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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

POZ VILLAGE DEVELOPMENT, INC.,

Plaintiff and Appellant,

v.

COLISEO HOUSING PARTNERSHIP,

Defendant and Respondent.

B236240

(Los Angeles County
Super. Ct. No. SC112119)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cesar C. Sarmiento, Judge. Affirmed.

Kennedy Kamrowski and J. Grant Kennedy for Plaintiff and Appellant.

Reuben Raucher & Blum, Stephen L. Raucher and K. Cannon Brooks for
Defendant and Respondent.

INTRODUCTION

Plaintiff POZ Village Development, Inc. appeals from a judgment entered in favor of defendant Coliseo Housing Partnership after the grant of a special motion to strike (Code Civ. Proc., § 425.16).¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Coliseo Housing Partnership, a California limited partnership (the Partnership), was formed to develop and operate a multi-family apartment building for low-income tenants, commonly referred to as the Gilbert Lindsay Manor (the Property),² at 601 West 40th Place in Los Angeles. The real property purchase, development and construction of the Property was funded with a mix of low-income housing tax credit financing obtained through the California Tax Credit Allocation Committee (CTCAC),³ a Community Redevelopment Agency loan, and a mortgage.

The Partnership operated under the amended and restated limited partnership agreement entered into effective May 1, 1990 (the Partnership agreement). POZ Village

¹ Code of Civil Procedure section 425.16 is commonly referred to as the anti-SLAPP statute. SLAPP is an acronym for strategic lawsuit against public participation. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

Unless otherwise stated, further statutory references are to the Code of Civil Procedure.

² The Property was referred to originally in the Partnership agreement and records as Villa Del Coliseo.

³ The CTCAC was formerly known as California Mortgage Bond Allocation Committee. It administers two low-income housing tax credit programs, a federal program and a state program. The purpose of the programs is to “encourage private investment in affordable rental housing for households meeting certain income requirements.” The federal Low Income Housing Tax Credit Program began in 1986 and is regulated through Internal Revenue Code section 42 (26 U.S.C. § 42) but administered on the state level by CTCAC.

Development, Inc. (POZ), along with The Bedford Group (Bedford), United Housing Preservation Corporation (United) and D & S Development Company, were the general partners.

POZ was formed as a nonprofit entity and was affiliated with the Praises of Zion Church. The president of POZ was Reverend Joseph B. Hardwick (Hardwick), who was also closely affiliated with the church. Initially, POZ held a 0.5 percent interest in the Partnership and acted as the managing general partner, with primary responsibility for day-to-day management decisions with respect to the Property.

Before development of the Property was completed, by letter dated January 27, 1989 and signed by Hardwick, POZ applied, on behalf of the Partnership, for tax credits to finance a portion of the development of the Property. On May 3, 1989, by a letter addressed to POZ, the CTCAC granted the Partnership's application based upon an estimated cost of development of \$16,065,100. After the development of the Property was completed, on October 5, 1992, the CTCAC issued four 8609 forms certifying an award of the allocation of credits to the Partnership grounded on a total qualified basis of \$16,109,501 at 8.9 percent per year for 10 years.

From this award, based upon POZ's 0.5 percent interest in the Partnership, POZ's allocation was about \$7,000 per year in low income housing tax credits each year from 1992 through 2000, as well as a partial-year allocation of about \$4,000 in 1991 and of about \$3,000 in 2001. During the period POZ received its allocation of the tax credits, POZ never complained that it had received more tax credits than the development costs for the Property warranted.

POZ and Bedford were removed as general partners as of June 1, 2006, pursuant to the Partnership agreement. They refused to acknowledge their removal and to provide the required appraisal of their partnership interests. The other partners filed suit against them on June 28, 2006 (the removal lawsuit). (*AFC-Low Income Housing Credit*

Partners - I et al. v. POZ Village Development, Inc., et al. (Super. Ct. L.A. County, No. BC354676).) The lawsuit is in the appeals process (No. B244108).⁴

POZ remained as a limited partner in the Partnership and filed the instant lawsuit against the Partnership on April 5, 2011, for declaratory relief and an accounting. As to the accounting, the complaint alleged that POZ had learned of a \$5 million discrepancy in the development costs submitted to obtain tax credits from the State of California, but, despite numerous efforts, POZ had not been able to get clarification or related facts regarding the operation of the Partnership from either the Partnership or its current general partner, United. The alleged \$5 million discrepancy apparently was in the development costs total which POZ and the Partnership had included in the 1989 and 1990 application documents submitted to CTCAC to obtain tax credits.

As to declaratory relief, the complaint alleged “[t]here is an actual and present controversy regarding these facts in that an erroneous application for credits would result in obtaining over \$5,000,000 in improper credits creating exposure to the entity and perhaps damaging its ability to apply for further credits.” POZ stated that it “seeks a declaration as to the propriety of the credits applied for based upon the accounting requested herein and as otherwise may be accomplished, and if the credits applied for cannot be substantiated as correct, that those who benefitted by the misapplication pay said sums back to the State of California to avoid any injury to the Partnership.”

On May 12, the Partnership filed an anti-SLAPP motion. The Partnership asserted that the entire complaint was premised on the Partnership’s filing of a tax credit application with the CTCAC, which was protected speech under the anti-SLAPP statute. The Partnership claimed that POZ could not demonstrate a probability of success on the merits of its claim as required pursuant to section 425.16 to avoid having the complaint

⁴ Due to subsequent events arising from POZ’s conduct, the Partnership has brought two other lawsuits against POZ. Judgment was entered for the Partnership in both cases. In one of them, an appeal is currently pending (*Coliseo Housing Partnership v. POZ Village Development, Inc. et al.* (No. B236713)).

stricken and, therefore, the Partnership's motion should be granted. The Partnership requested \$11,330 in attorney's fees and costs as provided in section 425.16.

The Partnership presented three arguments to show that POZ could not demonstrate a probability of success. First, POZ's complaint was barred by the applicable statute of limitations, in that the subject tax credit application was submitted by POZ itself in 1989, over 20 years prior to the filing of the lawsuit. Second, even if the facts alleged in the complaint were assumed to be true, they were not sufficient to state any cause of action against the Partnership. Third, the causes of action alleged were barred pursuant to section 426.30, in that they were not brought in a prior action between the parties arising out of the same transaction or occurrence.

The trial court issued its tentative ruling dated June 29, 2011. After a hearing on July 1, the trial court issued an order granting the Partnership's anti-SLAPP motion and adopting its prior tentative ruling with one modification, to increase the award of attorney's fees and costs to the amount of \$11,330. The court found that the Partnership's application for tax credits was a protected activity, in that it was a written statement made before an executive proceeding or other official proceeding and a writing made in connection with an issue under consideration by an executive body or other official proceeding. (§ 425.16, subd. (e).) The court determined that the complaint failed to state a cause of action for declaratory relief or for an accounting and, therefore, POZ could not meet its burden to show a probability of prevailing on the merits.

On July 26, the trial court entered a judgment in favor of the Partnership, dismissing the action in its entirety with prejudice and awarding the Partnership attorney's fees in the amount of \$11,330.

DISCUSSION

The anti-SLAPP statute provides a quick dismissal remedy for a meritless suit arising from the exercise of protected free speech. (§ 425.16; *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.) Section 425.16 states that "[a] cause of action

against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or 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." (*Id.*, subd. (b)(1).) On appeal, we review de novo a trial court's grant or denial of an anti-SLAPP motion. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 109.)

Initially, the defendant has the burden to make a prima facie showing that the causes of action against the defendant arose from protected activity, that is, conduct in furtherance of his or her constitutional rights of free speech or petition. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472.) Among the statutorily protected activities are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e).)

POZ argues that only numbers, and not speech, are at issue in the lawsuit. The numbers were entered on an application for tax credits form submitted to a governmental agency for a decision as to the amount of tax credits which the agency would award the Partnership. Whether the numbers were in the form of written numerals, words or oral speech, they were communications to CTCAC, an executive body charged with evaluating entitlement to and the amount of tax credit awards under state and federal law. The communications, therefore, were made before an executive proceeding authorized by law (§ 425.16, subd. (e)(1)), and they were a necessary part of a writing made in connection with an issue under consideration or review by an executive body authorized by law (*id.*, subd. (e)(2)). "[T]he constitutional right to petition . . . includes . . . seeking administrative action." [Citations.] (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115.) Section 425.16 is to be broadly construed to

“encompass[] participation in official proceedings, generally.” (*Briggs, supra*, at p. 1118.) The Partnership met its burden to show that the causes of action brought against it by POZ arose from activity protected under section 425.16. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn., supra*, 136 Cal.App.4th at pp. 472-473.)

The burden thus shifted to POZ to “establish[] that there is a probability that [it] will prevail on the claim” arising from the Partnership’s submission to CTCAC of numbers required to complete the application for tax credits. (§ 425.16, subd. (b)(1).) Ordinarily, to determine if a plaintiff has met its evidentiary burden requires consideration of the pleadings and evidence submitted by the parties. (*McGarry v. University of San Diego, supra*, 154 Cal.App.4th at p. 108.) Then our task is “simply [to] determine whether the plaintiff’s evidence would, if credited, be sufficient to meet the burden of proof.” (*Ibid.*) That is because, ordinarily, there is no issue regarding whether the plaintiff has stated a cause of action.

In the instant case, however, the trial court determined that POZ could not show a probability of prevailing on a cause of action, in that it failed to state a cause of action either for declaratory relief or for an accounting. The trial court was correct.

A cause of action for declaratory relief must set forth “facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties . . . and request[] that the right and duties be adjudged.” (*Jefferson Incorporated v. City of Torrance* (1968) 266 Cal.App.2d 300, 302; see also § 1060.) “[T]he court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time” and “before there has been any breach of the obligation” which forms the basis of the declaration. (§ 1060.)

The declaratory relief cause of action, as well as the accounting cause of action, are premised on speculation and conjecture, not actual facts relating to a present, actual controversy about the legal rights and duties of the parties. Both causes of action are based upon the allegation that plaintiff “learned of a five million dollar discrepancy in submitted costs” to obtain “tax credits from the State of California.” From the remaining

allegations, it is readily inferable that POZ does not know if the discrepancy exists or if the Partnership has obtained improper tax credits as a result.

As to declaratory relief, the complaint alleges “[t]here is an actual and present controversy regarding these facts in that *an erroneous application for credits would result in obtaining over \$5,000,000 in improper credits creating exposure to the entity and perhaps damaging its ability to apply for further credits.*” (Italics added.) POZ appears to be requesting the court to force the Partnership to provide documents and explanations so that POZ and the court can determine if an actual discrepancy exists and, if it does, then POZ is requesting the court to declare that “those who benefitted by the misapplication pay back the State of California.”

As to declaratory relief, the complaint alleges “[t]here is an actual and present controversy regarding these facts in that an erroneous application for credits would result in obtaining over \$5,000,000 in improper credits creating exposure to the entity and perhaps damaging its ability to apply for further credits.” POZ states that it “seeks a declaration as to the propriety of the credits applied for based upon the accounting requested herein and as otherwise may be accomplished, and if the credits applied for cannot be substantiated as correct, that those who benefitted by the misapplication pay said sums back to the State of California to avoid any injury to the Partnership.”

In arguing that a cause of action for declaratory relief exists, POZ states in its brief: “It is a real injury to be a part of a partnership that has potentially engaged in defrauding the [S]tate of California for the benefit of a general partner. It is a real injury to not be able to get a simple explanation as to information to determine if there are further actionable issues. It should be actionable, *asking this Court to help force the partnership to respond to this simple accusation.* The limited partner (i.e., POZ) is injured by being ignored.”

There may be other legal avenues for POZ to force the Partnership to turn over its records, if that is the controversy POZ asserts exists at present. The allegations presented by POZ as the basis for declaratory relief, however, do not show there is a present, actual controversy between the parties as to their respective rights and obligations. Declaratory

relief may not be granted to give an advisory opinion to a party. “While a party may seek declaratory judgment before an actual invasion of rights occurs, it still must demonstrate the controversy is justiciable. The ripeness necessary in the declaratory judgment statute’s ‘actual controversy’ requirement (Code Civ. Proc., § 1060) ‘does not embrace controversies that are “conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.”’ [Citation.]” (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 186.) Given that there is no actual, justiciable controversy between the parties for which the court can issue a declaration of rights, POZ cannot show a probability of prevailing on its declaratory relief cause of action. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105.)

As to POZ’s cause of action for an accounting, POZ does not allege facts showing that the Partnership owes POZ any sum of money. If anything, POZ alleges that the Partnership could potentially owe the State of California money. POZ requests the court to declare that the Partnership must pay the State of California, in the event an accounting shows that the Partnership owes a sum to the state. “A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. [Citations.]” (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) POZ cannot meet its burden to show a probability of prevailing on its accounting cause of action, in that POZ has not alleged or submitted evidence showing that the Partnership owes POZ money. (*Mann v. Quality Old Time Service, Inc.*, *supra*, 120 Cal.App.4th at p. 105.)

To meet its burden and avoid an order striking its complaint under section 425.16, “[a] plaintiff is not required ‘to *prove* the specified claim to the trial court’; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. [Citation.]” (*Mann v. Quality Old Time Service, Inc.*, *supra*, 120 Cal.App.4th at p. 105.) POZ failed to make the required showing as to either its cause of action for declaratory relief or its cause of action for an

accounting. Therefore, the trial court properly granted the Partnership's anti-SLAPP motion.

DISPOSITION

The judgment is affirmed. The Partnership is awarded its costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.