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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MATTHEW MILES BARASCH,

Plaintiff and Appellant,

v.

CBS TELEVISION DISTRIBUTION
AS A DIVISION OF CBS STUDIOS,
INC.,

Defendant and Respondent.

B275758, B277999

(Los Angeles County
Super. Ct. No. BC568955)

APPEAL from orders of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Taylor & Ring, John C. Taylor; Esner, Chang & Boyer, Andrew N. Chang and Joseph S. Persoff for Plaintiff and Appellant.

Jackson Walker, Charles L. Babcock, Nancy W. Hamilton; Ford, Walker, Haggerty & Behar, Neil S. Tardiff and William C. Haggerty for Defendant and Respondent.

After appearing on the Dr. Phil Show, Plaintiff Matthew Barasch sued the host¹ and broadcasting station, CBS Television Distribution, as a Division of CBS Studios, Inc. (erroneously sued as CBS Television) (hereinafter referred to as CBS or defendant). According to Barasch, the gravamen of his complaint was that “ ‘he was defamed as a mentally ill attorney on Dr. Phil’s television show, despite representations from producers that his claims of cyber stalking would be investigated and objectively presented on the show.’ ” This appeal followed an order granting defendant’s anti-SLAPP (strategic lawsuit against public participation) motion. Barasch also appealed a subsequent order requiring him to pay defendant’s attorney’s fees.

“Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by [Code of Civil Procedure] section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.”² (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

We conclude defendant carried its burden of showing that Barasch’s claims arose from protected activity, more specifically, the production, content, and presentation of a television show. The show, which was broadcast to a national audience, concerned matters of public interest, including discussion of cyberstalking

¹ Barasch does not dispute that he did not serve Dr. Phil McGraw, the other defendant named in the operative complaint, and the record reflects service only on the broadcasting station.

² Statutory citations are to the Code of Civil Procedure unless otherwise indicated.

in an increasingly digital age, mental health, and the possible side effects of substance abuse. We further conclude Barasch failed to carry his burden to show a probability of success on any cause of action.

We thus affirm the orders granting defendant's anti-SLAPP motion and awarding defendant attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

"Dr. Phil" is a daytime television program hosted by Dr. Phil McGraw, a formerly licensed psychologist. Barasch was a guest on a Dr. Phil show that was taped on October 9, 2013 (the Show). As set forth above, this lawsuit stems from Barasch's appearance on the Show. Barasch describes himself as a once promising young attorney whose life changed after he suffered an injury to the front lobe of his brain "impairing his decision-making and self-control" Barasch acknowledged that he developed a drug dependency, which according to him, led to his undercover efforts to assist police officers in arresting drug dealers. Barasch believed that he was being stalked and harassed, and that his electronic devices had been hacked multiple times. "[C]ontemplating suicide, Barasch sought the help of Dr. Phil." Prior to the taping of the Show, Barasch wrote producers and associate producers over 300 letters and emails. For purposes of this appeal, we, and Barasch, assume the producers and associate producers were defendant's agents.

We describe below in detail Barasch's correspondence underlying his claims.³ We also summarize the content of the

³ The trial court erroneously sustained objections to Barasch's correspondence on the ground that the correspondence

Show, which included discussions of cyberstalking, substance abuse, and mental health. We do not address the reasonableness of defendant's attorney's fees because Barasch himself does not do so.⁴

1. Correspondence Between Barasch and the Producers of the Dr. Phil Show

a. September 10, 2013 letter from Barasch to Wendy

In a letter dated September 10, 2013, Barasch wrote Wendy (who is not further identified): "I am coming to Dr. Phil for help. I have reached the point of hopelessness in my life and if it was not for my desperation to get help, I would not even want to share my experiences on the show. But I will not hold back and will be open about everything.

"From a broader perspective, I cannot be the only person in this world dealing with this issue. The real problem on a day to day basis is that the acts of harassment and bullying are often so insignificant by themselves that you cannot even repor[t] the crime. . . . On a daily basis, in some form or another, I am reminded and terrorized that I am continually being stalked. It

had not been authenticated. Barasch's declaration in opposition to defendant's anti-SLAPP motion was sufficient to authenticate his correspondence. Barasch indicated that the documents are "what [they] purport[] to be." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

⁴ In fact, in ordering Barasch to pay defendant's attorney fees, the trial court reduced the amount of those fees.

has gotten to the point that I have considered suicide and vigilante behavior feeling I had nothing else to lose.”

Barasch continued: “There is a much bigger story here. It is about the fact that the average person does not yet realize that stalking, harassment and terrorism in every conceivable technological format is going to be the [wave] of the future. Just like people did not at first understand the ramifications of identity theft, this will become a common phenomena.”

b. September 17, 2013 letter from Barasch to Lisa Goldman and Wendy

On September 17, 2013, Barasch wrote to Lisa Goldman and Wendy: “I want to just give you an idea of what Dr[.] Phil can do to help my life and the lives of many others facing the same problems:

“Provide forensic experts to analyze my computers, media devices, cell phones to not only demonstrate the extent of the terrorism but to provide an entire additional layer of evidence to validate my allegations.

“Provide private investigators to again confirm, validate and support all of my assertions and to unearth even more evidence that will assist law enforcement [to] identify and convict the perpetrators and lead to the identity of the master minds behind this campaign of terror against me.

“Publicly validate that the terrorism, stalking, bullying and harassment has in fact taken place and is taking place. This very simple public validation by itself will enable me to hold my head [up] high again, reduce my shame, allow my dad to know that his son is not crazy and there is hope, enable me to not be ashamed to talk about it and to basically reclaim my life.

“Utilize the power of Dr[.] Phil to not only uncover the truth behind who is behind this, to put a stop to it and to encourage the FBI or law enforcement to step in and prosecute the perpetrators.

“By validating that I have been terrorized, providing me with the security that if I was to ever or continue to encounter this type of problem, that I will not have any difficulty being believed and getting the law enforcement to take charge.

“Providing awareness to everyone i[n] this country and the world who might be confronted with this type of problem in the future.

“Provide possible solutions to people and potential ways people can protect themselves.

“The very fact that I have gone public with the issue and that knowing I have credibility by its very self will prevent those responsible from ever targeting me again personally.

“Providing me with tools to protect my media devices, phones and computers from being compromised in the future although my experience and my knowledge of one of the organizations behind the cyber invasion leaves me with the unfortunate wisdom to know that if someone wants to hack your computer, they will.

“Provide me with much needed counseling as I do not think I have even touched the iceberg of how deeply this has and continues to affect me mentally.

“In a nutshell, I promise that these cyber terrorists and stalkers really did not realize who they were dealing with when they came after me. I am proud of myself for having been able to even deal with this for so long and not already given up. I have

been relentless with my collection of evidence in ways I think will shock them.”

c. September 29, 2013 letter from Barasch to Beth Thompson

In a handwritten letter dated September 29, 2013, Barasch wrote Beth Thompson: “I just got off the phone with you. This is Matthew Barasch and I am really excited that you and your staff are even considering having me on the show. [¶] Listen, as you know, my life has just sucked. I’m practically suicidal as I don’t foresee much of a future if I continue to be stalked (I apologize for my handwriting) but I’m working my ass off getting evidence ready for our meeting tomorrow morning. You said you devoted the whole day for me tomorrow and that makes me truly believe you guys are serious . . . to help me. [¶] Having said all that, now is my BUT the only thing we talked about on the phone that I am unsettled about is your mentioning mental illness at all. Beth and others I met told me that [they] were shocked that I was such a regular guy and that one of the primary reasons you wanted me on the show was because I didn’t come across as mentally-ill at all. [¶] Let me make it clear, perfectly clear. In no way in the world that I will appear on any show that purports I might even remotely possibly be mentally ill. I’ve been fight[ing] this battle for years & if the stalker[s] for even one second believe that people like Dr. Phil don’t believe me, they will be free to terrorize me forever. [¶] I know you clarified that you might want to mention mental illness for a brief part of the show to help those people that might be delusional. [¶] But I’m coming to you guys to help me. You promised me on the phone at my request that you, if you were even going to mention mental illness[,] you would make sure it is not in any way associated

with me. [¶] You haven't met me yet but here is what I am willing to do. After meeting me, and up and till the production day of the show, which will be way more than enough time after you guys investigate my claims then at that time if you think even a little bit that my contentions are false, then please let me know so I can opt out of being on the show. So again fair is fair—I know you said journalism means you have to mention for a few moments mental illness, but this is not really a news show. I can understand briefly mentioning the term, but not in association to me at all. There are too many and too much evidence to devote more than a minute or so to mental illness—it would ruin my life—I need to ensure that my dad does not die thinking I am not 100 percent sane.”

Based on this letter, Barasch repeatedly asserts that defendant agreed to his requests to evaluate him and allow him to “opt out” of the show if he were deemed mentally ill. For example, Barasch states that “wanting Defendants to be confident Barasch was sane, he requested a mental examination, a drug test and a forensic examination of his devices, all take place preproduction, and if the results of the three conditions indicated Barasch was mentally ill, then Defendants would voice those concerns, and either party had the opportunity to opt out. Thomson agreed to that”

We observe that this letter does not support Barasch's assertion that Thomson (or defendant) agreed to his request. There was no evidence Thomson read Barasch's handwritten letter or agreed to allow Barasch to “opt-out” based on the results of Barasch's mental health assessment.

***d. Barasch's correspondence with
Rachel Phillips***

On October 7, 2013, two days prior to the taping of the Show, Rachel Phillips wrote Barasch: “There is a lot you will find out on the stage for the first time . . . like what Dr. Phil has to say & think. We don’t share information like that before the show.” Phillips also wrote Barasch asking him if he was wearing a blue hat on a particular day. Barasch responded that he was and then asked: “I beg you, please tell me I’m going to be happy about that footage[.]”

In other correspondence, Barasch asked Phillips if the Show would “ambush” him. The record contains no response.

2. The Show

The Show⁵ began with a prerecorded film of Barasch. Dr. Phil states therein that Barasch believed he was monitored constantly and had 1,784 pieces of evidence to prove it (a number Barasch later confirms). An unidentified narrator asked: “Is he dealing in reality . . . or paranoia?” Using prerecorded films, Barasch explains his theory that an “organization” is stalking him.

In the studio, before a live audience, Dr. Phil asks Barasch why he wants to be on the Show. Barasch answers that he wants an open investigation. Barasch and Dr. Phil agree that the “evidence wins.” The next several segments of the show present Barasch’s evidence of the stalking both by using prerecorded videos and by asking Barasch to explain the reasons why he

⁵ A copy of the Show was included in the record and was reviewed by the Court.

believed he was being followed and who he believed may have been following him. (According to Barasch, these segments did not reflect the full panoply of evidence he had provided and did not portray the evidence objectively.)

The segments describing Barasch's evidence of stalking included a discussion of a video that Barasch believed would depict him being followed in a grocery store. As presented on the Show, the grocery store video showed Barasch was not followed as he purchased his groceries. In another segment, a computer expert assigned to evaluate Barasch's electronic devices explained that he found no evidence that the devices had been hacked. In a third segment, Dr. Phil described evidence that one of Barasch's cell phones had been "compromised." As a result, the phone company exchanged his phone for a new one.

A video of a friend of Barasch was played in which the friend expressed his strong belief in Barasch's stalking claims. Among other things, Barasch's friend explained: "Matt is too smart to be crazy." Another friend in the audience also expressed support for Barasch.

In a prerecorded video, Barasch discussed his prior use of methamphetamine and indicated that he had not used any controlled substance for six months. Barasch explained that initially he noticed his use of methamphetamine coincided with someone stalking him. Later he pretended to be "high" and noticed that the stalking continued. Barasch was shown leaving a drug testing facility. During the Show, Dr. Phil announced that Barasch tested negative for all controlled substances.

Approximately 40 minutes into the approximately 60-minute show, Dr. Phil presented a graphic display depicting the long term effects of methamphetamine use, which according

to the graphic included paranoia. Barasch agreed that substance abuse was an “alternative explanation.” Barasch explained that “it could be perceived as a logical explanation but it can also be the perfect time to stalk me, if there was a schizophrenic person and he reported he was being stalked, you probably wouldn’t believe him because he’s schizophrenic.”

Dr. Phil later presented graphics depicting the symptoms of personality disorders. Dr. Phil described this as “food for thought.” Dr. Phil indicated: “[I]f you were problem solving this you would have to put it on the short list of considerations.”

Portions of Barasch’s prerecorded interview with Dr. Charles Sophy were played for the studio and national audience. Dr. Sophy explained that he concluded Barasch was “not crazy,” “not psychotic,” “not . . . delusional and confused and hallucinating.” Sophy indicated that Barasch had drugs in his system, had suffered brain damage, and was highly anxious. Dr. Sophy further stated that being anxious can affect a person’s perception.

At the end of the Show, Barasch proposed: “Can I make a trade? . . . I will go through every single bit of therapy that you think I should explore if you would just open that one door to have all of my evidence inspected by the FBI.” Dr. Phil responded: “Well, I can certainly make the referral to people who will listen. . . . I don’t speak for the FBI; I can’t tell you what they will do.”

3. First Amended Complaint

Barasch’s first amended complaint (complaint), filed in propria persona, alleged causes of action for breach of a written contract, breach of an oral contract, breach of the implied covenant of fair dealing, fraudulent inducement, fraud, negligent

misrepresentation, negligence, violation of Business and Professions Code section 17200, intentional infliction of emotional distress, negligent infliction of emotional distress, slander, and libel. In our discussion below, we summarize Barasch's allegations for those causes of action he is pursuing on appeal. ⁶

4. Anti-SLAPP Motion

In its anti-SLAPP motion, defendant argued that plaintiff was a limited purpose public figure and must demonstrate that defendant acted with actual malice. Defendant also argued that releases signed by plaintiff barred his lawsuit.⁷

5. Barasch's Opposition to the Anti-SLAPP Motion

In opposing defendant's motion, Barasch, now represented by counsel, contended: "Dr. Phil uses his show to exploit guests who come to him seeking help, often with mental or emotional vulnerabilities. He bullies, mocks, abuses, name calls and

⁶ On appeal, Barasch makes no argument with respect to his negligent misrepresentation, negligence, negligent infliction of emotional distress, or slander causes of action. By failing to address these causes of action in his opening brief, Barasch has abandoned them. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 684 [plaintiff abandoned challenge to order striking two claims because of failure to address those claims in opening brief]; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 ["This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record."].)

⁷ Because we conclude that Barasch failed to present a prima facie case for any of his causes of action, we do not address defendant's arguments concerning actual malice or the releases.

humiliates the guest in front of a live audience, providing a train wreck type of reality TV show, geared to achieve high ratings. . . . He and his producers will promise and say anything to get guests for the show, regardless of the emotional harm they will suffer once they're a victim of Dr. Phil. . . . Plaintiff is yet another victim who sought support from Dr. Phil, who was promised to have his issues fully investigated by various experts, but then abused and humiliated by Dr. Phil on the show." Barasch also complained that the episode showed footage from Dr. Sophy's "private examination" of him. Barasch further claimed that the Show selectively introduced evidence to discredit him and improperly portrayed him as suffering from numerous mental disorders.

In his declaration in opposition to the anti-SLAPP motion, Barasch described himself as suffering from a traumatic brain injury. He indicated that he had previously used drugs, and had worked as a confidential informant in Florida. Then, for the next five years, he was stalked and his electronic devices were accessed without his permission. Barasch wanted to appear on the Dr. Phil show so that Dr. Phil could investigate who was stalking him. Barasch told "Dr. Phil that I [Barasch] was extremely sensitive to any discussion of mental illness." Barasch also told producer Beth Thompson he would not be on a show that discussed mental illness.

Barasch believed that the producers of the Dr. Phil Show wanted to help him. Being asked to identify his goals "along with the way I was being treated, made me completely trust that Defendants were my friends and working alongside me to produce a compelling Show about cyberstalking that would help me and the public." "Defendants combine the art of persuasion

and the tricks of television production to manipulate, edit and transform a Show into presenting the point of view of their choice”

With respect to his preproduction meeting with Dr. Charles Sophy, Barasch explained: “I was driven to Dr. Sophy’s house and upon arriving there, I learned for the first time that the meeting was being filmed. I had no idea that Dr. Sophy’s meeting with me was to be part of the Show. I was wearing a tee shirt. I walked out of the house refusing to participate. Dr. Sophy followed me outside, tried to gain my confidence by sharing with me that he was like me, a gay man. He told me I was completely sane, non-delusional and a genius and he promised to say that on the Show. Further trying to instill trust in him, he lent me a dress shirt to wear. I agreed to be filmed at this time, because I thought he would say I was sane and being followed.” Barasch further averred that Dr. Phil was not licensed to diagnose him.

Barasch also presented a declaration from Daniel Giedt, a psychiatric nurse.⁸ According to Giedt: “During September and October 2013 . . . I would diagnose Matt [Barasch] as suffering from the following: an Acute Stress Disorder, Bipolar Disorder with Psychotic Features, Narcissistic & Antisocial Personality Traits, and finally, a Substance Use Disorder.” Giedt further averred that “Matt had mental problems before meeting [with] Dr. Phil and his producers of which . . . Dr. Phil and his producers were aware; however, Matt suffered new, different and exacerbated mental problems and emotional injury after the

⁸ The parties dispute the admissibility of Giedt’s opinion, but for purposes of this appeal, we assume it was admissible.

severe emotional distress inflicted by . . . Dr. Phil and his producers.”

John Taylor, who had represented Barasch in a prior personal injury case, stated in a declaration that he had spoken to a producer of the “Dr. Phil” show in connection with Barasch’s participation on the Show. The producer “told me [Taylor] they were investigating his [Barasch’s] claims of being followed and terrorized online. The producer told me all of Matt’s electronic devices would be examined by a forensic computer expert.” Taylor stated that the unidentified producer acknowledged that Barasch had requested Taylor to review any “legal documents” Barasch would be asked to sign, but Taylor had never received any documents to review.

6. Trial Court Order

The trial court granted defendant’s anti-SLAPP motion. It dismissed defendant’s demurrer as moot. The trial court subsequently awarded defendant its attorney fees albeit in a reduced amount. We consolidated the appeal from the order granting the anti-SLAPP motion and the appeal from the order awarding attorney fees.

DISCUSSION

We review de novo the denial of an anti-SLAPP motion. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*)). “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.]” (*Ibid.* at p. 1067.)

We “engage[] in a two-step process, determining first whether the defendant made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the defendant’s exercise of a right to petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the statute; and if so, whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 628.)

The anti-SLAPP statute describes claims within its purview: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

The anti-SLAPP statute defines “‘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’ ” to include “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(4).) Here, defendant relies on this definition in moving to strike Barasch’s claims.

I. Barasch's Claims Arise Out of Protected Activity

“[I]n ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability.” (*Park, supra*, 2 Cal.5th at p. 1063.) Application of the anti-SLAPP statute does not “turn on how the challenged pleading is organized.” (*Baral v. Schnitt, supra*, 1 Cal.5th at p. 392.) “‘[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.’” (*Id.* at p. 393.) Our high court rejected the argument that “‘a garden variety breach of contract and fraud claim’” fell outside the purview of the anti-SLAPP statute, holding instead that the defendant’s activity, not the form of the action is critical. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-93.) “Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the ‘“power to rewrite the statute. . . .”’” (*Id.* at p. 92.) We “disregard” the plaintiff’s labeling of the claim and “instead ‘examine the *principal thrust* or *gravamen* of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies’ and whether the trial court correctly ruled on the anti-SLAPP motion.” (*Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc.* (2015) 235 Cal.App.4th 361, 368; see also *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164-165 [complaint for damages for making secret recording in connection with an investigative report was an act in furtherance of the exercise of free speech].)

Barasch describes the gravamen of his complaint: “ ‘Plaintiff essentially claims that he was defamed as a mentally ill attorney on Dr. Phil’s television show, despite representations from producers that his claims of cyber stalking would be investigated and objectively presented on the show.’ ” Barasch’s own description of his claims demonstrates that they arise from the creation, content, and presentation of a television show, which by definition is conduct in furtherance of the right to free speech. (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 [“The creation of a television show is an exercise of free speech.”]; see also *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1521 [citing *Tamkin*].) Although Barasch does not concede this conclusion, he does not contest it on appeal either. In a nutshell, his claims center on his disappointment and feelings of betrayal about the contents of the Show. This is the theme of his claims whether he calls that disappointment and betrayal a fraudulently induced breach of a purported contract about what would be the contents of the Show, criticizes aspects of the Show as a breach of fiduciary duty, asserts the contents were defamatory and caused him emotional distress, or contends that Dr. Phil’s discussion of his mental condition was improper under Business and Professions Code section 17200.

II. The Statements Concerned an Issue of Public Interest

The next question is whether the subject of the Show was one of public interest. Courts have construed the meaning of “public interest” broadly. (*Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039-1042.) The issue must be one in which the public is interested, not necessarily an issue of

significance. (*Id.* at p. 1042.) Statements are in the public interest if they (1) involve a person in the public eye; (2) affect a large number of people; or (3) involve a topic of widespread public interest. (*Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.) “[A] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.” (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 82.) “[A] person cannot turn an otherwise private matter into a matter of public interest simply by communicating it to a large number of people.” (*Ibid.*)

Barasch does not dispute that cyberstalking is an issue of public interest. Nor does he dispute that mental health can be a matter of public interest. Instead, he argues that the Show narrowly focused only on *his* mental health, and no public interest exists in *his* mental health.

Barasch’s argument, made for the first time on appeal, lacks merit because it does not accurately describe the content of the Show.⁹ The Show did not focus solely on Barasch’s personal mental health. It began with a description and evaluation of his claims of cyberstalking and the “organization” behind the cyber-

⁹ By failing to raise the issue in the trial court, Barasch forfeited it. (*Hunter v. CBS Broadcasting Inc., supra*, 221 Cal.App.4th at p. 1526; [declining to consider argument concerning public issue raised for the first time on appeal]; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [“ ‘ ‘ ‘issues raised for the first time on appeal which were not litigated in the trial court are [forfeited]’ ” ’ ”].) We, however, choose to consider the argument, which, as set forth in the text, lacks merit.

stalking discussed in the Show. Although Barasch challenged the thoroughness of defendant's presentation of evidence, cyberstalking was one of the main themes aired in the Show.

In addition, the mental health portion of the show was not focused primarily on diagnosing Barasch's mental health issues. Instead, Dr. Phil suggested that lingering side effects from methamphetamine use or personality disorders may be an alternative explanation to Barasch's persistent belief that he was followed, stalked, and terrorized. Even Barasch agreed that these lingering effects of drug abuse may explain his belief that he was being stalked and terrorized.

Public interest is interpreted broadly to include " 'any issue in which the public is interested.' " (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 675, italics omitted.) Barasch described the Dr. Phil show as having "millions of viewers." These "millions of viewers" confirmed that the Show concerned matters of public interest. (*Tamkin v. CBS Broadcasting Inc., supra*, 193 Cal.App.4th at p. 144 [fact that an episode of the *CSI* television show contained an issue of public interest was supported "by the posting of the casting synopses on various Web sites and the ratings for the episode"].)

Barasch's reliance on *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098 is misplaced. In *Buschel*, the plaintiff sued the defendant for an article published in a newsletter entitled "*Man stripped of UK medical license runs local rehab.*" (*Id.* at p. 1101.) The appellate court held that "[t]he licensing status of a single rehabilitation facility is not of 'widespread, public interest.' There is no showing that the San Clemente rehabilitation facility impacts, or has the potential to impact, a broad segment of society, or that the statements

were part of some larger goal to provide consumer protection information.” (*Id.* at p. 1105.) The court further explained: “The eBulletin statements about Sovereign’s San Clemente rehabilitation facility were simply comments about the purported license status of that particular facility. They did not concern treatment and rehabilitation facilities, in general, or even all of Sovereign’s facilities.” (*Id.* at p. 1106.) In contrast to *Buschel*, here, the allegations in the complaint and the subject matter of the Show were broader than Barasch’s individual mental health, and the national audience confirmed it was a matter of public interest.

III. Barasch Failed to Demonstrate a Probability of Success on Any of His Causes of Action

“To satisfy the second prong, ‘a plaintiff responding to an anti-SLAPP motion must “ ‘state[] and substantiate[] a legally sufficient claim.’ ” [Citation.] Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” ’ ” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis*).) Barasch has failed to shoulder this burden.

A. Contract Causes of Action

The elements of a contract cause of action are (1) existence of a contract; (2) plaintiff’s performance; (3) defendant’s breach; and (4) damages. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.) “ ‘ “The [implied] covenant of good faith and fair dealing . . . [is] implied by law in every contract” ’ [Citation.] The covenant is read into contracts

and functions ‘ “as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.” ’ [Citation.]” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244, italics omitted.)

Barasch alleged that his causes of action for breach of a written contract and the implied covenant of good faith and fair dealing were based on letters, emails, and documents. According to the complaint, defendant agreed to “investigate Barasch’s claims and evidence, provide Barasch with a drug test, complete psychological examination and a computer forensic specialist and to avail themselves of all resources necessary to assist Barasch [in] resolv[ing] his stalking dilemma.”

Barasch also alleged the following purported oral contract: “On October 9, 201[3], Barasch and Defendants entered into an oral agreement witnessed by the studio audience.” “Barasch and Defendants made mutual promises pursuant to that Agreement constituting consideration.” “Defendants breached the oral contract by failing to provide any meaningful reexamination or investigation of the evidence” At oral argument, Barasch elaborated that the oral contract was the “trade” he proposed at the end of the Show, to wit, that he would “go through every single bit of therapy” that Dr. Phil recommended if Dr. Phil would “just open that one door to have all of [Barasch’s] evidence inspected by the FBI.”

These contracts alleged in the complaint, however, are different from the one he now champions on appeal. Here, Barasch argues only that defendant breached its promise to him

because it “made no effort to help Plaintiff [Barasch] with his goals.” On appeal, Barasch argues, “Defendants promised to help Plaintiff, but they made no effort to do so.” Barasch cites his handwritten letter to Thomson as evidence of a prima facie case for all of his contract causes of action.

By ignoring the allegations in the complaint, Barasch cannot demonstrate that the trial court erred in concluding that Barasch failed to establish a prima facie case on his contract-based causes of action. The issues in an anti-SLAPP motion are framed by the pleadings. (*Paulus v. Bob Lynch Ford, Inc.*, *supra*, 139 Cal.App.4th at p. 672.) Like the trial court, our inquiry “is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.” (*Baral v. Schnitt*, *supra*, 1 Cal.5th 376, 384-385.) Because Barasch failed to proffer evidence to support the contract claims he actually alleged in the complaint, as opposed to his new theory on appeal, the trial court properly granted the motion to strike these causes of action.

Even if we were to consider Barasch’s new contract theory on appeal—that defendant promised to help him achieve his goals—that theory provides no basis for concluding there was error below. In a nutshell, there was no written contract indicating that defendant promised to advance Barasch’s goals. Barasch’s letter to Thomson was not indicative of a written contract between the parties because there was no evidence that Thomson (or defendant) agreed to the terms requested by Barasch in his letter. Mutual assent is necessary for contract formation. (*Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1010.) Barasch’s belief that the producers were

interested in assisting him does not create a contractual obligation on their part.

Turning to his claim of breach of an oral contract, Barasch cites no evidence of an oral contract in which defendant promised to assist him with his goals. There was evidence that Barasch described his goals in a lengthy letter to Goldman and Wendy quoted above. Once again, Barasch cites no evidence indicating that defendant orally agreed to further his goals or any specific goal.

Barasch has also failed to cite to any evidence supporting a prima facie case of the elements of a contract cause of action based on the contracts alleged in the complaint, and we find none in the record.¹⁰ With respect to the purported written contracts, there was no evidence that defendant agreed to any request in Barasch's letters, emails and documents. With respect to the oral contract Barasch highlighted at oral argument, Barasch presented no evidence that Dr. Phil's purported failure to refer Barasch's evidence of cyberstalking to the FBI damaged Barasch. Damages for emotional distress and punitive damages generally are not available for a breach of contract, and Barasch does not argue that his contract claims present any exception to that rule. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515-516; see also *Maxwell v. Fire Ins. Exchange* (1998) 60 Cal.App.4th 1446, 1449.)

¹⁰ We assume for purposes of this appeal that we may consider contracts that Barasch did not advocate in his appellate briefs and raised only at oral argument.

B. Misrepresentation Causes of Action

On appeal, Barasch argues he established a prima facie case of fraud. Barasch failed to demonstrate probability of success on his misrepresentation claims.

1. Fraud

“ ‘ “The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” ’ ” (Beckwith v. Dahl (2012) 205 Cal.App.4th 1039, 1060.) “Each such element must be alleged with particularity.” (Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn. (2018) 19 Cal.App.5th 399, 428.) “Thus, the plaintiff must plead the “ ‘ “ ‘how, when, where, to whom, and by what means the representations were [made].’ ” ’ ” (Thrifty Payless, Inc. v. Americana at Brand, LLC, supra, 218 Cal.App.4th at p. 1239.)

Barasch’s fraud cause of action is based on the allegation that defendant’s and its agents’ misrepresentations induced Barasch to participate in the Show. Barasch alleged defendants “either affirmatively made representations about or intentionally concealed that the Show was not going to have anything to do with stalking but [would be] only about mental illness.” In support of this assertion, in his declaration Barasch stated that he told Thomson, by means of Barasch’s handwritten letter, that he would not be on the Show if it referenced mental-illness. Barasch stated in his declaration, “I had asked repeatedly how the show was going to proceed and the producers told me to trust them and Dr. Phil.”

This evidence is insufficient to demonstrate a prima facie case of fraud. Barasch's statements to Thomson do not support the conclusion that Thomson (or defendant) made any misrepresentation to him. Barasch's letter to Thomson states that she told him mental illness might be mentioned on the Show "to help those people that might be delusional." Barasch acknowledged, "I know you said journalism means you have to mention for a few moments mental illness" Moreover, his evidence that he was simply told to "trust them and Dr. Phil" suggests that defendant made no specific representation concerning the content of the Show. Additionally, Barasch cites no evidence of justifiable reliance. Phillips warned Barasch that he could not learn of Dr. Phil's conclusions in advance of the Show. She wrote him "[t]here is a lot you will find out on the stage for the first time . . . like what Dr. Phil has to say & think. We don't share information like that before the show."

2. *Fraud in the inducement*

Barasch fails to identify a viable theory supporting his cause of action for fraud in the inducement and therefore fails to demonstrate any error in striking this cause of action. Barasch identifies no contract that defendant entered into without any intention to perform. Although, Barasch states that defendant assured him there would be no discussion about his mental health on the Show, the record does not support his assertion. The record demonstrates that Barasch made that request, but defendant refused to reveal the contents of the Show in advance of the Show. Even though Barasch asked for the producers to promise he would "be happy about that footage," there is no evidence defendant agreed to this request.

Additionally, Barasch does not identify or cite to a contract that he signed that was induced by fraud. Fraud in the inducement “ ‘occurs when “ ‘the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable.’ ” ’ ” (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294-295.) In short, Barasch has failed to demonstrate a prima facie case of fraud in the inducement.

C. Breach of Fiduciary Duty

“The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.” (*Oasis, supra*, 51 Cal.4th at p. 820.)

In his complaint, Barasch alleged: “Defendants breached their fiduciary duty to Barasch by among other things making misrepresentations and omitting material facts to induce Barasch into participating on the Show and practicing medicine without a license.” These allegations do not demonstrate either a fiduciary duty imposed by agreement or one imposed by a legal relationship. (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 447 [fiduciary duties are either imposed by law or undertaken by agreement].)

For the first time on appeal, Barasch states that his cause of action for breach of a fiduciary duty is based on his fiduciary relationship with Dr. Charles Sophy. On appeal, Barasch argues “by manipulating Plaintiff in order to further the interests of the Show at the expense of Plaintiff’s best interests, Dr. Sophy breached his fiduciary duty toward Plaintiff.” As evidence of a prima facie case, Barasch cites to his own declaration, in which

Barasch explains that he initially refused to be filmed but ultimately agreed to it because Dr. Sophy gained his trust.

First, this argument is untethered to the actual allegations in the complaint. Second, Barasch does not explain how Dr. Sophy's purported gaining of Barasch's trust creates a fiduciary duty between defendant and himself. Third, although a doctor patient relationship is a fiduciary one (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748), Barasch does not demonstrate how Dr. Sophy breached such a fiduciary relationship. Barasch does not argue that Dr. Sophy disclosed confidential information, nor could he given that Barasch ultimately consented to televising the session for a national audience. Barasch cites legal authority for the proposition that a doctor must reveal pertinent information to a patient. (*Wohlgemuth v. Meyer* (1956) 139 Cal.App.2d 326, 331.) Barasch, however, fails to explain how this duty applies to this case or provide evidence that Dr. Sophy breached this duty. Without identifying the alleged breach and providing evidence to support a prima facie case, Barasch has failed to show the trial court erred in concluding this cause of action for breach of fiduciary duty should be stricken.

D. Business and Professions Code Section 17200

Although in his complaint, Barasch alleges various violations of Business and Professions Code, section 17200, on appeal, he limits his argument to just one—"diagnosing [him] with numerous mental disorders without a medical license." We presume that diagnosing a person with mental disorders without a license falls within the definition of an unfair business practice

under section 17200.¹¹ Dr. Phil expressly disavowed any specific diagnosis. Instead, Dr. Phil indicated that personality disorders may be an explanation for Barasch's belief that he was followed: "I'm not saying it's the right explanation but it would be one of the ones that if you were problem solving this you would have to put [it] on the short list of considerations." Barasch agreed on air that personality disorders could be an alternative explanation.

We acknowledge that Dr. Phil suggested Barasch may suffer from a mental disorder. Barasch, however, cites no authority supporting his contention that suggesting that mental disorders merited consideration in evaluating Barasch's cyberstalking claims constitutes the unlawful practice of

¹¹ Under Business and Professions Code section 17200, any unlawful, unfair, or fraudulent business practice is deemed to be unfair competition. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) Business and Professions Code section 2052, subdivision (a) provides: "Notwithstanding Section 146, any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment."

medicine. He therefore fails to demonstrate a prima facie case of breach of fiduciary duty.

E. Intentional Infliction of Emotional Distress

“The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff’s injuries were actually and proximately caused by the defendant’s outrageous conduct.” (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.)

Barasch describes his cause of action for intentional infliction of emotional distress as follows: “Plaintiff’s evidence shows that Plaintiff approached Defendants with a desperate plea for help. [Citation.] When Defendants offered to have Plaintiff on their show in order to help him with his cyber-stalking issues, Plaintiff made it clear that he would not agree to be on the Show if they discussed his mental illness. [Citation.] Defendants assured him they would not discuss his mental illness, and Plaintiff appeared on the Show. [Citation.] When Plaintiff appeared on the Show, it became clear to Plaintiff that they were taking advantage of him—not only did they not put forth any legitimate effort to help Plaintiff with his issues, but they took advantage of his vulnerability and made a spectacle of him, portraying him as mentally ill before a national television audience.”

As previously explained, Barasch mischaracterizes the record to the extent he states that defendant promised him there would be no discussion of mental illness on the Show.

Additionally, Barasch fails to cite any legal authority supporting the proposition that defendant's conduct was outrageous, an essential element of the tort of intentional infliction of emotional distress. " 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " (*Cochran v. Cochran, supra*, 65 Cal.App.4th at p. 496.) Barasch, moreover, failed to proffer evidence rising to the "outrageous" level sufficient to support an intentional emotional distress claim.

Barasch cites *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832 but to no avail. In that case, the court concluded that the failure to reimburse the plaintiff for mileage for driving his truck on work-related errands did not support a claim of intentional infliction of emotional distress. We fail to see how *Vasquez* supports any conclusion that the conduct in this case was outrageous, and Barasch offers no other support.

F. Defamation

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory (4) unprivileged, and (5) has a natural tendency to injury or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) Defamation does not exist without a falsehood. (*Id.* at p. 1370.)

Barasch contends: "Defendants' graphic portrayal of Plaintiff as mentally ill is libelous on its face because there is no inducement, innuendo, or other extrinsic fact necessary for Defendant's graphic to have a defamatory effect on Plaintiff. As the graphic during Defendants' Show was a writing or other fixed

representation to the eye which exposed Plaintiff to ridicule, the graphic qualifies as libel.”

On appeal, Barasch does not identify the graphic that he claims to be libelous on its face. No graphic on the Show expressly identified him as mentally ill. The Show included graphics listing (1) the effects of long term use of methamphetamine, (2) the symptoms of paranoid personality disorder; and (3) the symptoms of schizotypal personality disorder. Dr. Phil described them as “alternative explanation[s].” He further indicated: “I’m not saying it’s the right explanation.”

Barasch may be challenging the use of graphics to suggest he was mentally ill. Barasch, however, cites no evidence supporting a prima facie claim that a portrayal of him as mentally ill was false, an essential element of a defamation cause of action. Although Barasch alleged in the complaint that “[t]he truth is that Barasch does not suffer from a single mental-illness other than potentially PTSS,” he provided no evidence in support of this allegation. Additionally, his own evidence contradicted his allegation. Giedt’s declaration, offered by Barasch, indicated that Barasch was mentally ill at the time of the Show. Additionally, Barasch acknowledges he was “mentally unsound” at the time of the show. Thus, Barasch fails to demonstrate a graphic libelous on its face and fails to provide any evidence that he was portrayed falsely as mentally ill. Based only on the evidence provided by Barasch, the trial court properly concluded that Barasch’s defamation cause of action should be stricken.¹²

¹² Because we rely only on Barasch’s evidence, we need not determine whether defendant’s evidence would defeat Barasch’s evidence as a matter of law. (*1-800 Contacts Inc. v. Steinberg*)

(See *Nygard, Inc. v. Uusi-Kerttula*, *supra*, 159 Cal.App.4th at p. 1054 [plaintiffs opposing anti-SLAPP motion failed to carry burden of demonstrating falsity which was necessary for defamation cause of action].)

DISPOSITION

The order granting defendant's special motion to strike is affirmed. The order awarding defendant attorney fees is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

(2003) 107 Cal.App.4th 568, 585.) Further, because Barasch failed to establish a prima facie case, we need not apply the burden shifting analysis relevant to an affirmative defense. (See *Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434 [discussing analysis of affirmative defense].)