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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

ZIA SHLAIMOUN, Cross-complainant and Appellant, v. HYBRID FINANCE, LTD., Cross-defendant and Respondent.	B269673 (Los Angeles County Super. Ct. No. BC523540)

APPEAL from order of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed.

Law Offices of George P. Eshoo & Associates and George P. Eshoo, for Cross-complainant and Appellant.

Law Offices of Michael Jason Lee and Michael Jason Lee; Dillon, Gerardi, Hershberger, Miller & Ahuja, Sunjina

K. Ahuja and Jessica L. Rasmussen, for Cross-defendant and Respondent.

Cross-complainant and appellant Zia Shlaimoun appeals from an order granting cross-defendant and respondent Hybrid Finance, Ltd.'s (Hybrid) motion under Code of Civil Procedure section 425.16[1] (the anti-SLAPP statute) to strike the fourth cause of action for tortious interference with contract from Shlaimoun's cross-complaint.[2] We affirm the order because (1) Shlaimoun's claim that Hybrid tortiously interfered in his contract with a third party by filing a complaint arose from protected activity as defined by the anti-SLAPP statute, and (2) the litigation privilege precludes Shlaimoun from making the minimal showing required to continue pursuing his claim.

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

[2] Because Hybrid's anti-SLAPP motion was directed at a cross-complaint, later references to plaintiff and defendant should be understood as referring to cross-complainant Shlaimoun and cross-defendant Hybrid.

FACTUAL AND PROCEDURAL BACKGROUND

Hybrid's Complaint

In October 2014, Hybrid filed a first amended complaint alleging causes of action for fraud and conversion against Shlaimoun and Infina Fund Ltd. (Infina). Hybrid alleged that Shlaimoun was the sole owner, officer, and director of Infina, and that Infina held an account at a British bank. According to Hybrid's complaint, Shlaimoun devised a leveraged investment scheme under which Hybrid would deposit an initial $1 million into Infina's account to gain access to $100 million for investment trading, and Hybrid would make monthly payments of 1% (representing 12% annual interest) to maintain access to those trading funds. In May 2010, Hybrid deposited $960,000[3] into Infina's account. Between May and October 2010, Shlaimoun and Infina did not give Hybrid access to the trading funds as anticipated, and by April 2011, Hybrid learned that the account had been depleted and closed. Hybrid sought damages in excess of $1 million.

[3] The remaining $40,000 was credited towards the $1 million deposit based on expenses and other monies laid out by Hybrid's partners.

Shlaimoun's Cross-Complaint

In January 2015, Shlaimoun filed a cross-complaint, naming as defendants Edward Ong and two of Ong's companies (collectively, the Ong cross-defendants), as well as Hybrid. The cross-complaint alleged that Ong entered into a Consulting Agreement with Shlaimoun,[4] and promised to transfer into Infina's account $700,000 that the Ong cross-defendants had on deposit with Hybrid. The purpose of the transfer was so Shlaimoun "could use those funds for fees and costs incident to the Consulting Agreement." Shlaimoun claimed that the Ong cross-defendants breached the Consulting Agreement by failing to disclose the true relationship between Ong and Shlaimoun to Hybrid, or acting with intent to breach the Consulting Agreement. Shlaimoun's only claim against Hybrid was the fourth cause of action for tortious interference with contract. In that cause of action, Shlaimoun alleged Hybrid was aware of the Consulting Agreement and knowingly interfered with the

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[4] The cross-complaint alleges that under the Consulting Agreement, Ong engaged Shlaimoun "to provide consulting services (not as alleged in the Complaint trading services) including consulting on a hydro-electric project in Israel and to advise and consult on proposals and refinancing of a resort and related projects at a fee based upon the market value of such services (collectively the 'Consulting Agreement')." The cross-complaint does not allege any facts to support a later allegation that Hybrid was aware of the Consulting Agreement.

relationship between Shlaimoun and the Ong cross-defendants. The two most relevant paragraphs state:

"41. HYBRID Cross-Defendants knew and know of the terms of the Consulting Agreement prior to the advice given to ONG designed to cause him to renege on the contract when he/it/they filed the Complaint.

"42. HYBRID Cross-Defendants had full knowledge of the Consulting Agreement and with such knowledge interfered with the relationship between [Shlaimoun] and ONG Cross-Defendants intending to disrupt the performance of the Consulting Agreement in order to falsely assert the claims in the Complaint against SHLAIMOUN."

Hybrid's anti-SLAPP motion

In April 2015, Hybrid filed an anti-SLAPP motion, arguing that Shlaimoun's claim arose from Hybrid's filing of its complaint, which was protected conduct, and that Shlaimoun could not demonstrate a probability of prevailing on his claim because Hybrid's conduct was protected by the litigation privilege, as set forth in Civil Code section 47, subdivision (b). Hybrid supported its motion with a request for judicial notice and declarations from one of Hybrid's principals and one of its attorneys.

Shlaimoun's opposition

Shlaimoun opposed Hybrid's anti-SLAPP motion, providing a history of his relationship with the Ong cross-defendants and asserting that Ong instructed Hybrid to transfer $700,000 of Ong's money to Shlaimoun's account to compensate Shlaimoun for services provided under the Consulting Agreement. The opposition claimed, "Hybrid was well aware that the monies were payable to Shlaimoun, and that the payment was based upon Shlaimoun's relationship with the Ong Cross-Defendants. Hybrid appears to have convinced the Ong Cross-Defendants to either assign this money over to it, or somehow transfer rights to the $700,000 to Hybrid, in violation of Shlaimoun's rights under his Consulting Agreement with the Ong Cross-Defendants. Alternatively, Hybrid is falsely claiming that the amount of $960,000 deposited into the account belongs to it, when in reality, about $700,000 had been promised to Shlaimoun as compensation for services that he provided to the Ong Cross-Defendants."

Shlaimoun argued that Hybrid's interference with the Consulting Agreement was not constitutionally protected speech, did not involve a public issue, and was not protected under the anti-SLAPP statute because it was illegal conduct. In support of his opposition brief, Shlaimoun filed his own declaration, with two exhibits attached. Shlaimoun's declaration characterized the Consulting Agreement as an oral agreement that was confirmed by an e-mail attached as

Exhibit A. That exhibit was an October 11, 2009 e-mail from zia.shlaimoun@infinafund.com to "CorpOff – President" which read:

> "Dear Edward,
>
> "Thank you so much for your kind hospitality, it was a pleasure to finally meet.
>
> "As requested, I am happy to offer our services and confirm our fee of $300 per hour plus expenses. I look forward to a long and fruitful business relationship."

The email was followed by a signature block and a footer concerning confidentiality. According to Shlaimoun's declaration, he spent hundreds of hours working for Ong, including getting deeply involved in trying to raise a substantial amount of money for Ong. He assisted Ong with opening accounts to receive funds, but to the best of his knowledge "no profits were ever paid out to Ong or his companies." Instead, Ong called Shlaimoun "to say that he had given instruction to Hybrid to transfer his money across to the Infina Fund Account." Approximately $700,000 of the $960,000 Hybrid deposited into the Infina account was to compensate Shlaimoun for costs and services he performed for the Ong cross-defendants at a rate of $300 per hour. Shlaimoun attached as Exhibit B to his declaration an e-

mail in which he claimed "Ong informed me that he had given instructions to Hybrid to send his money to my account." Exhibit B was a May 1, 2010 e-mail from "CorpOff – DEO" to Shlaimoun that states, "Dear Zia, [¶] I gave Hybrid instruction to send my money to your account if they don't perform soon. [¶] Blessings, [¶] EO."

Order granting Hybrid's motion

The court's tentative ruling explained the court's reasoning for granting the anti-SLAPP motion. First, the court concluded that Shlaimoun's cross-claim for tortious interference with contract was based on an act in furtherance of Hybrid's right of petition or free speech. "The cross-complaint alleges that [Hybrid] interfered with the Consulting Agreement between Shlaimoun and Ong *by filing the complaint in this action*." (Italics in original.) The court acknowledged Shlaimoun's argument that Hybrid had interfered in the Consulting Agreement by "'claiming that the funds in the [Infina Fund] Account belonged to Hybrid, and perhaps by obtaining an assignment of those funds . . . .'" It concluded, however, that nothing in the cross-complaint supported Shlaimoun's argument that his claim was based on anything other than Hybrid's conduct in filing the complaint.

Addressing the second prong of the anti-SLAPP analysis, the court concluded, "Here, Shlaimoun *cannot possibly* show that he will prevail on his intentional

interference cross-claim, because (as discussed above) the subject claim arises from the filing of the complaint in this action. Thus, it is *barred as a matter of law* by the absolute litigation privilege of [Civil Code section] 47[, subdivision] (b). See, e.g., *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960 ('the litigation privilege bars all tort causes of action except malicious prosecution')." (Italics in original.)

DISCUSSION

Inadequate record

The record on appeal does not include a reporter's transcript of the October 29, 2015 hearing on Hybrid's anti-SLAPP motion. On October 18, 2016, before either party had filed a brief, this court invited the parties "to brief the issue of whether defendant's failure to provide a settled statement of the hearing on the special motion to strike warrants affirmance based on the inadequacy of the record." The parties addressed the issue in their respective briefs.

Shlaimoun challenges a court order made after a hearing at which no court reporter was present. The record on appeal does not include a settled statement or agreed statement as authorized by California Rules of Court, rules 8.134 and 8.137. "[I]t is appellant's burden to provide a reporter's transcript if 'an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . .' (Cal. Rules of Court, rule 8.120(b)),

and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4)) . . . ." (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1034, fn. 5.) A reporter's transcript or suitable substitute may not be necessary if the appeal involves legal issues requiring de novo review. (See, e.g., *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 698–700 [transcript not necessary for de novo review of order granting an anti-SLAPP motions].)

Since we are applying a de novo standard of review, "[w]e proceed to consider the issues raised on appeal, cognizant of appellants' obligation to provide an adequate record to demonstrate error as well as our obligation to presume that the decision of the trial court is correct absent a showing of error on the record." (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.)

Anti-SLAPP analysis and standard of review

"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*).)

"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. (§ 425.16, subd. (b)(2); *Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89 [(*Navellier*)].) 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.)

1. Arising from protected activity

Shlaimoun contends the lower court incorrectly viewed the filing of Hybrid's complaint against him as the basis for his claim for tortious interference with contract. He argues that the basis for his interference claim "was the *actual interference* in Shlaimoun's right to $700,000" that the Ong cross-defendants purportedly paid to Shlaimoun pursuant to the Consulting Agreement. Shlaimoun also argues that Hybrid's conduct is not protected under the anti-SLAPP statute because (1) Hybrid's complaint does not involve a public issue, (2) illegal conduct is not protected under the anti-SLAPP statute, and (3) Shlaimoun's claim was a compulsory cross-claim, and the court should have granted leave to amend. We reject each of these arguments.

Hybrid's complaint against Shlaimoun was "in furtherance of [its] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" (§ 425.16, subd. (b)(1)), as that phrase is defined in the anti-SLAPP statute (see *id.,* subd. (e)). A defendant meets its threshold burden of demonstrating that a cause of action arises from protected activity by showing that the act or acts underlying the claim fit one or more of the four categories described in section 426.16, subdivision (e). (*Navellier*, *supra*, 29 Cal.4th at p. 88.) These categories include "any written or oral statement or writing" that is "made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" (§ 425.16, subd. (e)(1)), "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" (*id.,* subd. (e)(2)), or "made in a place open to the public or a public forum in connection with an issue of public interest" (*id.,* subd. (e)(3)), as well as "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" (*id.,* subd. (e)(4)).

The constitutional right of petition includes the filing of a lawsuit. (*Navellier, supra,* 29 Cal.4th at p. 90.) The defendant in *Navellier* was "being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [defendant's] alleged actions

taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong. (§ 425.16, subd. (b)(1).)" (*Ibid.*, fn. omitted.) An activity can be both tortious and protected under the anti-SLAPP statute. (*Id.* at p. 92 [focus is on the activity that gives rise to the asserted liability, not the form of the cause of action].) Ultimately, in determining whether a plaintiff's claim arises from protected activity as defined in the anti-SLAPP statute, "'the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights' [citation]." (*Id.* at p. 93.) Just as "[a] claim for relief filed in federal district court indisputably is a 'statement or writing made before a . . . judicial proceeding' (§ 425.16, subd. (e)(1))," (*id.* at p. 90), so is a complaint filed in state court. Here, but for Hybrid's complaint seeking damages based on the funds it paid into Infina's account, Shlaimoun's claim for tortious interference in a contract would have no basis. (See *Park*, *supra*, 2 Cal.5th at pp. 1062–1064 [reaffirming *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, and *Navellier*, *supra*, 29 Cal.4th 82, and distinguishing between disputes that exist "prior to and independent of" the current action, and those where specific elements of plaintiff's claims depend upon protected activity].) Nothing in Shlaimoun's cross-complaint or his opposition to the anti-SLAPP motion identifies any other act of interference.[5] Without such detail, Shlaimoun

[5] In his opening and reply briefs, Shlaimoun refers to

cannot demonstrate the court erroneously found that his claim arises from protected conduct.

Shlaimoun argues that section 425.16 only applies to activity involving a public issue or matter of public interest. The California Supreme Court rejected the same argument in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*) ["a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance"].) Because Hybrid's complaint falls under the protected category described by subdivision (e)(1) of section 425.16, Hybrid did not have to demonstrate that its statements were "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4); *Briggs*, at p. 1123.)

Shlaimoun next argues that because illegal acts are not protected under the anti-SLAPP statute, the court should have denied Hybrid's motion to strike. A motion to strike must be denied if illegality is conceded or conclusively shown as a matter of law. (*Flatley v. Mauro* (2006) 39

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deposition testimony obtained after the court granted Hybrid's anti-SLAPP motion. This information is not part of the record on appeal, and we do not consider it. Hybrid has moved to strike such references from Shlaimoun's reply brief. We need not grant the motion to strike, as we have no difficulty disregarding information not part of the appellate record.

Cal.4th 299, 316–317 (*Flatley*).) Here, Shlaimoun has not identified any illegal conduct by Hybrid. In *Flatley*, the California Supreme Court affirmed the lower court's denial of an anti-SLAPP motion where plaintiff's claim arose from acts of extortion by the defendant. The court agreed with an earlier opinion out of this appellate district (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), disapproved of on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53), and held "that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Id.* at p. 317.) In both *Flatley* and *Paul*, there was no dispute that the defendant seeking protection under the anti-SLAPP statute had engaged in criminal illegal activity. Because there is no evidence that Hybrid engaged in illegal activity in filing its complaint against Shlaimoun, this argument fails.

Shlaimoun also argues that anti-SLAPP protections do not apply to his claim against Hybrid because it is a compulsory cross-complaint arising out of the same transaction that was the subject of Hybrid's complaint. However, Shlaimoun's tortious interference with contract cause of action does not meet the statutory definition applicable to compulsory cross-complaints. Section 426.30, subdivision (a) makes it compulsory to file a "related cause of action," defined as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or

occurrences as the cause of action which the plaintiff alleges in his complaint." (§ 426.10, subd. (c).) The allegations of Hybrid's complaint focus on Shlaimoun's investment scheme, and make no mention of Ong or his business dealings with Shlaimoun. Shlaimoun's claim is not compulsory because it arises out of Hybrid's filing of the complaint, rather than being based on the monetary transaction that forms the basis for Hybrid's claims in its complaint. (See *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1373–1374 [anti-SLAPP protections apply when gravamen of cross-complaint arises from filing of complaint, not other activities that form the basis for the complaint].)

Finally, Shlaimoun argues the court should have granted him leave to amend his complaint to give him the opportunity to allege that Hybrid's interference extended beyond the filing of the complaint. This argument is meritless in light of the purpose behind the anti-SLAPP statute. "Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy." (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.)

2. Minimal merit

"To satisfy the second prong—the probability of prevailing—the plaintiff must demonstrate that the

complaint is legally sufficient and supported by a prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is accepted. The trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. Although "'the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 962–963, citations omitted.) The party defending against an anti-SLAPP motion need only show that the claim has "minimal merit" to survive an anti-SLAPP motion. (*Navellier, supra*, 29 Cal.4th at pp. 93–94.)

Because Shlaimoun's claim of tortious interference with contract is barred by the litigation privilege, he cannot satisfy the second prong required to defeat an anti-SLAPP motion. The question of whether the litigation privilege applies to a plaintiff's conduct "is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]' [Citation.]" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 38, fn. omitted.) "A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1172.)

The litigation privilege protects, among other things, the act of initiating a lawsuit. (Civ. Code, § 47, subd. (b); see *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241–1244.) Where the existence of a potential privilege is disclosed on the face of the complaint, a plaintiff must allege sufficient facts to show the privilege is inapplicable. (*Green v. Uccelli* (1989) 207 Cal.App.3d 1112, 1124.)

Shlaimoun does not present a valid argument about why the litigation privilege does not bar his claim against Hybrid. Hybrid's complaint is indisputably protected by the litigation privilege, and nothing in Shlaimoun's complaint or declaration establishes any facts that would overcome the privilege. Shlaimoun's declaration states, "It is not Hybrid's filing of this lawsuit that has resulted in the claim for tortious interference with contract; it is the *actual interference* in my right to receive $700,000 placed in the account on the instruction of Mr. Ong, to pay for services, work and labor performed pursuant to a Consulting Agreement between the Ong Cross-Defendants and me. This is what constitutes an interference by Hybrid, with his contractual relationship with Ong." But nowhere does Shlaimoun identify any acts of interference other than the filing of the complaint. On these facts, the lower court correctly concluded that Shlaimoun could not show a probability of prevailing on his claim.

Attorney fees

As part of his appeal, Shlaimoun seeks not only an order reversing the lower court's grant of Hybrid's anti-SLAPP motion, but also an order reversing the award of attorney fees. Shlaimoun offers no authority to support its request. Having concluded the court properly granted Hybrid's anti-SLAPP motion, we also conclude the award of attorney fees was proper.

DISPOSITION

The order granting cross-defendant and respondent Hybrid Finance, Ltd.'s motion under Code of Civil Procedure section 425.16 and awarding attorney fees is affirmed. Costs on appeal are awarded to Hybrid.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

RAPHAEL, J.*

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