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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**PEDRO EVA,**

**Plaintiff and Appellant,**

**v.**

**REGISTRY OF PHYSICIAN  
SPECIALISTS, INC., et al.,**

**Defendants and Respondents.**

**A132608**

**(Contra Costa County  
Super. Ct. No. C10-03239)**

Plaintiff and appellant Pedro Eva (Eva) appeals from the trial court’s order dismissing two causes of action pursuant to a special motion to strike filed by defendants and respondents (respondents)<sup>1</sup> under the anti-SLAPP<sup>2</sup> statute (Code Civ. Proc., § 425.16).<sup>3</sup> Eva contends the trial court erred in concluding that he failed to show a probability of prevailing on his third cause of action for “Intentional Tort.” We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case involves a lawsuit filed by Eva against RPS, several RPS employees, and other defendants.

<sup>1</sup> Respondents are Registry of Physician Specialists, Inc. (RPS), and RPS employees Samuel Benson, Ursula Reinhart, and Hector Vergara.

<sup>2</sup> SLAPP is an acronym for “strategic lawsuit against public participation.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.)

<sup>3</sup> All undesignated section references are to the Code of Civil Procedure.

In mid-2006, Eva, a licensed psychiatrist, was hired as a subcontractor by RPS to perform psychiatric services at Salinas Valley State Prison (SVSP) pursuant to a contract between RPS and California's Department of Corrections and Rehabilitation (CDCR). Under the contract, RPS psychiatrists may only charge for time actually spent in the prison. However, Eva alleges in his complaint and avers in a declaration that he was not informed of that requirement; instead, he understood his job consisted of four 10-hour days, and the acting chief psychiatrist at SVSP, David Hoban, told him he should bill for 10 hours even if he was not inside the prison the whole time.

According to Eva's complaint, at some point in 2007, California's Office of the Inspector General (OIG) began investigating the billing practices of contract psychiatrists working at SVSP. Appellant alleges in his complaint that Hoban and Charles Lee, the chief medical officer at SVSP, either informed him that he could bill for 10-hour days even if he left early, or indirectly approved the practice. As part of the OIG investigation, OIG investigators interviewed several RPS employees, including Benson, Reinhart, and Vergara. The complaint alleges that those RPS employees "falsely informed the investigators that [Eva] was given an orientation and several documents that informed him specifically that he was not to bill for time that he was not at the prison."

In November 2008, an indictment was filed against Eva in Monterey County Superior Court, charging him with grand theft, presentation of fraudulent claims, and conspiracy to commit grand theft. Lee, Hoban, and others were also indicted on charges related to the submission of allegedly false time sheets.

In November 2010, Eva filed the instant action in Contra Costa County Superior Court against RPS, Benson, Reinhart, Vergara, Lee, and Hoban. The first two causes of action for negligence and misrepresentation were based on the defendants' failure to inform Eva that he was required to bill only for the time he was physically at SVSP. The third cause of action was brought against respondents. Entitled "Intentional Tort," it alleged respondents were liable for damages due to intentional misrepresentations made to OIG investigators. In particular, the complaint alleged respondents falsely told the investigators that Eva was informed that he was required to only bill for the time he was

at SVSP. The fourth cause of action for unfair business practices, against RPS alone, was based on both the failure to inform Eva about the billing requirement and the misrepresentations to OIG investigators.

In January 2011, respondents filed a section 425.16 special motion to strike the complaint. The motion was supported by, among other things, a declaration from Reinhart with four letters attached as exhibits; she averred the letters were communications to contract physicians informing them that they were only allowed to bill for the time they were on the prison grounds. She averred that she included such letters in payment envelopes to psychiatrist subcontractors “about twice a year.”

Eva moved for an order allowing discovery, pursuant to section 425.16, subdivision (g).<sup>4</sup> In March 2011, the trial court entered an order allowing Eva to conduct certain discovery and continuing the hearing on the anti-SLAPP motion to April 2011. Among other things, the court ordered RPS to produce electronically stored versions of the letters attached to the Reinhart declaration. In response, counsel for RPS mailed to Eva’s counsel a compact disc purportedly containing electronic versions of four letters, but only two were versions of letters attached to the Reinhart declaration.

Following completion of the authorized discovery, the trial court received supplemental briefing. The court denied the section 425.16 motion as to the first two causes of action, but granted the motion as to the third and fourth causes of action, concluding Eva had not produced enough evidence to show a probability of prevailing on those claims. This appeal followed.<sup>5</sup>

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<sup>4</sup> Section 425.16, subdivision (g) provides: “All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.”

<sup>5</sup> Although the trial court dismissed his third and fourth causes of action, Eva’s briefs only provide reasoned argument that the court erred as to the third cause of action. Accordingly, we will affirm dismissal of the fourth cause of action.

## 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.] . . . ‘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.)

In the present case, Eva’s third cause of action for Intentional Tort is based on the allegation that respondents intentionally gave false information to OIG investigators. Eva concedes that this cause of action falls within the scope of section 425.16. In particular, he concedes that the alleged communications to the OIG investigators were statements made in the context of an “official proceeding authorized by law,” within the meaning of section 425.16, subdivision (e). (See also, e.g., *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 850.) Accordingly, the issue on appeal is whether Eva established a probability that he will prevail on the merits of the cause of action.

### 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.” ’ [Citation.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*)).

Eva’s third cause of action is for Intentional Tort. On appeal, he asserts the complaint states a cause of action under Civil Code sections 1708 and 1714, subdivision

(a).<sup>6</sup> He contends he “established that [respondents] intentionally misrepresented facts to the OIG investigators for the purpose of shifting blame for improper billing of CDCR from themselves to [Eva], resulting in [Eva’s] indictment and attendant damages.” Eva concedes the allegations in the third cause of action do “not give rise to a specific intentional tort such as malicious prosecution,” but argues “the cited Civil Code sections support a cause of action for an otherwise undefined ‘intentional tort’ where such allegations clearly point to willful conduct that causes injury.”

Because Eva fails to provide citations to authority identifying the elements of his tort claim, and fails to discuss the elements in light of such authority, he has failed to demonstrate a probability of prevailing on his claim under section 425.16. It was not respondents’ burden to show that Eva cannot demonstrate a probability of prevailing; rather, Eva was obligated to “explain how [his] evidence substantiates the elements of [his] claim.” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239; 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 his appellate briefing, Eva discusses the evidence he claims shows intentional misrepresentation and the litigation privilege defense raised by respondents, but he fails to set forth the elements of his intentional tort claim and explain how his evidence substantiates the elements of the claim. Because Eva has failed to present a reasoned argument that he has a probability of prevailing on his third cause of action, the

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<sup>6</sup> Civil Code, section 1708 provides, “Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights.” Civil Code, section 1714, subdivision (a) provides in part, “Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.”

issue has been forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

In any event, the trial court properly concluded that the third cause of action is barred by the litigation privilege, which respondents contend prohibits liability to Eva even if one or more RPS employees lied to the OIG investigators. Section 47, subdivision (b) of the Civil Code provides, in relevant part, that “[a] privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . .” Eva concedes the statements the RPS employees made to the OIG investigators would normally be subject to the litigation privilege. (See *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 [“[T]he internal investigation itself was an official proceeding authorized by law. [Citation.]”]; see also *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 362.) However, Eva contends the spoliation exception to the litigation privilege applies in this case.<sup>7</sup> Civil Code, section 47, subdivision (b)(2) provides in relevant part: “This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence . . . .” (See also *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 464 [“The plain language of the statute makes it clear the exception only applies when the alleged alteration or destruction is intended to deprive a party of the ‘use’ of that evidence.”], disapproved on another ground in *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520.)

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<sup>7</sup> Although respondents bear the burden of proof on the litigation privilege defense (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 676), Eva does not dispute respondents’ assertion that Eva bears the burden of proving that the spoliation *exception* to the litigation privilege applies. (See *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 109 [in an anti-SLAPP case, stating that the plaintiff bears the burden of proving applicability of an exception to the conditional privilege of Civ. Code, § 47, subd. (c)].)

At issue are the letters attached as exhibits A through D to the Reinhart declaration, which Reinhart avers were sent to RPS doctors, informing them of the proper billing procedures. The letter attached as exhibit A bears the date August 18, 2006. An electronic version of the letter was produced by RPS and, according to an exhibit to Eva's counsel's declaration, the document properties show the letter was created, last modified, and last printed near the date printed in the letter. However, Eva argues he would not have received the letter because he had just moved to California in August 2006 and RPS did not yet have his address. The letter attached as exhibit B to the Reinhart declaration does not bear a printed date, but there is a handwritten notation "10/30/06" at the top of the page. As Eva points out, the letter ends with the statement "Happy Holidays." RPS did not produce an electronic version of that letter. The letter attached as exhibit C bears the date June 21, 2007. RPS did not produce an electronic version of that letter. Finally, the letter attached as exhibit D to the Reinhart declaration does not bear a printed date, but there is a handwritten notation "in paychecks Oct. 2007[,] March 2008" at the top of the page. RPS produced an electronic version of the letter; according to an exhibit to Eva's counsel's declaration, the document properties show the letter was created, last modified, and last printed in 2003.

Eva argues, because RPS failed to produce electronic versions of two of the letters attached to the Reinhart declaration, the October 2006 and June 2007 letters, it can be inferred that the electronic versions of those letters were intentionally destroyed. He asserts the electronic versions were intentionally destroyed because one would be able to determine from the electronic versions that the letters were not actually created and printed at or near the dates shown on the letters. Eva alleges the electronic versions were destroyed for the purpose of depriving him of the use of the electronic versions to rebut RPS's assertion it sent the letters to Eva.<sup>8</sup>

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<sup>8</sup> Eva also alleges RPS physically altered some of the letters by adding or altering dates. Eva has not presented evidence from which it reasonably can be inferred that the printed date on the June 2007 was altered. As to the October 2006 letter and the letter purportedly mailed in October 2007 and March 2008, even assuming it reasonably can be

It is not clear whether Eva’s allegations, if proven, would be sufficient to support application of the spoliation exception. Arguably, the allegedly false statements to the OIG investigators were made in furtherance of RPS’s attempt to avoid responsibility for Eva’s billing practices, rather than in furtherance of the alleged destruction of electronic versions of certain letters. In any event, even assuming the spoliation exception could apply to such statements, Eva’s evidence is insufficient to constitute a “ ‘prima facie showing of facts to sustain’ ” (*Navellier, supra*, 29 Cal.4th at pp. 88-89) a finding that the spoliation exception applies. Although Eva is entitled to all reasonable inferences in his favor (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 52), “A reasonable inference . . . ‘may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.’ [Citation.]” (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; see also Evid. Code, § 600, subd. (b) [“An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”]; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 828, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 68 & fn. 5 [applying rule in anti-SLAPP context].)

In the present case, Eva’s spoliation claim is based entirely on speculation—his assertion that if the electronic versions do not exist it must be because they were destroyed in contemplation of this litigation. He asserts it is suspicious that “only” the October 2006 and June 2007 letters do not exist in electronic form, but his logic is flawed: the evidence is that, of the four letters attached to the Reinhart declaration, the

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inferred that the handwritten dates are recent additions, Eva does not explain how any such alteration was “undertaken for the purpose of depriving a party to litigation of the use of that evidence.” (Civ. Code, § 47, subd. (b)(2); see also *Laborde v. Aronson, supra*, 92 Cal.App.4th at p. 464.) Because Eva does not explain how he would have otherwise used the alleged original *undated* letters as evidence, he has not provided reasoned argument for a spoliation claim based on those alleged additions.

electronic versions are missing for those two, but there is no information in the record regarding other letters that may have been sent at other times, and whether electronic versions were retained. The trial court granted Eva's request for discovery to support his opposition to the section 425.16 motion, but Eva did not request to depose Reinhart regarding her electronic document retention practices. Accordingly, there is no basis in the record to conclude that it is unusual that electronic versions of the October 2006 and June 2007 letters are missing.

Furthermore, the evidence that RPS sent the same letter in October 2007 and March 2008, and the evidence that the letter was written in 2003, suggests that RPS was not in the practice of creating new electronic versions of the letters each time it sent them to the doctors. This would explain the "Happy Holidays" reference in the October 2006 letter. Although there may be other explanations for the evidence in the record, the point is that there is no evidence from which a jury could draw a reasonable, nonspeculative inference that RPS destroyed the electronic versions of the October 2006 and June 2007 letters.<sup>9</sup> Because Eva's evidence is insufficient to constitute a "prima facie showing of facts to sustain" (Navellier, supra, 29 Cal.4th at pp. 88-89) a finding that the spoliation exception to the litigation privilege applies, Eva failed to show a probability of prevailing on his third cause of action.

#### DISPOSITION

The trial court's order dismissing the third and fourth causes of action in the complaint is affirmed. Costs on appeal are awarded to respondents.

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<sup>9</sup> Eva's statement in his declaration that he "do[es] not recall" receiving the letters that were purportedly sent to him may be evidence that the letters were not sent to him, but his statement is not evidence from which a reasonable jury can infer the destruction of electronic versions of the letters.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.