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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

MARSHALL A. CASKEY et al., Plaintiffs and Respondents, v. JOHN BARNETT et al., Defendants and Appellants.	B230085 (Los Angeles County Super. Ct. No. BC445945)

APPEAL from an order of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Affirmed.

Nemecek & Cole, Jonathan B. Cole, Michael W. Feenberg, and Susan S. Baker, for Defendant and Appellant John Barnett.

Proskauer Rose, Michael A. Firestein, and Navid Soleymani, for Defendants and Appellants Robert Kaufman and Stacey Nicholas.

Caskey & Holzman, Marshall A. Caskey, Daniel M. Holzman, and Thomas L. Dorogi, for Plaintiffs and Respondents.

Robert Kaufman, Stacey Nicholas, and John Barnett (collectively defendants) appeal from an order denying their special motion to strike the underlying complaint as a strategic lawsuit against public participation (SLAPP; Code Civ. Proc., § 425.16).[1] We conclude that defendants did not meet their burden of showing that the conduct forming the basis of the underlying complaint involved petitioning activity within the meaning of section 425.16, and affirm the trial court's order.

FACTUAL AND PROCEDURAL HISTORY

The complaint alleges the following facts. Tim Langan had been employed by Nicholas and one her entities, Captain Enterprises, Ltd. Langan also had been in a relationship with Nicholas. Nicholas was the estranged spouse of Henry Nicholas, III, founder of a major corporate entity. In October 2009, the Nicholases were in the midst of divorce proceedings when Henry Nicholas subpoenaed Langan for a deposition. Langan retained John Barnett, a criminal law attorney, to represent him at this deposition.

In March 2010, Langan sought representation for potential legal claims against Nicholas arising out of Langan's employment and their personal relationship. He met with Thomas Simpson, a family law attorney, and discussed these claims. Simpson recommended that Langan retain Daniel Holzman, a partner with the law firm Caskey & Holzman, to represent him on his claims under the Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq.

Langan told the attorneys that he would be able to proceed with legal representation only if they agreed to a contingency fee arrangement. Langan told them he believed it would be unnecessary to file a lawsuit against Nicholas because she would promptly settle the matter.

On March 26, Holzman began to draft a legal services agreement. Langan requested that the agreement include a provision for a lower contingency fee in the event the matter settled quickly. Holzman sent the agreement to Langan, which contained a

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

provision that attorney fees would constitute 25 percent of the gross recovery if the matter settled without mediation and 33⅓ percent of the recovery if a settlement was reached during prelitigation mediation. The agreement further provided, "Client understands that Attorney is only being retained for purposes of a pre-litigation mediation . . . [¶] . . . if this matter does not resolve in a pre-litigation mediation then a new fee agreement will be prepared if [the attorneys] continue to represent Client." The agreement also reflected Langan's instruction not to file a complaint with the Department of Fair Employment and Housing.

Langan indicated that he was hesitant to sign the agreement because Nicholas's lawyers had been in contact with Barnett about a settlement, and he was concerned that Simpson and Holzman's fees would be unfair if the matter settled quickly and for a significant amount of money. He wrote to Simpson and Holzman, "[w]ithout a way to really calculate or quantify what the damages are, I am left guessing and thinking that I should write her myself, or just walk away." On April 1, he told the two attorneys that he would not be continuing with representation and would try to settle the matter himself.

On April 8, Barnett negotiated a tolling agreement with Nicholas's counsel on behalf of Langan. The purpose of the agreement was to "allow the Parties . . . the opportunity to amicably resolve the potential Claims, if possible." It provided, "Nicholas [and Captain Enterprises] believes it has claims against Langan, and Langan believes [he] has claims against Nicholas. . . . By entering into this Tolling Agreement, the Parties are reserving their rights to assert each and every such claim . . . ."

On April 17, Langan wrote to Simpson and Holzman. He said that he had failed to resolve the matter "quietly," and he believed it would not be resolved without Simpson's and Holzman's services. Langan sent the signed legal services agreement to the attorneys. Langan also informed Barnett that he had formally retained Simpson and Holzman.

On April 23, Nicholas's attorney, Robert Kaufman, called Barnett and left him a message stating that Nicholas had authorized him to convey a settlement offer to Langan. Barnett responded and told Kaufman that Langan had retained Simpson and Holzman and

that Kaufman should communicate with them. Kaufman stated he was not authorized to communicate the offer to Holzman and Simpson and that Kaufman would only present Nicholas's "generous offer" to Barnett. Langan told Holzman and Simpson of this condition and assured them that he would not agree to any settlement without their advice. Barnett also told Simpson and Holzman that no settlement would be concluded and expressed his discomfort with the situation.

The next day Langan and Barnett met with Nicholas and Kaufman. After the meeting, Langan e-mailed Simpson and Holzman, informing them that he had reached a confidential agreement with Nicholas. Holzman responded and asked Langan to provide a copy of the agreement. Langan replied that he was discharging the two attorneys and that no settlement agreement had been signed. On April 25, Simpson and Holzman sent a notice of lien to Barnett and Nicholas.

On September 20, Holzman's law firm, Caskey & Holzman, his partner Marshall A. Caskey, and Simpson (collectively plaintiffs), filed the present action against Barnett, Kaufman, and Nicholas. Langan was not named as a defendant. Plaintiffs alleged the condition on the settlement offer—that Caskey and Holzman not be present at the meeting where the offer would be presented—constituted an intentional interference with the legal services agreement and was designed to induce Langan to breach it. Plaintiffs brought claims for inducing a breach of contract, intentional interference with an economic relationship, intentional interference with a prospective economic relationship, and negligent interference with a prospective economic relationship.

Kaufman and Nicholas filed a special motion to strike plaintiffs' complaint as a SLAPP action, contending that the settlement offer at issue arose from a protected activity and that plaintiffs were unable to demonstrate a probability they would prevail on their claims. (See § 425.16, subd. (b).) Barnett filed a separate motion on the same grounds. The trial court denied both motions, reasoning that defendants failed to show plaintiffs' claims were based on acts in furtherance of their right of petition or free speech. In particular, the court found there was insufficient evidence that Langan was

seriously contemplating litigation at the time the settlement communications occurred. This timely appeal followed.

At the request of appellants, we have taken judicial notice of a May 2011 demand for arbitration written by Langan claiming "he is entitled to compensation from Nicholas and Captain arising from the facts, events, contracts, and circumstances surrounding his employment with and separation from Captain and his personal relationship with Nicholas." Attached to the demand letter is an agreement to arbitrate entered into by Langan and Nicholas, which stated that Nicholas and Captain believed they had potential claims against Langan. We also have taken judicial notice of a May 2011 lawsuit filed by Langan against plaintiffs for breach of contract and declaratory relief. The complaint alleges that there was no settlement between Langan and Nicholas and that plaintiffs are not entitled to any future settlement Langan obtains.

DISCUSSION

Defendants contend the trial court erred in denying their motion to strike the complaint because plaintiffs' causes of action arise from constitutionally protected petitioning activity. (See § 425.16.) We disagree. Defendants did not meet their burden of showing that the conduct which forms the basis for plaintiffs' allegations involves petitioning activity within the meaning of section 425.16.

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

The statute provides in part: "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 . . . or . . . 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).)

Resolution of an anti-SLAPP motion involves a two-step inquiry. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).) The statute describes four categories of conduct that will qualify: "(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." (§ 425. 16, subd. (e).) If the defendant makes this showing, then the court determines whether the plaintiff has demonstrated a probability of prevailing on the claim.[2] (*Equilon Enterprises*, at p. 67.)

We review the trial court's ruling de novo (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*)), and consider "the pleadings, and supporting and opposing affidavits stating the facts 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." [Citations.]'" (*Flatley*, at p. 326.)

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[2] Since the trial court in this case denied defendants' anti-SLAPP motion on the ground that the statute's "arising from" prong does not encompass their claims, it did not reach the second step, involving the plaintiffs' "probability of prevailing" in the lawsuit. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.)

Plaintiffs allege they had an attorney-client agreement with Langan, of which Kaufman and Nicholas were aware, and that by conditioning the settlement offer on excluding plaintiffs from the negotiations, they induced Langan to breach the agreement and interfered with plaintiffs' ability to collect a contingency fee. Plaintiffs allege that Barnett aided Kaufman and Nicholas by participating in the settlement negotiations despite knowing of the agreement between plaintiffs and Langan.

Defendants contend they demonstrated these claims involved protected activity as defined under section 425.16, subdivision (e)(1) as "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and subdivision (e)(2) as "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law." Plaintiffs contend that defendants do not meet their burden under section 425.16, subdivision (e)(1) since the subdivision requires that the statement be made before an "official proceeding authorized by law," a criterion which is not met by acts or statements that occur outside a legislative, executive, judicial, or other official proceeding. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 865.) Plaintiffs note that subdivision (e)(2) has been broadly construed to encompass communications preparatory to or in anticipation of litigation or another official proceeding. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*).) We agree with plaintiffs and confine our analysis to whether defendants have met their burden under subdivision (e)(2) of section 425.16.

While we adopt an expansive view of what constitutes litigation-related activities under section 425.16 (*Briggs, supra,* 19 Cal.4th at p. 1106) to be protected, a prelitigation statement must "'concern[] the subject of the dispute' and [be] made 'in anticipation of litigation "contemplated in good faith and under serious consideration" [citation].'" (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268.)[3] To make this determination,

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[3] For this reason, defendants' reliance on *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, is unavailing. In *GeneThera*, the plaintiff's offer to settle with one of the defendants was made after litigation had

we look to case law interpreting both the anti-SLAPP statute and the litigation privilege in Civil Code section 47, subdivision (b). This is because "clauses (1) and (2) of subdivision (e) of . . . section 425.6 . . . 'are parallel to and coextensive with the definition of privileged communication under Civil Code section 47, subdivision (b).' [Citation.]" (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 617, fn. omitted; accord *Briggs, supra,* at p. 1115 [since communications preparatory to or in anticipation of litigation are within the protection of the litigation privilege, such statements are equally entitled to benefits of anti-SLAPP statute].)

In *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, the court delineated the outer bounds of the litigation privilege. It set out four "considerations for distinguishing the point at which the litigation privilege may attach to statements in advance of litigation." (*Id*. at p. 34) First, "the communication must have been made preliminary to a *proposed* judicial or quasi-judicial proceeding," which is evidenced by the party having suggested or proposed a lawsuit orally or in writing. (*Ibid*.) Second, "the verbal proposal of litigation must be made in good faith." (*Id*. at p. 35, italics omitted.) Third, "the contemplated litigation must be imminent." (*Ibid*., italics omitted.) Fourth, "the litigation must be proposed in order to obtain access to the courts for the purpose of resolving the dispute." (*Ibid*., italics omitted.) The court noted that "[t]he critical point of each of these four elements is that the mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future is insufficient to invoke the litigation privilege." (*Id.* at p. 36.)

The trial court found the gravamen of plaintiffs' causes of action to be that Kaufman and Nicholas convinced Langan to exclude Simpson and Holzman from the negotiation in order to avoid paying their fees. It concluded that at the time of these communications, Langan was not seriously considering litigation.

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commenced. (*Id.* at p. 906.) Because of this, the court did not have to analyze whether the offer was made in anticipation of litigation contemplated in good faith and under serious consideration.

Accepting as true the evidence favorable to plaintiffs (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 326), we find neither party was seriously considering litigation when the Nicholas offer was communicated. The legal services agreement signed by Langan reflects his intent to retain plaintiffs for the limited purpose of prelitigation negotiations. The agreement contained a clause stating as much and providing that if Langan wanted to pursue litigation, a separate agreement would be required. No such agreement was ever executed. Further, Langan instructed plaintiffs not to file a complaint with the Department of Fair Employment and Housing, which is a statutory prerequisite to filing a lawsuit based on Langan's employment law claims. (Gov. Code, § 12960; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) It is evident that Langan's purpose in hiring plaintiffs was to give him leverage in negotiations with Nicholas, not to initiate a lawsuit.[4] Further, defendants produced no evidence that either party suggested or proposed litigation orally or in writing. (See *Edwards v. Centex Real Estate Corp., supra*, 53 Cal.App.4th at p. 34; cf. *Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1269 [letter sent by attorney had subject line "'Maxsecurity v. Mark Neville'" and stated that attorney was representing the party in the matter and would aggressively pursue all available remedies].)

Defendants argue that Langan's May 2011 letter demanding arbitration compels the conclusion that he contemplated litigation in April 2010. The subsequent filing of a lawsuit is evidence that litigation was contemplated in good faith when the lawsuit is filed within a reasonable time of the offending statements. (Compare *Edwards v. Centex*

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[4] Defendants counter this evidence by citing one clause of the legal services agreement which provides, "Attorney may advance all 'costs' in connection with [the] representation of Client under this agreement. . . . Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, . . . and process server fees." They argue this clause constitutes an admission that Langan anticipated litigation. However, the scope of the representation as stated in the agreement was limited to negotiating with Nicholas and did not include filing a lawsuit. Indeed, as we have discussed, the agreement said a new contract would have to be executed if Langan decided to pursue litigation. These express provisions of the agreement, which demonstrate Langan's intent, govern the generic clause stating the attorneys *may* advance costs and these costs *could* include litigation expenses.

Real Estate Corp., supra, 53 Cal.App.4th at p. 35 [statement made five years before litigation commenced not privileged] with *Neville v. Chudacoff, supra,* 160 Cal.App.4th at p. 1269 [statements protected by anti-SLAPP statute when litigation filed four months later].) However, arbitration is not litigation; it is "a private alternative to a judicial proceeding." (*Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 5 (*Century 21*).) The court in *Century 21* held that the anti-SLAPP statute does not protect the act of initiating a private agreement to arbitrate. (*Ibid.*) The court reasoned that arbitration is neither a judicial proceeding nor "an 'official proceeding' because it is a nongovernmental activity not reviewable by administrative mandate or required by statute." (*Ibid.*) Here, Nicholas and Langan voluntarily entered into an agreement to arbitrate, and Langan wrote the demand letter pursuant to this agreement. Under *Century 21*, this act is not protected by the anti-SLAPP statute. The voluntary mediation, an act that is not litigation and not protected under the anti-SLAPP statute, demonstrates that the objective was to avoid litigation.[5] Since Nicholas and Langan continue to rely on informal procedures to try to resolve their dispute, it is reasonable to conclude that they still seek to avoid litigation.

Defendants also point to the tolling agreement to show the parties contemplated litigation. But that agreement states that its purpose is to allow the parties the opportunity to "amicably resolve" any potential claims. Indeed, the purpose of the tolling agreement was to avoid litigation.

Defendants argue that by alleging that Langan sought representation for his "civil matters," "valid claims," "potential case," and "claims for damages," plaintiffs' complaint effectively concedes that Langan contemplated litigation. That Langan genuinely believed he had a valid dispute against Nicholas does not mean there was a threat of impending litigation. In other words, Langan may very well have believed he had a potential case against Nicholas, but neither he nor Nicholas proposed access to the courts for the purpose of resolving their dispute. Rather, as we have discussed, the

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[5] We also note that the record does not suggest Nicholas ever filed a lawsuit related to her own asserted claims against Langan.

evidence shows that a mutual goal was to avoid litigation, and by retaining plaintiffs, Langan sought leverage to achieve that goal. (See *Edwards v. Centex Real Estate Corp., supra*, 53 Cal.App.4th at p. 36 [litigation privilege attaches when "imminent access to the courts is seriously proposed by a party in good faith for the purpose of resolving a dispute, and not when a threat of litigation is made merely as a means of obtaining a settlement"].) The complaint's language cited by defendants fails to establish "anything more than the mere possibility" of litigation, not that either party was planning litigation when the Nicholas offer was made. (*Id.* at p. 39, italics omitted.)

In sum, defendants do not defeat the favorable evidence for plaintiffs, which shows that neither Langan nor Nicholas seriously considered litigation during the relevant time period. Although the anti-SLAPP statute must be construed broadly, the Legislature did not intend it to apply to purely private transactions merely having some remote connection to an official proceeding. (E.g., *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 [complaint by former client against his attorney alleging ethical violations and breach of fiduciary duty not protected, "[a]lthough petitioning activity is part of the evidentiary landscape within which [the] claims arose"]; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931 [city's complaint against contractor alleging claims associated with the contractor's improper bidding process not protected because it did not implicate the contractor's right to petition].) We conclude plaintiffs' causes of action are not barred by the anti-SLAPP statute.

DISPOSITION

The order of the trial court is affirmed. Plaintiffs to have their costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.