) ["An unpublished opinion may be cited or relied on . . . [w]hen the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel."].) In particular, Casado argues the legal conclusions in the unpublished decision are binding on Allstate in this case because, in the unpublished case, Allstate made and lost arguments similar to those it makes in this case. But because the unpublished decision involved different factual and legal issues than those in this case, it has no preclusive effect on this case. (See *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1513 ["'where the previous decision rests on a "different factual and legal foundation" than the issue sought to be adjudicated in the case at bar, collateral estoppel effect should be denied'"]; *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516-1517 [same].)

C. *Allstate Is Not Entitled to an Award by This Court of Attorneys' Fees on Appeal*

Section 425.16, subdivision (c)(1), "requires the trial court to award reasonable attorneys' fees to a prevailing plaintiff pursuant to Code of Civil Procedure section 128.5 when the court determines that a defendant's [special motion to strike] was 'frivolous or . . . solely intended to cause unnecessary delay.'" (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.) In its opposition to Casado's special motion to strike, Allstate requested attorneys' fees under section 425.16, subdivision (c)(1). The trial court found Casado's motion was not frivolous and denied Allstate's request.

Allstate did not appeal from the trial court's order and does not argue the trial court erred in denying its request for attorneys' fees. Instead, Allstate argues it is entitled to attorneys' fees on appeal because Casado's motion was frivolous. That argument, however, rests on a factual finding contrary to the trial court's order denying Allstate's request for attorneys' fees, and Allstate did not appeal from that order (assuming it was appealable).[2] Nor does Allstate seek attorneys' fees under Code of Civil Procedure section 907. (See *Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1062 ["Under section 907 and California Rules of Court, rule 8.276(a)(1), we may award sanctions when an appeal is frivolous and taken solely to cause delay."]; *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 558 ["'[f]actors relevant to determining the amount of sanctions to be awarded a party responding to a frivolous appeal include "the amount of respondent's attorney fees on appeal"'"].)

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[2] See *Doe v. Luster* (2006) 145 Cal.App.4th 139, 150.)

DISPOSITION

The order denying the special motion to strike Allstate's complaint against Casado and the Casado Law Firm is affirmed. Allstate is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.