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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

SHAME ON YOU PRODUCTIONS, INC., Plaintiff, Respondent and Cross-Appellant, v. LAKESHORE ENTERTAINMENT GROUP, LLC, et al., Defendants, Appellants and Cross-Respondents.	B279896 (Los Angeles County Super. Ct. No. BC617024)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Barnes & Thornburg, Stephen R. Mick and Devin J. Stone for Defendants, Appellants and Cross-Respondents Lakeshore Entertainment Group, LLC, Brillco, Inc., and Steven Brill.

Abrams Coate and Charles M. Coate for Plaintiff, Respondent and Cross-Appellant Shame on You Productions, Inc.

When a screenwriter submits a script to a studio or individual with the power to get the movie made, under circumstances in which it is understood by both parties that compensation will be paid to the writer if the script is used, an implied contract to pay reasonable compensation can arise. If the movie is made and compensation is not paid, the writer may have a cause of action for breach of that implied contract. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 739-741 (*Desny*).) In this case, plaintiff brought a *Desny* cause of action, alleging that defendants used his script to make a movie without paying him reasonable compensation. The defendants responded with a demurrer and a motion to strike pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)

The demurrer of a single defendant, the film's production company, was sustained without leave to amend, on the basis that the screenwriter had not directly submitted the script to the production company, so contractual privity was not alleged. The writer appeals, arguing that privity was satisfied by his submission to a third party, who later sold the script to the production company.

The defendants' anti-SLAPP motion was denied in large part, on the basis that a *Desny* cause of action is not subject to the anti-SLAPP law, as it arises from a failure to pay, not from any conduct in furtherance of defendants' right of speech. On appeal, defendants argue the motion should have been granted in its entirety, because the gravamen of the *Desny* cause of action is conduct in furtherance of defendants' right of speech in connection with a public issue, specifically, making and releasing a motion picture.

We find each appeal unpersuasive and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Allegations of the Complaint*

Dan Rosen is a screenwriter. In 2006, he wrote a screenplay for a romantic comedy called *Darci's Walk of Shame*. He thought the actress Elizabeth Banks would be perfect for the leading role of Darci. Through an acquaintance, he set up a meeting to pitch his screenplay to Banks. In August 2007, he met with Banks and had a lengthy discussion about his script, leaving a copy with her. There is no dispute that he gave a copy of his script to Banks, and although Banks is a defendant in this action, she is not a party to this appeal.

Over the next few years, Rosen submitted his screenplay around Hollywood. Although he received positive feedback on his script, nobody expressed interest in purchasing it and making the movie.

Rosen was therefore surprised to read, in 2014, that Banks was starring in a motion picture called *Walk of Shame*, which he believed to be similar to the script he had pitched to her seven years earlier. The writer/director of *Walk of Shame* was Steven Brill. The production company was Lakeshore Entertainment Group.

Walk of Shame was "released theatrically, digitally and on pay per view on May 2, 2014 in the United States." According to evidence submitted in connection with the anti-SLAPP motion, *Walk of Shame* was neither a critical nor a financial success. It had a score of only 12 percent positive on the review aggregator website "Rotten Tomatoes," and made $7.9 million in domestic box office on a $15 million budget.

In 2014, Rosen assigned both his script and any causes of action he might have arising from its use to an entity called Shame On You Productions, Inc. Although Shame On You is the actual plaintiff in this action, for clarity, we continue to refer to the plaintiff as Rosen.

2. *The Federal Suit*

Rosen brought suit against Banks, Brill, Lakeshore and others in federal court, alleging both copyright violation and a *Desny* cause of action for breach of implied contract. In 2015, the district court issued a lengthy opinion, later affirmed on appeal, resolving the copyright cause of action in favor of defendants. The district court found no substantial similarity between Rosen's script and the ultimate *Walk of Shame* movie as a matter of law.[1] (*Shame on You Prods. v. Banks* (C.D. Cal. 2015) 120 F.Supp.3d 1123, 1171 affd. (9th Cir. 2017) 690 Fed.Appx. 519.) Having resolved the federal cause of action, the district court declined to exercise supplemental jurisdiction over the state law *Desny* claim, and dismissed that claim without prejudice. (*Id*. at pp. 1171-1172.) Rosen was then free to pursue the *Desny* cause of action in state court.

3. *The Complaint in this Action*

On April 13, 2016, Rosen brought this action against Banks, Brill and Lakeshore.[2] Initially, Rosen alleged only a

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[1] In his briefing on appeal, Rosen raises a lengthy and scurrilous challenge to the impartiality of the district court judge. There is no place for such an attack here. The 9th Circuit affirmed the district court in a memorandum opinion.

[2] In addition to naming Brill as a defendant, Rosen named Brillco, Inc., Brill's loanout corporation. We refer to Brill and Brillco collectively as Brill.

single cause of action, for breach of implied contract in violation of *Desny*.

4. *The First Demurrer*

Banks, Brill and Lakeshore collectively demurred. They argued that a *Desny* cause of action, based, as it is, on an implied contract arising from the circumstances in which a script is conveyed from plaintiff to defendant, requires contractual privity between the two parties. The moving defendants all argued that Rosen had failed to properly allege privity.

The trial court overruled the demurrer only as to Banks, concluding Rosen had adequately alleged privity as to her. The court sustained the demurrers of Brill and Lakeshore, with leave to amend, concluding Rosen had failed to sufficiently allege contractual privity with them.[3]

5. *The First Amended Complaint*

Rosen amended his complaint. As to the specific issue of privity with Brill and Lakeshore, Rosen's allegations involve a third party: producer Todd Garner and his company, Broken Road Productions. Rosen alleged that he submitted *Darci's Walk of Shame* to Garner/Broken Road in 2009 (two years after the submission to Banks) in circumstances that would give rise to a *Desny* implied contract. As to Brill, Rosen alleged that Brill had

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[3] In his cross-reply brief, Rosen argues that he had amended his complaint "as a matter of right" and that defendants' subsequent demurrer to his first amended complaint was "the first time the Court considered the sufficiency of the pleadings." This is simply untrue; the court considered the sufficiency of Rosen's allegations of privity in connection with the demurrer to his first complaint, and found them lacking as to Brill and Lakeshore.

an informal partnership with Garner/Broken Road "in producing and setting up" *Walk of Shame*.

As to Lakeshore, Rosen's contractual privity allegation was a bit different. In 2011, Lakeshore executed a written contract with Garner/Broken Road, by which, in exchange for a payment of $250,000, Garner/Broken Road conveyed to Lakeshore certain "literary" material Lakeshore could use in connection with *Walk of Shame*. Rosen attached a copy of this written agreement to his first amended complaint. Although the agreement did not specifically refer to Rosen's script, Rosen alleged that it could be inferred that Rosen's script was, by this agreement, transferred to Lakeshore by Garner/Broken Road. He further alleged that, with the transfer, "flowed a corresponding obligation by [Lakeshore] to assume" Garner/Broken Road's implied contractual obligations to pay Rosen for his script if it was used. The problem with this allegation was that it was contradicted by the language of the agreement itself, in which Garner/Broken Road certified that all written material it gave Lakeshore in connection with *Walk of Shame* "was and/or will be *solely created by us* as a 'work-made-for-hire' specially ordered or commissioned" by Lakeshore with Lakeshore "being deemed the sole author of the Material" and owner of all rights in and to it. (Emphasis added.)

Rosen also added two more causes of action to his complaint: breach of the implied covenant of good faith and fair dealing; and unjust enrichment. All three causes of action alleged that the implied contract obligated defendants to both pay Rosen for the script and to give him screen credit for it. Rosen sought damages in excess of $500,000 and injunctive relief regarding screen credit.

6. *Overview of Responsive Pleadings and Motions*

Banks filed her answer to the first amended complaint and, as we have discussed, is not a party to this appeal. Brill and Lakeshore demurred and brought an anti-SLAPP motion. We discuss the demurrer first.

7. *The Demurrer to the First Amended Complaint*

Brill and Lakeshore again demurred on the basis of lack of contractual privity. As to Brill, the trial court would ultimately conclude Rosen's allegation of a partnership between Brill and Garner/Broken Road, at the time of the script's submission to Garner/Broken Road, was sufficient to allege privity.[4] But the court reached a different conclusion with respect to Lakeshore.

The court's tentative ruling had been to overrule the demurrer as to Lakeshore, on the basis that Rosen sufficiently alleged that Lakeshore assumed the implied contractual obligations of Garner/Broken Road to pay Rosen. However, at the hearing on the demurrer, the court posed the following hypothetical: Suppose a writer submits a script to Producer A, who rejects it. Then, some years later, Producer A mentions the script to Producer B, who wants the script. Producer B pays Producer A for the script under the table. Producer B knows the script was stolen by Producer A, but the writer had never pitched the script to Producer B. The court asked defendants' counsel what causes of action the writer would have against Producer B. Defense counsel responded that the cause of action against Producer B may be copyright violation, but there can be no cause of action for breach of contract against Producer B, because there was no privity – even if Producer B had actual knowledge that

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[4] The merits of the court's ruling on Brill's demurrer are not before us on appeal.

the script was stolen. Defense counsel argued that a breach of contract cause of action could exist only against Producer A. Defense counsel represented that Rosen had settled with Garner/Broken Road – the producer with whom he had been in privity – and argued he can have no breach of contract claim against Lakeshore. The court later specifically stated that its tentative opinion was subject to change and invited further argument on the demurrer. After the hearing, the court did not follow its tentative, and sustained Lakeshore's demurrer without leave to amend.[5]

8. *The Anti-SLAPP Motion*

Concurrently with the demurrer, Brill and Lakeshore filed their anti-SLAPP motion. "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. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).) In this appeal, the sole battleground is the first issue, whether the

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[5] We have set forth the course of this argument in some detail, because in Rosen's briefing, he states that the court's tentative was in his favor and "it seems implausible that more than a month later in December 2016, the trial court without further hearing completely reversed course and ruled completely contrary to its own tentative ruling." As we have explained, the hearing on demurrer specifically addressed this issue, which explains why the court changed its mind. Whether a trial court has changed its mind or not does not establish error. It is the final ruling we review.

moving defendants established the claims arose from protected activity.[6]

As we shall discuss, resolution of the first prong of the anti-SLAPP analysis requires a determination of whether the defendants' acts which underlie the plaintiff's cause of action are themselves acts in furtherance of the right of free speech. (*Park, supra,* 2 Cal.5th at p. 1062.) Minimal evidence was submitted by the parties on this issue.[7] The issue largely turned on how a *Desny* cause of action is to be characterized as a matter of law. Is the conduct challenged by a *Desny* plaintiff the defendant's making of the movie, which could be considered protected speech? Or, is the challenged conduct simply the failure to pay, which is not?

The trial court charted a third course, concluding that, to the extent Rosen's complaint was based on the failure to provide

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[6] This was because Rosen, in an apparent misunderstanding of the applicable law, believed he could satisfy his burden of establishing minimal merit by submitting a verification of his operative complaint. As a plaintiff may not rely on a verified complaint to satisfy its burden under the second prong of an anti-SLAPP analysis (*Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 593), and Rosen submitted little else, he failed to meet a second prong burden. If defendants had met their burden on the first prong, they were entitled to prevail on their anti-SLAPP motion.

[7] Not all speech is protected speech under the anti-SLAPP law. To be protected, the speech must be in connection with a public issue. (Code Civ. Proc., § 425.16, subd. (b)(1).) In connection with their motion, defendants submitted copies of reviews and articles in trade publications to show that the public had some level of interest in the *Walk of Shame* movie.

him with screen credit, it was based on defendants' speech. However, to the extent Rosen's complaint was based on the failure to pay him for the script, it did not implicate speech. The court therefore granted the anti-SLAPP motion with respect to the allegations arising from the failure to give Rosen credit, but denied it with respect to the allegations arising from the failure to pay him.

9. *Appeal, Cross-Appeal and Limitation of Issues*

Brill and Lakeshore filed a timely notice of appeal from that part of the court's order denying the part of their anti-SLAPP motion addressing the failure to pay. Rosen filed a cross-appeal only from the order dismissing Lakeshore following the sustaining of its demurrer without leave to amend.

In his respondent's brief on appeal, Rosen argues the trial court erred in granting the anti-SLAPP motion in part (on the failure to provide screen credit), and that this court should reverse that portion of the court's order. This he cannot do as a *respondent*, and, because Rosen did not cross-appeal from the partial grant of the anti-SLAPP motion, the partial grant of the anti-SLAPP motion is not before us.[8]

DISCUSSION

We will address first Rosen's appeal from the dismissal of Lakeshore on demurrer, and then turn to Brill's appeal of the

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[8] Rosen argues, among other things, that the entire anti-SLAPP motion should have been denied as untimely. To the extent his untimeliness argument is addressed to the portion of the anti-SLAPP motion which was granted, he cannot pursue it, because he did not cross-appeal the partial grant. To the extent his untimeliness argument is offered as an alternative ground for affirming the partial denial of the anti-SLAPP, we decline to address it, as we choose to affirm on the merits.

partial denial of his anti-SLAPP motion. Because, as both appeals relate to the substantive law of a *Desny* cause of action, we begin with a brief discussion of that authority.

1. *The Desny Case*

A *Desny* cause of action, sometimes referred to as an "idea submission" case, was first recognized by our Supreme Court in 1956. (*Desny, supra,* 46 Cal.2d 715; see *Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 175.) In *Desny*, plaintiff Desny had written a script based on the true story of caver Floyd Collins, which he wanted to submit to producer/writer/director Billy Wilder at Paramount. Desny telephoned Wilder's office and sought an appointment with Wilder. Wilder's secretary demanded that he "explain his purpose." Desny described his Floyd Collins script to the secretary. She seemed interested, but explained to Desny that Wilder does not read scripts, he only reads synopses. Desny prepared his own script synopsis and called the secretary back when it was finished. The secretary had him read it over the phone while she took it down in shorthand. She told Desny that she would talk it over with Wilder and get back to Desny. Desny told the secretary that defendants could only use the story if they paid him reasonable value; the story had been written for sale. The secretary agreed that if Wilder or Paramount used Desny's story, he would naturally be paid. (*Desny, supra,* 46 Cal.2d at pp. 726-727.) Wilder then made a Floyd Collins movie at Paramount; Desny was never paid. Desny conceded that Wilder's movie was not sufficiently similar to Desny's synopsis for him to recover in copyright, but believed he should be able to pursue Wilder and Paramount for breach of contract. (*Id.* at p. 728.)

The California Supreme Court agreed, and reversed the summary judgment against Desny.

The court began with the premise that ideas are generally not regarded as property, because ideas cannot be owned or possessed to the exclusion of others. (*Desny, supra,* 46 Cal.2d at p. 731.) However, this does not mean an idea cannot be the subject of a contract. (*Id.* at p. 733.) "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." (*International News Service v. Associated Press* (1918) 248 U.S. 215, 250; dis. opn. of Brandeis, J.) If, prior to disclosure of an idea, the parties bargain that the recipient will pay the disclosing party for the service of conveying the idea, such a contract can be a valid obligation. (*Desny,* at pp. 737-738.) "But, assuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as 'implied' or 'implied-in-fact.' " (*Id.* at p. 738.) "Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered." (*Id.* at p. 739.)

Desny's evidence did not establish a contract with Wilder or Paramount to pay for the conveyance of the mere idea of making a movie about Floyd Collins; so the defendants were free to make

their own Floyd Collins movie. (*Desny, supra,* 46 Cal.2d at pp. 739-740.) However, the same logic which could impose an implied contract to pay for an idea under the right circumstances could also impose an implied contract to pay for Desny's script synopsis. "Under the principles of law which have been stated it appears that for plaintiff to prevail on this appeal the record must indicate either that the evidence favors plaintiff, or that there is a triable issue of fact, in respect to the following questions: Did plaintiff prepare a literary composition on the Floyd Collins tragedy? Did he submit the composition to the defendants for sale? Did the defendants, knowing that it was offered to them for sale, accept and use that composition or any part thereof? If so, what was the reasonable value of the composition?" (*Id.* at p. 744.) Summary judgment against Desny was reversed as to Desny's implied-in-fact contract cause of action. (*Id.* at pp. 724-725, 752.)

We return to our case.

2. *Lakeshore's Demurrer*

A. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that

the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint . . . , if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

B. *The Requirement of Privity in Implied-in-Fact Claims*

Lakeshore prevailed on demurrer on the basis that a *Desny* cause of action requires privity of contract between the parties. This it does. "Although we recognize that assignability of things in action is now the rule and nonassignability the exception, contracts of a purely personal nature generally fall under the exception. [Citation.] As we see it, the creation of an implied-in-fact contract between an author, on the one hand, and an agent, producer, or director, on the other hand, is of such a personal nature that it is effective only between the contracting parties." (*Rokos v. Peck* (1986) 182 Cal.App.3d 604, 617.) "The rights flowing from such an agreement are qualitatively different from copyright protection, and their recognition creates no monopoly in the ideas involved. A cause of action for breach of an implied-in-fact contract bears upon the relationship between the individual parties and makes breaches of such agreements actionable between parties because of the nature of their *personal*

relationship." (*Id.* at pp. 617-618.) This is so because, in the absence of the alleged contract, there is no protected interest in the idea conveyed. Any person not a party to the contract is free to use the idea without restriction. (*Chandler v. Roach* (1957) 156 Cal.App.2d 435, 441.)

C. *Lakeshore's Demurrer Was Properly Sustained Without Leave to Amend*

The trial court concluded Rosen had failed to allege privity with Lakeshore. We agree. Rosen alleged that he separately submitted his script to Garner/Broken Road under circumstances which gave rise to an implied promise to pay by Garner/Broken Road if they used the script. But Garner/Broken Road did not use the script; according to Rosen's allegations, they instead sold his script to Lakeshore for $250,000. These allegations would support a *Desny* cause of action against Garner/Broken Road, but not Lakeshore. Rosen did not submit the script to Lakeshore and was not in direct contractual privity with Lakeshore. Moreover, even if the *Desny* implied-in-fact obligation to pay were assignable, the written contract attached to Rosen's complaint demonstrates that no such obligation was assigned to, or accepted by, Lakeshore.

Rosen's non-*Desny* causes of action fall with the *Desny* cause of action. His second cause of action, for breach of the implied covenant of good faith and fair dealing, assumes the implied-in-fact *Desny* contract. His third cause of action, for unjust enrichment, does not necessarily require a contractual basis. However, where the claimed enrichment arises out of a conversion of an idea, there is no independent cause of action for unjust enrichment. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

On appeal, Rosen seeks leave to amend, arguing that he could amend his complaint "to further allege why independent creation by Lakeshore could not be established." But even if Rosen could allege that Lakeshore knowingly used a script Garner/Broken Road had stolen from him, this would not establish contractual privity between Rosen and Lakeshore sufficient to support at *Desny* cause of action. Lack of independent creation is not the issue; lack of privity is.[9] Even on appeal, Rosen makes no argument that he could legitimately allege privity of contract with Lakeshore.

3. *Brill and Lakeshore's Anti-SLAPP Motion*

We next turn to the appeal of Brill and Lakeshore of the partial denial of their anti-SLAPP motion.[10]

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[9] Rosen similarly argues that Lakeshore is judicially estopped from denying "access" to the script, in that Lakeshore conceded access in the federal case, and it gained a litigation advantage in that case from its concession. The argument is raised for the first time in Rosen's cross-reply brief, and is therefore considered waived. In any event, the argument is meritless. To be sure, Lakeshore did concede access for the purpose of its motion for judgment on the pleadings on Rosen's copyright cause of action. (*Shame on You Prods. v. Banks, supra,* 120 F.Supp.3d at p. 1148.) But, Lakeshore gained no litigation advantage in federal court by conceding access. In the copyright context, a plaintiff must make a higher showing of substantial similarity between its work and the allegedly infringing work when there is no access shown. (*Id.* at p. 1148 & fn. 133.) Here, Lakeshore conceded access, meaning that for copyright infringement purposes, Rosen needed to establish a *lesser* degree of similarity between his script and Lakeshore's movie.

[10] Although Lakeshore obtained judgment following its successful demurrer, it nonetheless appealed the partial denial of

A. *Standard of Review*

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law. [Citation.]" (*Park, supra,* 2 Cal.5th at p. 1067.)

B. *First Prong Analysis*

As we have discussed, we are concerned only with the first prong of the anti-SLAPP analysis. The issue is whether the cause of action arises "from any act of [the defendant] 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." (Code Civ. Proc., § 425.16, subd. (b)(1).) The statute further explains, "As used in this section, '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: . . . (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

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its anti-SLAPP motion, in the apparent interest of a potential future attorney's fee award. (Code Civ. Proc., § 425.16, subd. (c)(1).) We therefore consider both Lakeshore and Brill as appellants of the anti-SLAPP order, even though we otherwise affirm Lakeshore's dismissal.

constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

This analysis encompasses three steps: First, we must consider the specific actions of the defendants alleged to provide the basis for liability. Second, we consider whether those acts are in furtherance of the defendants' exercise of their right of free speech. Third, we consider whether the speech was in connection with an issue of public interest. (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143.)

1. *Step One – What Conduct is Alleged to Provide the Basis of Desny Liability?*

Applying this three step analysis de novo, we first consider the conduct alleged to provide the basis of liability in Rosen's *Desny* complaint against Brill and Lakeshore. The California Supreme Court recently clarified this inquiry in *Park, supra,* 2 Cal.5th at page 1057. In that case, the court concluded "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, 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." (*Id.* at p. 1060.) "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

Our Supreme Court has already held that, with respect to a breach of contract cause of action, the first prong inquiry must

focus on "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.) In that case, the court focused on the specific conduct the plaintiff had alleged breached the contract (there, filing counterclaims which had allegedly been released) and determined the conduct constituted protected speech/petitioning. (*Id.* at p. 90.) Similarly, in *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885-886, the court focused on the specific conduct alleged to have constituted the multiple breaches of contract alleged.

We now turn to the elements of the *Desny* cause of action, as well as the specific conduct of the defendant alleged to have breached the implied contract.

As we have explained, a *Desny* cause of action for breach of implied contract requires proof of: (1) plaintiff's preparation of the material; (2) plaintiff's submission of the material for sale to defendant; (3) defendant's acceptance and use of the material, knowing it had been submitted for sale; and (4) the reasonable value of the material. (*Desny, supra,* 46 Cal.2d at p. 744; see also *Klekas v. EMI Films, Inc.* (1984) 150 Cal.App.3d 1102, 1114.)

As to the critical question of the conduct alleged to breach the *Desny* contract, Rosen alleged that Brill and Lakeshore breached the implied-in-fact contract "by exploiting [Rosen's] Screenplay to the exclusion of [Rosen], including by failure to afford proper screen credit on the Film." Rosen sought damages of $500,000 and screen credit. The trial court concluded that Rosen's allegations regarding screen credit did, in fact, implicate the defendants' protected speech rights. As we have observed, Rosen did not cross-appeal from that part of the ruling, so we are

concerned only with Rosen's allegations that Brill and Lakeshore "exploit[ed]" the screenplay without paying Rosen.

To be sure, there are two theoretical ways to characterize this allegation. As defendants would have it, the breaching conduct was the alleged exploitation of the screenplay, i.e., the fact that Brill wrote and directed, and Lakeshore produced, *Walk of Shame*. Rosen prefers to identify the breaching conduct not as the making of the motion picture, but the failure to pay Rosen for his script. In this, we conclude that Rosen has the better argument. We consider, as we must on the first prong, the pleadings stating the facts upon which liability is based. (*Area 51 Productions, Inc. v. City of Alameda, supra,* 20 Cal.App.5th at p. 594.) Rosen gave the script to Garner/Broken Road (Brill's alleged partner and Lakeshore's alleged assignor) in the hopes that they would make the movie, and defendants impliedly agreed to pay Rosen if they made it. Rosen wanted Brill and Lakeshore to make the movie; his purpose in shopping the script around Hollywood was to get the movie made. Rosen has no quarrel with defendants for making the movie. In fact, he wanted a movie to be made from his script. The dispute arose because he was not paid. This is precisely the analysis used by the Ninth Circuit Court of Appeal, when it concluded a *Desny* cause of action arose from the failure to pay, and therefore was outside the scope of the first prong of the anti-SLAPP statute. (*Jordan-Benel v. Universal City Studios, Inc.* (9th Cir. 2017) 859 F.3d 1184, 1190-1191 (*Jordan-Benel*).) This conclusion is compelled by *Park*, which directs us not to focus on "a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) Making the movie was "just a step" which led to the non-payment. (*Ibid.*)

Defendants argue that we should distinguish between "idea submission" cases and "bare invoice" cases. In a so-called idea submission case, the court must look at the script submitted and the movie made, to determine whether, and to what extent, the submitted script was actually used. This, according to defendants, demonstrates that such a case is truly rooted in the making of the movie. Defendants would contrast this with a "bare invoice" case, in which the parties agree that the plaintiff was owed for services rendered, but the defendant simply failed to pay. Defendants argue that only a "bare invoice" case is based on the failure to pay. We are not persuaded by the distinction. Defendants have cited no authority for the proposition that in determining the acts on which a cause of action is based, a court should consider which elements of that cause of action are conceded and which are disputed. Instead, we must consider the conduct alleged to constitute the breach. Here, Rosen could have alleged a cause of action based purely on the alleged making of a movie which used his script. In fact, he did so in federal court, alleging that *Walk of Shame* violated his copyright. Had Brill and Lakeshore pursued an anti-SLAPP motion in federal court (see *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 900) with respect to that cause of action, they would have had a strong argument that the cause of action arose from their writing and producing the movie, satisfying the anti-SLAPP first prong. But that cause of action is not before us. Instead, having lost on that cause of action, Rosen is now pursuing defendants *not* for copying his script but for refusing to pay for the script although they allegedly agreed to do so. That cause of action sounds in contract, and is violated by the failure to pay. (See *Jordan-Benel, supra,* 859 F.3d at p. 191 [a *Desny* cause of action arises from a breach of

the promise to pay, because without the promise to pay, the cause of action is preempted by the Copyright Act].)

Finally, defendants suggest that *Jordan-Benel* disagreed with a different Ninth Circuit case, creating a split in authority. In *Doe v. Gangland Prods.* (9th Cir. 2013) 730 F.3d 946, the court considered a cause of action arising out of a documentary television series about criminal street gangs. The plaintiff had agreed to be interviewed for an episode of the show on condition that his identity be concealed in the broadcast. The episode aired without the plaintiff's identity being concealed, and he sued. (*Id.* at p. 950.) The defendant filmmakers brought an anti-SLAPP motion, which the district court denied. The Ninth Circuit reversed, concluding, on the first prong, that the cause of action arose "directly from Defendants' act of broadcasting" the documentary. (*Id.* at p. 955.) The court then found that the plaintiff had met its second prong burden on some of his claims, but not others. (*Id.* at p. 963.) *Doe* does not aid Brill and Lakeshore. The defendant's activity supporting the plaintiff's cause of action in *Doe* was the broadcasting of the documentary with plaintiff's identity not concealed. The only dispute between *Doe* and *Jordan-Benel* is that *Doe* used language suggesting that the first prong analysis was a "but for" test, stating, "But for the broadcast and Defendants' actions in connection with the broadcast, Plaintiff would have no reason to sue Defendants." (*Id.* at p. 955.) In *Jordan-Benel*, the Ninth Circuit stated that, by the use of this language in *Doe*, it did not mean that "a claim arises from any and all conduct that is the 'but for' cause of the claim." (*Jordan-Benel, supra,* 859 F.3d at p. 1192.) Instead, the *Jordan-Benel* court explained, it was simply talking about the specific wrongful act that gave rise to the claim. (*Ibid.*) We see

no conflict in the cases. The wrong in *Doe* was that the producers made a conscious decision to put an unconcealed Doe on the screen. That conduct is at the heart of the documentary and is protected speech. But even if there was a conflict, we would not adopt the dicta in *Doe*. Defendants point to no California authority that the first prong anti-SLAPP analysis is, in fact, a but-for analysis. Instead, as instructed in *Park*, we focus on the elements of the cause of action and the specific conduct alleged to be actionable. Here, that conduct is the failure to pay.

2. *Step Two – Was the Conduct in Furtherance of Defendant's Right of Speech?*

The second question asks whether the conduct, defendants' failure to pay Rosen for the script, was conduct in furtherance of defendants' right of speech. The answer, clearly, is no.

To be sure, movies are generally considered speech. (See, e.g., *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 383, review granted May 10, 2017.) But the question here is whether failing to pay was conduct in furtherance of the speech of the movie. "*Furtherance* means *helping* to advance, *assisting*. (See Oxford English Dict. Online (2d ed. 1989).)" (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166.) Not paying Rosen for the script did not help to advance or assist the speech of the movie in any way. Defendants suggests in a footnote citing to no authority, that failure to pay for the script was in furtherance of speech because the failure to pay "allowed the defendants to release and distribute a movie." The argument is nonsensical; the release of the movie was not in any way impacted by whether defendants paid Rosen for his script. The facts of this case prove the point: the movie was released and Rosen was not paid. If he had been paid, the movie still would

have been released. Taken to its logical conclusion, defendants' argument would hold that a law firm's failure to pay its fax repair person would be conduct in furtherance of its right of petition because the fax was necessary to file papers in court. We conclude the "furtherance" requirement cannot be stretched this far. The complaint does not arise from protected speech, and the court did not err in denying that portion of defendants' anti-SLAPP motion based on their failure to pay Rosen.

In this regard, we find *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 instructive. In that case, the plaintiff alleged that the defendant television network discriminated against him on the basis of age and gender in refusing to hire him as an on-air weather anchor. The court concluded that the first prong of the anti-SLAPP analysis was satisfied, because reading the weather on the air is clearly speech, and choosing whom to hire to do so is conduct in furtherance of speech. (*Id.* at p. 1521.) In *Park*, our Supreme Court distinguished *Hunter*, in the case of a university assistant professor who claimed he was denied tenure for discriminatory reasons. The court explained that choosing who would report on the weather on behalf of the network is conduct in furtherance of that speech, but the university had not shown the choice of faculty involves conduct in furtherance of the university's speech on an identifiable matter of public interest.[11] (*Park, supra,* 2 Cal.5th at p. 1072.) Not all conduct with some relation to speech is in furtherance of that speech; failing to pay for a script is not sufficient.

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[11] The Supreme Court explicitly declined to express an opinion on whether *Hunter* had been correctly decided. (*Park, supra,* 2 Cal.5th at p. 1072.)

3. *Step Three – Was the Speech in Connection With an Issue of Public Interest?*

As we have concluded the complaint does not arise from acts in furtherance of Brill and Lakeshore's right of speech, it is unnecessary to address the question of whether any such speech was of public interest.

DISPOSITION

The judgment of dismissal in favor of Lakeshore following the sustaining of the demurrer is affirmed. The court's ruling partially denying the anti-SLAPP motion to the extent Rosen's complaint is based on failure to pay is also affirmed. On remand, the action may proceed against Brill to the extent it is based on his alleged failure to pay, and against Banks on all causes of action alleged against her.

The parties shall bear their own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

DUNNING, J.*

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