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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARGARET A. SELTZER,

Plaintiff and Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant and Respondent.

A130719

**(Marin County
Super. Ct. No. CV 096123)**

Plaintiff Margaret A. Seltzer (Seltzer) appeals orders granting defendant Allstate Insurance Company (Allstate) special motions to strike her complaint and first amended complaint pursuant to the anti-SLAPP¹ statute (Code Civ. Proc., § 425.16).² Seltzer contends the trial court erred in concluding that her causes of action against Allstate arise from speech or petitioning activity, and that she has no probability of prevailing on her claims. We affirm the trial court's orders.

FACTUAL AND PROCEDURAL BACKGROUND³

Seltzer, an attorney, owns a condominium unit located in a Marin City condominium development known as "The Headlands View Homes." The development is managed by The Headlands Homeowners Association (Association), and a

¹ SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.)

² All undesignated section references are to the Code of Civil Procedure.

³ This summary is taken in part from our decision in *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953.

management company hired by the Association, the Eugene Burger Management Corporation Association (Burger).

In March 2003, Seltzer commenced an action against the Association and Burger (the 2003 Action). The 2003 action, among other things, sought to enjoin a range of alleged unlawful conduct on the part of the development's management. The Association filed a cross-complaint alleging claims based on Seltzer's damaging and destroying trees without the Association's permission (the trespass claims) and claims arising from Seltzer's failure to pay assessments (the assessment claims).

Seltzer tendered the cross-complaint to the provider of her homeowner insurance policies, Allstate. Allstate retained attorney Michael Barnes and his law firm to provide advice concerning coverage for the cross-complaint under Seltzer's insurance policies. Through Barnes, Allstate informed Seltzer it would defend her against the cross-complaint, subject to a reservation of rights to deny coverage. Allstate took the position that the assessment claims in the cross-complaint were not covered under Seltzer's policies. Allstate retained attorney Richard Reynolds as Seltzer's defense counsel.

Barnes negotiated a settlement of the trespass claims with Paul Windust, counsel for the Association. Allstate agreed to pay the Association \$37,500 and the Association agreed to dismiss its fourth and fifth causes of action against Seltzer and any other claims for "bodily injury," "personal injury," or "property damage." The settlement did not encompass the assessment claims. Allstate and the Association signed a "Settlement and Release Agreement" and, on September 24, 2007, the Association filed a request for dismissal in accordance with the agreement; the dismissal was entered that same day.

In February 2008, Seltzer commenced an action against the Association, Burger, Allstate, Barnes, and Windust (the 2008 Action). The complaint alleged, among other things, that Allstate and the other defendants colluded to defraud Seltzer, defeat her coverage under her insurance policies, and convert the proceeds of her insurance policies to the Association. In particular, it alleged that, following secret negotiations, Allstate and the Association entered into an agreement in September 2007 to dismiss the claims that Allstate considered covered under Seltzer's insurance policies, in order to justify

Allstate's denial of a defense on the remainder of the cross-complaint and to provide the Association with funds to continue its litigation against Seltzer. Seltzer alleged five causes of action against Allstate for breach of insurance contract, breach of the covenant of good faith and fair dealing, unfair business practices, intentional infliction of emotional distress, and declaratory relief.

In December 2009, Seltzer filed the instant action against the Association, Burger, Allstate, and United States Liability Insurance Company (the insurer for the Association) (2009 Action). The complaint (Complaint) alleges three causes of action against Allstate for breach of insurance contract, breach of the covenant of good faith and fair dealing, and unfair business practices.

In February 2010, Allstate filed a special motion to strike the claims alleged in the 2009 Action against it pursuant to section 425.16. In April 2010, after Allstate filed its motion, Seltzer filed a first amended complaint (FAC). The FAC revised and expanded the allegations in the causes of action against Allstate and added a new cause of action for intentional and negligent infliction of emotional distress.

At a hearing in June 2010, the trial court orally granted Allstate's section 425.16 motion. Because Seltzer did not agree to dismiss her claims against Allstate in the FAC, Allstate filed a second section 425.16 motion to strike, this time directed at the FAC. In September 2010, the trial court entered separate orders granting Allstate's two section 425.16 motions, thereby dismissing all causes of action against the company in the Complaint and FAC. This appeal followed.

DISCUSSION

I. *Summary of Section 425.16*

"In 1992, the Legislature enacted section 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of . . . freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) The section authorizes a special motion to strike '[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’ (§ 425.16, subd. (b)(1).) The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. [Citations.] The statute directs the trial court to grant the 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).)” (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1395-1396 (*Gallimore*), fn. omitted.)

“The statutory language establishes a two-part test. First, it must be determined whether the plaintiff’s cause of action arose from acts by the defendant in furtherance of the defendant’s right of petition or free speech in connection with a public issue. [Citation.] ‘A defendant meets this burden by demonstrating that the *act underlying* the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e).’ [Citation.] Assuming this threshold condition is satisfied, it must then be determined that the plaintiff has established a reasonable probability of success on his or her claims at trial.” (*Gallimore, supra*, 102 Cal.App.4th at p. 1396.) “Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions which we review independently on appeal. [Citations.]” (*Ibid.*) The statute provides that section 425.16 “shall be construed broadly.” (§ 425.16, subd. (a).)

II. “*Arising From*”

“A defendant who files a special motion to strike bears the initial burden of demonstrating that the challenged cause of action arises from protected activity. [Citations.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669 (*Peregrine Funding*).) In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, the California Supreme Court explained: “[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 fits one of the categories spelled out in section 425.16, subdivision (e)’ [Citations.]” (*Id.* at p. 78.) “In deciding whether the ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).)” (*Id.* at p. 79.) “ ‘[W]here a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is “merely incidental” to the unprotected conduct.’ ” (*Peregrine Funding*, at p. 672; see also *Seltzer v. Barnes*, *supra*, 182 Cal.App.4th at pp. 962-963.)⁴

Allstate contends Seltzer's causes of action against it fall under section 425.16, subdivision (e)(2), which includes statements and writings made in connection with civil court litigation.⁵ (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 4-5.) Cases construing this subdivision hold that “a statement is ‘in connection with’ litigation under section 425.16 subdivision (e)(2), if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.” (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266, fn. omitted; see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 [courts have adopted “a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16”].)

⁴ We agree with *Peregrine Funding* that the proper test is whether the allegations of protected conduct are “incidental,” not whether they are the “gravamen” of the cause of action. (*Peregrine Funding*, *supra*, 133 Cal.App.4th at pp. 672-673 & fn. 9; see also *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288 & fn. 5.)

⁵ Under section 425.16, subdivision (e)(2), an act in furtherance of a person's right of petition or free speech includes “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.”

Seltzer's causes of action against Allstate arise in part from Allstate's statements and writings in the 2008 Action.⁶ In the seventh cause of action, against Allstate for "Continuing Breach of Insurance Contracts," the Complaint alleges that "Since the 2008 Action was filed, Allstate colluded, coordinated and collaborated with [the Association] to delay the proceedings and burden Plaintiff with responding to frivolous motions and appeals so that she would be forced to trial in the [2003] Action without the superior financial resources Allstate was contractually required to furnish." The Complaint further alleges, "Allstate used [its] superior financial resources for which Plaintiff contracted for its own benefit to fund a 20 month frivolous pleading and discovery battle, forcing Plaintiff to fight a war on two fronts in which Allstate used its financial resources solely for its own benefits." Similarly, the Complaint alleges, "Allstate's conduct following the filing of the 2009 [*sic*] Action was and is a continuing breach of its duties under the Allstate Policies. Allstate's continuing collaboration with [the Association] to delay the 2008 Action and defeat Plaintiff's interests in the [2003] Action is intended to destroy Plaintiff financially in order to deter her from prosecuting her claims against Allstate. Allstate's litigation tactics of delay and deception have been and continue to be employed to delay and to impose economic duress upon its insured."

In the eighth cause of action, against Allstate for "Continuing Breach of Covenant of Good Faith and Fair Dealing," the Complaint incorporates all of the previous allegations. It further alleges, "Allstate's conduct as alleged herein was unreasonable and violated the covenant of good faith and fair dealing in the Policies. . . . Allstate has spent

⁶ Seltzer asserts in passing in her opening brief that the trial court erred in granting the section 425.16 motions because "Allstate did not submit an affidavit providing evidence that the causes of action . . . arose from any oral or written statement" In her reply brief, she clarifies that her argument is based on section 425.16, subdivision (b)(2), which provides that, in deciding a motion brought under the statute, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Seltzer fails to present any argument or authority that such an affidavit is *required* where the factual allegations underlying the causes of action are apparent on the face of the complaint. The language of the statute does not compel that result, and we decline to adopt such a rule in the present case.

twenty months on frivolous motions in the 2008 Action designed to delay the proceedings and avoid its duty to defend the [2003] Action and has launched economic warfare against its insured, all the while offering assistance, both financial and otherwise, to [the Association]. Allstate has paid its own attorneys to conduct a scorched earth campaign of economic warfare which financial resources should have been paid to attorneys defending its insured in the [2003] Action.” In the eleventh cause of action, against Allstate and other defendants for “Unfair Business Practices,” the Complaint incorporates all of the previous allegations. The cause of action states its allegations in only very general terms. As to Allstate, it alleges in part, “Allstate engaged in a continuing pattern and practice of fraudulent activity by [an] insurer by collaborating with the third party claimant to commit insurance fraud under Penal Code § 550 to harm and damage its insured. . . .” Based on the previous allegations, it is clear that the alleged collaboration includes Allstate’s litigation activities in the 2008 Action, as well as its settlement with the Association.

The Complaint and Seltzer’s brief on appeal also refer to other conduct by Allstate, most significantly a range of non-litigation conduct relating to how Allstate has handled Seltzer’s insurance coverage claim and, in particular, her continuing requests that Allstate pay for her defense in the 2003 action.⁷ Nevertheless, although Seltzer contends that Allstate’s mishandling of her insurance claim is the “gravamen” of her causes of

⁷ The Complaint also contains various allegations relating to the settlement in the 2003 Action negotiated between counsel for Allstate and counsel for the Association. In *Seltzer v. Barnes, supra*, 182 Cal.App.4th at pp. 962-964, this court held that the negotiation of that settlement was protected conduct under section 425.16, subdivision (e)(2). Seltzer appears to argue that the present action does not arise from the settlement because the Complaint states, “This lawsuit results in part from the continuing breaches of duty of the defendants after the filing of [the 2003 and 2008] actions and [defendants’] refusal to permit amendment of those actions to add new causes of action that accrued since” the 2003 and 2008 Actions were filed. Because we conclude the allegations in the Complaint regarding the 2008 Action are sufficient to bring the Complaint within the scope of the anti-SLAPP statute, we need not and do not determine whether the allegations regarding the settlement in the 2003 Action also trigger the protections of the statute.

action, she does not contend that the allegations relating to Allstate’s statements and writings in the 2008 Action are “ ‘merely incidental’ ” to the causes of action. (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 672.) As in *Peregrine Funding*, at page 673, “[a]lthough the overarching thrust” of Seltzer’s claims may relate to Allstate’s failure to defend her in the 2003 Action, “some of the specific conduct complained of involves” Allstate’s litigation activities in the 2008 Action. “We cannot conclude these allegations of classic petitioning activity are merely incidental or collateral to” Seltzer’s claims against Allstate. (*Ibid.*) In particular, Allstate’s allegedly “frivolous motions and appeals” were necessarily “statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body,” within the meaning of section 425.16, subdivision (e)(2).

Seltzer largely fails to acknowledge the allegations quoted above, many of which were omitted from the FAC. She does assert that “[t]he allegation that Allstate participated in frivolous motions for purposes of delay is not material to the cause of action for breach of contract which would be adequately pleaded were it to simply allege damages for nonpayment of defense expenses.” She also asserts that “engaging in frivolous activities of any type for purpose of delay in paying money owed is not constitutionally protected activity.” As to Seltzer’s first argument, she fails to cite any authority that a cause of action is not within the scope of the anti-SLAPP statute if it can stand without the allegations of protected conduct. That would be contrary to the proposition that “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.’ ” (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308; accord, *Peregrine Funding, supra*, 133 Cal.App.4th 672.) As to her second argument, the *alleged* frivolousness or illegality of Allstate’s petitioning activity does not render that conduct unprotected for the purposes of the first prong of the section 425.16 analysis. (*Seltzer v. Barnes, supra*, 182 Cal.App.4th at p. 964.)

Seltzer appears to argue that section 425.16, subdivision (e)(2) does not apply because the Complaint does not refer to specific statements or writings. However, the

plain language of the statute does not require such specificity, and Seltzer fails to cite any authority in support of her argument, which would allow plaintiffs to avoid application of the anti-SLAPP law by drafting vague complaints. Absent supporting authority, we decline to adopt Seltzer's interpretation of section 425.16, subdivision (e)(2). Citing *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1391, Seltzer also argues that the anti-SLAPP statute is inapplicable because her claims are based on Allstate's "failure to act," which does not trigger the protections of the statute. However, unlike the complaint in *Coretronic*, Seltzer's Complaint alleges she was economically harmed by *writings* (motions and appeals) filed by Allstate in the 2008 action. Allstate's alleged failures to act largely relate to its alleged failure to provide Seltzer a defense in the 2003 Action; we do not conclude those allegations trigger the protections of the anti-SLAPP statute.

For the stated reasons, the trial court properly concluded that Seltzer's claims against Allstate are within the scope of section 425.16.

III. *Probability of Prevailing*

In order to establish a probability of prevailing for purposes of section 425.16, subdivision (b)(1), "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." ' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) However, a defendant that advances an affirmative defense to the plaintiff's claims bears the burden of proof on the defense. (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 676.)

In the present case, Allstate contends, among other things, that Seltzer's causes of action are without merit because its conduct is protected under the litigation privilege (Civ. Code, § 47, subd. (b)) and because the causes of action in the 2009 Action are duplicative of those in the 2008 Action. We need not address those arguments, because Seltzer has failed to make a prima facie showing of a probability of prevailing on any of her causes of action.

It was not Allstate’s burden to show that Seltzer cannot demonstrate a probability of prevailing; rather, Seltzer was obligated to “explain how [her] evidence substantiates the elements of [her] claim[s].” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239 (*Tuchscher*); see also *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [considering each element of malicious prosecution claim in determining whether plaintiff showed probability of prevailing]; *StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1398 [“StaffPro had to demonstrate a probability of prevailing with respect to each of the elements of its malicious prosecution action”].)

In her appellate briefing, Seltzer addresses the specific defenses raised by Allstate, but she fails to set forth the elements of her claims against Allstate and explain how her evidence substantiates the elements of those claims. Because Seltzer has failed to present a reasoned argument that she has a probability of prevailing on any of her claims, the issue has been forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) The trial court properly granted the motion to strike Seltzer’s causes of action against Allstate in the Complaint.

IV. *Seltzer’s First Amended Complaint*

As noted previously, Seltzer filed her FAC during the pendency of Allstate’s section 425.16 motion to strike directed at her Complaint. The trial court properly granted Allstate’s subsequent motion to strike directed at the FAC.

This court’s decision in *Salma v. Capon, supra*, 161 Cal.App.4th 1275, is directly on point. There, Salma amended his cross-complaint before the trial court ruled on Capon’s section 425.16 motion to strike directed at the original cross-complaint. (*Salma*, at p. 1281.) After concluding that Salma’s original claims were subject to dismissal, we ruled that the amended claims were subject to “automatic dismissal.” (*Id.* at pp. 1293-1294.) As we explained: “When a cause of action is dismissed pursuant to section 425.16, the plaintiff has no right to amend the claim. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073[] (*Simmons*)). ‘Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would

completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.' (*Ibid.*) [¶] Here, unlike *Simmons, supra*, 92 Cal.App.4th 1068[], Salma amended his cross-complaint *before* the court ruled on Capon's first motion to strike causes of action for conversion and intentional interference with prospective economic advantage. Capon then filed a separate motion to strike the amended pleadings. Nevertheless, *Simmons* supports automatic dismissal of the amended claims. Requiring the trial court to analyze the amended claims under section 425.16 simply because the claims were amended before the court ruled on the first motion to strike would cause all of the evils identified in *Simmons* and would undermine the legislative policy of early evaluation and expeditious resolution of claims arising from protected activity.'" (*Salma*, at pp. 1293–1294; accord *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 880.)

Because the circumstances in *Salma v. Capon* are not materially distinguishable from those in the present case,⁸ the trial court properly granted Allstate's motion to strike directed at the FAC.⁹

⁸ The only significant difference between the present case and *Salma v. Capon, supra*, 161 Cal.App.4th 1275, is that Seltzer added a new cause of action, in addition to revising the causes of action in the Complaint. Arguably, allowing a plaintiff to amend the complaint to add new causes of action would present largely the same problems as allowing a plaintiff to amend the causes of action in a complaint when confronted by a section 425.16 motion to strike. In any event, we need not resolve that issue because, as the trial court concluded, the new cause of action for intentional and negligent infliction of emotional distress arises in part from non-incidentally allegations of protected conduct (incorporated allegations regarding litigation activities and the settlement in the 2003 Action, which features prominently in the FAC), and Seltzer has not demonstrated a probability of prevailing on the claim.

DISPOSITION

The trial court's orders granting Allstate's section 425.16 motions to strike are affirmed. Costs are awarded to Allstate.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

⁹ Although the trial court granted the motion to strike directed at the FAC on the ground that Seltzer failed to show a probability of prevailing on her claims, we may affirm on any ground. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)