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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAWN C. THOMAS, et.al.,

Plaintiffs and Appellants,

v.

STEPHEN DWYER, et.al.,

Defendants and Respondents.

2d Civil No. B234715
(Super. Ct. No. 1303457)
(Santa Barbara County)

Dawn C. Thomas and Curie Storage Enterprises, LLC appeal from the trial court's order denying their motion to strike respondents' cross-complaint under Code of Civil Procedure section 425.16,¹ the Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The trial court denied the motion because it concluded that the cross-complaint does not allege causes of action arising out of protected speech or petitioning activity within the meaning of section 425.16. We affirm.

Facts

Appellant Dawn C. Thomas formed Curie Storage Enterprises, LLC in July 2005, to invest in a self storage facility in Denver, Colorado with respondents Stephen and Susan Dwyer and their limited liability company, S.E. Denver Storage LLC. The investment has not been profitable. In October 2008, appellants filed a complaint against

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

respondents relating to the failed investment. In April 2009, they filed their first amended complaint, alleging causes of action for fraud, negligent misrepresentation, negligence, breach of fiduciary duty, breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, indemnity, injunction, and the appointment of a receiver for the property.²

Appellants' first amended complaint alleges that respondents were responsible for identifying the property in which their partnership would invest and for managing the property after it was purchased. Appellants allege that respondents made intentional or negligent misrepresentations about the storage facility before it was purchased and failed properly to manage the property afterwards. They further allege that respondents breached the partnership agreement by preventing appellants from selling their interest in the storage facility to a third party.

Respondents failed to respond to the first amended complaint in a timely manner. However, in October 2009, the trial court granted their motion for relief from default. Respondents demurred to the first amended complaint, contending that it failed to state a cause of action because the partnership agreement required 30 days' written notice of default and a demand for performance before the non-breaching party could initiate litigation. The trial court overruled the demurrer on the grounds that the "notice of default" provision in the partnership agreement did not operate as a condition precedent to the non-breaching party's contractual right to file a lawsuit.

Respondents filed their answer to the first amended complaint in December 2009. Fifteen months later, in April 2011, they filed their cross-complaint. It alleges that appellants breached the partnership agreement and the implied covenant of good faith and fair dealing because Thomas "failed and refused to advance funds necessary to pay

² Appellants were represented in the transaction by Gary Bright and the law firm in which he is a partner, Bright & Powell. The complaint alleges that Bright was also the attorney for, and a personal friend of, respondent Stephen Dwyer. The tenth and eleventh causes of action in appellants' first amended complaint allege that Bright and the law firm committed malpractice and breached his fiduciary duties toward appellants in connection with the transaction. Bright and the law firm are not parties to this appeal.

necessary expenses when there was insufficient revenue or cash reserves to otherwise do so. [Appellants'] breaches of the Agreement include *inter alia*: [¶] -- the refusal to agree to a commission for a leasing agent to market and lease vacant office space on the property; [¶] -- the refusal to agree to pay the fee for an agent to contest the tax assessment and obtain a lower tax rate; [¶] -- the refusal to pay the property taxes; [¶] -- the refusal to provide notice of default or failure to perform prior to bringing a lawsuit; and [¶] -- the failure to provide the Bank with financial information requested for consideration of [respondents'] proposal to modify and restructure the loan."

The cross-complaint also alleges causes of action for promissory fraud, fraud, negligent misrepresentation, breach of fiduciary duty, indemnification, declaratory relief and specific performance. These causes of action allege that Thomas entered into the partnership agreement "with the knowledge and intent that she would not perform her obligations as promised." Respondents further allege that Thomas intentionally or negligently misrepresented her financial ability to provide sufficient funds for the partnership to meet its expenses, if revenue from the storage facility was insufficient. Appellants allegedly breached their fiduciary duties by breaching the partnership agreement and making the misrepresentations.

Appellants responded to the cross-complaint with a special motion to strike pursuant to section 425.16. They contend the cross-complaint is a SLAPP suit because it alleges that appellants breached the partnership agreement and defrauded respondents by filing their lawsuit without first providing respondents with a notice of default. Because filing a complaint is a protected activity within the meaning of section 425.16, subdivision (b)(1), appellants contend the cross-complaint should be stricken as a SLAPP suit. The trial court disagreed. It concluded that the "causes of action [in the cross-complaint] do not arise out of petitioning activity within the scope of Code of Civil Procedure section 425.16." Accordingly, it denied appellants' special motion to strike.

Discussion

The anti-SLAPP statute 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).) As we recently explained, this statute "was enacted 'to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) To that end, the statute is liberally construed." (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036.)

We review de novo the trial court's order denying the motion to strike. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1367.) Like the trial court, our review includes two steps. "First we decide whether the challenged claims arise from acts in furtherance of the defendant's right of free speech or right of petition under one of the four categories set forth in section 425.16, subdivision (e). [Citation.] In doing so, we 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' " (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 272.) If we find that appellants have made this showing, we then must consider whether respondents have demonstrated a probability of prevailing on their claims. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

A cause of action arises from protected activity where the conduct underlying the cause of action was itself "an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section

425.16, subdivision (e) . . . ' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)³

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) The anti-SLAPP statute does not apply where "protected activity is only collateral or incidental to the purpose of the transactions or occurrence underlying the complaint." (*California Back Specialists Medical Group v. Rand, supra*, 160 Cal.App.4th at p. 1037.) If protected activity is "merely incidental to the cause of action[.]" then the cause of action does not "arise from" protective activity for purposes of section 425.16. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 884.)

The fact that a cause of action was filed after protected speech or petitioning activity occurred does not establish that the cause of action "arose from" that activity. "[T]hat a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) The " 'gravamen or principal thrust' of the action" determines whether it arose from protected activity. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) As our Supreme Court noted in *Episcopal Church Cases*, "The additional fact that protected

³ Subdivision (e) of section 425.16 defines the phrase, "act in furtherance of a person's right of petition or free speech" to include, "(1) any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

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." (*Id.* at p. 478.)

Our task, then, is to determine whether appellants made the requisite showing that causes of action alleged in respondents' cross-complaint arose from, or were based on acts by appellants in furtherance of their right of petition or free speech. We conclude that they did not. The cross-complaint alleges that appellants breached the partnership agreement because they "failed and refused to advance funds necessary to pay necessary expenses when there was insufficient revenue or cash reserves to otherwise do so." It then cites three examples of bills appellants refused to pay and describes two other ways in which appellants breached the agreement: by failing to provide a notice of default before filing their complaint and by failing to provide financial information to a bank. The remaining causes of action allege that appellants misrepresented their intent to perform the partnership agreement and their financial ability to advance additional funds to keep the business going.

The "gravamen or principal thrust" of these causes of action is the parties' disagreement about whether appellants were required to, ever intended to, or misrepresented their ability to advance additional funds to meet the partnership's expenses. That dispute has nothing to do with appellants' protected activity in filing a complaint alleging that respondents also breached the partnership agreement. Respondents' reference to appellants' failure to provide a notice of default prior to filing the complaint is incidental to these causes of action and insufficient to transform this contract dispute into a SLAPP. (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 478; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1572, footnote omitted ["As Salvatore Tessio said to Tom Hagen, 'Tell Mike it was only business.' So it is here."].)

At oral argument, appellants' counsel attempted, for the first time, to distinguish between claims alleged in the cross-complaint against Thomas as an individual, and those alleged against Curie Storage Enterprises, the limited liability

company of which she is the principal manager. Appellants did not raise these contentions in the trial court or in their briefs on appeal. As a consequence, they have been waived. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

Because appellants failed to demonstrate that the cross-complaint arises from protected activity, we need not consider whether respondents have demonstrated a probability of prevailing on the merits of their claims. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 445.)

Motion for Sanctions

Respondents seek an award of sanctions pursuant to section 907 and California Rules of Court, rule 8.276(a) for what they characterize as a frivolous appeal. We deny the motion because we conclude that, although the appeal is unsuccessful, it is not frivolous. An appeal is frivolous only when "it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637,650; see also § 128.5; *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 469.)

The record provides no evidentiary support for the claim that appellants or their counsel filed this appeal for improper reasons. Similarly, while their contentions on appeal are weak, we cannot say they are "totally and completely without merit." The cross-complaint does allege that appellants breached the contract by filing their complaint without first giving notice of default. Filing a complaint is a protected activity. There was at least a slim possibility this court would conclude, on de novo review, that respondents' cross-complaint was based on, or arose out of appellants' protected activity in filing the complaint. As a consequence, we cannot conclude the appeal was frivolous.

We note in addition that the agreement between the parties includes an attorney's fee provision. Should respondents prevail on their cross-complaint, they will be entitled to recover their reasonable attorney's fees, including those incurred in opposing the motion to strike and those incurred on this appeal.

Conclusion

The order denying appellants' special motion to strike the cross-complaint is affirmed. Respondents' motion for sanctions is denied. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Denise de Bellefeuille, Judge
Superior Court County of Santa Barbara

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