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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

HELEN YU, as Trustee, etc., Plaintiff and Respondent, v. BROADWAY HOLLYWOOD HOMEOWNERS ASSOCIATION, et al., Defendants and Appellants.	B267052 (Los Angeles County Super. Ct. No. BC553215)

APPEAL from an order of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Reversed and remanded.

Keith A. Fink & Associates, Keith A. Fink, Olaf J. Muller and London A. Venturelli for Defendants and Appellants.

Miller Barondess, James Goldman for Plaintiff and Respondent.

Code of Civil Procedure section 425.16, the anti-SLAPP statute, provides an expeditious means to strike a meritless cause of action that threatens to chill public participation.[1] Until recently, appellate courts disagreed whether the anti-SLAPP statute reaches a "mixed cause of action," i.e., one arising from both protected and unprotected activity. In August 2016, our Supreme Court resolved the conflict by holding that a trial court may strike the meritless portion of a mixed cause of action arising from protected activity, while leaving intact the part arising from unprotected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.)

Here, the owner of a condominium in a common interest development sued the homeowners association for declaratory relief, alleging in one cause of action that the association interfered with a homeowners board election by (1) causing its attorney to send a letter to homeowners regarding ongoing litigation between the owner and the association, which is protected activity, and (2) committing 11 arguably unprotected acts. The trial court, not yet having the benefit of *Baral v. Schnitt*, denied the association's motion on the ground that the thrust of the cause of action concerned the unprotected acts of interference, not the one act of sending an attorney letter.

In light of *Baral v. Schnitt*'s holding that the anti-SLAPP statute reaches discrete allegations arising from protected activity in a mixed cause of action, we conclude that the portion of the owner's cause of action arising from protected activity may

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[1] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. Further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

be stricken even if the cause of action as a whole may not. The trial court's order to the contrary is reversed, and the matter is remanded for a determination whether the owner's allegations arising from protected activity have probable merit.

BACKGROUND

I. Original Complaint

The YL Trust owns a condominium unit in a common interest development in the Broadway Hollywood building at Hollywood and Vine in Los Angeles. The Broadway Hollywood Homeowners Association (the association) oversees the building.

By 2013, Helen Yu, the trustee of the trust, had become dissatisfied with several of the association's policies, including a policy concerning valet parking. She thereafter ran for election to a one-year term on the association's executive board (the 2013 election), but was defeated.

On July 30, 2014, Yu sued the association and its five board members on the trust's behalf, seeking, in three causes of action: (1) an injunction requiring the association to comply with its bylaws; (2) a declaration that the 2013 election was null and void because of the association's interference; and (3) damages against the board members for breach of fiduciary duty.

While the litigation was pending, Yu again ran for election to a one-year term on the association's board (the 2014 election), but after events described below was again defeated.

II. The Muller Letter

On October 13, 2014, after Yu began her campaign in the 2014 election but before the vote, Olaf J. Muller, the association's attorney, sent a letter to association members at the association's behest to discuss Yu's pending litigation (the Muller letter). In it, he stated Yu's claims were facially defective and factually

meritless, and the association had neither violated its bylaws nor interfered with the 2013 election. Muller stated the association had attempted to resolve the dispute, but Yu "made exceedingly clear that she does not wish to comply with the neighborly rules and regulations the rest of the Members live by, particularly with respect to valet parking and HOA elections." Muller stated that as a consequence of the Yu litigation, homeowners association fees could rise, and the homeowners could be required to disclose the existence of the litigation should they want to sell or refinance their condominiums.

Yu was then defeated in the 2014 election.

III. First Amended Complaint

A. Allegations Concerning the Muller Letter

On March 2, 2015, Yu amended her complaint to insert a new third cause of action against only the association, seeking a declaration that the association engaged in misconduct relating to the 2014 election. (The former third cause of action—for breach of fiduciary duty against association board members—became the new fourth cause of action.)

Yu first alleged that "shortly before" the 2014 election, the association directed Muller send the Muller letter to all members to discourage them from voting for Yu. Yu alleged the Muller letter falsely stated that her claims in the lawsuit were meritless, the association had violated no statute or rule relating to parking or the 2013 election, the association attempted to address her concerns, and she did not wish to comply with association rules. Yu alleged the association refused to discuss her claims in good faith, and the Muller letter "attempted to improperly influence the 2014 election by scaring the members into thinking that [her] supposedly wrongful conduct would cause their fees to increase."

Yu alleged the Muller letter "violate[d] an Association rule prohibiting communications of that nature within 30 days of an election."

B. Allegations Concerning Non-Attorney Conduct

Yu further alleged the association interfered with the 2014 election in 11 other ways by: "(i) refusing to permit Plaintiff to inspect ballots or failing to provide her with a fair opportunity to inspect them; (ii) arbitrarily voiding certain ballots without stating the reasons and without the Inspector's initials; (iii) not adopting a resolution designating the location for the return of secret ballots; (iv) not signing the Election Report of the results of the 2014 Election; (v) not determining the authenticity, validity, and effect of proxies and ballots; (vi) not considering challenges and questions; (vii) conducting the election process in a way that was not fair to all Members; (viii) not providing Plaintiff with equal access to the Association's media, newsletters and website; (ix) depriving Plaintiff of her right to solicit votes and to communicate with the Members by, among other things, withholding information and documentation that Plaintiff had requested regarding the membership list and Members that had opted out of including certain information on the membership list; . . . (x) not signing the Results of the Election Report; [and] (xi) not noting the voided ballots in the Election report."

Yu sought a declaration that the 2014 election was null and void.

IV. The Association's Anti-SLAPP Motion

On April 24, 2015, the association specially moved to strike Yu's third cause of action pursuant to section 425.16, arguing its conversation with Muller and the resulting Muller letter were exercises of its right of petition, and Yu could not prevail on the

merits because (1) the communications were privileged under Civil Code section 47, subdivision (b), and (2) any controversy over the 2014 election was moot because another election would occur before the litigation ended. The motion did not address Yu's other allegations of interference with the 2014 election.

Yu opposed the anti-SLAPP motion, arguing the Muller letter constituted only one of many reasons for invalidating the 2014 election. Yu argued she would likely prevail on the merits because the privilege set forth in Civil Code section 47, subdivision (b) does not apply in a declaratory relief action, and the matter was not moot because the litigation could be completed before the 2015 election. Yu further argued that Muller's refusal to respond to her attorney's letter of November 4, 2014 constituted an implied admission that the matters stated in the letter were true.

In support of her opposition, Yu declared the association sent the Muller letter "shortly before" the 2014 election, which violated "an Association rule prohibiting communications of that nature within 30 days of an election." Yu further declared the association violated its own rules and interfered with the 2014 election in the 11 additional ways outlined in the first amended complaint.

Yu did not identify what association rule was violated by the Muller letter, but she cited page 20 of the association's residential handbook as evidence of her claim. The only pertinent rule on that page is set forth in section III(G) of a chapter titled "Election Procedures" (Rule III(G)). Rule III(G) provides in pertinent part as follows: "No member shall be provided access to Association media within thirty (30) days of an Association election for the purposes of campaigning for election

of a Director. For purposes of this paragraph, 'Association media' means the Association's newsletters, internet websites and/or Association cable channel." (Rule III(G).)

Yu identified no evidence showing that within 30 days of the 2014 election an association member was given access to association media to transmit the Muller letter for the purpose of campaigning for election of a director.

At a case management conference on May 4, 2015, discovery was stayed, the anti-SLAPP motion was scheduled to be heard on August 26, and trial was calendared for October 26.

Before oral argument, the trial court tentatively found that although the Muller letter constituted protected activity under the anti-SLAPP statute, the controversy was moot because "[b]y the time this matter goes to trial, and after some post trial motions, the HOA board members' term for [the 2014] election will have come and gone. There is no 'effectual relief' for the court to grant to plaintiff." Therefore, the court found, plaintiff failed to demonstrate a reasonable probability of prevailing on the merits.

After oral argument, however, the court concluded that an anti-SLAPP motion cannot be granted when the "thrust" of the challenged cause of action concerns unprotected activity, even if part of the cause of action arises from protected activity. The court therefore denied the association's motion. However, it indicated that had it reached the merits it would have concluded that plaintiff failed to demonstrate a reasonable probability of prevailing because trial and posttrial proceedings could not be concluded before the 2015 election, the controversy was therefore moot.

The association and board members timely appealed.[2]

DISCUSSION

I. Legal Principles and Standard of Review

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

A "special motion to strike under section 425.16 involves a two-step process. First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute.'" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420.) As used in section 425.16, "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subd. (e).)

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[2] We note that Yu alleged her third cause of action, which this appeal solely concerns, against only the association, which is therefore the only proper party on appeal. Although individual board members also purport to appeal, they were not named in the third cause of action.

"If the defendant makes this initial showing of protected activity, the burden shifts to the plaintiff at the second step to establish a probability it will prevail on the claim." (*City of Montebello v. Vasquez*, *supra*, 1 Cal.5th at p. 420.) To determine whether the plaintiff has met this burden, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) "The plaintiff need only state and substantiate a legally sufficient claim. [Citation.] The plaintiff's evidence is accepted as true; the defendant's evidence is evaluated to determine if it defeats the plaintiff's showing as a matter of law." (*City of Montebello v. Vasquez*, *supra*, 1 Cal.5th at p. 420.)

We review the trial court's findings de novo using a two-prong approach, determining first whether the moving party has made a threshold showing that the challenged cause of action arises from protected activity, and then whether the opposing party has established a probability of prevailing on the claim. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 988.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

II. Notice of Motion

Yu argues for the first time on appeal that the association's anti-SLAPP motion must be denied because the notice of motion addressed only the third cause of action as a whole, failing to identify specific allegations the association sought to have stricken. Yu forfeited the argument by failing to raise it below. (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 151 [an opposing party

who fails to object to a deficient notice of motion impliedly waives any defect].)

In any event, the argument is meritless. "A basic tenet of motion practice is that the notice of motion must state the grounds for the order being sought [citations], and courts generally may consider only the grounds stated in the notice of motion [citation]." (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277.) But "an omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought." (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125.) The purpose of the notice requirements "is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.'" (*Ibid.*)

Here, although the association's notice of motion stated the association moved to strike the "third cause of action," it also stated the motion was "based on the fact that [Yu] has impermissibly sued [the association] for instructing their counsel to write building residents advising them of the status of this pending lawsuit." The supporting papers thus made it clear that the association challenged only Yu's allegations concerning the Muller letter. Therefore, the motion sufficiently defined the issues for Yu's information and attention.

III. Anti-SLAPP First Prong

Yu does not now dispute that section 425.16 reaches a mixed cause of action. Nor does she dispute that her allegations concerning the Muller letter arise from protected activity. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th

1106, 1115 [a communication made to an attorney concerning civil litigation is entitled to the benefits of section 425.16].)[3]

Instead, relying on *Navellier v. Sletten*, *supra*, 29 Cal.4th 82, Yu argues that by adopting Rule III(G), the association waived its right to anti-SLAPP protection of any activity that violates the rule. Yu argues that because the Muller letter violated Rule III(G), her allegations concerning the letter do not arise from protected activity.

Navellier v. Sletten confutes rather than supports Yu's argument. There, one issue was whether a defendant who contracts not to petition waives anti-SLAPP protection with respect to later petitioning activity that breaches the contract. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94.) Our Supreme Court stated that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Ibid.*) But a defendant need not affirmatively disprove such a waiver on the first prong an anti-SLAPP analysis; the burden of establishing waiver arises only on the second prong. "The Legislature's inclusion of a merits [i.e., second] prong to the statutory SLAPP definition [citation] . . . preserves appropriate remedies for breaches of contracts involving speech." (*Ibid.*) Any "'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.'" (*Ibid.*) Like the plaintiff in *Navellier v.*

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[3] For its part, the association has never argued that Yu's allegations concerning other acts of election interference arise from protected activity.

Sletten, Yu "'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.'" (*Ibid.*) Therefore, whether the Muller letter violated Rule III(G) is irrelevant to whether allegations concerning the letter arise from protected activity.

In any event, no evidence suggests the Muller letter violated Rule III(G). As noted above, the rule provides that "[n]o member shall be provided access to Association media within thirty (30) days of an Association election for the purposes of campaigning for election of a Director. For purposes of [the rule], 'Association media' means the Association's newsletters, internet websites and/or Association cable channel." No evidence in the record suggests the Muller letter was disseminated by way of the association's newsletters, Web sites, or cable channel. Even if the letter was published in the association's media, no evidence establishes it was published on behalf of an association member for the purpose of campaigning for election of a director. Nor does the record establish the Muller letter was disseminated within 30 days of the 2014 election, as Yu neither alleged nor offered evidence as to when that election occurred; she alleged and declared only that the letter was sent "shortly before" the election.

IV. Second Prong

Once the association established that Yu's claims concerning the Muller letter arose from protected activity, the burden shifted to Yu to demonstrate a probability of prevailing on the merits. To do so, she must demonstrate the claims were "'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.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).) The trial court must deny an anti-SLAPP motion if "'"the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff."'" (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1421.) At this stage of the proceedings, the plaintiff "need only establish that his or her claim has 'minimal merit' [citation] . . . ." (*Soukup*, *supra*, 39 Cal.4th at p. 291.) Although "'the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Ibid*.)

Yu's third cause of action asserts that a current, justiciable controversy exists between herself and the association as to whether the association's communication with its attorney, and the attorney's subsequent communication with association members, violated Rule III(G). The trial court concluded no reasonable probability exists that Yu will prevail on the claim because the dispute was no longer justiciable, as trial on it could not be completed until after the 2015 board election. The court erred.

First, an otherwise timely, justiciable claim does not lack merit under section 425.16 solely because it might be mooted by the passage of time. The Legislature enacted section 425.16 to address "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The concern with lawsuits "brought" to chill the exercise of constitutional rights suggests the merits of a potential

SLAPP must be evaluated in light of circumstances existing when it was filed, not later developments.

This conclusion is bolstered by the requirement that to determine whether a plaintiff has stated and substantiated a legally sufficient claim the court may consider only "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); accord *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 412.) To determine whether a matter is moot because it cannot be tried by a certain time would require the court to consider its own calendar, which the statute does not permit. That is not to say that a dilatory lawsuit filed an impossibly short time before a dispute becomes moot may never be found to have been brought primarily to chill the defendant's exercise of a constitutional right. But no such finding was made here, nor could it be. Yu amended the instant complaint four months after the 2014 election and eight before the 2015 election. That afforded ample time for the matter to be tried. (See § 1062.3 [declaratory actions are given precedence in setting trial dates].)

That the merits of a potential SLAPP are evaluated in light of circumstances existing when it was filed is further bolstered by the Legislature's prescription that all discovery proceedings be stayed while an anti-SLAPP motion is pending, thus potentially delaying resolution of a case. (§ 425.16, subd. (g).) If the mere passage of time could reduce a plaintiff's probability of prevailing on the merits for purposes of section 425.16—on mootness grounds, as the association suggests—then an anti-SLAPP motion would potentially be originative of the very deficiency it

proposes to interdict. We do not believe the Legislature intended such a result.

In any event, it appears trial was set for October 26, 2015, while the next association board election was not until November 2015. It is therefore unclear why the trial court found this lawsuit could not be completed before the election. Even if the controversy was moot as to the 2014 election, a court may entertain a moot issue that presents an important question that is likely to recur but will evade review. (See *California Charter Schools Assn. v. Los Angeles Unified School Dist*. (2015) 60 Cal.4th 1221, 1233.) This is especially so in the context of a declaratory relief action, which may be brought proactively as well as retrospectively. (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 898 ["a declaratory judgment action may be brought to establish rights once a conflict has arisen, or a party may request declaratory relief as a prophylactic measure before a breach occurs"].) Here, the association's alleged election interference could be repeated but yet perennially evade review.

On appeal, the association does not pursue its argument that the lawsuit was moot because it could not be tried before the election. Instead, it argues the lawsuit was moot because the trial court, on the same day that it denied the anti-SLAPP motion, sustained without leave to amend the association's demurrer to Yu's third cause of action—on the ground that the action is moot. In other words, the association argues the lawsuit is moot because it was dismissed because the court found it was moot. No ruling can be supported by begging the question ruled upon.

Therefore, Yu's third cause of action is justiciable.

The association argues Yu's third cause of action is barred by the litigation privilege set forth in Civil Code section 47, but we agree with the trial court and Division Five of this court that the litigation privilege does not apply where a plaintiff seeks only a declaration regarding the accuracy and legality of the plaintiff's statements and conduct. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 479.)

This does not mean Yu established a probability of prevailing on the merits. As implied above, her claim appears to be facially and factually deficient in several respects. But because the association has never urged these deficiencies, neither can we conclude on appeal that Yu failed to make a sufficient showing.

Yu argues that Muller refused to acknowledge a letter sent by her attorney on November 4, 2014, wherein he set forth the substance of her claim that the Muller letter was misleading. She argues this constitutes affirmative evidence that the Muller letter actually was misleading and violated Rule III(G). We disagree.

On November 4, 2014, Yu's attorney wrote Muller to explain that the Muller letter was misleading. Yu's attorney asked that Muller respond to this letter if he disagreed with anything said in it. Muller gave no response.

Silence in the face of a statement calculated to draw forth a reply may imply the statement is true when "in the ordinary practice of mankind the party receiving it would have answered it if he did not acquiesce in" it. (*Simpson v. Bergmann* (1932) 125 Cal.App. 1, 8.) But here, the Muller letter was the original statement and Yu's attorney's letter the reply to it. Muller's refusal to repeat his statement in response to Yu's reply was not

evidence that he acquiesced in the substance of the reply. If it were, an attorney could meet every repeated denial with a further query, and then claim the opposing attorney's failure to issue a denial in response to the final query constituted an admission.

DISPOSITION

The order denying the association's special motion to strike is reversed. The matter is remanded for further proceedings to determine whether Yu has a probability of prevailing on the portion of her third cause of action arising from protected activity. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.