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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

VIVIEN PENG,

Cross-Complainant and Appellant,

v.

HONG SANG MARKET, INC.,

Cross-Defendant and Respondent.

A133044

A134394

(San Francisco County
Super. Ct. No. CGC-11-509287)

Cross-complainant Vivien Peng appeals from the trial court’s order granting cross-defendant Hong Sang Market, Inc.’s special motion to strike three causes of action in the cross-complaint, pursuant to Code of Civil Procedure¹ section 425.16 (hereafter also referred to as the SLAPP statute or anti-SLAPP statute). The trial court also awarded Hong Sang Market, Inc., as the prevailing party, attorney fees and costs in the sums of \$7,834.75 and \$3,953, pursuant to the anti-SLAPP statute. We agree with Peng that the trial court erred in striking the challenged causes of action as those claims do not arise from protected activity within the meaning of the anti-SLAPP statute. Accordingly, we reverse the order granting Hong Sang Market’s special motion to strike and the order awarding Hong Sang Market attorney fees and costs, and remand the matter for further proceedings.²

¹ All further unspecified statutory references are to the Code of Civil Procedure.

² On the court’s own motion, we consolidate the appeals in case numbers A133044 and A134394 for purposes of decision.

FACTS

A. *Background*

Hong Sang Market, Inc. is the owner of a two-unit building located on Grant Avenue in San Francisco. On June 7, 2002, Ming Kee Game Birds, Inc. (Ming Kee) leased the entire premises as a tenant under a written lease (hereafter referred to as the master lease). Thereafter, with the consent of Hong Sang Market, Ming Kee sublet one of the units to Vivien Peng for a period of 10 years beginning August 21, 2002 and continuing until August 21, 2012. Peng entered into possession, pursuant to a written sublease.

On or about May 10, 2004, Ming Kee sued Peng for breach of the sublease, and Peng filed a cross-complaint for breach of contract and related causes of action. The case was tried in March 2006, and resulted in a judgment in favor of Peng in the sum of \$46,545. On or about August 7, 2009, Peng collected the sum of \$46,500 in partial satisfaction of her outstanding judgment against Ming Kee. On or about September 11, 2009, Peng was granted an additional award of attorney fees in the sum of \$47,800, payable by Ming Kee.

On or about August 21, 2009, while Peng was attempting to collect her judgment against Ming Kee, she was informed that Hong Sang Market and Ming Kee had agreed to terminate the master lease. Peng received a document entitled “Mutual Lease Termination” from Hong Sang Market. A new tenant, Ming’s Poultry, LLC, immediately took possession of the property formerly leased by Ming Kee and continued the exact same poultry business as conducted by Ming Kee. According to Peng, this change of ownership was “a fraudulent conveyance designed to deprive [her] of the means of collecting [her] judgment [against] MING KEE via a setoff against the rent” owed under the sublease. Consequently, Peng rejected Hong Sang Market’s offer of a lease and demand for rent.

On November 24, 2009, Hong Sang Market “commenced an unlawful detainer action . . . to evict [Peng], but the action was “voluntarily dismissed” on or about January 18, 2011.

B. Current Litigation

On March 18, 2011, Hong Sang Market filed this complaint against Peng, alleging breach of contract and seeking to recover monthly rent of \$4,725, for the period of September 2009 through February 2011. In its amended complaint, Hong Sang Market alleged, in pertinent part, that on or about August 15, 2009, Ming Kee's tenancy was automatically terminated and forfeited for nonpayment of rent after Ming Kee had been validly served with a notice to pay rent or quit, and the termination and forfeiture of the master tenancy had the automatic legal effect of terminating Peng's subtenancy. Hong Sang Market and Ming Kee executed a written agreement that "formalized the already-accomplished termination of [the master] tenancy." Because Peng remained in possession, a new month-to-month tenancy was created by operation of law between Hong Sang Market and Peng, for a monthly rent of \$4,725, which was past due for the period of September 2009 through February 2011.

Peng filed this cross-complaint against Hong Sang Market, Ming Kee, and Ming's Poultry, LLC. The cross-complaint included six causes of action. As against Hong Sang Market, Peng alleged causes of action labeled "Interference with Contractual Relations," "Breach of the Covenant of Quiet Enjoyment," and "Conspiracy" (hereafter referred to as the challenged causes of action).³ Under the cause of action labeled "Interference with Contractual Relations," Peng alleged, in pertinent part, that Hong Sang Market had "falsely advised" Peng that Ming Kee had been in default under the master lease, that the master lease had been terminated based on that default, and that the sublease was likewise terminated. It was further alleged that as a result of Hong Sang Market's conduct, Peng was required to employ an attorney and incur attorney's fees and costs in order to defend herself against the unlawful detainer action. She had also lost the flexibility of being able to offset the judgment she had obtained against Ming Kee by using rents owed under the

³ Peng also alleged as against Hong Sang Market another cause of action labeled "Declaratory Relief," seeking a declaration as to the parties' rights and duties pertaining to the premises subleased by Peng. Hong Sang Market's special motion did not seek to strike that cause of action. Peng's cross-complaint included two causes of action for fraudulent conveyance against Ming Kee, which claims are not at issue on this appeal.

sublease. Under the cause of action labeled, “Breach of the Covenant of Quiet Enjoyment,” Peng alleged, in pertinent part, that Hong Sang Market had unreasonably interfered with her “quiet enjoyment and possession of the premises by falsely representing . . . that her sublease . . . was terminated as a result of [Ming Kee’s] default and by bringing an unlawful detainer action against [her] in order to evict her from the premises.” Peng also alleged that as a direct and proximate result of Hong Sang Market’s activities, she was discharged from payment of rent after August 21, 2009, and she was required to employ an attorney and incur attorney’s fees and costs in order to defend herself against the unlawful detainer action. Under the cause of action labeled, “Conspiracy,” against all named cross-defendants, Peng alleged, in pertinent part, that Ming Kee and Ming’s Poultry, LLC had conspired to “hinder, delay, and defeat” Peng’s ability to collect her judgment against Ming Kee by agreeing that Ming’s Poultry, Inc. would “take over the business formerly operated by [Ming Kee] so as to render [Ming Kee] insolvent and without any assets and to prevent [Peng] from collecting her judgment against [Ming Kee]. It was further alleged that Hong Sang Market had “aided and abetted the . . . conspiracy by agreeing to terminate [the] master lease on the false pretense that [Ming Kee] was in default and then re-renting the same property to Ming’s Poultry, LLC . . . so that the latter could continue the operation of the same business on the same property”; and that Hong Sang Market knew of Peng’s judgment against Ming Kee, knew the judgment could only be satisfied out of the proceeds of the business owned and operated by Ming Kee, and had “intentionally, willfully, fraudulently, and maliciously” acted to defraud Peng. Again, Peng alleged that as a proximate result of the wrongful acts of Hong Sang Market and the other named cross-defendants, Peng was deprived of the ability to offset the amount of her judgment against rents owed to Ming Kee and had been required to defend against the unlawful detainer action.

Hong Sang Market filed a special motion to strike the challenged causes of action on the ground that those causes of action were based on an act in furtherance of its right to free speech, i.e., the filing of an unlawful detainer action. In opposing the motion, Peng argued there was no connection between the dismissed unlawful detainer action and her

current cross-complaint filed in response to Hong Sang Market's complaint for past due rent. She additionally argued the cross-complaint did not arise from the unlawful detainer action but from Hong Sang Market's participation in the conspiracy to terminate the master lease so as to deprive Peng of her ability to collect her judgment against Ming Kee, and the termination of the master lease was not an activity taken in furtherance of Hong Sang Market's constitutional rights of free speech or petitioning. In reply, Hang Sang Market asserted, in pertinent part, that the cross-complaint repeatedly alleged that Peng was damaged by the unlawful detainer action, and that her cross-complaint arose from Hong Sang Market's protected activity "leading up to and in filing an unlawful detainer" against Peng.

After a hearing, the trial court issued a written order granting Hong Sang Market's special motion to strike the challenged causes of action. The court explained: "[Hong Sang Market] has shown that each of the challenged causes of action arises at least in part from protected activity. [Peng] has not presented admissible evidence establishing a probability of success on these causes of action." The court also issued an order granting Hong Sang Market's motion for attorney fees and costs in the sums of \$7,834.75 and \$3,953. Peng filed timely notices of appeal from both orders.

DISCUSSION

Section 425.16, subdivision (b), provides, in pertinent part: "(1) 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."

We review the trial court's order granting Hong Sang Market's motion to strike under section 425.16 de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) A two-step process is used to determine "whether a defendant's anti-SLAPP motion should be granted. First, [we decide] whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd.

(b)(1).)” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*City of Cotati*)). “In deciding whether the ‘arising from’ requirement is met, [we consider] ‘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.) If we find that defendant has met the burden under the first step, we “then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Id.* at p. 76.)

In deciding whether Hong Sang Market has met its burden under the first step of the section 425.16 analysis, “the critical point” is whether the challenged causes of action were “based on an act in furtherance of [Hong Sang Market’s] right of petition or free speech. [Citation.]” (*City of Cotati, supra*, 29 Cal.4th at p. 78, italics in original.) Hong Sang Market argues it has met its burden because the challenged causes of action “arise from the fact that [it] filed an unlawful detainer action against [Peng].” We disagree. It is undisputed that the filing of an unlawful detainer action is protected activity within the meaning of section 425.16. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 (*Birkner*)). Nevertheless, our independent review of the record convinces us that the challenged causes of action do not arise from the filing of the unlawful detainer action, but seek to resolve the parties’ dispute concerning the termination of the master lease, which is not protected activity within the meaning of the anti-SLAPP statute. (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 161 (*Marlin*) [“[t]erminating a tenancy . . . [is] not [an activity] taken in furtherance of the constitutional rights of petition or free speech”]; see *Birkner, supra*, 156 Cal.App.4th at pp. 281-282 [accord].)

We agree with Peng that the decisions in *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308 (*Pearl Street*), *Marlin, supra*, 154 Cal.App.4th 154, and *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281 (*Clark*), are persuasive authority supporting our conclusion that the challenged causes of action should not have been stricken pursuant to the anti-SLAPP statute.

In *Pearl Street*, the Santa Monica Rent Control Board (Board) filed a suit for declaratory and injunctive relief against property owners, alleging the owners were violating state and local rent control laws relating to restoring a residential rental property

to the market after having withdrawn it pursuant to the Ellis Act. (*Pearl Street, supra*, 109 Cal.App.4th at pp. 1311, 1313-1314.) The Board alleged the property owners were charging market rents for units that should have been no greater than the rent that would have been in effect had the unit not been withdrawn from the market. (*Id.* at p. 1314.) The owners filed a special motion to strike, claiming that the Board was attempting to punish them for filing paperwork with the Board to restore several units of the property to the rental market. (*Id.* at pp. 1315, 1318.) The appellate court disagreed, explaining that while the lawsuit “may have been ‘triggered by’ [the owners’] submission of such documents to the Board, it is *not* true that this suit is *based on* the filing of such papers. Rather, the suit is based on activity that preceded the filing of the papers. *This suit is based on the Board’s claim that [the owners] are charging an illegal rent for units A and C.* Not surprisingly, [the owners] have not presented any authority for the proposition that their conduct in charging illegal rent is an act in furtherance of their rights of petition or free speech.” (*Id.* at p. 1318, italics in original.) The court concluded: “If we were to accept [the owners’] argument, then they could preclude any judicial review of their violation of the rent control law, no matter how egregious, by simply filing a SLAPP motion in response to any Board complaint. We are confident that the Legislature intended no such application of this statute. [¶] [The owners] have thus not met their threshold burden of showing that this suit is based on protected activity.” (*Ibid.*)

In *Marlin*, the defendant property owners gave notice they intended to permanently remove rental units from the market pursuant to the Ellis Act. (*Marlin, supra*, 154 Cal.App.4th at p. 157.) After the renters filed an action seeking a declaration of their rights under the Ellis Act, the defendants responded with an anti-SLAPP motion, arguing the complaint arose from the act of filing and serving the Ellis Act notices. (*Id.* at pp. 157-158.) The appellate court held the defendants had not met their burden under the first step of the anti-SLAPP analysis, reasoning that the renters’ suit was “not based on defendants’ filing and serving of a notice required under the Ellis Act, it is based on the [renters’] contention ‘defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home.’ ” (*Id.* at pp. 161-162.)

In *Clark*, “[a] landlord successfully evicted a long-term tenant from a rent-controlled apartment, ostensibly to free the unit for occupancy by the landlord’s daughter. The landlord’s daughter never moved in, and the tenant sued the landlord for fraud and unlawful eviction, and failure to pay relocation expenses.” (*Clark, supra*, 170 Cal.App.4th at p. 1284.) The landlord filed an anti-SLAPP motion, contending the tenant’s complaint arose from protected activity, including privileged communications in the course of proceedings before the Los Angeles City Housing Department and in the unlawful detainer action, and from the acts of filing and serving the eviction notice. (*Id.* at p. 1285.) The appellate court disagreed, explaining: “There is no question that the prosecution of an unlawful detainer action is indisputably protected activity within the meaning of section 425.16. [Citations.]” (*Id.* at p. 1286.) However, the tenant’s “complaint against [the landlord] is not based on [the landlord’s] filing or service of the notices of intent to evict, it is not based on anything [the landlord] said in court or a public proceeding, and it is not based on the fact that [the landlord] prosecuted an unlawful detainer action against [the tenant]. The complaint is based on [the landlord’s] allegedly unlawful eviction, in that she fraudulently invoked the [rent stabilization ordinance] to evict [the tenant] from her rent-controlled apartment as a ruse to provide housing for her daughter, but never installed her daughter in the apartment as required by that ordinance, and also that she failed to pay [the tenant’s] relocation fee.” (*Id.* at p. 1288.) The tenant’s lawsuit “was unquestionably ‘triggered by’ [the landlord’s] statements and the documents she filed in connection with the unlawful detainer. But the suit is *not based on* those statements or filings. It is based on [the tenant’s] claim that [the landlord] fraudulently invoked the family occupancy exemption of the [rent stabilization ordinance] to effect [the tenant’s] eviction, and failed to fulfill her obligations under that ordinance to install her daughter in the apartment or to pay [the tenant’s] relocation expenses. [The landlord’s] eviction notices and the unlawful detainer action are merely cited as evidence and background to illustrate [the landlord’s] subsequent violation of the [rent stabilization ordinance] and Civil Code section 1947.10, subdivision (a).” (*Clark, supra*, 170 Cal.App.4th at p. 1290.)

Like the situations in *Pearl Street*, *Marlin*, and *Clark*, the challenged causes of action do not arise from the protected activity of the filing of the unlawful detainer action. Instead, we are concerned here with a “*property dispute*” regarding Hong Sang Market’s termination of the master lease. “This dispute, and not any protected activity is ‘the gravamen or principal thrust’ of the [challenged causes of] action. [Citation.] The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit.” (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477, 478.)

Conversely, we find inapposite *Birkner*, *supra*, 156 Cal.App.4th 275, relied on by Hong Sang Market, as well as *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467 (*Feldman*), and *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169 (*Wallace*).

In *Birkner*, a landlord who was sued for wrongful eviction, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress, had rescinded an eviction notice before filing an unlawful detainer action. (156 Cal.App.4th at pp. 278-280.) The tenants were not evicted but sued nonetheless based solely on the landlord’s filing, service, and initial refusal to rescind the eviction notice. (*Id.* at pp. 279, 282.) This court held that the tenant’s complaint “indisputably arose from ‘activity protected under the anti-SLAPP statute.’ [Citation.]” (*Id.* at p. 283, fn. omitted.) In so concluding, we explained that generally, “ ‘[t]erminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech.’ [Citations].” (*Id.* at pp. 281-282.) However, if an eviction “notice [was] a legal prerequisite for bringing [the] unlawful detainer action,” as it was in *Birkner*, service of such a notice was a protected activity in furtherance of the constitutionally protected right to petition. (*Id.* at p. 282.) We further concluded that, “[u]nlike the situations in *Marlin* and *Pearl Street*, plaintiffs’ causes of action do not challenge the validity of the Rent Ordinance or any activity by [the landlord] that preceded the service of the termination notice. As noted by the trial court and supported by the record, ‘[t]he sole basis for liability’ in each of plaintiffs’ causes of action ‘was the service

of a termination notice, pursuant to Rent Ordinance,’ and [the landlord’s] ‘refusal to rescind it after [the tenants] informed him that they constituted a protected household.’ ” (*Id.* at p. 283.)

In *Feldman*, the landlord filed an unlawful detainer action against its tenant and the tenant’s subtenants. (*Feldman, supra*, 160 Cal.App.4th at p. 1473.) The landlord dismissed his action after the tenant gave up his tenancy and the subtenants vacated the premises. (*Ibid.*) The appellate court held the subtenants’ cross-complaint against the landlord was, “with one exception, based upon the filing of the unlawful detainer, service of the three-day notice [to quit], and [the landlord’s agent’s] statements in connection with the threatened unlawful detainer. These activities are not merely cited as *evidence* of wrongdoing or activities ‘triggering’ the filing of an action that arises out of some other independent activity. These *are* the challenged activities and the bases for all causes of action, except possibly that of negligent misrepresentation.” (*Id.* at p. 1483, italics in original.) As to the negligent misrepresentation cause of action, the court found that “the anti-SLAPP statute” would not “appear to apply, as the gravamen of the cause of action was not the eviction action or communications or conduct prepa[ra]tory thereto, but the misleading statements and representations allegedly made to the [subtenants] by [the landlord’s] agent, upon which they reasonably relied, to their detriment. [Citation.]” (*Id.* at p. 1484.)

In *Wallace*, defendants made a motion to strike causes of action for wrongful eviction and retaliatory eviction on the ground that the “ ‘gravamen of [the] claim[s]’ was that all defendants served a bogus notice of termination of the tenancy (the three-day notice [to quit the premises]) and instigated a frivolous and malicious unlawful detainer action, both of which constituted protected activity.” (*Wallace, supra*, 196 Cal.App.4th at p. 1179.) The appellate court held that the tenants’ causes of action for wrongful eviction and retaliatory eviction were subject to an anti-SLAPP motion. (*Id.* at p. 1187.) In explaining its ruling, the court noted that as to the wrongful eviction action, “[i]t makes no sense for [plaintiffs] to argue that their cause of action for defendants’ attempt to evict them wrongfully is not based on defendants’ alleged attempt to evict them” (*id.* at p. 1183),

which “[a]ccording to the complaint, [consisted of] acts by which defendants attempted to recover possession of the apartment [that] were, or at least included, [the owner’s] service of the three-day notice to quit and his filing of the unlawful detainer action. Indeed, this is the wrongdoing alleged in the complaint that is most obviously related to a wrongful eviction claim.” (*Id.* at p. 1182.). As to the cause of action for retaliatory eviction, the court found the same protected conduct (service of a three-day notice and prosecution of the ensuing unlawful detainer) was “not merely incidental to [any] alleged unprotected conduct. The three-day notice and unlawful detainer are two of the acts on which liability is premised, and those acts are certainly not collateral to a cause of action that seeks relief for causing a lessee to quit involuntarily or bringing an action to recover possession.” (*Id.* at p. 1187.)

Unlike the situations in *Birkner*, *Feldman*, and *Wallace*, in this case the challenged causes of action do not arise from the mere filing of the unlawful detainer action. Rather, the challenged causes of action are based on Hong Sang Market’s allegedly fraudulent termination of the master lease, which conduct is not protected activity within the meaning of the anti-SLAPP statute. The allegation that Hong Sang Market filed an unlawful detainer action against Peng is not determinative. The critical inquiry is whether the challenged causes of action *arise from* protected activity. Hong Sang Market does not explain how it is that the challenged causes of action arise from protected activity. It cannot be said as a matter of law that but for the filing of the unlawful detainer action, Peng would have no basis to pursue the challenged causes of action that seek relief for Hong Sang Market’s allegedly fraudulent termination of the master lease. (Cf. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 [“but for the federal lawsuit and [defendant’s] alleged actions taken in connection with that litigation, plaintiffs’ present claims [for breach of settlement agreement resolving the litigation] would have no basis”].) “Dictum in *Fox Searchlight [Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294] suggested ‘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.” ’ (*Id.* at p. 308.) Conversely, a defendant in an ordinary private dispute cannot

take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] We conclude it is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies ([*City of Cotati, supra*, 29 Cal.4th at p. 79), and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

We see no merit to Hong Sang Market’s contentions regarding the timing of Peng’s cross-complaint. “[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.’ [Citations.] [¶] . . . [¶] To construe ‘arising from’ in section 425.16, subdivision (b)(1) as meaning ‘in response to,’ . . . would in effect render all cross-actions potential SLAPP’s. We presume the Legislature did not intend such an absurd result. [Citation.] Absurdity aside, to suggest that all cross-actions arise from the causes of action in response to which they are pled would contravene the statutory scheme governing cross-complaints. [Citations.] The Legislature expressly has provided that a cross-action may ‘arise[] out of the same transaction or occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges’ [citations], rather than out of that cause of action itself.” (*City of Cotati, supra*, 29 Cal.4th at pp. 76-77.) “As a corollary, a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. [Citation.] That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such.” (*Id.* at p. 78.)

We acknowledge that each challenged cause of action includes an allegation that, as a consequence of Hong Sang Market’s allegedly fraudulent conduct in terminating the

master lease, Peng was forced to incur attorney fees to defend against the dismissed unlawful detainer action, and she seeks to recover those fees. However, “[a] SLAPP motion lies to strike ‘[a] cause of action,’ ” which “must be distinguished from the remedy sought: ‘ “The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.” ’ ” (*Marlin, supra*, 154 Cal.App.4th at p. 162, fns. omitted; see *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1282, fn. 3 (*Department of Fair Employment & Housing*) [“damages are remedies, not causes of action or claims”]; *Solvensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1535 [“the fact that too much is asked for does not affect the cause of action stated”].) To focus on Peng’s request for relief, “rather than on the substance of [the challenged causes of action], risks allowing [Hong Sang Market] to circumvent the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP *arise from* protected speech or petitioning. [Citation.]” (*City of Cotati, supra*, 29 Cal.4th at p. 78, fn. omitted, italics in original.)⁴

In sum, we conclude that because the challenged causes of action do not arise from protected activity, Hong Sang Market’s special motion to strike must be denied. Our reversal of the grant of the anti-SLAPP motion requires that we also vacate the award of attorney fees and costs to Hong Sang Market as the statutory basis for that award no longer exists. (*Pearl Street, supra*, 109 Cal.App.4th at p. 1320.)⁵ In light of our determination,

⁴ As our Supreme Court has noted, “[T]o emphasize the anti-SLAPP statute’s express requirements does not leave litigants confronting meritless, retaliatory countersuits without a remedy. ‘If a [defendant or] cross-defendant believes that a [responsive complaint or] cross-complaint has been filed “for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” or that the claims against it are frivolous or lacking in evidentiary support, then it may move for sanctions, including attorney fees and other expenses, to be awarded in the trial court’s discretion.’ [Citations.]” (*City of Cotati, supra*, 29 Cal.4th at p. 78, fn. 4.)

⁵ Inasmuch as Peng is now the prevailing party, she may be entitled to recover her attorney fees and costs at trial and on appeal on a “motion in the trial court and a showing that [Hong Sang Market’s] motion to strike was ‘frivolous or [was] solely intended to

we do not reach the second step of the section 425.16 analysis concerning whether Peng demonstrated a probability of prevailing on the challenged causes of action. Consequently, we deny as moot the parties' separate requests for judicial notice of certain documents relating to the merits of those causes of action. Because we have not addressed and express no opinion on the merits of the challenged causes of action, Hong Sang Market is "free to challenge" those causes of action "on other grounds and through other procedural means." (*Department of Fair Employment & Housing, supra*, 154 Cal.App.4th at p. 1288, fn. omitted.)

DISPOSITION

The July 19, 2011, order granting Hong Sang Market, Inc.'s special motion to strike is reversed and the October 26, 2011, order granting Hong Sang Market's motion for attorney fees and costs is vacated. The matter is remanded to the trial court with directions to enter new orders denying Hong Sang Market, Inc.'s special motion to strike and denying Hong Sang Market, Inc.'s motion for attorney fees and costs, and for further proceedings consistent with this opinion. Vivien Peng is awarded costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

cause unnecessary delay.' (§ 425.16, subd. (c))" (*City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1594, fn. 11.) We express no opinion on whether Peng will be able to demonstrate her right to recover attorney fees and costs, pursuant to section 425.16, subdivision (c).