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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PEOPLE ORGANIZED FOR WESTSIDE RENEWAL et al., Plaintiffs and Respondents, v. LANCE JAY ROBBINS PALOMA PARTNERSHIP et al., Defendants and Appellants.	B295756 (Los Angeles County Super. Ct. No. BC711940)

APPEAL from an order of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Joseph K. Hegedus, Caroline E. Chan and Alexander J. Harwin, for Defendants and Appellants.

Venskus & Associates, Sabrina D. Venskus; The Myers Law Group and Robert M. Kitson, for Plaintiffs and Respondents.

I. INTRODUCTION

Lance Jay Robbins is the legal owner of the Lance Jay Robbins Paloma Partnership (LJRPP), which owns an apartment building called the Ellison located near the beach in Venice, California. Robbins and LJRPP have been petitioning the City of Los Angeles (City) to allow them to convert the Ellison into a hotel. According the record before us, that process remains ongoing and the City has not approved the conversion.

People Organized for Westside Renewal (POWER) is a nonprofit organization that helps tenants organize around affordable housing issues. POWER, along with 15 tenants or former tenants of the Ellison,[1] sued Robbins and LJRPP, alleging Robbins and LJRPP are proceeding with an illegal conversion of the Ellison for use as a hotel or short-term rentals, and that construction and other issues were interfering with the individual plaintiffs' tenancy. Plaintiffs (hereafter Tenants) alleged that Robbins and LJRPP were liable on numerous theories typical of landlord-tenant disputes—habitability, nuisance, quiet enjoyment, and similar claims.

Robbins and LJRPP filed a special motion to strike under the anti-SLAPP statute, asserting that the gravamen of Tenants' complaint is to thwart Defendants' petitioning activity before the

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[1] The tenant plaintiffs are Brian Averill, Mary Campbell, Jacqueline Cooper, Kelly Day, Carlos Flores, Cristina Salinas-Flores, Matt Garcia, Taylor Hornecker, Simon Jeffries, Chelsea Kammeyer, Bruce Kijewski, Todd Lyons, Susanne Detto, Michael Detto, and Jennifer VanderWeed.

City to convert the Ellison into a hotel.[2] The trial court denied LJRPP's anti-SLAPP motion as untimely, and denied Robbins's motion because Tenants' claims did not arise from activity protected under Code of Civil Procedure section 425.16.[3] We affirm.

II. BACKGROUND

The following facts are taken from the pleadings and declarations submitted in the trial court. (*Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1536.)

A. Administrative Proceeding to Convert the Ellison From an Apartment Building into a Hotel

Prior to Tenants' lawsuit, LJRPP began an administrative proceeding to get permission from the Los Angeles Department of Building and Safety (LADBS) to convert the Ellison from an apartment complex into a hotel. LADBS denied the request, stating that because the 1967 Certificate of Occupancy listed the Ellison as an apartment house, the Los Angeles Municipal Code (Municipal Code) prohibited the Ellison from being converted into a hotel. (L.A. Mun. Code, § 12.21, subd. (A)(1).)

In accordance with the procedure laid out in the Municipal Code, LJRPP initially appealed this determination to LADBS

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[2] "SLAPP stands for 'Strategic Lawsuit Against Public Participation.' " (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835, fn. 1.) For clarity, we refer to a "SLAPP" or "anti-SLAPP" motion as a "special motion to strike"—the language used in the statute (Code Civ. Proc., § 425.16, subd. (b)(1)).

[3] All unspecified statutory references are to the Code of Civil Procedure.

itself, arguing that LADBS had erred or abused its discretion in 1967 when it issued the Certificate of Occupancy. On May 16, 2018, LADBS issued a determination that it did not err or abuse its discretion in issuing the 1967 Certificate of Occupancy. LADBS reiterated its finding that the Municipal Code's prohibition on using any building for a nonpermitted use prevented Defendants from converting the Ellison into a hotel. LADBS further emphasized that buildings allowing for rental periods of 30 days or less must comply with the definition of "Transient Occupancy Residential Structures," as defined in section 12.03 of the Municipal Code, and such structures are not permitted in the residential zone where the Ellison is located.

On May 31, 2018, LJRPP appealed LADBS's determination to the Zoning Administrator of the Department of City Planning, which was to be heard by the Department's Director of Planning (Director). There was a public hearing before the Director on September 20, 2018. The record before us contains neither the Director's decision, nor information regarding any subsequent administrative proceedings.

B. Tenants' Complaint

Tenants filed their complaint on June 28, 2018, seeking compensatory and punitive damages and injunctive relief. Tenants alleged the conversion of the Ellison into a hotel "has caused the Ellison to become a public and private nuisance and has resulted in a multitude of habitability problems for the rent-stabilized tenants who reside there."

Tenants' complaint sets forth 13 causes of action, including breach of warranty of habitability, negligent and intentional tortious breach of warranty of habitability, negligent and

intentional breach of covenant of quiet enjoyment, negligent and intentional nuisance, public nuisance, intentional infliction of emotional distress, violations of sections 52.1, 1942.4 and 1950.5 of the Civil Code,[4] and wrongful (constructive) eviction. Tenants seek general, special, economic and noneconomic damages, as well as punitive damages. They also seek injunctive relief, requesting, among other things, orders prohibiting Defendants from converting any additional apartments into hotel rooms, requiring Defendants to cease and desist from operating the Ellison as a de facto hotel, and prohibiting Defendants from harassing rent-stabilized tenants.

The complaint alleges habitability problems including (i) unreasonable and constant construction noise, (ii) numerous deferred, delayed, and denied maintenance requests for the rent-stabilized units, (iii) hotel-related nuisances such as amplified music, screaming people, incessant trash and objects blocking the hallways, increased traffic, and privacy concerns, and (iv) security issues. The complaint further asserts these issues resulted in the constructive eviction of at least two tenants. We summarize these allegations below.

1. *Construction Noise*

Tenants allege that, beginning in the latter half of 2016, as tenants of rent-stabilized units would move out of the Ellison, Defendants began converting their units into hotel rooms. As a

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[4] Civil Code sections 1942.4 and 1950.5 are landlord-tenant specific statutes pertaining to rent collection and security deposits, respectively; Civil Code section 52.1 provides equitable relief for interference with the exercise of constitutional or statutory rights.

result, the building was under constant construction, with the accompanying noise of saws, nail guns, hammers and drills during daytime hours. A few of the tenant plaintiffs alleged they worked from home and thus were particularly bothered by the constant construction noise. One plaintiff needed to rent an office space for four or five months because it was impossible for her to take work calls from home.

2. *Maintenance Requests*

Tenants allege that they suffered a variety of habitability issues which required repairs by the landlord LJRPP. These included severe plumbing and electricity problems, water leaks, toxic smells from ongoing construction, bedbugs and vermin infestations, mold, moisture, gas leaks, broken windows and walls, and deteriorated flooring. Tenants allege their repair requests were either ignored altogether or addressed only after a significant delay. When Tenants asked a building maintenance worker why their requests were being ignored, the worker replied that Defendants had instructed the maintenance staff to focus on the hotel rooms and guests rather than the building's long-term tenants.

3. *Hotel-Related Nuisances*

Tenants allege the de facto conversion of the Ellison into a hotel has led to a range of other problems for the long-term tenants. First, in their efforts to market the Ellison as a hotel, Defendants throw parties every Friday night, and on the occasional Thursday and Saturday as well, where they offer free alcohol and live entertainment through an amplified sound system. The parties take place in the central, enclosed courtyard.

The parties result in intoxicated people yelling in the building at all hours of the night.

Tenants allege that hallways at the Ellison are constantly being blocked by cleaning carts that maids use to clean the hotel rooms, as well as bags of trash hotel guests leave outside their rooms. Tenants assert the hotel's cleaning staff store garbage outside their units while cleaning, causing Tenants' units to always smell of trash.

Tenants also assert that because the Ellison is mostly occupied with temporary guests, traffic around the building has greatly increased due to taxi cabs, Ubers, and Lyfts picking people up and dropping people off.

4. *Security and Privacy Issues*

Tenants allege that, since its conversion into a hotel, security at the Ellison has degraded to the point of being nonexistent. Entry to the Ellison is by keypad, and all hotel guests are given a code to enter the building. Tenants believe the code remains active for some months, and that there is no restriction on guests sharing the code. Tenants often hear guests yelling the code out the window to people trying to enter the building. In addition, the back entrance to the Ellison is nearly always propped open. As a result, theft of mail and personal goods has increased.

Defendants commissioned giant murals portraying two famous singers that were spray painted onto the side of the Ellison. Three of the plaintiffs allege that while the murals were being painted, the fumes from the spray paint got into their units and their windows continue to be covered with spray paint. Since the murals have been up, these three plaintiffs allege their

privacy has been destroyed—people frequently photograph the murals, and those pictures generally show the inside of Tenants' units. Furthermore, Defendants have put up a spotlight to illuminate the murals at night, and one of the spotlights shines directly into one plaintiff's unit. His request for the lights to be shaded have been ignored.

5. *Unlawful Eviction and Threats of Eviction*

Plaintiffs Carlos Flores and Cristina Salinas-Flores allege they were constructively evicted due to Defendants' harassment and the incessant construction noise. They state Defendants harassed them by issuing bogus three-day notices stating they were in violation of the terms of their tenancy for placing items such as plants or bicycles in common areas near their unit, even though hotel guests were permitted to leave items such as luggage and garbage in common areas. Salinas-Flores also received a warning for creating excessive noise for singing in her apartment at 3:00 p.m. one day. Two employees at the Ellison warned Salinas-Flores that Robbins was trying to evict Flores and Salinas-Flores from their unit so it could be converted for hotel use.

In October 2016, Defendants began eviction proceedings against Flores and Salinas-Flores, on the basis they had provided the door code to a nonresident and had made excessive noise during the early morning hours. Tenants assert the eviction proceedings were unfounded, and it appears the proceedings were either abandoned or unsuccessful. Flores and Salinas-Flores moved out in 2017 due to the harassment and the ongoing construction noise.

Plaintiff Kelly Day alleges Defendants threatened to evict her after she testified in court as a witness in a case by another tenant against Defendants. She further claims that Defendants served her with three-day notices based on bogus allegations (for example, asserting she was subletting her apartment based on a dog walker having access to her apartment when Day was out of town).

C. Service of Summons and Answer

1. *LJRPP*

Tenants filed a proof of service of summons as to LJRPP on August 21, 2018. The proof of service stated that a process server served Stanley Treitel, LJRPP's agent for service of process, by substituted service to his wife and co-occupant, Barbara Treitel, on July 7, 2018.[5] The proof of service described Mrs. Treitel as being 65 years old, Caucasian, female, weighing 140 pounds, five feet five inches tall, and having brown hair. The proof of service also stated that, on July 9, 2018, the process server mailed copies of the summons and complaint to Mr. Treitel at his home address (the same location where copies were left with Mrs. Treitel).

Under section 415.20, subdivision (a), when a summons and complaint are served by substituted service, service is deemed complete the tenth day after service. Accordingly, service was complete as to LJRPP on July 19, 2018. LJRPP filed its answer on September 7, 2018. It contained a general denial and pleaded numerous affirmative defenses.

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[5] Barbara Treitel's name on the proof of service was incorrectly spelled as "Barbara Frietel."

2. *Lance Jay Robbins*

Tenants served Robbins on September 20, 2018 and filed a proof of service on September 28, 2018. Robbins answered Tenants' complaint on October 22, 2018. Like LJRPP, Robbins's answer contained a general denial and pleaded numerous affirmative defenses.

D. Defendants' Anti-SLAPP Motion

On November 6, 2018, Defendants filed a special motion to strike Tenants' complaint pursuant to section 425.16. Defendants alleged that Tenants' complaint "clearly relates to Defendants' rights to petition government and free speech under the Los Angeles Rent Stabilization Ordinance [citations], and challenges 'dance parties' [citation], a 'portrait' [citation], and 'live entertainment' [citation], all forms of free speech and association" as well as " 'three-day notices' " and " 'eviction proceedings [citation],' " which are legal processes and "forms of First Amendment petitioning of government protected by the litigation privilege." (Fns. omitted.) Defendants argued, by filing the lawsuit and making habitability complaints, Tenants were trying prevent Defendants from petitioning the City to convert the Ellison into a hotel.

Defendants attached declarations of Robbins and Stanley Treitel to the special motion to strike. Treitel declared, among other things, that he was not properly served on behalf of LJRPP. He asserted that although the proof of service said his wife was served at 9:00 a.m. on July 7, 2018, that date was a Saturday and he and his wife are observant Orthodox Jews who do not answer

the door on Saturday mornings.[6] He further declared the individual described in the proof of service somewhat resembles his maid, and that his maid was not competent to accept service. He did not, however, describe his wife's appearance or detail what about the description in the proof of service does not match her appearance. Treital also asserted he did not receive a copy of the summons or complaint in the mail.

E. Tenants' Opposition to the Anti-SLAPP Motion

Tenants opposed the special motion to strike, asserting the motion was untimely as to LJRPP, and that in any event, it should be summarily denied as to both Defendants because the causes of action in the complaint did not "arise from" Defendants' protected activity. Tenants also argued that if the court found that their causes of action *did* "arise from" Defendants' protected activity, the motion should still be denied because Tenants demonstrated a likelihood of success on the merits. To support their likelihood of success assertions, Tenants submitted declarations from six of the individual tenant plaintiffs detailing their habitability allegations.

F. The Trial Court Denies the Anti-SLAPP Motion

On January 14, 2019, the trial court denied Defendants' anti-SLAPP motion. The court found LJRPP's special motion to strike was untimely, as it was filed well after 60 days from the date service was deemed complete. The court declined to exercise

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[6] The record does not contain a declaration of Barbara Treitel saying whether she opened the door and received service on July 7, 2018.

its discretion and allow the untimely motion, as LJRPP offered no facts justifying such relief.

The trial court denied Robbins's anti-SLAPP motion on the ground that he did not show that the claims in Tenants' complaint arose from activity protected under section 425.16. The court noted the mere fact an action is filed after protected activity takes place does not mean the claims arose from that protected activity. Relying on *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*), the court noted that Robbins was required to go through the individual causes of action and demonstrate that the actions of Robbins or LJRPP by which the Tenants will prove the elements of the cause of action arise from protected activity. Robbins, however, failed to make any such showing and therefore did not meet his burden of proof.

Defendants timely appealed. We granted Tenants' motion for calendar preference.

III. DISCUSSION

A. Standard of Review

To combat lawsuits designed to chill the exercise of free speech and petition rights, "the Legislature has authorized a special motion to strike claims that are based on a defendant's engagement in such protected activity." (*Park*, *supra*, 2 Cal.5th at p. 1060.) We review the trial court's ruling on the timeliness of a special motion to strike for abuse of discretion. (See *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 782 (*Platypus Wear*).) We review the denial of a special motion to strike de novo. (*Park*, *supra*, 2 Cal.5th at p. 1067.) " 'We consider "the

pleadings, and supporting and opposing affidavits upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' " (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.)

B. The Trial Court Did Not Abuse Its Discretion in Finding LJRPP's Anti-SLAPP Motion Was Untimely

A "special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. (§ 425.16, subd. (f).) In other words, the defendant is only entitled to 'file[]' such a motion within 60 days of service; thereafter filing may be allowed, or not, in the trial court's discretion." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1186 (*Hewlett-Packard*).)

The trial court found that service was complete as to LJRPP on July 19, 2018. LJRPP therefore had until September 17, 2018 to file a special motion to strike, but did not do so until November 6, 2018. LJRPP argues its motion was in fact timely, and if the motion was untimely the trial court abused its discretion in declining to consider the motion.

1. *LJRPP Waived All Objections to Service of Process*

To argue its special motion to strike was timely, LJRPP first asserts that service on it was improper based on its agent for service of process contradicting statements in the proof of service about what happened on July 7, 2018 when the summons and complaint were purportedly served. LJRPP asserts the 60-day

period to file its special motion to strike therefore did not commence on July 19, 2018, but instead either never commenced or began running when LJRPP answered the complaint on September 7, 2018. We reject this argument, as LJRPP waived any claim of improper service by failing to file a motion to quash and instead answering the complaint.

Section 1014 provides that filing an answer constitutes a general appearance. Section 410.50, subdivision (a) states that "[a] general appearance by a party is equivalent to personal service of summons on such party." Section 418.10, subdivision (e)(3) provides that a failure to make a motion to quash service at the time of filing a motion to strike "constitutes a waiver of the issues of . . . inadequacy of process [and] inadequacy of service of process . . . ." (§ 418.10, subd. (e)(3).) Courts have long interpreted these sections to mean that a defendant who makes a general appearance before filing a motion to quash service waives the issue of inadequacy of service of process, and relinquishes all objections based on defective service of process. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 52; *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1147.)

LJRPP argues the only thing it waived by answering the complaint was its ability to file a motion to quash the service itself, not its ability to object to the service for other purposes such as the time limitation to file a special motion to strike. The sole authority LJRPP cites in support of this argument is *In re Marriage of Smith* (1982) 135 Cal.App.3d 543 (*Smith*). *Smith* held only that section 410.50's provision that a general appearance is equivalent to personal service does not apply when the appearance is made after a default judgment was entered. *Smith* reached this conclusion because the Legislature "clearly

rejected the rule that a defendant's general appearance after entry of a default judgment against him based upon a void service of summons retroactively makes valid that void service." (*Id.* at p. 546.) No default judgment was entered here, and the applicable statutes state LJRPP's answer was a general appearance that waived claims of improper service. *Smith*'s holding is therefore not instructive.

LJRPP also asserts that, because service was allegedly improper, the 60-day period provided for by section 425.16 began running the day LJRPP filed its answer. LJRPP provides no statutes, case law, or analysis in support of this bald assertion. Because LJRPP's failure to make a motion to quash waived any claim of improper service, the factual predicate of LJRPP's argument (that service was improper) is untenable. (§ 418.10, subd. (e)(3).) The anti-SLAPP statute makes clear the 60-day period begins to run from the day service is complete, not the day an answer is filed. (§ 425.16, subd. (f).) We accordingly reject LJRPP's argument that its special motion to strike was timely filed.

2. *The Trial Court Did Not Abuse its Discretion in Refusing to Consider LJRPP's Untimely Motion*

LJRPP next argues that, even if its special motion to strike was untimely, the trial court abused its discretion in refusing to consider that tardy motion. "In the anti-SLAPP context, courts have identified two particular ways in which a refusal to entertain a late anti-SLAPP motion might be shown to constitute an abuse of discretion: (1) if 'the grounds given by the court . . . are inconsistent with the substantive law of section 425.16,' and (2) if the court's application of the statute to the facts of the case

is 'outside the range of discretion conferred upon the trial court under the statute, *read in light of its purposes and policy*.' " (*Hewlett-Packard*, *supra*, 238 Cal.App.4th at p. 1187.) LJRPP does not claim that the trial court's ruling violated any express mandate of the anti-SLAPP statute. "Its appellate challenge therefore necessarily rests on the premise that the refusal to entertain the motion on the merits did violence to the statute's purpose and policy." (*Id.* at p. 1188.)

"The overarching objective of the anti-SLAPP statute is 'to prevent and deter' lawsuits chilling speech and petition rights. [Citation.] 'Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPs by *ending them early and without great cost to the SLAPP target*' " [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure *at an early stage of the litigation*. [Citation.]' [Citations.] [¶] . . . By failing to act within [the 60 days], a defendant incurs costs—and permits the plaintiff to incur costs—that a timely motion might be able to avert. As these costs accumulate in the course of conventional discovery and motion practice, the capacity of an anti-SLAPP motion to satisfy the statutory purpose diminishes. And as the utility of the motion diminishes, so does the justification for the statute's deviations from more conventional modes of disposition." (*Hewlett-Packard*, *supra*, 238 Cal.App.4th at pp. 1188—1189.)

LJRPP argues its nearly two-month delay past the 60-day filing period was not as egregious as the delays in *Hewlett-Packard*, *supra*, 238 Cal.App.4th 1174 and *Platypus Wear*, *supra*, 166 Cal.App.4th at pp. 776—777, where the defendants waited

about two years (and right before their trial started) to file a special motion to strike. That ignores, however, that appellate courts have upheld refusals to consider untimely motions for periods shorter than LJRPP's delay. (E.g., *Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 679—681 [special motion to strike untimely by six weeks].) LJRPP also points out that unlike *Hewlett-Packard* and *Platypus Wear*, extensive discovery had not yet been conducted in this case—Tenants had served only a request for production of documents on LJRPP. Finally, LJRPP notes the trial court had to analyze the special motion to strike regardless, because Robbins's special motion to strike was timely.

Fully considering LJRPP's arguments, we see no abuse of its discretion. LJRPP offered no facts explaining why the motion could not have been timely made (other than its waived claims regarding service). Moreover, "[b]oth the Legislature and the Supreme Court have acknowledged the ironic unintended consequence that anti-SLAPP procedures, enacted to curb abusive litigation, are also prone to abuse occasioned by the stay of proceedings on appeal of the denial of an anti-SLAPP motion . . . ." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 283, fns. omitted.) One of the purposes of the 60-day limitation for filing a special motion to strike is "to avoid tactical manipulation of the stays that attend anti-SLAPP proceedings. The 'prejudice' to the opponent pertinent to these purposes is that which attends having to suffer [litigation] expenses or be subjected to such a stay." (*Id.* at p. 287.) Here, Tenants were prejudiced by unwarranted delay in the resolution of habitability claims regarding units in which they still reside. "[E]ven though we might have exercised the statutory discretion differently had it been ours, we cannot say the trial court's decision 'exceeds the

bounds of reason, all of the circumstances before it being considered.' " (*Morin v. Rosenthal*, *supra*, 122 Cal.App.4th at p. 681.)

C. The Trial Court Did Not Err in Denying the Anti-SLAPP Motion as to Robbins

We turn next to the court's denial of Robbins's timely filed special motion to strike. Under the anti-SLAPP statute, "[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).) The constitutional rights of petition and free speech referenced in section 425.16 include seeking administrative action, such as Robbins's efforts before various City agencies to convert the Ellison into a hotel. (§ 425.16, subd. (e); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. (§ 425.16, subd. (b) . . . .) If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' " (*Park*, *supra*, 2 Cal.5th at p. 1061.) Tenants do not dispute that Robbins's acts of petitioning the City to convert the Ellison from an apartment building into a hotel, along with speech related to that petitioning, are protected activity under

section 425.16, subdivision (e). The issue presented is whether the gravamen of Tenants' claims arise from that petitioning activity and related speech.[7]

The defendant bears the burden on the first step of the anti-SLAPP analysis "to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute. A 'claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.' [Citation.] To determine whether a claim arises from protected activity, courts must 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.' [Citation.]" (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884.) Where a plaintiff could omit allegations regarding protected conduct and still state the same claims, the first prong is not met. (*Park*, *supra*, 2 Cal.5th at p. 1068.)

Here, although the Tenants' complaint refers to the same underlying subject matter at issue in the administrative proceedings (i.e., converting the Ellison into a hotel), the complaint "contains no reference to the action itself. California

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[7] In their anti-SLAPP motion, Defendants also asserted that Tenants' causes of action arose from Defendants' right of free speech and petitioning in that it was attacking their " 'dance parties,' " " 'portrait[s],' " " 'live entertainment,' " their issuance of three-day notices, and their commencing eviction proceedings. On appeal, Defendants abandon these arguments, and assert only that Tenants' causes of action arise from petitioning activity and speech related to that petitioning activity.

courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77.)

Here, the causes of action—breach of warranty of habitability, negligent and intentional tortious breach of warranty of habitability, negligent and intentional breach of covenant of quiet enjoyment, negligent and intentional nuisance, public nuisance, intentional infliction of emotional distress, violations of sections 52.1, 1942.4 and 1950.5 of the Civil Code, and wrongful (constructive) eviction—reference only acts Robbins allegedly took that, while related to the conversion, are not themselves speech or petitioning activity. Before the trial court, and again on appeal, Robbins makes no effort to explain what protected activity allegedly supplies any element of these causes of action. He instead simply asserts "[t]he heart and substance of the plaintiffs' complaint is that they are suing to stop the conversion" and to "prevent the reduction of the number of rent stabilized housing units available," which "necessarily includes the defendant's [sic] attempts to legalize the conversion by making adjudicatory applications and appeals with City agencies."

This is insufficient to satisfy Robbins's burden. Our independent analysis of the complaint confirms this conclusion. Take, for example, the first cause of action—breach of warranty of habitability. To prove such a claim, Tenants must show: (1) "the existence of a material defective condition affecting the premises' habitability," (2) "notice to the landlord of the condition

within a reasonable time after the tenant's discovery of the condition," (3) "the landlord was given a reasonable time to correct the deficiency," and (4) "resulting damages." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1282, 1297.) That Robbins was petitioning the City to convert the Ellison into a hotel is not a fact that supports any element of this claim. Instead, the factual allegations that support this claim are things like leakage of water, plumbing issues, mold and vermin infestations, broken windows, and deteriorated flooring.

The cause of action for breach of covenant of quiet enjoyment is no different. To succeed on this cause of action, Tenants must show " 'an act or omission on the part of the landlord,' " or anyone acting under him, " 'interferes with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy. [Citations].' " (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 291—292.) Tenants allege that Robbins breached his duty to abide by the covenant of quiet enjoyment by failing to repair unsafe, unsanitary and uninhabitable conditions, failing to maintain the premises in a habitable condition, failing to ensure Tenants' right to privacy, and unlawfully evicting some individual plaintiffs. Though some of those breaches stem from Robbins's physical conversion of the Ellison's units into hotel rooms, none of the allegations involve Robbins's speech or petitioning activity. (See *Park*, *supra*, 2 Cal.5th at p. 1060.)

The same is true for the remaining causes of action, including negligent and intentional tortious breach of the warranty of habitability, negligent and intentional nuisance, intentional infliction of emotional distress, violation of sections 52.1, 1942.4 and 1950.5 of the Civil Code, the nuisance claims

and constructive eviction. The elements of these claims do not arise from Robbins's administrative proceeding or any statements made during the proceeding. Rather, Tenants contend the *actual operation* of the Ellison as a hotel, along with associated habitability issues and nuisances from construction, violate existing laws. Those violations are not protected activity. Accordingly, the cause of action does not arise from any protected activity. (See *Park*, *supra*, 2 Cal.5th 1057.)

Like the plaintiff in *Park*, Tenants do not need to, and in fact do not, bring up the fact that Robbins is petitioning the City to convert the Ellison from an apartment building into a hotel. The trial court correctly held Robbins did not carry his burden of showing that the conduct by which Tenants claim to have been injured " 'falls within one of the four categories described in subdivision (e).' " (See *Park*, *supra*, 2 Cal.5th at p. 1073.)[8]

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[8] We deny Tenants' request for sanctions equivalent to the fees incurred in responding to what they assert was a frivolous appeal. "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

IV. DISPOSITION

The order is affirmed. Tenants are to recover their costs on appeal.

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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