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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

JON SHERMAN, Individually and as Administrator, etc., et al., Cross-complainants and Respondents, v. ROBERT ROSS et al., Cross-defendants and Appellants.	B239395 (Los Angeles County Super. Ct. No. SC108787)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Ross Law Inc. and Robert S. Ross for Cross-defendants and Appellants Bonnie Kalcheim and Philip George.

Wittenberg Law and Jeffrey Wittenberg for Cross-defendant and Appellant Robert Ross.

Hanger, Steinberg, Shapiro & Ash, John Demarest; The Law Offices of Alda Shelton and Alda Shelton for Cross-complainants and Respondents.

Apparently tall trees, unlike good fences, do not make good neighbors.

Bonnie Kalcheim, Jack A. Panaro and Philip George, represented by Robert S. Ross, sued their neighbors Alda Shelton and Jon Sherman for public nuisance, private nuisance, breach of covenants running with the land and breach of equitable servitudes based on Shelton and Sherman's alleged refusal to trim a tall hedge and large trees on their property. Approximately six months after the lawsuit was filed, Kalcheim and George obtained a permit from the County of Los Angeles and had a contractor cut down two other trees, located on the County parkway immediately adjacent to Shelton and Sherman's property. Sherman and Shelton then filed a cross-complaint against Kalcheim, George and Ross for violation of Code of Civil Procedure section 16.76733 (trespass for cutting or carrying away trees),[1] fraudulent concealment and negligence.

The trial court denied Kalcheim, George and Ross's special motion to strike the cross-complaint pursuant to section 425.16, concluding "they are being sued for cutting down these trees. That's not a protected activity." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Lawsuit*

This lawsuit involves residential property located in a neighborhood known as Sunset Mesa, an unincorporated area of Los Angeles County between Pacific Palisades in the City of Los Angeles and the City of Malibu. In a first amended complaint filed in

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[1] Code of Civil Procedure section 733 provides, "Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction."

Statutory references are to the Code of Civil Procedure unless otherwise indicated.

March 2011, Kalcheim,[2] Panaro and George[3] allege Shelton and Sherman's property at 3900 Castlerock Road, on the corner of Castlerock Road and Wakecrest Drive, has a tall, dense hedge and trees surrounding the property, which create a blind corner endangering drivers and pedestrians. In addition, they allege the trees and hedge block the ocean view from their homes, located 18283 Wakecrest Drive and 18271 Wakecrest Drive, across the street from Shelton and Sherman's property, in violation of covenants, conditions and restrictions (CC&Rs) recorded against all the parties' properties. The first amended complaint further alleges the hedge and trees violate County planning and zoning ordinances, which limit trees and other landscaping to a height of six feet, and also violate the Sunset Mesa subdivision's CC&Rs, which similarly limit the height of hedges and trees and also prohibit landscaping that interferes with the ocean views of adjacent lots.

The first amended complaint alleges Shelton and Sherman consciously maintain their property, which they rent to tenants, in violation of the County landscaping requirements and governing CC&Rs and in disregard of the public's safety and their neighbors' view rights. Kalcheim, Panaro and George allege they requested that Shelton and Sherman trim the noncomplying hedge and trees, but their requests were rejected. The pleading asserts causes of action for public nuisance, private nuisance, breach of covenants running with the land and breach of equitable servitudes.

2. *The Cross-complaint*

In their cross-complaint filed December 27, 2011 Shelton and Sherman[4] allege their property, which is bounded by Wakecrest Drive on its north side, abuts and is

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[2] Kalcheim is a named plaintiff individually and as Trustee of the Bonnie Lee Kalcheim Famly Trust.

[3] George is a named plaintiff individually and as Trustee of the Trust of Robert George and Helga George.

[4] Sherman is a named cross-complainant individually and as Administrator of the Estates of Edith Sherman and Gerry Sherman.

adjacent to a parkway owned by the County of Los Angeles. Kalcheim and George reside in properties across the street from the parkway. In their first cause of action Shelton and Sherman allege Kalcheim, George and attorney Ross caused two ancient trees located on that parkway to be cut down in the early morning of May 5, 2011 without lawful authority in violation of section 733. Shelton and Sherman seek statutory treble damages of at least $120,000 (that is, three times the estimated replacement cost of "at least $20,000" for each tree).[5]

In their second cause of action for fraudulent concealment, Shelton and Sherman allege Kalcheim, George and Ross unlawfully obtained a permit from the County to cut down the trees although they had no right to do so. Shelton and Sherman further allege the permit issued by the County required notice to Shelton and Sherman prior to removal of the trees, but "cross-defendants intentionally gave cross-complainants completely inadequate notice on May 3, 2011, in order to prevent cross-complainants from having any time to protect their rights and the ancient trees." In addition, Shelton and Sherman allege "[c]ross-defendants concealed the material facts from cross-complainants that cross-defendants had illegally obtained a permit . . ." and further allege Kalcheim, George and Ross failed to disclose pertinent information to the County in connection with their permit application, including that the validity of the CC&Rs upon which they were relying had been subject to litigation since 2004. (Shelton and Sherman also allege the 2004 CC&Rs concerning ocean view rights "were finally held invalid and expunged on November 1, 2011.")

The third cause of action again alleges Kalcheim, George and Ross "illegally obtained a permit to cut down the trees" and asserts the permit they obtained imposed a legal duty to use due care to give Shelton and Sherman meaningful advance notice of their intention to remove the trees. Shelton and Sherman allege Kalcheim, George and Ross "negligently gave [them] completely inadequate notice on May 3, 2011."

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[5] According to Sherman's declaration, filed in opposition to the special motion to strike, the trees were 31 feet and 34 feet tall.

3. *The Special Motion To Strike the Cross-complaint*

Kalcheim, George and Ross filed a special motion to strike each of the three causes of action in the cross-complaint pursuant to section 425.16. They argued the misconduct alleged by Shelton and Sherman arose from the protected exercise of their petition rights, including petitioning the County to obtain a permit to remove the two trees from County land adjacent to Shelton and Sherman's property, as well as from their written notice of the trees' removal, which they contend was given in connection with the pending lawsuit (because they were considering naming the County as an additional defendant) and in furtherance of the County's consideration of their petition for the permit. They also argued there was no probability Shelton and Sherman could prevail on the cross-complaint because the County certified all work in connection with the tree removal had been completed in accordance with the terms and conditions of the permit, the County had affirmatively approved their written notice prior to issuance of the permit and the cross-complaint admitted that advance written notice, in fact, had been received. In addition, Kalcheim, George and Ross asserted any purported misrepresentations in connection with their permit application were privileged under Civil Code section 47, subdivision (b).

In their opposition to the special motion to strike, Shelton and Sherman argued the gravamen of the three causes of action in the cross-complaint is Kalcheim, George and Ross's noncommunicative act of cutting down two trees and their failure to provide the required notice, not any protected speech or petitioning activity. They also asserted they had made a prima facie showing the tree removal was unlawful because Kalcheim and George had admitted in their moving papers they did not have a recorded easement over the subject trees, which, according to Shelton and Sherman, demonstrated they had no right to a permit from the County.

With respect to the merits of the second and third causes of action, in a declaration filed with the opposition papers Shelton stated she did not receive any notice of the tree cutting until the afternoon of May 3, 2011 and explained, "Had I been given adequate

notice, instead of last minute notice, I would have made an ex parte application for a TRO sooner and filed a writ of mandate to contest the permit." In his declaration Sherman stated he was not informed the trees were going to be cut down prior to May 5, 2011 and similarly asserted, "Had I been informed timely, I would have obtained a TRO and sued to invalidate any alleged permit." John Demarest, counsel for Shelton and Sherman, also submitted a declaration stating he had not received advance notice of the May 5, 2011 tree removal.

Kalcheim, George and Ross filed a reply memorandum in support of their motion, which argued, in part, their permit was valid because the governing ordinance allows issuance of a permit to a homeowner when a County tree interferes with the homeowner's view easement over a third party's property. The reply also reiterated that written notice the trees would be removed pursuant to County permits had been mailed to Shelton on April 28, 2011 (although that notice did not specify the date of intended removal) and Shelton had conceded she had actual notice of the intended removal no later than the morning of May 4, 2011 when she gave Kalcheim, George and Ross notice of her ex parte application for a temporary restraining order.

After hearing oral argument on February 21, 2012, the court denied the motion, ruling Kalcheim, George and Ross had failed to demonstrate any of the three causes of action in the cross-complaint arose from protected activity. The court explained its view at the end of the hearing, "Regardless of the procedures that they may or may not have followed in getting a permit or not getting a permit or petitioning or whatever, the case is about the cutting down of the trees. . . . And that is not protected under the statute."[6]

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[6] Kalcheim has submitted two motions for judicial notice with photographs to "assist in orienting the Court to the purpose of Appellants' petitioning activity" and probate orders to correct what she describes as Shelton and Sherman's misleading implication concerning the parties entitled to notice of the County-issued permit. We deny both motions since none of this material was before the trial court when ruling on the special motion to strike.

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[7]

Section 425.16, subdivision (b)(1), provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States 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." Pursuant to subdivision (e), an "'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: (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."

In ruling on a motion under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the

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[7] SLAPP is an acronym for "strategic lawsuit against public participation." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8, fn. 1.)

claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

a. *Step one of the two-part test and mixed causes of action*

In terms of the threshold issue, the moving party's burden is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; see *Scalzo v. Baker* (2010) 185 Cal.App.4th 91, 98.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271.)

When a special motion to strike pursuant to section 425.16 challenges a cause of action that involves both protected and nonprotected activity (sometimes referred to as a "mixed" cause of action), "if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 415; accord, *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1574.) On the other hand, if the allegations of nonprotected conduct are collateral to the substance of the cause of action, their presence does not prevent the court from applying the statute. As we explained in *Fox Searchlight Pictures v. Paladino* (2001)

89 Cal.App.4th 294, 308, "[A] plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" (Accord, *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103.)

In applying section 425.16 to mixed causes of action, "it is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; see *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477-478 ["This dispute [involving ownership of property] and not any protected activity 'is the gravamen or principal thrust' of the action. [Citation.] The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit."].) That is, "the cause of action is vulnerable to a special motion to strike under the anti-SLAPP statute only if the protected conduct forms a substantial part of the factual basis for the claim." (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125.)

This analysis does not require an either-or determination or mean the gravamen of a cause of action must be based only on protected activity or on nonprotected activity. Rather, the proper statement of the rule, as articulated in *Haight Ashbury Free Clinics, Inc. v. Happening House Venture*s (2010) 184 Cal.App.4th 1539, 1551, footnote 7 is: "[W]here the defendant shows that the gravamen of a cause of action is based on nonincidental protected activity as well as nonprotected activity, it has satisfied the first prong of the SLAPP analysis." (Accord, *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra*, 172 Cal.App.4th at p. 1574.)

b. *Step two*

If the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court 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.'" (*Taus*, at p. 714; *Wilson*, at p. 821; *Zamos*, at p. 965.)

c. *Standard of review*

We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; accord, *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1055.)

2. *Los Angeles County Code Provisions Regarding Tree Trimming*

Los Angeles County Code section 16.76.010 prohibits trimming, cutting or removing trees on public property without a written permit:

> "It is unlawful for any person, firm or corporation (other than the director of parks and recreation, with regard to public grounds or public property, or the road commissioner, with regard to public highways, or persons acting under their authority) to trim, prune, cut, break, deface, destroy, burn or remove any shade or ornamental tree, hedge, plant, shrub or flower growing, or to grow upon any public highway, public ground or public property within the county of Los Angeles without the written permit of the

director of parks and recreation, with regard to public grounds or public property, or the road commissioner, with regard to public highways . . . ."[8]

The requirements for a tree cutting permit are set forth in Los Angeles County Code section 16.76.020:

"A permit shall not be granted to any person, firm or corporation, except:

"A. A person, firm or corporation who owns or is the tenant of the property adjacent to that portion of the highway on which the shade or ornamental trees, hedges, plants, shrubs or flowers which it is proposed to trim, prune, cut, break, deface, destroy, burn or remove, grow;

"B. A person, firm or corporation having a valid, unrevoked easement or franchise, with the exercise of which the shade or ornamental trees, hedges, plants, shrubs or flowers interfere, and the trimming, pruning, cutting, breaking, defacing, destruction, burning or removing of which is necessary to the exercise of such easement or franchise;

"C. A person, firm or corporation whose principal business is tree-trimming and maintenance and tree surgery, who in the opinion of either the director of parks and recreation, with regard to public property or public grounds, or the road commissioner, with regard to public highways, is qualified for such business, and who deposits with either the director of parks and recreation or the road commissioner a sum sufficient, in the opinion of either the director of parks and recreation or the road commissioner, to reimburse the county for any expense necessarily incurred to do corrective tree-trimming necessitated by any trimming done by the permittee. . . ."

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[8] A violation of this provision is a misdemeanor. (L.A. County Code, § 16.76.40.)

3. *Shelton and Sherman's Statutory Cause of Action for Trespass by Cutting Trees Does Not Arise from Protected Activity*

Cutting down a tree, without more, is plainly not an act taken in furtherance of the tree cutter's constitutional right of petition or free speech. Just as clearly, filing an application and supporting documents to obtain permission from the County of Los Angeles to cut down the tree is protected petitioning activity. (See, e.g., *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 668-669 [submission of development plan application for government approval involved rights of speech and petition]; *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272 [submission of tract map for approval by planning commission and city council was an act in furtherance of defendants' right of petition and free speech].) However, section 425.16 does not apply simply because the defendant obtained governmental permits for the activity that constituted the allegedly wrongful conduct. (See *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809 [overall thrust of complaint for breach of contract challenged manner in which Wal-Mart dealt with the Wangs; Wal-Mart's pursuit of governmental approvals for its activity was collateral to the parties' private dealings].)

Kalcheim, George and Ross contend Shelton and Sherman's cause of action for trespass for cutting trees arises from their protected permit-seeking activity itself and from conduct in furtherance of that protected activity. They emphasize section 733 proscribes only cutting down trees on public grounds "without lawful authority" and argue Shelton and Sherman must establish the permit they obtained from the County was invalid as an element of their case-in-chief. In this regard they point to allegations in the second cause of action for fraudulent concealment, where Shelton and Sherman assert Kalcheim, George and Ross "unlawfully obtained a permit to cut down the trees" by advancing disputed legal theories and failing to disclose that fact to the County—a direct challenge to the content of their protected speech and petitioning activity.

Shelton and Sherman, on the other hand, argue Kalcheim, George and Ross's liability on the first cause of action is based solely on cutting down the trees, not their

speech or petitioning activity. They stress the County-issued permit is not mentioned in any of the allegations of the first cause of action and argue it is, at most, a defense to their claim.[9] Moreover, although Shelton and Sherman contend the County had no legal authority to grant a permit to remove the trees to anyone but them, they insist Kalcheim, George and Ross's petitioning activity is irrelevant to determining whether the permit was properly issued under Los Angeles County Code section 16.76.020.

The issue is not quite as simple as either side implies. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 66; see *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002.) Nor is the arising-from requirement met merely because the cause of action was arguably triggered by protected activity. (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924.) Thus, that Kalcheim, George and Ross's petitioning activity, which resulted in

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[9] To the extent Shelton and Sherman suggest our determination on this threshold issue—whether the challenged cause of action arises from the cross-defendants' protected activity—must be based solely on the allegations in their pleading, they are wrong. To decide whether the moving party met its burden on this issue, we consider not only the pleadings, but also "'supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 79; see *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1389-1390 ["[t]he court reviews the parties' pleadings, declarations and other supporting documents to determine what conduct is actually being challenged"].) Accordingly, Sherman and Shelton's omission of any reference to the permit while asserting Kalcheim, George and Ross unlawfully cut down the two trees does not limit our inquiry into whether Kalcheim, George and Ross's arguably protected petitioning activities, described elsewhere in the cross-complaint and in declarations filed in support of the special motion to strike, form a substantial part of the factual basis for the claim or are, in fact, only incidental to the cause of action under section 733. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 ["[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning"].)

issuance of a permit, was a necessary prelude to the act of cutting down the trees does not mean the section 733 claim arose from that protected activity.

Kalcheim, George and Ross contend, however, that cutting down the trees did not merely occur after their petitioning activity but was, in fact, conduct in furtherance of the exercise of their constitutional right to petition within the meaning of section 425.16, subdivision (e)(4). This argument is based on a fundamental misunderstanding of subdivision (e)(4)—sometimes known as the anti-SLAPP statutes's catch-all provision. (See *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164 ["Subdivision (e) . . . includes four separate categories of acts which qualify for treatment under the section. . . . Category four provides a catch-all for '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'"].)

Examples of subdivision (e)(4) conduct in furtherance of the exercise of the right of petition or free speech include demonstrating or leafleting to criticize government policy (see *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1245-1246; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 620-621) and refusing on free speech grounds to comply with statutory requirements mandating that drug claims processors provide pharmacy fee reports to insurance companies. (See *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323.) It does not include conduct intended only to enforce or implement the results previously obtained from protected activity. (See, e.g., *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1117-1118 [although entering into settlement agreement during the pendency of a lawsuit is protected activity, lawsuit to enforce the agreement based on defendant's alleged breach thereafter is not protected activity]; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307-1308 [same].) Here, the challenged conduct (removal of the trees) was the ultimate goal of their petitioning activity, not a manifestation or an integral part of it.

To be sure, in *Rusheen v. Cohen, supra,* 37 Cal.4th 1048, upon which Kalcheim, George and Ross rely, the Supreme Court held, in considering postjudgment collection activities such as obtaining a writ of execution and levying on a judgment debtor's property in an abuse of process action, "where the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Id*. at p. 1052.) That is, although the physical act of levying on property involves a noncommunicative physical act, when the gravamen of the abuse of process claim is communicative conduct—in *Rusheen*, filing allegedly false declarations of service to obtain a default judgment—the litigation privilege of Civil Code 47, subdivision (b), applies and protects against torts arising from the privileged declarations. (*Rusheen*, at pp. 1061-1062.)

The second-prong question addressed in *Rusheen*—whether the Civil Code section 47, subdivision (b), litigation privilege applies to certain apparently noncommunicative conduct—is substantially different from the first-prong inquiry at issue here—was the act of cutting down the trees in furtherance of Kalcheim, George and Ross's protected right to petition for a permit. (Cf. *Flatley v. Mauro, supra,* 39 Cal.4th at pp. 322-324 [scope of protection under Civ. Code, § 47's litigation privilege and anti-SLAPP statute is not identical; Civ. Code, § 47 "does not operate as a limitation on the scope of the anti-SLAPP statute"]; *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1519 ["the scope of the litigation privilege and the anti-SLAPP statutes significantly differ"].) As discussed, although protected activity may lurk in the background, to the extent Shelton and Sherman's section 733 claim attacks only the legality of Kalcheim, George and Ross's tree-cutting conduct, it is not expressly based upon, and does not arise from, the exercise of their constitutional right of petition or free speech.

We come to this conclusion with one significant reservation: If Shelton and Sherman were asserting the permit issued by the County was invalid because of misrepresentations or deliberate omissions by Kalcheim, George or Ross in the application process, we would be inclined to hold that protected activity formed a

substantial part of the factual basis for their claim, which, as a result, could properly be challenged under section 425.16. However, as discussed, Shelton and Sherman have disclaimed any intention of introducing evidence or otherwise relying on anything done by Kalcheim, George or Ross to obtain the permit in connection with their section 733 claim, insisting "[n]o activity of Appellants in seeking a permit is relevant or admissible on the issue of the permit's validity."[10] Rather, they simply contend the County had no legal authority under the relevant provisions of the Los Angeles County Code to grant a tree-cutting permit to anyone other than themselves.

We take Shelton and Sherman at their word: No evidence relating to the permit application process may be introduced by them in connection with their first cause of action; and no argument based on the validity of that process, as opposed to the authority of the County to issue the permit, is to be advanced by them in the trial court. With that clear limitation on the nature of their section 733 cause of action, we agree with the trial court's ruling it does not arise from protected activity within the meaning of section 425.16.[11]

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[10] As discussed, in the second and third causes of action of the cross-complaint, Shelton and Sherman have alleged Kalcheim, George and Ross illegally obtained the permit and further allege Kalcheim, George and Ross failed to disclose pertinent information to the County in connection with their permit application. In light of Shelton and Sherman's representations concerning the limited basis for their claim, none of these allegations is properly considered in connection with the section 733 cause of action.

[11] Because we conclude Kalcheim, George and Ross failed to make the threshold showing that the section 733 cause of action is one arising from protected activity, we do not determine whether Shelton and Sherman demonstrated a probability of prevailing on the claim. In particular, we express no view whether removing a tree pursuant to a permit violates Los Angeles County Code section 16.76.010 if it is subsequently determined the permit was not properly issued by the County through no fault of the party who obtained the permit.

4. *Shelton and Sherman Established a Probability of Prevailing on Their Causes of Action Based on Inadequate Notice of the Impending Tree Removal*

The second and third causes of action of Shelton and Sherman's cross-complaint allege Kalcheim, George and Ross, either intentionally or negligently, failed to provide meaningful advance notice of their intention to remove the trees in violation of a duty to provide such notice imposed by the County-issued permit. There is no dispute some notice was given. Shelton acknowledges she learned on May 3, 2011 that the trees would be removed, but asserts that was inadequate for her to obtain a court order to stop the destruction of the trees. Kalcheim, George and Ross, on the other hand, contend that they mailed notice to Shelton on April 28, 2011 and that the County approved this form of notice in connection with the issuance of the permit and explain Shelton had previously refused to accept service of documents by email.

Shelton and Sherman's insistence before this court that these two causes of action involve only Kalcheim, George and Ross's failure to comply with the permit condition and their concealment of their obligation to give timely notice, and not any communicative activity, is directly at odds with express allegations in their cross-complaint. As pleaded, the gravamen of both claims is that Kalcheim, George and Ross's notice to Shelton and Sherman was inadequate. That the notice, apparently given both orally and in writing, was not disseminated in a public forum does not disqualify the statements from protection under section 425.16. (See *Ruiz v. Harbor View Community Assn*. (2005) 134 Cal.App.4th 1456, 1466 [private letters concerning public issues are protected under § 425.16]; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175 [private conversation concerning a controversial plan to purchase a home for a battered women's shelter is protected]; see also *Garretson v. Post, supra*, 156 Cal.App.4th at p. 1522 [notice of nonjudicial foreclosure is protected communication].)

Although communicative activity thus forms a substantial part of the factual basis for these two claims, it is a close question whether the challenged notice, required as a condition of the County-issued permit, is protected under either section 425.16, subdivision (e)(2), as a statement made in connection with an issue under consideration in

an official proceeding, or falls within section 425.16, subdivision (e)(4), as one made in connection with a public issue or an issue of public interest.[12] We need not resolve that issue, however; for, even if Kalcheim, George and Ross established that section 425.16 applies to the second and third causes of action, the motion was properly denied because Sherman and Shelton satisfied their burden of showing a reasonable possibility of prevailing on those claims.

In their opposition to the special motion to strike, Sherman and Shelton presented evidence Kalcheim, George and Ross were required as a condition of the permit to give them notice that the trees would be removed (in other words, that they owed a duty to provide adequate notice) and failed to do so in a meaningful or timely manner—that is, sufficiently in advance of the tree removal to permit Sherman and Shelton to protect their rights. Although Kalcheim, George and Ross dispute many of the facts presented in the opposition papers, as well as Sherman and Shelton's interpretation of the notice condition,[13] in determining whether the party opposing the motion has shown a

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[12] In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, the Supreme Court held a moving party relying on section 425.16, subdivision (e)(1) and (2), need establish only that the challenged statement was made within or in connection with an official proceeding whether or not it pertained to an issue of public significance: "[P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (*Briggs*, at p. 1113; see *id*. at p. 1123 ["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 [under subdivision (e)(1) and (2)] need *not* separately demonstrate that the statement concerned an issue of public significance"].) However, a defendant seeking to strike a cause of action that arises from protected conduct described in subdivision (e)(3) and (4) must demonstrate the matter concerns a public issue or an issue of public interest. (*Briggs*, at pp. 1117-1118.)

[13] Although conceding they were obligated to give Sherman and Shelton advance written notice of the tree removal, Kalcheim, George and Ross contend the County did not intend to require them to advise Sherman and Shelton of the date and time of the work. Based on the dueling declarations submitted in the trial court, it appears likely parol evidence relating to the negotiations between the County and Ross will be required

probability of prevailing, "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.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; accord, *Flatley v. Mauro, supra*, 39 Cal.4th at p. 326.) The evidence presented by Sherman and Shelton is sufficient to show their claims have "minimal merit." (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 ["[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning act *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute"]; *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736 ["[t]he plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP"].)

DISPOSITION

The order denying the special motion to strike the cross-complaint is affirmed. Shelton and Sherman are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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to resolve this issue of construction. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [extrinsic evidence is admissible to interpret a document when a material term is ambiguous].)