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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

BRADFORD D. CREGER, Plaintiff and Appellant, v. HUDSON 141 HOMEOWNERS ASSOCIATION et al., Defendants and Respondents.	B247480 (Los Angeles County Super. Ct. No. GC050120)

APPEAL from orders of the Superior Court of Los Angeles County. David S. Milton, Judge. Affirmed in part, reversed in part and remanded with directions.

Law Offices of Paul H. Sweeney, Paul H. Sweeney, and Freeman, Freeman & Smiley, Steven E. Young and Tracy R. Daub for Plaintiff and Appellant.

Slaughter & Reagan, Barry J. Reagan and Gabriele M. Lashly for Defendants and Respondents Hudson 141 Homeowners Association, Christopher Taylor Stirling, Joao Huang-Anacleto and Thomas C. Quach; Cole Pedroza, Joshua C. Traver, and Fierstadt & Mans, Jack A. Fierstadt for Defendants and Respondents Beven & Brock Property Management Co., David Brock and Juany Flores; Haight Brown & Bonesteel, Jules S. Zeman, Denis Moriarty, Blythe Golay, and Valerie A. Moore for Defendants and Respondents Richardson Harman Ober, PC, Kelly Gene Richardson, Matt D. Ober and Dennis L. Althouse; and Gaglione, Dolan & Kaplan, Robert T. Dolan and Jack M. LaPedis for Defendants and Respondents Baer & Troff, LLP and Eric L. Troff.

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Bradford D. Creger (plaintiff) bought a condominium that, unbeknownst to him, had construction and legal defects. When those defects came to light, plaintiff and the other condo owners in the same complex filed suit and entered into two sets of settlements. Unsatisfied with these settlements, plaintiff sued many of the entities and lawyers involved in the earlier litigation. These defendants moved to dismiss many of plaintiff's claims under the "anti-SLAPP"[1] statute. (Code of Civ. Proc., § 425.16.)[2] The trial court partly granted and partly denied those motions, and awarded attorney's fees to the defendants on those motions. Plaintiff now appeals some (but not all) of the grants and the fee awards. Except as to one claim, we conclude that the trial court's rulings were correct and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this section are drawn from the allegations in plaintiff's complaint, as supplemented by any evidence offered in opposition to the anti-SLAPP motions.

I. Purchase of unit and formation of homeowner's association

In 2007, plaintiff brought Unit 401 in a new, residential and commercial mixed-used condominium complex located on Hudson Avenue in Pasadena (Hudson Avenue) to use for his financial planning business. Unit 401 was comprised of two of the complex's 13 units—Unit 9 (a residential space) and Unit 13 (a commercial space); plaintiff's grant deed consequently reflected that he acquired a 2/13 interest in the complex as a tenant in common. Plaintiff's condo was subject to various covenants, conditions and restrictions (CC&Rs).

The property owners in the complex formed the 141 Hudson Homeowners Association (HOA) and elected plaintiff to the HOA's board of directors as its treasurer. In that capacity, plaintiff searched for a property management company, and ultimately recommended Beven & Brock (B&B). The HOA hired B&B.

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1 SLAPP is an acronym for strategic lawsuits against public participation.

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

II. Defects come to light

In 2008, the condo owners discovered two sets of defects: (1) construction defects exacerbated by a recent rainstorm; and (2) legal defects with the purchase transactions. There were three legal defects: (1) the condo developer never obtained a certificate of occupancy for the complex, which violated the purchase agreement and escrow instructions; (2) the square footage of plaintiff's units was overstated in the CC&R; and (3) plaintiff's Unit 401 should have been treated as one unit (rather than as two) for the purpose of calculating assessments against the condo owners.

III. Plaintiff's interactions with the HOA

Plaintiff alleges he thereafter entered into two agreements with the HOA: (1) a "repair agreement"; and (2) a "double unit" agreement. Under the repair agreement, the HOA agreed to (1) reimburse plaintiff for his out-of-pocket expenses in repairing the rain damage to Unit 401 by crediting that amount against what he owes for monthly and special condo unit assessments, and (2) excuse plaintiff from paying any special assessments to fund HOA litigation against the developer until the litigation successfully obtains damages. Under the double unit agreement, the HOA agreed to (1) permit plaintiff to pay a monthly assessment as if Unit 401 were a single unit, (2) try to modify the governing documents to treat Unit 401 as a single unit, and (3) allow plaintiff to use any credit balance from the repair agreement to pay off any underpayments resulting from his payment of a single unit assessment, should the HOA be unsuccessful in modifying the governing documents.

Pursuant to these alleged agreements, plaintiff started paying the monthly assessment for a single unit and did not pay the January 2009 special assessment. In mid-2009, plaintiff stopped all payments. B&B notified plaintiff that his assessments were past due in August 2009 and again in January 2010. Plaintiff made no payments, purportedly (1) because the HOA did not credit him for his repair costs, and (2) to get the HOA's attention regarding the alleged agreements. In May 2010, plaintiff received two letters warning him that continued nonpayment would prompt the HOA to file assessment liens against Unit 401.

Soon thereafter, plaintiff met with HOA board president Christopher Stirling (Stirling). Plaintiff alleges that Stirling agreed to follow up on the single-unit assessment and the overstatement of Unit 401's square footage; in exchange, plaintiff agreed to resume making monthly payments at the single-unit rate. However, plaintiff only briefly resumed making monthly payments.

Plaintiff was sent two more pre-lien notices in February and March 2011. In April 2011, Stirling signed HOA board resolutions authorizing assessment liens to be placed on Unit 401. However, the board's minutes did not indicate the board's approval of any pre-lien notices until May 2011 and did not reflect the board's approval of the lien resolutions until June 2011.

IV. Litigation regarding the defects

In this same time frame, the HOA board and its members considered suing the complex's developer, the contractors it used, the real estate broker (Prudential Realty) and the escrow company (Jade Escrow). In 2009, they filed suit on behalf of six owners, including plaintiff. The litigation was to be financed through special assessments levied on the homeowners.

Six months after the complaint was filed (in October 2009), the HOA retained the law firm of Richardson, Harmon & Ober (RHO) and RHO attorney Dennis Althouse (Althouse) as lead counsel. Plaintiff separately retained RHO to represent him personally in prosecuting claims unique to Unit 401. Plaintiff signed a retainer agreement with RHO, but did not initial the paragraph waiving potential conflicts that might develop between himself, the HOA and others.

As the litigation progressed, plaintiff alleged that RHO was using the claims unique to him (such as the overstatement of Unit 401's square footage and the express reference in his escrow instructions to a certificate of occupancy) to leverage a better settlement for *all* homeowners at the expense of plaintiff's personal recovery. In the fall of 2010, RHO moved to withdraw as plaintiff's individual counsel because plaintiff's nonpayment of his HOA assessments put him in a direct conflict with the HOA. Plaintiff then retained his own counsel, Kevin T. Moore (Moore).

V. Settlement of lawsuits

A. Construction defect claims

On behalf of the HOA, Althouse sent plaintiff a draft agreement to settle the construction defect portion of the litigation for a lump sum of $350,000 to be apportioned among the plaintiffs. Moore advised plaintiff that the settlement was in his best interest and, accordingly to plaintiff, pressured him to sign; plaintiff signed the agreement on the condition that he be permitted to review it afterwards. The trial court approved the signed agreement as a good faith settlement. Plaintiff later reviewed the agreement, found errors and disagreeable provisions, and instructed Moore to retract his approval. Plaintiff ultimately decided to sign the final agreement and to focus on his remaining legal defect claims against Prudential Realty and Jade Escrow.

B. Legal defect claims

The remaining parties to the ongoing litigation decided to mediate the outstanding legal defect claims. They hired George Calkins (Calkins), of JAMS Mediation Services, to be the mediator. Plaintiff fired Moore midway through the mediation,[3] and retained Eric L. Troff (Troff) of Baer & Troff LLP.

In September 2011, Calkins suggested that the mediation proceed to a mandatory settlement conference (September MSC) that would be conducted by Calkins and assisted by the judge to whom the pending litigation had been assigned. Plaintiff alleged that Troff did a poor job: Troff did not adequately prepare for the MSC; he did not represent plaintiff's interests; and he pressured plaintiff to accept a $140,000 settlement, even though plaintiff wanted to "unwind" his entire $1.45 million purchase of Unit 401. Plaintiff further alleges that mediator Calkins used physical intimidation and menacing words to pressure plaintiff to agree to the settlement.

Nearly a month after the September MSC, but before plaintiff signed the agreed-upon settlement, plaintiff learned that he had been elected to the HOA board. He alleges

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[3] Plaintiff sued Moore in a separate action, Los Angeles County Superior Court Case No. GC049043.

that, had he known of his status as a board member-elect, he would have voted to have the board veto the settlement. But one day after learning of the election results, plaintiff resigned from the board; the day after that, plaintiff signed and thereby ratified the settlement (the Prudential/Jade settlement) at the final mediation meeting (October MSC), obtaining for himself $144,375 in damages.

VI. Postsettlement rain damage and sale

In early 2012, the HOA hired a contractor to repair the roof at Hudson Avenue. Heavy rains fell while the roof was removed, and Unit 401 suffered additional water damage.

Plaintiff sold Unit 401 in a short sale at the end of 2012.

VII. Plaintiff's complaint in this case

In September 2012, plaintiff filed a 152-page complaint with approximately 50 claims against 19 named defendants who were involved in his purchase and ownership of Unit 401. Defendants fall into four groupings: (1) the HOA defendants, including the HOA and HOA board members Stirling, Joao Huang-Anacleto and Thomas C. Quach; (2) the RHO defendants, including RHO and attorneys Althouse, Kelly Gene Richardson and Matt D. Ober; (3) the B&B defendants, including B&B, David Brock (Brock) and Juanita Flores (Flores); and (4) the Troff defendants, including Baer & Troff and Troff.

Each group of defendants filed a special motion to strike pursuant to section 425.16. Plaintiff opposed each motion, supported by (1) his own declaration that frequently mirrored the allegations of his complaint and (2) multiple exhibits. He also filed additional declarations with attached exhibits that were not directed to any particular motion to strike.

Following multiple hearings, the trial court granted the motions to strike filed by the HOA defendants, RHO and the B&B defendants in part, and granted the motions to strike by the individual RHO defendants and the Troff defendants in their entirety.

With respect to attorney fees, the trial court denied RHO's request and awarded fees to the individual RHO defendants, the HOA defendants, the B&B defendants and the Troff defendants.

Plaintiff appealed from each order and we consolidated the matters.

DISCUSSION

When a person is sued for engaging in activity protected by the right to free speech or the right to petition the government, that defendant can move under the anti-SLAPP statute to strike claims based on that activity. (§ 425.16, subd. (b)(1); *Taus v. Loftus* (2007) 40 Cal.4th 683, 714; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.) The statute has two procedural steps. The moving defendant must first demonstrate that the plaintiff's claim(s) arise from the defendant's exercise of the rights to free speech or to petition. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) If the defendant does so, the plaintiff must then show a probability of prevailing on those claim(s). (*Ibid.*) This requires the plaintiff to "'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 the plaintiff is credited.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*); accord, *Hecimovitch v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 469.) "The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence." (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.)

We review a trial court's ruling on an anti-SLAPP motion de novo. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) We do not reweigh the evidence; instead, we accept the plaintiff's evidence as true, and ask whether that evidence, along with the defendant's evidence, entitles the defendant to judgment as a matter of law. (*Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 159; *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989.) We may affirm the trial court's order on any theory, whether or not relied on by the trial court (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573).

I. Scope of this appeal

It is helpful to start by delineating what is not before us in this appeal.[4] The claims not on appeal fall into four broad categories:

Claims plaintiff voluntarily dismissed before the trial court: 5.12.1 (declaratory and injunctive relief regarding HOA liens and voting rights against the HOA defendants and the RHO defendants); 5.15.1 (promissory estoppel against the individual HOA defendants); and 5.17 (quiet title against the HOA).

Claims the trial court did not dismiss in response to the anti-SLAPP motions: 5.2.4 (breach of fiduciary duty against the HOA defendants regarding damage to Unit 401); 5.4.4 (concealment against the HOA defendants regarding incompetent rain repairs); 5.5.1 (false promise against the HOA regarding a false promise to reimburse plaintiff for repairs); 5.9.1 (negligence against the HOA regarding the failure to pay for repairs); 5.9.3 (negligence against the HOA and the B&B defendants regarding destruction of Unit 401); 5.10 (negligent interference with prospective economic advantage against the HOA defendants and the B&B defendants); 5.13.1 (breach of contract against the HOA regarding the repair agreement); 5.13.2 (breach of contract against the HOA regarding the double unit agreement); 5.14.1 (breach of the implied covenant of good faith and fair dealing against the HOA regarding the repair agreement); 5.14.2 (breach of the implied covenant of good faith and fair dealing against the HOA regarding the double unit agreement); 5.14.3 (breach of the implied covenant of good faith and fair dealing against RHO regarding the retainer agreement); 5.15.1 (promissory estoppel against the HOA regarding the repair agreement); 5.18.4 (Davis-Stirling Act

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[4] Plaintiff alleged all his causes of action in section 5 of his complaint and separately numbered each allegation, sometime including multiple allegations under a single number. We will use the same naming convention and will identify each cause of action by number.

CC&R violations as to the B&B defendants)[5]; and 5.20 (intentional interference with prospective economic advantage against the HOA defendants and the B&B defendants).

Claims dismissed but which plaintiff expressly identified as not challenged on appeal in his notices of appeal: 5.1.1 (legal malpractice against the RHO defendants related to the HOA liens); 5.1.2 (legal malpractice against the RHO defendants regarding legal strategy for the Prudential/Jade settlement); 5.2.1 (breach of fiduciary duty against the RHO defendants); 5.2.2 (breach of fiduciary duty against the RHO defendants and as to the failure to pay for repairs against the HOA defendants and the B&B defendants); 5.2.3 (breach of fiduciary duty against the RHO defendants and the HOA defendants regarding legal strategy); 5.2.4 (breach of fiduciary duty against the RHO defendants regarding damage to Unit 401); 5.3.2 (misrepresentation against the RHO defendants and the HOA defendants regarding a reiteration of a repair promise made in chambers); 5.5.2 (false promise against the RHO defendants and the HOA defendants regarding repair repayments); 5.5.3 (false promise against the RHO defendants and the HOA defendants regarding the JAMS bill); 5.8.1 (abuse of process against the RHO defendants); 5.8.2 (abuse of process against the RHO defendants and the HOA defendants); 5.9.1 (negligence against the RHO defendants regarding the failure to pay repairs); 5.9.2 (negligence against the RHO defendants regarding the HOA liens); 5.12.2 (declaratory and injunctive relief against the RHO defendants regarding the JAMS bill); 5.16 (conversion of repair proceeds against the HOA and the RHO defendants); 5.18.1 (Davis-Stirling Act[6] violations against the RHO defendants regarding the 2012 election and executive session violations, and against the HOA and the B&B defendants regarding the 2012 election); 5.18.2 (Davis-Stirling Act record production violations against the HOA defendants, the RHO defendants and the B&B defendants); 5.18.3 (Davis-Stirling Act

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5 Plaintiff purports to appeal the trial court's dismissal of B&B's motion to strike this claim, but the trial court denied the motion.

6 Plaintiff alleged several violations of the Davis-Stirling Common Interest Development Act (the Davis-Stirling Act), Civ. Code, § 1350 et seq.

lien violations against the RHO defendants); 5.18.4 (Davis-Stirling Act CC&R violations against the HOA defendants and the RHO defendants); 5.21.1 (slander to character against Stirling and Althouse); 5.21.2 (libel to character against the HOA defendants, the RHO defendants and the B&B defendants); and 5.21.3 (slander of title against the RHO defendants).

Claims alleged against defendants not parties to this appeal: 5.6 (assault); 5.13.4 (breach of contract); and 5.14.5 (breach of the implied covenant of good faith and fair dealing).

II. Anti-SLAPP motion rulings

A. Legal malpractice (5.1.2)

Plaintiff sued the RHO defendants and the Troff defendants for legal malpractice. He alleged that he was damaged when (1) the RHO defendants and the Troff defendants breached their duties of loyalty and care by coercing him into signing the Prudential/Jade settlement, and (2) the Troff defendants further breached their duty of care by not pursuing damages against Prudential Realty and Jade Escrow according to the strategy he advocated. The trial court granted the motions to strike this claim.

1. Protected activity

Among other things, the anti-SLAPP statute protects "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).) A statement or writing is "in connection" with litigation if it "relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266, fn. omitted (*Neville*).) Protected activity does not lose that status just because it is unlawful; it is removed from the anti-SLAPP statute's embrace only if the activity is "illegal as a matter of law." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 315-316 (*Flatley*).)

If the allegations supporting a claim refer to activity that is protected as well as activity that is not, it is not enough that the protected activity happened at the same time as the unprotected activity or that protected activity is part of a broader course of conduct.

Instead, a claim rests on protected activity only if the "principal thrust or gravamen" of the claim is the protected activity. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520 (*Ramona Unified*); *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551 fn. 7; *United States Fire Ins. Co. v. Sheppard Mullin Richter & Hampton LLC* (2009) 171 Cal.App.4th 1617, 1625 (*United States Fire Ins. Co.*); *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLC* (2005) 133 Cal.App.4th 658, 671-673.) Focusing on the gravamen of a claim precludes plaintiffs from "pleading around" the anti-SLAPP statute by including extraneous allegations involving unprotected activity. (*Ramona Unified*, at pp. 519-520.) In assessing the gravamen of a claim, we are to look at whether the protected activity is what "gives rise to [the defendant's] asserted liability" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier*)), and is "the 'core injury producing conduct'" (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 267 (*Tuszynska*); accord, *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188).

Whether a malpractice claim is "protected activity" under the anti-SLAPP statute turns on whether the alleged attorney misfeasance itself involved the right to petition. (Cf. *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1273 [existence of attorney-client relationship that contemplates litigation; not automatically protected activity]; accord, *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702-704.) Thus, where the misfeasance is unrelated to a judicial proceeding or other petition, it is not protected activity under the anti-SLAPP statute. (See, e.g., *Jesperson v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 632 [attorney's failure to comply with discovery statute; not automatically protected activity]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 [attorneys' acceptance of representation that breaches duty of loyalty; not protected activity]; *PrediWave Corp. v. Simpson Thatcher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226-1227 [simultaneous representation of clients with conflicting interests where principal thrust of claim is "continuous joint representation"; not protected activity]; *United States Fire Ins. Co., supra*, 171 Cal.App.4th at pp. 1626-

1627 [same]; *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 493 [same]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732 [same] (*Freeman*).)

However, "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480.) This includes statements made as part of settlement negotiations. (See, e.g., *Navellier*, *supra*, 29 Cal.4th at pp. 89-90; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907-908 (*GeneThera, Inc.*); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 (*Dowling*).) It also includes communications in preparation for, or in contemplation of, litigation. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

In this case, the principal thrust of plaintiff's malpractice claims are allegations involving protected activity. Plaintiff alleged that the RHO defendants and the Troff defendants made a number of statements to him during the mediation and MSC regarding the merits of the settlement and the consequences of failing to accept it that had the effect of forcing him to accede to the Prudential/Jade settlement. He further alleged that Troff made representations during those proceedings about the extent of plaintiff's damages that were inconsistent with plaintiff's theory that he was entitled to unwind his Unit 401 purchase. These allegations are comprised of conduct and statements that frequently occurred in chambers and in front of the mediator; all of the statements involved the propriety of plaintiff's entering into the Prudential/Jade settlement. Plaintiff invokes *Benasra*, *Prediwave*, and *United States Fire Ins. Co.*, and argues that the RHO defendants breached their ethical duty of loyalty by representing him and the HOA. But the injury-producing conduct he alleges are the statements and coercion brought to bear on the settlement; this is protected activity.

2. Probability of prevailing

Plaintiff did not meet his burden to establish a probability of prevailing on the malpractice claims.

As to the RHO defendants, plaintiff submitted no evidence to support his allegations of coercion. His verified complaint is not competent, admissible evidence. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672-673; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614.) Nor are the declarations that, without more, "reaffirm[ed]" the allegations in his complaint. He argues that the individual RHO attorneys conspired with third parties, but this argument does not negate the applicability of the anti-SLAPP statute or the absence of any evidence of misfeasance.

As to the Troff defendants, plaintiff did not produce evidence linking Troff's alleged misfeasance with any damages. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199 [requiring damages proximately caused by the attorney's breach of duty].) When a case ends in settlement, a plaintiff establishes the requisite causal link by proving "'that, if not for the malpractice, [he] would *certainly* have received more money in settlement or at trial.' [Citation.]" (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 166; accord, *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662 (*Thompson*).) This is no easy task due to "the myriad of variables that affect settlement;" proof of a better outcome is usually speculative. (*Thompson*, at p. 663.)

This is a case in point. Plaintiff declares that, but for the Troff defendants' malpractice, he would have (1) been able to press for a larger overall settlement or a larger posttrial verdict; or, at a minimum, (2) obtained a larger piece of the actual $1.1 million settlement pie. Plaintiff argues that *Filbin* and *Thompson* do not apply in the second instance, but the distinction plaintiff asks us to draw—between obtaining a larger pie and slicing it differently—is one without a difference. In either instance, it is not enough "to simply claim . . . that it was possible to obtain a better settlement or a better result at trial." (*Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461; accord, *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1519 [plaintiff declared the case was worth more than the settlement, but offered no evidence other party would have settled for less or that a court would have awarded different amount; insufficient proof of causal link]; cf. *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 851-852 [plaintiff

declared that attorney committed malpractice in taking case to arbitration against an insolvent corporate defendant and in settling for less than the arbitration award rather than suing other, solvent defendants for the damages the arbitrator actually awarded; causal link sufficiently plead].)

B. Breach of fiduciary duty

1. HOA liens (5.2.2)

Plaintiff alleged the HOA defendants owed him a fiduciary duty and breached that duty "by imposing and recording the HOA liens . . . ." The trial court dismissed this claim.

a. Protected activity

"Communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute." (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 943 (*Comstock*).) Recording an assessment lien is the first step in the foreclosure process. (See Civ. Code, § 5700; *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 568 (*Wilton*); *Comstock* , at p. 944 [protected activity includes "prelitigation statements or writings"]; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 474 (*Premier Medical Management Systems*) [protected activity includes "the basic act of seeking administrative action"].) As such, it constitutes protected activity.

Plaintiff offers three reasons why the recording of the liens is not protected activity. First, he argues that the liens were recorded in violation of the statutory requirements of the Davis-Stirling Act, Civ. Code § 1350 et seq. As noted in section II.A.1, *ante*, unlawful activity is still protected unless it is also illegal as a matter of law. Noncompliance with the requirements of civil statutes is not illegal. (*Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654 ["the Supreme Court's use of the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute"]; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 712 [same].)

Second, plaintiff asserts that the recording of the liens are just one facet of defendants' broader course of conduct. However, the cause of plaintiff's injury is the recording of the liens, and that is what matters. (See section II.A.1, *ante*.)

Lastly, plaintiff contends that the dismissal of this claim is inconsistent with the trial court's refusal to dismiss his breach of fiduciary claim against the HOA defendants (claims 5.14.1 and 5.14.2). But these other claims allege breaches of the repair agreement and double unit agreements—not the protected activity of recording liens.

b. Probability of prevailing

Plaintiff did not establish a probability of prevailing against either the HOA defendants or B&B.

His claim against B&B will not succeed because he did not provide authority or evidence that B&B owed him any fiduciary duty in the first place. (Cf. *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558-1559 [homeowner's association management company owes no fiduciary duty to individual homeowners unless one is agreed to by contract or imposed as a matter of law].)

Plaintiff's claims against both B&B and the HOA defendants are also barred by the litigation privilege codified in Civil Code section 47, subdivision (b). The privilege precludes civil liability premised on any communication made in a judicial or quasi-judicial proceeding that (1) is made by authorized participants, (2) is made to achieve the objects of litigation, and (3) has a logical connection to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) The privilege applies to communications "'"made to initiate official action,"'" regardless of whether they were made with malice or intent to harm. (*A.F. Brown Electric Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126.) The litigation privilege has been extended to various liens, including a lis pendens, an assessment lien and a mechanic's lien. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 831.) More to the point, "the publication of homeowners' assessment liens is absolutely privileged under Civil Code section 47, subdivision (b)." (*Wilton*, *supra*, 18 Cal.App.4th at p. 569.)

Plaintiff argues that the litigation privilege does not apply because the HOA defendants did not comply with the statutory prerequisites for assessment liens set forth in the David-Stirling Act. He cites former Civil Code section 1367.1, subdivision (c)(2) (currently section 5673),[7] which requires a homeowner's association to approve a lien in advance and at an open meeting. He also cites *Diamond v. Superior Court* (2013) 217 Cal.App.4th 1172, 1190-1193, which concludes that noncompliance with the Davis-Stirling Act renders a lien invalid. Plaintiff contends that the HOA defendants did not approve the lien assessment until *after* it was signed, such that it is invalid and, by extension, outside of the litigation privilege.

We disagree. Nothing in the Davis-Stirling Act's text or legislative history indicates any intent to override the litigation privilege. The privilege insulates assessment liens, even when they are "fraudulent" (*Wilton, supra,* 18 Cal.App.4th at p. 571); it thus insulates nonfraudulent liens whose sole defect is statutory noncompliance. For these same reasons, plaintiff's argument that the alleged statutory violations amount to negligence per se (Evid. Code, § 669) adds nothing to his argument; if fraudulent liens are still protected, so are negligent ones. We will also not imply an exception to the litigation privilege for any and all Davis-Stirling Act claims. To be sure, *Kamarova v. National Credit Acceptance Corp., Inc.* (2009) 175 Cal.App.4th 324, 339-340, held that the litigation privilege did not apply at all to claims asserted under the Rosenthal Fair Debt Collection Practices Act, Civil Code section 1788 et seq. But *Kamarova* so held because Rosenthal Act claims by their nature entail debt collection efforts that precede litigation; applying the litigation privilege would render the Rosenthal Act "'significantly or wholly inoperable.'" (*Kamarova*, *supra*, 175 Cal.App.4th at pp. 339-340.) The Davis-Stirling Act is different. Its provisions regulate a spectrum of conduct involving common interest developments, many of which have nothing to do with litigation. (*Villa de la Palmas Homeowners Assn. v. Terifaj* (2004) 33

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[7] The Davis-Sterling Act has since been reorganized and recodified. (Stats. 2012, ch. 180, § 1; Legis. Counsel's Dig., Assem. Bill No. 805 (2011–2012 Reg. Sess.).)

Cal.4th 73, 81). Consequently, the litigation privilege does not render the Davis-Stirling Act significantly inoperative.

2. Prudential/Jade settlement and legal strategy (5.2.3)

Echoing his claim for legal malpractice (in count 5.1.2), plaintiff alleged that (1) the RHO defendants, the Troff defendants and the HOA defendants breached their fiduciary duty to him by coercing him into signing the Prudential/Jade settlement, and (2) the Troff defendants did not adopt his legal strategy against Prudential Realty and Jade Escrow. The trial court struck the claim against the RHO defendants and the Troff defendants for the same reasons it rejected plaintiff's malpractice claim against them. We do the same. (See section II.A, *ante*.) The trial court also dismissed this claim against the HOA defendants.

a. Protected activity

Concealing a material fact in the course of settlement negotiations is protected activity. (*Dowling*, *supra,* 85 Cal.App.4th at pp. 1418-1420 [false representations and concealment of material facts while negotiating a stipulated settlement protected activity].) Plaintiff's breach of fiduciary duty claim against the HOA defendants is grounded on those defendants' alleged coercion by concealing the HOA board election results. Because the resulting injury was plaintiff's uninformed agreement to the Prudential/Jade settlement, the injury-producing conduct was the settlement, which is protected activity. (See section II.A.1, *ante.*) We accordingly reject plaintiff's assertion that the gravamen of his claim is the concealment of the election results, without more.

b. Probability of prevailing

Plaintiff did not carry his burden of showing a probability of prevailing against the HOA defendants. He offered no evidence of coercive conduct by those defendants; his evidence pertained solely to his unawareness of the election results. Indeed, the evidence tends to negate coercion because, upon learning of the election results, plaintiff promptly resigned from the board and then signed the settlement. Plaintiff's declaration contains no statements suggesting how the HOA defendants coerced him into ratifying the settlement after his resignation. Plaintiff also contends that, had he known he was board

member-elect, he could have persuaded the board to make a higher initial settlement offer, which would have resulted in a higher settlement. However, this is wholly speculative. (Accord, *Marshak*, *supra*, 72 Cal.App.4th at p. 151; see section II.A.2, *ante*.)

3. Damage to Unit 401 (5.2.4)

Plaintiff initially alleged that multiple defendants breached their fiduciary duty to him and conspired to cause the destruction of Unit 401 "from extensive mold, rotting, water damage, [and] toxic roof-water absorption," at an estimated $250,000 cost of repair. Only the B&B defendants remain on appeal. The trial court tentatively denied B&B's motion to strike this claim because it did not involve protected activity, but ultimately granted the dismissal because plaintiff could not prevail on the merits.

Although we agree with the trial court that plaintiff failed to establish a probability of prevailing, that finding is irrelevant to an anti-SLAPP motion unless the claim involves protected activity. (See *Freeman*, *supra*, 154 Cal.App.4th at p. 733 ["merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity"].) Here it does not.

Plaintiff alleged the B&B defendants were liable for that destruction because they participated in two conspiracies: (1) a "main conspiracy" to treat plaintiff adversely and differently from other homeowners and to get a better result for everyone at plaintiff's expense; and (2) a "destruction conspiracy" to evade any responsibility to plaintiff by letting Unit 401 deteriorate. Although the main conspiracy involves some litigation-related conduct, it does not involve B&B. The principal thrust or gravamen of plaintiff's claim is accordingly the "destruction conspiracy" and the physical damage to Unit 401 resulting from that conspiracy. Thus, the claim ultimately does not involve protected activity. (See section II.A.1, *ante*; accord, *Episcopal Church Cases* (2009) 45 Cal.4th 467, 478 ["[t]he additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit."].)

We accordingly reverse the order granting the motion to strike count 5.2.4 as to the B&B defendants.

C. Misrepresentation

1. Troff's alleged misrepresentations (5.3.1)

Plaintiff alleged that Troff made a series of misrepresentations at four specified time periods: (1) before the September MSC, to mislead plaintiff as to the MSC's function, whether he was required to attend, and what percentage of the settlement he should expected to receive; (2) during the September MSC, to induce plaintiff to agree to the Prudential/Jade settlement; (3) at the October MSC, to induce plaintiff to ratify the settlement; and (4) after the October MSC, to induce plaintiff to sign the settlement. Without explicitly addressing whether the allegations involved protected activity, the trial court granted the Troff defendants' motion to strike on the ground that plaintiff failed to establish a probability of prevailing on the issue of damages.

a. Protected activity.

Settlement negotiations are well recognized as a protected activity within the meaning of the anti-SLAPP statute. (See *Selzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-964 [citing cases] (*Selzer*); see also *GeneThera, Inc.*, *supra*, 171 Cal.App.4th at pp. 907-908 [communicating offer to settle pending case held protected activity].) Each of the four categories of Troff's alleged misrepresentations involved settlement negotiations or settlement offers. Plaintiff alleged with specificity Troff's statements that formed the basis for his claim, including Troff's (1) conveying the amount of the settlement offer, (2) describing the purpose of the mediation, (3) pressuring him to accept the Prudential/Jade settlement, (4) discussing with plaintiff the amount of his damages "in the hallway outside the court room", (5) submitting only a fraction of plaintiff's claimed damages to the mediator, (6) emerging from chambers and telling plaintiff his share of the settlement, (7) pressuring plaintiff to ratify the settlement and informing him he had no choice but to do so, and (8) alerting him to a typographical error in the settlement document. This misrepresentation claim against Troff involved communications incident to his representation of plaintiff that are considered "per se

protected activity" under section 425.16. (*Cabral, supra*, 177 Cal.App.4th at p. 480; accord, *GeneThera, Inc.*, at p. 907.)

b. Probability of prevailing

Plaintiff has not established he is likely to prevail. To be actionable, a misrepresentation must not only be made with knowledge of the statement's falsity and with intent to defraud, it must also induce reliance and cause damage. (Civ. Code, § 1709; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364 [causation element].) Speculative damages will not suffice. (*Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc.* (2011) 196 Cal.App.4th 1559, 1573-1574.)

Plaintiff alleged that Troff's misrepresentations caused damages of at least $4.1 million because, in plaintiff's view, Prudential Realty and Jade Escrow owed him his full purchase price and would have been found liable for this greater amount at trial. For the reasons outlined in section II.A, *ante*, this evidence is too speculative and hence inadequate to demonstrate that plaintiff suffered damage as a result of Troff's alleged misrepresentations.

2. Misrepresentation regarding the HOA's settlement approval (5.3.2)

Plaintiff alleged that at the September MSC, the HOA defendants and the RHO defendants misrepresented to the trial court in chambers that the HOA had approved the Prudential/Jade settlement in order to get the trial court to pressure plaintiff to agree to it. Plaintiff was not present, and learned about these misrepresentations second hand. The trial court granted the motions to strike the claim.

a. Protected activity

As a statement made in court, concerning the settlement of a pending action, the alleged misrepresentations constituted protected petitioning activity. (E.g., *Navellier*, *supra*, 29 Cal.4th at pp. 89-90; *Selzer*, *supra*, 182 Cal.App.4th at pp. 963-964; *GeneThera, Inc.*, *supra*, 171 Cal.App.4th at pp. 907-908.) Plaintiff asserts that his allegations fall outside section 425.16 because they focused on noncommunicative

conduct—that is, the concealment of the HOA board election—preceding the misrepresentation. But the gravamen of plaintiff's claims are misrepresentations made to the court and the resulting, coercion-tainted settlement.

b. Probability of prevailing

Plaintiff has not proven a likelihood of prevailing on this claim for two reasons. First, his evidence of the misrepresentations is second hand; this presents problems of proof, as plaintiff has yet to identify who made the statement, that it was false or that plaintiff relied on it to his detriment. Second, and critically, the statements were absolutely privileged under Civil Code section 47, subdivision (b). (E.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 [an in-court communication made to achieve a litigation objective is absolutely privileged] (*Rusheen*); *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193 ["communications with 'some relation' to judicial proceedings" are absolutely immune from tort liability under Civ. Code, § 47, subd. (b)]; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 24 [the litigation privilege "applies to statements made by counsel during settlement negotiations"].) Plaintiff insists that the litigation privilege does not apply because the RHO defendants breached their duty of loyalty codified in rule 3-310 of the California Rules of Professional Conduct. However, as we discussed in section II.B.1.b, *ante*, the privilege applies to fraudulent acts; it also reaches conduct that transgresses ethical rules.

D. Concealment

1. Concealment regarding conspiracy and conflict of interest (5.4.1)

Plaintiff alleged the HOA defendants, the RHO defendants and the B&B defendants intentionally concealed from him (1) the existence of the "main conspiracy," and (2) RHO's conflict of interest arising from RHO's dual representation of the HOA defendants and plaintiff without plaintiff's consent. Plaintiff further alleged he had no knowledge of the concealed matters, all defendants owed him a duty to disclose, all defendants concealed the matters to induce him to enter into the Prudential/Jade settlement and, if he had been aware of the matters, he would not have agreed to the settlement. The trial court dismissed these claims.

a. Protected activity

Because the defendants' concealment of the conspiracy and conflict of interest was aimed at inducing plaintiff to ratify the Prudential/Jade settlement, and because plaintiff's alleged damages resulted from agreement to that settlement, plaintiff's allegations involve protected activity. (Accord, *Dowling*, *supra*, 85 Cal.App.4th at p. 1418 [attorney "knowingly made unspecified false 'representations,' and concealed unspecific 'material facts,' during unspecified 'negotiations'" of a stipulated settlement; protected activity]; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1299 [characterizing concealment as communicative conduct].)

b. Probability of prevailing

Plaintiff has not established a probability of prevailing on this concealment claim for two reasons. First, the litigation privilege bars his claim. The intent behind the defendants' concealment, according to plaintiff, was to force him to agree to a settlement unfavorable to him. The privilege insulates a defendant's concealment when that silence is communicative. (*Silberg*, *supra*, 50 Cal.3d at pp. 210, 220 [alleged failure to disclose preexisting relationship affecting neutrality of an agreed upon expert held privileged]; *Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1333 [concealment of facts regarding status of the plaintiff's art held communicative in nature and thus privileged]; *Pollack v. Superior Court* (1991) 229 Cal.App.3d 26, 29 [representations and omissions made by attorney in the course of a judicial proceeding held privileged].) More importantly, the alleged concealment was connected with, and had some logical relation to, the pending litigation. (*Silberg*, at pp. 219-220.)

Second, plaintiff's evidence did not satisfy several elements of his concealment claim. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) As to the B&B defendants, plaintiff did not produce evidence that they owed him a duty to disclose. (*Berryman*, *supra*, 152 Cal.App.4th at p. 1558; see also section II.B.1.b, *ante*.) This is an element of a concealment claim. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868 (*Blickman*).) As to all defendants, plaintiff did not establish that he was unaware of the allegedly concealed

facts at the time he ratified the Prudential/Jade settlement. (*Ibid.* [plaintiff's ignorance of concealed facts is an element of concealment claim].) By the time plaintiff ratified the settlement, he (1) knew the potential for a conflict of interest arising from RHO's dual representation of himself and the HOA, (2) knew he did not initial the paragraph in the RHO retainer agreement waiving any potential conflict, and (3) knew what portion of the settlement he would receive and knew he was not receiving the compensation he felt he was owed for his unique claims. Lastly, as to all defendants, plaintiff did not establish that he suffered more than speculative injury or damage from his entering into the Prudential/Jade settlement. (See section II.A.2, *ante*.)

2. Concealment of election results (5.4.2)

Plaintiff alleged the HOA defendants, the RHO defendants and the B&B defendants intentionally concealed the results of the August 2011 election from him. He further alleged all defendants owed him a duty to disclose the election results; they concealed the results to prevent him from vetoing the Prudential/Jade settlement; he was unaware of the results and would have prevented the HOA from approving the settlement had he been aware; and he suffered damages as a result of the concealment. The trial court granted the motions to strike the claim.

a. Protected activity

Plaintiff alleged that all defendants suppressed the election results to prevent him from vetoing the Prudential/Jade settlement. He alleged "[i]f he had known the true results of the election, he could readily have blocked the HOA from accepting the $1.4M OFFER." (Emphasis omitted.)

This is protected activity because it involves communications directly related to ongoing litigation. (See, e.g., *Navellier*, *supra*, 29 Cal.4th at pp. 89-90; *GeneThera, Inc.*, *supra*, 171 Cal.App.4th at p. 908.) As noted above, it is of no moment that plaintiff also alleges conduct that violates a statute. (See section II.B.1.a, *ante*.)

b. Probability of prevailing

Plaintiff has not proven a probability of prevailing because, for the same reasons expressed in section II.B.2.b, *ante*, he has not established more than a speculative causal link between this alleged concealment and any damages.

3. Concealment of Troff's personal bias (5.4.3)

Plaintiff alleged the Troff defendants concealed their personal bias against him and their desire to undermine his position in the litigation, acquired when they spoke with Althouse. The trial court struck the claim on the ground plaintiff failed to show a probability of prevailing, finding that Plaintiff's evidence of damages was speculative.

We find no basis to disturb the trial court's ruling. The allegations involve protected activity for the same reasons set forth in section II.C.1, *ante*. Moreover, plaintiff's alleged damages are a lower settlement amount, which is speculative. (See section II.A.2, *ante*.)

E. False imprisonment against Troff (5.7)

Plaintiff alleged that during the course of the September MSC, mediator Calkins deprived him of his freedom to leave chambers by "closing the door, assaulting him and putting him under extreme duress to sign the settlement," effectively compelling him to remain in chambers. He further alleged that Troff "backed up CALKINS and offered no alternatives to [plaintiff] but to agree from the settlement *just to escape from the room*." He alleged he suffered both physical tort damages and damages from entering into the settlement. The trial court ruled plaintiff failed to show a probability of prevailing on the basis of his speculative evidence of damages.

1. Protected activity

Plaintiff's allegations against Troff arose from protected activity because Troff "backed up" Calkins in chambers, during mediation, and for the purpose of pressuring plaintiff to enter into a settlement. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 ["the statutory phrase 'cause of action . . . arising from' means simply that 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"]; see also section II.A.1, *ante*.)

2. Probability of prevailing

Plaintiff did not establish a probability of proving damages. Damages are an essential element of a false imprisonment claim. (*Smith v. Madruga* (1961) 193 Cal.App.2d 543, 546.) Plaintiff provided only allegations—but no evidence—of any physical injury. The sole evidence plaintiff presented on the issue of damages was his entering into an inadequate settlement , which is speculative. (See section II.A.2, *ante*.)

F. Abuse of process against Troff (5.8)

Plaintiff repeated his false imprisonment and misrepresentation allegations, and recast them as a claim for abuse of process, and the trial court granted the Troff defendants' motion to strike for the same reasons it dismissed these other claims.

1. Protected activity

Plaintiff alleged the Troff defendants abused the process of the court by participating in Calkins' intimidation and confinement in chambers for the purpose of coercing plaintiff to agree to the Prudential/Jade settlement. This claim involves protected activity under section 425.16. (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 42; see *Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370 ["misconduct *in* the underlying litigation . . . is the essence of the tort of abuse of process . . . and it is hard to imagine an abuse of process claim that would not fall under the protection of the [anti-SLAPP] statute"].)

2. Probability of prevailing

Plaintiff's abuse of process claim related to Troff's conduct in chambers during the course of the September MSC. According to plaintiff's declaration, Troff's behavior was comprised of communicative statements to plaintiff that "he had 'no choice' but to accept the $140[,000 settlement offer]"; that Troff exercised "undue influence"; and that Troff "offered *no alternatives* for [plaintiff] to the threat that he would be sued by the other UC PLAINTIFFS if he did not acquiesce and agree." For reasons akin to those previously outlined in section II.C.2.b, *ante*, this conduct was absolutely privileged under Civil Code section 47, subdivision (b). (E.g., *Rusheen*, *supra*, 37 Cal.4th at p. 1057; *JSJ Ltd. Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1522-1523; see also *Estate of*

Beard (1999) 71 Cal.App.4th 753, 776-777 [appellate court may affirm a ruling on any theory of law applicable to the case, regardless of the basis for the trial court's decision].)

G. Negligence (5.9.2)

As against the HOA[8] and the B&B defendants, plaintiff alleged they owed him a duty "not to impose any lien on any unit unless the owner owes money to the HOA and the HOA follows all the required procedures and the law in imposing such a lien." He further alleged these defendants breached that duty by recording the HOA liens because (1) plaintiff had a credit balance and (2) defendants did not comply with the requisite statutory procedures. He alleged that he was damaged in his profession as a financial advisor by having to report the HOA liens as required under his financial licenses. The trial court granted the motions to strike.

For the same reasons set forth in section II.B.1.b, *ante*, we conclude the motions were properly granted, as defendants' lien recordation arose from protected activity and was absolutely privileged under Civil Code section 47, subdivision (b).

H. Negligent interference with prospective economic advantage (5.10)

Plaintiff alleged he was in an economic relationship with his existing and prospective financial planning clients "that probably would have resulted in an economic benefit to him." He further alleged the RHO defendants and the Troff defendants knew about those relationships and knew they would be disrupted if defendants failed to act with reasonable care, including by permitting Unit 401 to be damaged and destroyed. He claimed defendants did not act with reasonable care with respect to Unit 401, and alleged their wrongful conduct caused him damages from the loss of use of his unit in 2008 and the loss of professional opportunities in 2012. The trial court granted the motion.

1. Protected activity

In his complaint, plaintiff generally alleged that defendants' "wrongful conduct" was their failure to act with reasonable care "by failing to protect Unit 401 and by destroying Unit 401." In his opening brief, plaintiff argued that the RHO defendants'

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8 Plaintiff omitted the individual HOA board defendants from this claim.

wrongful conduct involved their (1) failing to prosecute his individual claims against Jade Escrow, thereby preventing him from receiving adequate funds through the Prudential/Jade settlement to repair Unit 401, and (2) prosecuting the HOA liens. Plaintiff's opening brief is silent on what the Troff defendants did to disrupt his economic relationships beyond mishandling the settlement negotiations.

Plaintiff's allegations arose from protected activity. The principal thrust and gravamen of plaintiff's claims is that the RHO defendants and Troff defendants manipulated the settlement negotiations or filed assessment liens; it is this litigation-based misfeasance from which plaintiff's injured economic relationships springs. (See section II.A.1.a, *ante.*)

2. Probability of prevailing

Plaintiff also did not sustain his burden of showing a probability of prevailing on the merits. As to any *prospective* clients, plaintiff did not adduce sufficient evidence of an existing "economic relationship between [himself] and some third party, with the probability of future economic benefit to the plaintiff." (*Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596 (*Winchester Mystery House, LLC*).) This is required. (*Ibid.*; see also *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1164; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1291.) To be sure, plaintiff alleged that he had sponsored events aimed at recruiting clients, some of whom had filled out forms or otherwise expressed interest in his financial services. But this tort does not protect "the more speculative expectation that a potentially beneficial relationship will eventually arise." (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 524; see also *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 243 [economic relationship with probable future benefit not formed through asset purchase negotiations].) Plaintiff's speculation that individuals who turned in forms after events or seminars would have become clients falls far short of establishing he had an existing business relationship with these prospects. (See *Wise v. DLA Piper (US)* (2013) 220 Cal.App.4th 1180, 1188 ["'speculation is not evidence'"].)

As to the only existing client plaintiff alleged in his complaint, plaintiff did not adduce any evidence that this relationship was disrupted, which is another element of this tort. (*Winchester Mystery House, LLC, supra*, 210 Cal.App.4th at p. 596.) Plaintiff also did not adduce any evidence to show that the possible loss of a single affluent client at an unspecified date was the result of defendants' conduct.

I. Negligent hiring, supervision, and retention of Flores (5.11)

Plaintiff alleged that the B&B defendants negligently hired, supervised and retained Flores despite her incompetence as the manager of the HOA. Specifically, plaintiff alleged Flores's failure (1) to correct plaintiff's double assessment, (2) to credit him for amounts he paid to repair Unit 401, and (3) to place his name on an earlier HOA board ballot. The trial court dismissed this claim.

1. Protected activity

Plaintiff concedes his ballot omission allegation constituted protected activity (see *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 478-479), but argues the balance of his claim does not. However, plaintiff's inclusion of allegations not explicitly tied to litigation does not take his claim outside the ambit of the anti-SLAPP statute for two reasons. First, Flores' alleged incompetence in not correcting the double assessment is directly tied to the ongoing litigation, such that the principal thrust of this claim entails protected activity and is more than incidental. (See section II.A.1, *ante.*) Second, and tellingly, the damages plaintiff sought for the B&B defendants' alleged negligence was the difference between what he received in the Prudential/Jade settlement and what he claims he should have received. Thus, the injury-producing core of this claim is directly linked to protected petitioning activity. (See section II.A.1, *ante*.)

2. Probability of prevailing

Plaintiff has not established a probability of prevailing on this claim. A plaintiff pressing a claim for negligent hiring, supervision or retention must not only prove the employee's incompetence; he must also prove that "'the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment . . .'" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565,

quoting Rest.2d Agency, § 213, com. d.; accord, *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 664 [with negligent supervision claim, plaintiff must prove employer's knowledge that employee could not be trusted to work without supervision].) Plaintiff offered no evidence to show that Flores posed an undue risk to plaintiff and other homeowners, and correspondingly, no evidence to show that B&B or Brock knew or should have known that Flores posed a risk. At best, plaintiff alleged she was incompetent or careless; that is not enough to impose liability on B&B and Brock.

J. Declaratory relief against Troff

1. JAMS bill (5.12.2)

Plaintiff alleged that Troff wrongfully obligated him to pay the bill to JAMS for mediator Calkin's services; plaintiff seeks a declaration that he is not liable for that bill, and an injunction against any collection efforts by JAMS. The trial court struck this claim.

a. Protected activity

"[A]ttorney selection and litigation funding decisions constitute" protected activity under the anti-SLAPP statute. (*Tuszynska*, *supra*, 199 Cal.App.4th at p. 268, citing § 425.16, subd. (e)(2).) Plaintiff's allegations regarding his personal liability for a litigation-related expense falls within the protections of the anti-SLAPP statute.

b. Probability of prevailing

Plaintiff has not proven a likelihood of prevailing on this claim because he has not adduced any evidence that Troff wrongfully obligated him to pay the JAMS bill. Plaintiff points to his declaration that restates the complaint's general allegation of "wrongful acts," but that does not constitute evidence. (See section II.A.2, *ante*.) To the contrary, plaintiff's declarations indicates that plaintiff *did* authorize Troff to enter into an agreement with JAMS and that Troff sought to have Althouse remove plaintiff from the JAMS bill.

2. Retainer agreement (5.12.3)

Plaintiff sought a declaration that his agreement retaining Troff as his attorney was invalid because signed without knowledge that Troff was personally biased against him

and secretly committed to sabotaging his case to aid the other condo owners. The trial court again struck this claim on the basis plaintiff offered no evidence of damages.

a. Protected activity

Although private business relationships and transactions do not generally involve protected activity (see *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 676-677), a claim predicated on a contract tied to litigation does. (See *Philipson v. Simon & Gulsvig* (2007) 154 Cal.App.4th 347, 360-361 [law firm's claim that client breached retainer agreement when it brought a fee arbitration challenging law firm's retention of settlement proceeds held subject to an anti-SLAPP as it was based on the client's protected act of commencing fee arbitration].) Here, the principal thrust of plaintiff's claim was that the retainer agreement was invalid due to Troff's biased representation and settlement conduct. This litigation conduct is what entitles plaintiff to the relief he seeks, so the claim is protected activity. (See section II.A.1, *ante*.)

b. Probability of prevailing

We conclude that plaintiff failed to establish a probability of prevailing. His claim was barred by the litigation privilege for the reasons set forth in section II.B.1.b, *ante*.

K. Breach of contract against Troff (5.13.3)

Plaintiff alleged he also entered into an oral retainer agreement with Troff prior to his written retainer agreement, and that Troff breached the oral agreement by (1) not diligently prosecuting plaintiff's case against Prudential Realty and Jade Escrow, (2) joining the "main conspiracy" to treat him differently and less favorably than other plaintiffs, and (3) coercing him into signing the Prudential/Jade settlement. He asserted that Troff's breach caused him to suffer damages in an amount of the difference between the settlement and what he should have received. The trial court struck this claim on the basis plaintiff had not shown a probability of prevailing on the element of damages.

1. Protected activity

This claim constitutes protected activity for the same reason as plaintiff's malpractice claim. (See section II.A.1, *ante*.)

2. Probability of prevailing

Plaintiff failed to establish a probability of prevailing because his claimed damages of a better settlement are speculative. (See section II.A.2, *ante*.)

L. Breach of the implied covenant of good faith and fair dealing against Troff (5.14.4)

Plaintiff asserts that Troff further breached the oral retainer agreement's implied covenant of good faith and fair dealing, and caused him to receive a smaller share of the settlement, due to Troff's half-hearted prosecution of plaintiff's claims. The trial court granted Troff's motion to strike, again for lack of evidence of damages.

This claim was properly stricken for the reasons set forth in section II.K, *ante*.

M. Promissory estoppel against the RHO defendants (5.15.2)

Plaintiff alleged that the RHO defendants promised him that the HOA had set aside $60,000 of any settlement to reimburse plaintiff for damage to Unit 401 from the initial rainstorm, and that plaintiff need only detail his expenses. Plaintiff further alleges that he relied upon that promise when signing the Prudential/Jade settlement and that the RHO defendants should be estopped from denying their promise.

1. Protected activity

As an oral statement made during settlement negotiations, the RHO defendants' alleged promise constituted protected activity. (E.g., *Navellier*, *supra*, 29 Cal.4th at pp. 89-90; *Dowling*, *supra*, 85 Cal.App.4th at p. 1420.)

2. Probability of prevailing

Plaintiff cannot show a probability of prevailing because the litigation privilege bars his claim as a matter of law. The privilege is absolute, and applies to any communication made in judicial proceeding and to all torts except malicious prosecution. (*Silberg*, *supra*, 50 Cal.3d at p. 212; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 615.) Critically, it applies to bar actions based on false statements or promises. (See, e.g., *Seltzer*, *supra*, 182 Cal.App.4th at pp. 970-971 [fraud and other tort claims based on false promises to induce settlement]; *Navarro* v. *IHOP Properties, Inc.* (2005) 134 Cal.App.4th at pp. 843-844 [fraud claim based on alleged false promises about the

defendant's intentions with respect to settlement terms]; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 24-26 [fraud claim based on alleged false statements made by attorneys to induce settlement of lawsuit].) This authority encompasses Althouse's allegedly false promises.

N. Davis-Stirling Act violations

1. Election fraud and executive session violations (5.18.1)

Against the RHO defendants, the HOA defendants and the B&B defendants, plaintiff alleged they committed fraud by failing to communicate the HOA board election results to him for three weeks. As against the HOA defendants and the B&B defendants, plaintiff further alleged the HOA board held numerous executive sessions that were not reported in any meeting minutes, and that such sessions were used to run the HOA without homeowner oversight. The trial court dismissed the claim.

a. Protected activity

Plaintiff's allegations involved protected activity for the reasons set forth in section II.D.2.a, *ante*. As to the RHO defendants, plaintiff further argues that their breach of the duty of loyalty is distinct from the litigation. Although such breaches *can* be distinct if unrelated to litigation, plaintiff alleges that the RHO defendants suppressed the election results for the specific purpose of preventing him from vetoing the approval of the Prudential/Jade settlement. This is protected activity. (See section II.A.1, *ante*.)

b. Probability of prevailing

Because plaintiff's damages on this claim was the lost opportunity for a better settlement, he did not establish a probability of prevailing for the reasons set forth in section II.D.2.b, *ante*. Moreover, plaintiff's request for other relief is barred by the litigation privilege. (See section II.C.2.b, *ante*.)

2. Lien violations (5.18.3)

Plaintiff further alleged the HOA defendants and the B&B defendants violated the Davis-Stirling Act because Stirling authorized the assessment liens without prior board approval at an open meeting. Although framed as a statutory violation, this claim is functionally indistinguishable from plaintiff's claim for negligence and breach of

fiduciary duty premised on the same statutory noncompliance. We accordingly conclude that it also constitutes protected activity barred by the litigation privilege. (See section II.B.1, *ante*.)

O. Intentional infliction of emotional distress (5.19)

Plaintiff alleged that every defendant engaged in conduct that was "outrageous" and done with the intent (or reckless disregard) to inflict emotional distress, thereby entitling him to damages. The trial court dismissed this claim.

1. Protected activity

Plaintiff's sole allegation in support of this claim is the incorporation of his entire complaint. The principal thrust of plaintiff's allegations as a whole involves protected activity, so a claim based on the sum total of his allegations is also protected activity. (See section II.A.1, *ante*.)

2. Probability of prevailing

Plaintiff did not establish a probability of prevailing on this claim for two reasons. Plaintiff did not establish that defendants engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 (*Hughes*).) This is a critical element of his claim. For proof of outrageous conduct, plaintiff pointed to (1) Althouse's statements that the HOA would not allow plaintiff to withdraw his written consent to the construction defect settlement, (2) the HOA's request for additional information about his request for reimbursement for repairs to Unit 401, (3) defendants' efforts to collect the HOA liens, (4) defendants' coercing him into agreeing to the Prudential/Jade settlement, and (5) defendants' failure to require the contractor to tarp his removed roof before heavy rains. At most, this conduct showed that the parties were pursuing their own economic interests. However, "[a]n assertion of legal rights in pursuit of one's own economic interests does not qualify as 'outrageous' under this standard." (*Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1398.)

Plaintiff also did not establish a probability of prevailing on another key element of his claim—namely, that he suffered "severe or extreme emotional distress." (*Hughes*,

supra, 46 Cal.4th at p. 1050.) "Severe emotional distress means '"emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it."'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004; accord, *Kiseskey v. Carpenters' Trust for So. California.* (1983) 144 Cal.App.3d 222, 231 ["mere monetary or transitory emotional distress is insufficient to constitute severe emotional distress"].) Plaintiff described his emotional distress as (1) his relationship with his wife "became strained" as a result of the HOA's adversarial treatment of him, (2) he was "devastated," "living in a nightmare" and had suffered a "ton of emotional distress" at the time he consented to the Prudential/Jade settlement, and (3) his life was "forever changed" because he was forced to list his home for sale as a result of the loss of use of Unit 401. This evidence showed nothing more than the "discomfort, worry, anxiety, . . . concern and agitation" that has long been viewed as not constituting severe emotional distress. (*Hughes*, at p. 1051.)

P. Intentional interference with prospective economic advantage (5.20)

Similar to his allegations in count 5.10, plaintiff alleged that the RHO defendants and the Troff defendants engaged in wrongful conduct with the intent to disrupt the economic relationships he had with existing and prospective financial planning clients "that probably would have resulted in an economic benefit to him." He claimed their wrongful conduct resulted in the lost use of Unit 401 and the loss of professional opportunities. The trial court dismissed the claim. For the reasons set forth in section II.H, *ante*, we agree with the trial court's ruling.

Q. Slander to title (5.21.3)

Plaintiff alleged the HOA defendants and the B&B defendants published false and unprivileged statements, including the HOA liens, which disparaged his title to Unit 401 and caused damage to his business and reputation. The trial court ruled the claim involved protected activity that could not be proven because it relied on privileged communications.

This claim was properly stricken for the reasons set forth in section II.B.1, *ante.*

III. Attorney fees

The trial court awarded attorney fees to the individual RHO attorneys (but not the RHO law firm), the HOA defendants, the B&B defendants and the Troff defendants. Plaintiff challenges all but the Troff defendants' award.

A defendant who brings a successful motion to strike is statutorily entitled to recover attorney fees and costs. (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131(*Ketchum*) ["any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees"].) We review the threshold question of entitlement de novo. (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378; *Sherwood Partners, Inc. v. EOP-Marina Business Center, L.L.C.* (2007) 153 Cal.App.4th 977, 981.) The amount of the fee award, however, is left to the trial court's discretion. (*Ketchum*, *supra*, at p. 1134; *Premier Medical Management Systems*, *supra*, 163 Cal.App.4th at pp. 556-557.)

A. The RHO award

Plaintiff offers three arguments as to why the trial court erred in awarding attorney's fees to the individual attorneys at RHO.

First, he notes that the attorneys who represent themselves are not entitled to attorney's fees under the anti-SLAPP statute. (*Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1211 [so holding, by borrowing the rule applied to fee awards under Civil Code section 1717 and set forth in *Trope v. Katz* (1995) 11 Cal.4th 274, 292].) However, it is well settled that an individual attorney who is represented by another attorney may be awarded fees—even if the attorney works at the same firm. (*Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, 221 (*Gilbert*); *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 254.)

The critical question is whether the individual attorney had an attorney-client relationship with the attorney representing them. (*Ramona Unified*, *supra*, 135 Cal.App.4th at p. 524; *Gilbert*, *supra*, 87 Cal.App.4th at p. 222.) Here they did: RHO attorney J. Andrew Douglas submitted a declaration outlining the time he and others in the firm spent representing attorneys Richardson, Ober and Althouse in connection with

the anti-SLAPP motion. Plaintiff maintains that Douglas's declaration is entitled to no weight because it contradicts an earlier declaration submitted by Althouse. But Douglas explained the apparent contradiction, and the trial court found that explanation credible. We are not at liberty to disagree with that credibility call. (See *In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1051-1052.)

Second, plaintiff contends that the RHO attorneys offered no evidence that they "incurred" fees, as Douglas's declaration identified only "the total value of the time incurred" on the RHO attorneys' behalf. However, the "incurring" of fees is a requirement of Civil Code section 1717, not section 425.16. As explained above, it is enough under section 425.16 that the defendant is represented by counsel.

Lastly, plaintiff argues the amount of the attorney fees sought by the RHO attorneys appears "grossly inflated." But plaintiff offered no facts or legal argument in support of his characterization. We consequently deem waived his challenge to the amount of the award. (E.g., *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [we may treat as waived arguments not supported by legal argument or citation to authority].)

B. The HOA and B&B awards

Plaintiff raises two objections to the attorney's fee awards to the HOA defendants and the B&B defendants. As to both groups of defendants, plaintiff argues that any fees for services performed by RHO have been forfeited because RHO was laboring under a conflict of interest at the time, in violation of rule 3-310 of the California Rules of Professional Conduct. However, an attorney's fee award is not automatically forfeited by the commission of an unethical act. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1005-1006 (*Pringle*); see also *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 10-12; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618-624.) Instead, forfeiture is warranted only when the ethical violation is "serious" (*Sullivan v. Dorsa* (2005) 128 Cal.App.4th 947, 965.) Whether an ethical violation is serious enough to compel a forfeiture of fees is left to the trial court's discretion. (*Id*. at pp. 965-966.)

The trial court did not abuse its discretion in concluding the conflict giving rise to RHO's disqualification was not sufficiently serious to compel forfeiture. RHO reasonably believed plaintiff had waived any conflict because he signed the retainer agreement and that agreement contained a waiver, although that belief was mistaken because plaintiff did not initial the waiver paragraph. RHO also withdrew as counsel once plaintiff's refusal to pay assessments created an actual conflict. Plaintiff has offered no evidence showing RHO engaged in fraud or used any confidential information it obtained during the joint representation. (Accord, *Pringle, supra,* 73 Cal.App.4th at pp. 1005-1006 [where attorney represented corporation and employee in sexual harassment case in violation of rule 3-310, client failed to show how conflict of interest was sufficiently egregious to justify forfeiture of earned fees].)

As to the HOA defendants, plaintiff also asserts that the trial court abused its discretion in awarding them the full amount they sought, when they only succeeded in obtaining dismissal of 18 of the 32 claims. However, complete success is not required to be a prevailing defendant under the anti-SLAPP statute; it is enough if the anti-SLAPP motion is "partially successful" as long as the results obtained are significant and of some practical benefit to the defendant. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 218 (*City of Industry*); accord, *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 345 [fees awarded to a partially-successful defendant moving to strike "should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way"].) This is a discretionary call. (*City of Industry*, at p. 218.)

Here, the trial court struck all claims related to alleged election concealment, fraudulent lien recordation, intentional infliction of emotional distress, and fraud or coercion in connection with the Prudential/Jade settlement. This leaves only those claims related to the HOA defendants' alleged breach of oral agreements and to later allegedly inadequate repairs to his unit. The trial court could reasonably find that the HOA defendants achieved their litigation objectives through the anti-SLAPP motion and award attorney fees on that basis.

DISPOSITION

The order granting the motion to strike the claim alleged as 5.2.4 against the B&B defendants is reversed. In all other respects, the orders granting in part and denying in part the motions to strike and awarding attorney fees are affirmed. Defendants are entitled to recover their costs and attorney fees on appeal, the amount of which is to be determined by the trial court upon remand.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ