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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ARROW DISPOSAL SERVICES, INC., Cross-Complainant and Respondent, v. DAVID S. MILTON et al., Cross-Defendants and Appellants.	B294294 (Los Angeles County Super. Ct. No. BC643454)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

Gronemeier & Associates, Dale L. Gronemeier, and Elbie J. Hickambottom, Jr. for Cross-Defendants and Appellants.

No appearance for Cross-Complainant and Respondent.

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Two trash haulers previously in direct competition sued each other for engaging in unfair competition. One of the haulers alleged, in its lawsuit, that its competitor's unfair practices included "fil[ing] frivolous lawsuits" to "extort[] settlements," but curiously did not go on to base any of its unfair competition claims on that conduct. Citing this allegation, the other hauler filed a motion to dismiss the entire lawsuit under the anti-SLAPP law (Code Civ. Proc., § 425.16).[1] The trial court denied the motion. We conclude this was correct, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

From about 2011 through 2016, Clean Up America, Inc. (Clean Up) and Arrow Disposal Services, Inc. (Arrow) were direct competitors in the trash hauling business. Clean Up declared bankruptcy in 2014, and ceased operations sometime in 2016.

II. Procedural History

A. *The operative cross-complaint*

After Clean Up sued Arrow in December 2016 for engaging in a number of unfair business practices, Arrow in June 2018 filed a cross-complaint against Clean Up, its two owners (the Potters), David Milton (Milton) and Janet Randolph (Randolph).

In the initial paragraphs of its cross-complaint, Arrow alleged that Clean Up had engaged in two different categories of unfair competition: (1) Clean Up, while it was still in operation, had "illegal[ly] dump[ed] . . . trash" at its own property, which (a)

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1 "SLAPP" is short for Strategic Lawsuit Against Public Participation.

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

enabled it to avoid any "sorting" fees and thus "price its services well below [its competition]," and (b) allowed it to "'steal'" Arrow's customers by claiming that Arrow's fees were higher "due to its inefficiency"; and (2) Clean Up, once it became defunct, started "fil[ing]" "frivolous," "shakedown lawsuits" against "legitimate [trash hauling] business[es] . . . with the purpose of extorting settlements."

Arrow then set forth four claims: (1) unlawful business practices (Bus. & Prof. Code, § 17200), (2) unfair business practices (*ibid.*), (3) interference with existing and prospective economic relationship, and (4) equitable relief under the Unfair Competition Law (*ibid.*). Although each claim incorporated the general allegations regarding both categories of unfair competition detailed above, Arrow's allegations supporting each claim rested solely on the illegal dumping / customer stealing category of unfair competition.

The sole allegations against Milton and Randolph pertained to the "shakedown lawsuit[]" category of unfair competition: Arrow alleged that Milton "financed the operation when it ran out of cash" and that Randolph "provided services free of charge when [Clean Up] experienced financial difficulties."

B. *Anti-SLAPP litigation*

In August 2018, Clean Up, the Potters, Milton and Randolph filed a motion to dismiss Arrow's entire cross-complaint on the ground that it was "filed to interfere with [their] constitutional right to file lawsuits."

After entertaining further briefing, and conducting a hearing, the trial court denied the motion. The court reasoned that the (1) cross-complaint did not rest on any "'protected activity'" under the anti-SLAPP law because Arrow's cross-claims

were all based on the allegations regarding "illegal dumping[] and stealing customers," not the allegations regarding "shakedown lawsuits," such that the "shakedown lawsuit[]" allegations were only "incidental" to its cross-claims, and (2) Arrow had in any event shown that its unfair competition cross-claims had minimal merit.

C. *Appeal*

Milton and Randolph filed this timely appeal.

DISCUSSION

Milton and Randolph argue that the trial court erred in denying their anti-SLAPP motion. We independently review such a denial. (*Optional Capital, Inc. v. Akin Gump Strauss Hauser & Feld LLP* (2017) 18 Cal.App.5th 95, 112-113.) As we explain, there was no error.

The anti-SLAPP law "provides a procedure for weeding out, at an early stage, *meritless* claims arising from" activity that is protected by law. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) When a party moves to strike a cause of action (or portion thereof) under the anti-SLAPP law, a trial court must ask: (1) Has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056), and if it has, (2) has the nonmoving party demonstrated that the challenged cause of action has "minimal merit" by making "a prima facie showing of facts [sufficient] to sustain" a judgment in its favor? (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 93-94; *Baral,* at pp. 384-385; § 425.16, subd. (b)(1).)

In assessing whether the challenged cause of action arises from protected activity (the first step), a court must ask "two subsidiary questions: (1) What conduct does the challenged cause

of action 'arise[] from'; and (2) is that conduct 'protected activity' under the anti-SLAPP [law]?" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 698.) In answering the first subsidiary question, a cause of action "arises from" protected activity when it is "*based on*" protected activity—that is, when the protected activity is the ""'principal thrust or gravamen'"" or "'core injury-producing conduct'" warranting relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 134.) However, a cause of action does not "arise from" "protected activity" "'if the allegations of protected activity are only incidental to a cause of action [that is] based essentially on nonprotected activity.' [Citation.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672; *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1169 [same] (*Sheley*); accord, *Episcopal Church Cases* (2009) 45 Cal.4th 467, 478 [when "protected activity" "lurk[s] in the background," anti-SLAPP law does not apply].)

We agree with the trial court that none of Arrow's cross-claims "arose from" the allegations involving the "shakedown lawsuits," which are the only allegations that Milton and Randolph assert constitute "protected activity." (See, *Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 880 ["filing petitions . . . in court . . . [is] protected . . . activit[y] under the anti-SLAPP statute"]; § 425.16, subd. (e)(2).) Instead, each of Arrow's cross-claims was explicitly based upon Clean Up's alleged misconduct of illegal dumping and lying to Arrow's customers. Because Arrow did not allege that the *shakedown lawsuits* were what caused its injury (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193 [a claim "arises from" the "wrongful injury-

producing conduct"]; *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 [same]), the allegations regarding shakedown lawsuits were "merely incidental" and "collateral" to Arrow's claims (*Sheley*, *supra*, 9 Cal.App.5th at p. 1169). Thus, Milton and Randolph did not carry their burden under the first step of the anti-SLAPP analysis, and the trial court correctly denied their anti-SLAPP motion.

Milton and Randolph offer four arguments to the contrary.

First, they argue as a procedural matter that Arrow cannot assert that its cross-claims do not "arise from" the shakedown lawsuit allegations because Arrow did not take that position during the meet and confer process leading up to the filing of the anti-SLAPP motion. We reject this argument. Not only was the basis for Arrow's cross-claims set forth *in the cross-complaint itself*, we are not bound in our independent review by the trial court's reasoning in evaluating an anti-SLAPP motion (e.g., *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 622)—and, by extension, are not bound by the parties' positions in informal discussions preceding the filing of such a motion.

Second, Milton and Randolph contend that the trial court was wrong to assess whether the shakedown lawsuit allegations constituted the "'gravamen'" of Arrow's cross-claims (or were instead merely "incidental" to those claims) because our Supreme Court in *Baral*, *supra*, 1 Cal.5th 376, overruled that approach. They are wrong. *Baral* made plain that it was addressing "the second step of the [anti-SLAPP law] analysis," and in that regard, held that courts are to evaluate whether each "specific claim[] of protected activity" has minimal merit. (*Id.* at pp. 385, 393.) Contrary to what Milton and Randolph urge, *Baral reaffirmed* that "[a]ssertions that are 'merely incidental' or 'collateral' are

not subject to" the anti-SLAPP law (that is, in the first step of the anti-SLAPP analysis). (*Id.* at p. 394.)

Third, Milton and Randolph assert that Arrow's "act of naming" them "is inherently an act . . . intend[ed] to assert a cause of action" against them, and, relatedly, that the shakedown lawsuit allegations, by virtue of being incorporated into each cross-claim, *could have* been the basis for those claims. These assertions lack merit. The fact that a party is named in a pleading does not mean it is *properly* named or subject to suit; demurrers *exist* to test the sufficiency of allegations. (§ 430.10, subd. (e).) More to the point, by explicitly spelling out the basis for its cross-claims as the the illegal dumping / customer stealing conduct, Arrow narrowed the basis for those cross-claims notwithstanding its incorporation of allegations regarding Clean Up's conduct of illegal dumping and of filing shakedown lawsuits. And the fact that Arrow *could* have based its claims on the shakedown lawsuit allegations does not alter the reality that it *did not do so*.

Lastly, Milton and Randolph lament that it is "absurd" to force them to remain in the lawsuit when "there purportedly is no cause of action against them" because none of Arrow's cross-claims is based upon their conduct. We agree. However, the question before us is whether *the anti-SLAPP law* is the proper procedural device for dismissing them from Arrow's cross-complaint. For the reasons noted above, it is not. Whether other devices—such as a demurrer, motion to strike, motion for judgment on the pleadings or motion for summary judgment—are appropriate or, at this stage, timely, is beyond the scope of this appeal.

Because we conclude that Arrow's cross-claims are not "based upon" any allegations against Milton and Randolph, we have no occasion to decide (1) whether those allegations would fall into the anti-SLAPP law's "commercial exception" (§ 425.17), or (2) whether Arrow established that its cross-claims have "minimal merit."

DISPOSITION

The order denying Milton and Randolph's anti-SLAPP motion is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ