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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CITY OF MONROVIA,

Plaintiff and Respondent,

v.

PAULINE WHITE,

Defendant and Appellant.

B254080 c/w B258206

(Los Angeles County
Super. Ct. No. EC060809)

APPEAL from orders of the Superior Court of Los Angeles County. Donna Fields Goldstein, Judge. Affirmed in part and reversed in part.

Pauline White, in pro. per., for Defendant and Appellant.

Dapeer, Rosenblit & Litvak and William Litvak for Plaintiff and Respondent.

This consolidated appeal concerns an action by the City of Monrovia (the City) to enjoin allegedly unpermitted grading and construction activity on property owned by Pauline White (White), and a cross-action by White against the City for multiple claims, including indemnity, abuse of process, trespass, and violation of her Fourth Amendment and privacy rights. The City prevailed on a special motion to strike White's cross-complaint under Code of Civil Procedure section 425.16,¹ and successfully opposed White's subsequent anti-SLAPP motion against the City's complaint. White appeals from the orders granting the City's anti-SLAPP motion and denying her anti-SLAPP motion. White also appeals from the order awarding the City its attorney fees in successfully opposing her anti-SLAPP motion.

We affirm the order denying White's anti-SLAPP motion and the order awarding the City its attorney fees in opposing that motion. We affirm in part and reverse in part the order granting the City's anti-SLAPP motion.

BACKGROUND

The City's investigation

In January 2010, in response to neighbors' complaints of construction and grading activity at property owned by White at 502 and 504 Mesa Circle in the City of Monrovia, the City determined that no building permit had been issued for such work. The City issued a correction/stop work request on April 3, 2009, but White did not respond to that request.

After serving a stop work order on White and unsuccessful attempts to obtain White's consent to inspect her property, the City obtained an inspection warrant issued by the Superior Court of Los Angeles County on June 8, 2012, authorizing an inspection of White's property. The City served the inspection warrant on White, but was still unable to obtain access to White's property; and on June 11, 2012, it obtained a modification of the warrant authorizing forcible entry onto White's property. The City inspected White's property pursuant to the warrant, and determined that no permits had been issued for

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise stated. A special motion to strike is also referred to as an anti-SLAPP motion.

retaining walls and grading activity on the property, in violation of applicable municipal code requirements. Subsequent efforts by the City to obtain White's voluntary compliance with municipal code requirements were unsuccessful.

The City's complaint

The City filed a complaint on May 31, 2013, for public nuisance, municipal code violations, and declaratory relief, seeking to abate and enjoin the unpermitted grading and construction activity on White's property. In its complaint, the City alleged that since approximately January 2004, it had received complaints regarding, and had observed through multiple inspections, unpermitted excavation, grading, and construction activity on White's property, in violation of the municipal code and other applicable legal requirements.

On June 24, 2013, the City filed a motion for issuance of a preliminary injunction against White. The trial court granted that motion on August 28, 2013, and ordered White to cease all grading, excavation, and construction at her property.

White's cross-complaint

White filed a cross-complaint against the City on August 6, 2013, in which she alleged 21 causes of action for indemnity, contribution, apportionment, declaratory relief, separation of powers violation, abuse of police power, abuse of process, violation of her Fourth Amendment rights, violation of her right of privacy, violation of due process and equal protection, selective enforcement, void for vagueness/overbreadth, discrimination and chilling of public participation and free speech, slander of title, taking, trespass, violation of the contracts clause of the federal constitution, estoppel, laches, and unclean hands, improper taxation in violation of Proposition 26 and the California constitution, accord and satisfaction, and emotional distress and loss of income.

The City's anti-SLAPP motion

The City filed a demurrer to each of the causes of action asserted in the cross-complaint, as well as an anti-SLAPP motion. In support of the anti-SLAPP motion, the City filed declarations by a City building inspector and an engineering consultant, attesting to their respective inspections of White's properties and the various code

violations and public safety issues they observed there, and the declaration of its attorney, describing the City's unsuccessful efforts to obtain White's voluntary compliance with the municipal code. Also in support of its motion, the City filed a request for judicial notice of an inspection warrant issued by the superior court on June 8, 2012, authorizing inspection and photographing of White's property; an order dated June 11, 2012, modifying the inspection warrant to authorize use of forcible entry; a notice of pendency of the City's action against White recorded by the Los Angeles County Recorder's Office on July 3, 2013; and copies of the relevant municipal code provisions.

White moved to continue the hearing date on the City's anti-SLAPP motion to allow her to conduct discovery regarding the City's allegations. The trial court denied White's request for a continuance and to take discovery.

White opposed the City's anti-SLAPP motion, arguing that the City's enforcement action was not protected activity and did not concern an issue of public interest, and that White had a probability of prevailing on her cross-claims. In support of her opposition, White submitted her own declaration in which she stated, among other things, that the retaining walls on her property were preexisting when she acquired the property, that she had never been served with a copy of the inspection warrant, and that she was unable to find a copy of the warrant in the superior court files. White also filed evidentiary objections to the declarations the City submitted in support of its anti-SLAPP motion. The City, in turn, filed evidentiary objections to White's declaration.

The trial court sustained nearly all of the City's evidentiary objections to White's declaration, and overruled the majority of White's evidentiary objections to the City's evidence. On November 20, 2013, the trial court entered its order granting the City's anti-SLAPP motion in its entirety. In light of its ruling on the anti-SLAPP motion, the trial court took the City's demurrer off calendar as moot.

White's anti-SLAPP motion

On February 5, 2014, White filed an anti-SLAPP motion to strike the City's complaint. On March 21, 2014, the trial court denied White's anti-SLAPP motion and imposed monetary sanctions against White for filing a frivolous motion.

Attorney fee awards

The City filed separate motions to recover its attorney fees under section 425.16, subdivision (c) as the prevailing party in its motion to strike White's cross-complaint and in opposing White's unsuccessful motion to strike the complaint. The trial court granted the motions and awarded the City attorney fees in the amounts of \$12,600 on its anti-SLAPP motion and \$11,522.50 for successfully opposing White's anti-SLAPP motion.

White filed separate appeals from the orders granting the City's anti-SLAPP motion and denying her anti-SLAPP motion, and from the order awarding the City its attorney fees for successfully opposing White's anti-SLAPP motion. We ordered the appeals consolidated.

DISCUSSION

I. Standard of review

A trial court's order granting or denying a special motion to strike under section 425.16 is reviewed de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) A trial court's evidentiary rulings are reviewed under the abuse of discretion standard. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.) A trial court's ruling on the propriety of an attorney fee award is reviewed for abuse of discretion (*Visher v. City of Malibu* (2005) 126 Cal.App.4th 364, 368), as is a trial court's order imposing sanctions under the anti-SLAPP statute and the frivolous actions statute (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392 (*Decker*)). The determination of whether the trial court had the statutory authority to make an attorney fee award is a question of law that we review de novo. (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 724.)

II. Anti-SLAPP motions

Section 425.16 was enacted "to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]" (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315 (*Club Members*)). As relevant here, subdivision (b)(1) of section 425.16 provides: "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.”

Determining whether section 425.16 bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*)). First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action “aris[es] from any act . . . in furtherance of the [moving party’s] right of petition or free speech.” (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.) “A cause of action “arising from” [a] defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike.’ [Citations.] ‘Any act’ includes communicative conduct such as the filing, funding, and prosecution of a civil action. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*)). The scope of the statute is broad. In authorizing the filing of a special motion to strike, the Legislature “expressly provided that section 425.16 should ‘be construed broadly.’ [Citations.]” (*Club Members, supra*, 45 Cal.4th at p. 315.)

If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a “probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 “““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.]” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. omitted (*Jarrow*)). ““The plaintiff’s showing of facts must consist of evidence that would be admissible at trial. [Citation.]”” (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679.) “[D]eclarations that lack foundation or personal knowledge, or that are argumentative,

speculative, impermissible opinion, hearsay, or conclusory are to be disregarded. [Citation.]” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)

A. The City’s anti-SLAPP motion

1. Arising out of protected activity

The City contends all of the claims asserted in the cross-complaint arise out of the filing of its enforcement action -- protected petitioning activity under section 425.16. Filing a lawsuit is an exercise of a party’s constitutional right of petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*); *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 (*Chavez*)). ““[T]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.” [Citations.]” (*Briggs, supra*, at p. 1115.) Thus, “a cause of action arising from a defendant’s alleged improper filing of a lawsuit may appropriately be the subject of a section 425.16 motion to strike. [Citation.]” (*Chavez, supra*, at p. 1087.)

To determine whether the causes of action asserted in White’s cross-complaint arise from acts in furtherance of the City’s right of petition, we must “consider the pleadings, and supporting and opposing affidavits stating the facts on which the liability or defense is based.” (§ 425.16, subd. (b)(2).) In doing so, we “examine the *principal thrust* or *gravamen*” of those causes of action to determine whether the anti-SLAPP statute applies. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520.) We assess the gravamen of White’s claims by identifying “[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.” [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) As our Supreme Court has explained, “[t]he anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning.” (*Navellier, supra*, 29 Cal.4th at p. 92.) A court considering an anti-SLAPP motion must therefore examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed. (*Id.* at pp. 92-93.) We apply these principles to each of the causes of action asserted against the City.

a. Causes of action 1 through 4

The first four causes of action asserted in the cross-complaint, for partial indemnity, contribution, apportionment, and declaratory relief, are premised on White's allegations that the unauthorized retaining walls constructed on her property were preexisting at the time she purchased the property, that the City has no records or knowledge as to when the retaining walls were built, that the City has no proof of any of the municipal code violations it seeks to enforce in its complaint, and that if White is held liable for any such violations, she is entitled to indemnity, contribution and apportionment from the City. The first cause of action alleges that "[White] was in no way liable for the allegations made in the Complaint"; that "[t]he acts alleged in the Complaint, if they can be proven, were the direct, proximate and legal result of the conduct of the Cross-Defendants," and that "if as a result of the allegations in the Complaint, [White] is held liable for all or any part of the damages," she "is entitled to partial indemnity."

The second cause of action similarly alleges that "if as a result of the matter alleged in the Complaint, [White] is held liable for all or any part of the claims asserted against her, Cross-Defendants . . . are obligated to reimburse and are liable to [White] for all and any liability so asserted by way of contribution." The third cause of action alleges that the City and its employees "were negligently, tortuously [*sic*], or otherwise responsible, in whole or in part, in some proportionate relationship to themselves and to [the City] for the damages, if any, suffered and/or claimed by [the City] as identified in the underlying Complaint" so that each cross-defendant should "be required to pay to [White] a sum equal to the proportionate share of monetary payments" to be made to the City. The fourth cause of action incorporates the previous allegations and claims that White is entitled to declaratory relief with respect to the City's obligation to indemnify her.

The gravamen of each of these causes of action is the City's enforcement of alleged municipal code violations through the filing of its complaint -- protected activity

under section 425.16. Each of these causes of action accordingly comes within the ambit of the anti-SLAPP statute.

b. Causes of action 5, 6, 10, 11, and 15

The fifth, sixth, 10th, 11th, and 15th causes of action for separation of powers violation, abuse of police power, violation of due process and equal protection, selective enforcement, and taking, are all similarly premised on allegations that the City's enforcement action is arbitrary, discriminatory, procedurally improper, and impinges upon White's due process rights.

The fifth cause of action alleges that the City's drafting and enforcing of its own municipal code sections violates federal and state law separation of powers requirements. The sixth cause of action for abuse of police power alleges that the City "improperly drafted municipal code sections, and improperly created policies and procedures to implement such code" and that "[a]pplication by the City of its municipal code sections solely against [White] as described in the complaint is arbitrary and capricious." The 10th and 11th causes of action allege that the City's interpretation and enforcement of its municipal code requirements denied White due process and equal protection under the law. The 15th cause of action alleges that the City has sought "to regulate properties in such an excessive and restrictive way" as to "constitute a regulatory taking and cause impairment of value and/or diminution of value of [White's] properties without just compensation."

All of these causes of action come within the ambit of the anti-SLAPP statute.

c. Causes of action 12 through 14 and 17 through 20

The 12th through 14th, and 17th through 20th causes of action are premised upon, and expressly refer to, the City's filing of the complaint. The 12th cause of action (void for vagueness/overbroad) alleges that the statutes and alleged violations cited in the City's complaint are undated, "the laws referenced in the complaint are too vague for any citizen of Monrovia to understand" and "the municipal code relied upon by [the City] in the complaint is . . . overbroad." The 13th cause of action alleges that "[t]he actions of [the City] in filing this lawsuit" chill White's right to participate in City government. The

14th cause of action for slander of title alleges that the City “caused documents to be filed in the County Recorder’s Office,” namely a notice of pendency of action, to impair White’s title and credit. The 15th cause of action (taking) alleges that the City seeks to regulate White’s properties, through enforcement of its municipal code requirements, “in such an excessive and restrictive way” as to “constitute a regulatory taking.” The 17th cause of action (contracts clause) alleges that the “complaint filed by [the City] impairs the contractual relationship” between White and her tenants. The 18th cause of action alleges that the City is estopped from filing and prosecuting its enforcement action because of laches and unclean hands. The 19th cause of action (improper tax, violation of Proposition 26) alleges that the City, “by virtue of the complaint” seeks to impose financial burdens on White that constitute improperly levied taxes. The 20th cause of action (accord and satisfaction) alleges that the City’s filing of its enforcement action breached a previous oral agreement to resolve the dispute. These causes of action all arise out of protected petitioning activity and therefore come within the scope of section 425.16.

d. Causes of action 7 through 9 and 16

Causes of action 7 through 9 and 16, unlike the other causes of action asserted in the cross-complaint, do not arise out of the City’s protected petitioning activity. The seventh cause of action (abuse of process) is premised on the allegation that the City falsely claimed to have entered White’s property pursuant to a warrant, when in fact no warrant was issued by the superior court. The eighth and ninth causes of action allege that the City unlawfully entered White’s property, damaging a fence while doing so, and photographed and videotaped the premises, in violation of White’s Fourth Amendment rights and her federal and state constitutional rights of privacy. The 16th cause of action alleges that the City trespassed onto White’s property. The gravamen or principal thrust of these causes of action is that the City violated White’s privacy rights, not by filing the complaint, but by entering, searching, and damaging her property without a warrant and without reasonable cause. The City fails to explain how such actions might constitute

conduct in furtherance of the constitutional right of petition or free speech under section 425.16.

The circumstances here are similar to those in *Anderson v. Geist* (2015) 236 Cal.App.4th 79 (*Anderson*), in which the court denied a law enforcement agency's special motion to strike a complaint alleging that deputies unlawfully entered a residence while attempting to execute an arrest warrant. (*Id.* at p. 82.) The court in *Anderson* rejected the law enforcement agency's argument that execution of an arrest warrant constitutes "conduct in furtherance of the exercise of the constitutional right of petition" within the meaning of the anti-SLAPP statute. (*Id.* at pp. 86-87.) The court reasoned that "the execution of a warrant is not an exercise of rights by the peace officer; it is the performance of a mandatory duty, at the direction of the court. [Citation.] Because peace officers have no discretion in whether or not to execute a warrant issued by the court, it seems unlikely that a lawsuit asserting claims arising from such activity could have the chilling effect that motivated the Legislature to adopt the anti-SLAPP statute, or that extending protections of the anti-SLAPP statute to such activity would serve the statute's goals. [Citation.]" (*Id.* at p. 87.) The same is true with respect to the City's execution of the inspection warrant issued in this case. The warrant commands the City's employees to perform an inspection of White's property within a certain time frame and to make a return to the superior court according to section 1822.55.

The City attempts to distinguish *Anderson* by arguing that the challenged activity in that case did not include the filing of a lawsuit, whereas the City's execution of the inspection warrant in this case preceded the filing of a complaint. The City's subsequent filing of the complaint does not bring execution of the inspection warrant within the scope of the anti-SLAPP statute. As the court in *Anderson* observed, "[e]xecution of an arrest warrant is of course 'an act in furtherance of a criminal prosecution,' . . . [b]ut that does not necessarily make it 'conduct in furtherance of the exercise of the constitutional right of petition'" within the meaning of section 425.16. (*Anderson, supra*, 236

Cal.App.4th at pp. 86-87.)² An anti-SLAPP motion is directed at “[a] cause of action . . . arising from any act . . . in furtherance of the . . . right of petition or free speech . . . in connection with a public issue” (§ 425.16, subd. (b)(1), italics added.) The seventh, eighth, ninth, and 16th causes of action in the cross-complaint are premised on the City’s allegedly unlawful entry, search, and damage to White’s property, not on the filing or prosecution of the City’s enforcement action. “If liability is not based on protected activity, the cause of action does not target the protected activity and is therefore not subject to the SLAPP statute. [Citations.]” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1550.)

The City further attempts to distinguish *Anderson* by claiming that the court’s denial of the anti-SLAPP motion in that case was predicated on the moving party’s failure to show how its execution of a warrant implicated a public issue or an issue of public interest. While the court in *Anderson* noted that the moving party’s failure to raise such an argument was an additional basis for denying the anti-SLAPP motion, the text of the court’s opinion makes clear that factor was an additional, and not primary basis for its decision. (*Anderson, supra*, 236 Cal.App.4th at pp. 86-87.)

² *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, a case that was not cited by either party, does not support the argument that execution of an inspection warrant is protected activity under section 425.16. *Squires* concerned a lawsuit filed by plaintiff landowners against the City of Eureka for harassment, abuse of process, and other claims concerning alleged code violations at real properties owned by the plaintiffs. (*Id.* at pp. 581-584.) The trial court granted the City’s anti-SLAPP motion, after finding that the plaintiffs’ claims arose from protected activity under section 425.16 because they “involve actions allegedly taken by the defendants in the investigation and prosecution of . . . code enforcement violations occurring at real properties owned by plaintiffs,” and that plaintiffs failed to establish a reasonable probability of prevailing on their claims. (*Id.* at p. 584.) The plaintiffs did not dispute the trial court’s determination that their causes of action arose from conduct protected under the anti-SLAPP statute, so the only issue on appeal was whether they had demonstrated a probability of prevailing. (*Id.* at p. 598.) The court in *Squires* accordingly did not address whether the city’s execution of an inspection warrant and its investigation of potential code violations constituted protected activities under section 425.16. (*Squires*, at p. 598.)

The City argues the entire cross-complaint was properly stricken because all of the causes of action allege both protected and nonprotected activity. While it is true that causes of action 7 through 9 and 16 of the cross-complaint incorporate by reference previous allegations concerning protected conduct in preceding causes of action, the mere mention of protected conduct does not subject those claims to an anti-SLAPP motion. When a claim arises from both protected and nonprotected activity, if the protected activity is “merely incidental” to the unprotected conduct, then the anti-SLAPP statute does not apply. (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 967-968.) The absence of an express mention of protected conduct in causes of action 7 through 9 and 16, in contrast to the repeated statements describing the City’s enforcement action in the other claims asserted in the cross-complaint, shows that the protected activity is “merely incidental” to the allegations in these causes of action.

The City maintains that the instant case is similar to *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, in which the court upheld the granting of an anti-SLAPP motion after concluding that the gravamen of each of the causes of action asserted in a cross-complaint was directed at the moving party’s filing of a complaint. The cross-complainant in that case alleged claims for trade libel, predatory tactics, harassment, intimidation, invasion of privacy, and interference with rights of free speech and association, among others, but “alleged very little in terms of specific acts on the part of [the plaintiff] that could form a basis for any cause of action.” (*Id.* at p. 1369.) The only specific nonprotected conduct mentioned in the cross-complaint concerned an alleged communication that occurred after the filing of the complaint. (*Id.* at p. 1371.) The court in *Raining Data* concluded that this “incidental reference” to a single potentially nonprotected activity “could not save the entire cross-complaint from the anti-SLAPP motion.” (*Id.* at p. 1372, fn. omitted.) Here, in contrast, the seventh through ninth and 16th causes of action allege specific nonprotected conduct -- the City’s alleged unlawful entry, damaging White’s property and invading her privacy. Those allegations are not “merely incidental” to White’s causes of action for abuse of process, invasion of

privacy, and violation of Fourth Amendment rights. *Raining Data* is thus distinguishable.

In sum, the City failed to meet its burden of establishing that the seventh, eighth, ninth and 16th causes of action in the cross-complaint arise out of conduct protected under the anti-SLAPP statute. The trial court accordingly erred by granting the City's special motion to strike those causes of action.

e. Twenty-first cause of action

The 21st cause of action alleges that as the result of the City's conduct in all of the previously alleged causes of action, White has suffered emotional distress and loss of income. For reasons discussed, to the extent this cause of action is premised on the City's enforcement of alleged municipal code violations through the filing of its complaint (i.e., the allegations of the first through sixth, and the 10th through 20th causes of action), it arises out of protected activity and comes within the ambit of the anti-SLAPP statute. To the extent it is based on the City's allegedly unlawful entry onto White's property and invasion of White's privacy rights, it falls outside the scope of the statute.

2. Probability of prevailing

Because the City met its threshold burden of establishing that all but the seventh, eighth, ninth, 16th and in part, the 21st causes of action asserted in the cross-complaint arise out of its protected right of petition, we must now determine whether White met her burden of demonstrating a probability of prevailing on those causes of action that come within the ambit of the anti-SLAPP statute. To do so, White was required to present "competent and admissible evidence" showing she could establish a prima facie case at trial. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236 (*Tuchscher*); *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496.) She failed to do so.

As a matter of law, the causes of action at issue are barred because White failed to comply with the Claims Act (Gov. Code, § 900 et seq.).³ Subject to certain exceptions that are not applicable here, the Claims Act provides that “no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity” (§ 945.4.) Compliance with the statutory claim presentation procedure is an element of a cause of action for damages against a public entity and a condition precedent to maintaining a legal action against a public entity. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776-1777.) White concedes that the City is a public entity. She does not contend she complied with the Claims Act. Because White cannot show the requisite compliance with the Claims Act, she failed to demonstrate a probability of prevailing on the merits of her cross-claims. (*Ibid.*)

In addition, White failed to present admissible evidence showing she could present a prima facie case at trial. The declaration she submitted in support of her opposition to the anti-SLAPP motion was deemed inadmissible in nearly its entirety. Although White claims the trial court’s evidentiary rulings were “arbitrary and capricious,” she presents no reasoned argument or analysis to support that claim. She accordingly fails to sustain her burden on appeal to affirmatively challenge the trial court’s evidentiary ruling by demonstrating the court’s error. (*Roe v. McDonald’s Corp.* (2005) 129 Cal.App.4th 1107, 1114.)

White failed to meet her burden of demonstrating a probability of prevailing on her claims. The trial court did not err by granting the anti-SLAPP motion as to all claims asserted in the cross-complaint except the seventh, eighth, ninth, and 16th causes of

³ Because the City failed to make a threshold showing that the seventh, eighth, ninth, and 16th causes of action, and in part, the 21st cause of action asserted in the cross-complaint arise out of conduct protected under the anti-SLAPP statute, we do not address whether White could demonstrate a probability of prevailing on the merits of those claims. (*Navellier, supra*, 29 Cal.4th at p. 88.) The trial court’s ruling on the City’s demurrer as to those causes of action is not at issue in this appeal.

action and, as discussed, the 21st cause of action to the extent it is premised on the City's allegedly unlawful entry onto White's property and invasion of White's privacy rights.

3. White's discovery request

White contends the trial court should have permitted her to take discovery before ruling on the City's anti-SLAPP motion. The filing of a anti-SLAPP motion stays all discovery proceedings in an action. (§ 425.16, subd. (g).) Notwithstanding the stay, a court may, upon the filing of a noticed motion and a showing of good cause, order that specified discovery may be conducted. (*Ibid.*) White moved to continue the hearing on the City's anti-SLAPP motion to allow her to take discovery. The trial court denied that request because White failed to establish good cause for discovery by identifying the additional facts she expected to obtain in discovery and why those facts were necessary to establish a prima facie case against the City.

White argues that discovery was necessary to challenge the City's assertion that its employees lawfully entered White's property pursuant to an inspection warrant. Copies of the warrants issued by the superior court were attached to a request for judicial notice filed by the City concurrently with its anti-SLAPP motion. White did not oppose the request for judicial notice, and the trial court overruled White's evidentiary objections to references to the warrants in declarations by City employees.

White failed to establish good cause for the requested discovery, and the trial court's refusal to allow discovery was not an abuse of discretion. (*Tuchscher, supra*, 106 Cal.App.4th at p. 1248.)

B. White's anti-SLAPP motion

The trial court denied White's anti-SLAPP motion on the ground that it was untimely and filed without leave of court. The trial court also denied the motion on the merits, concluding that the City's action to enforce its municipal code is exempt from the anti-SLAPP statute under section 425.16, subdivision (d) and that White failed to meet her threshold burden of demonstrating that the City's claims arose out of White's protected right of petition or free speech. White contends the denial of her motion on all of these grounds was erroneous.

1. Timeliness

Section 425.16, subdivision (f) states that an anti-SLAPP motion “may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper.” White fails to demonstrate any abuse of discretion by the trial court. White filed her anti-SLAPP motion 189 days after the City filed proof of service of its complaint. She did not seek leave of court to file her untimely motion. Although White claims to have “used section 473 to seek leave of court to bring her anti-SLAPP, within the 6 months after the complaint was served,” the record contains no application for such relief. The trial court in any event rejected as unpersuasive White’s argument that she did not discover the basis for seeking relief under section 425.16 until after the City’s anti-SLAPP motion to strike her cross-complaint was granted. White fails to show that the trial court’s denial of her anti-SLAPP motion as untimely was an abuse of discretion. (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285.)

2. Prosecutorial exemption

The trial court also denied the motion on the ground that the City’s action was subject to the prosecutorial exemption set forth in section 425.16, subdivision (d), which states: “This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.” White argues that the plain language of that statute limits the public enforcement exemption to actions brought in the name of the people of the State of California, not to civil actions brought by state and local agencies to enforce laws aimed at public protection.

In *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302 (*City of Long Beach*), Division Seven of this court held the exception in section 425.16 subdivision (d) applied to a city attorney’s civil injunction action to enforce local election laws brought on behalf of a city. (*City of Long Beach, supra*, at pp. 308-309.) The court held it was reasonable to extend the exception beyond the literal language of the statute to include “all civil actions brought by state and local agencies to enforce laws aimed at consumer and/or public protection.” (*Id.* at p. 308)

Subsequent to the *City of Long Beach* decision, however, the California Supreme Court, in *Jarrow, supra*, 31 Cal.4th 728, held that “[t]he Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so” (at p. 735), and when it has not done so, the court has no authority to create a broad exception that the Legislature has not enacted. (*Id.* at pp. 735-741.) In the aftermath of *Jarrow*, Division Seven, in *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606 (*City of Los Angeles*), acknowledged that previously in *City of Long Beach* it had extended the plain language of the statute, but emphasized that “any further erosion of the specific requirements of that provision is unwarranted in light of the Supreme Court’s subsequent admonition in [*Jarrow, supra*,] 31 Cal.4th [at page] 735 . . . that the plain language of section 425.16 is to be respected and that exceptions to the statute’s broad reach must not be lightly implied.” (*City of Los Angeles, supra*, at p. 620.) The court in *City of Los Angeles* stated: “Although section 425.16, subdivision (d), thus applies somewhat more broadly than the literal language of the provision may suggest, only actions brought by a governmental agency to enforce laws aimed generally at public protection qualify for this exemption to anti-SLAPP scrutiny. [Citation.]” (*Id.* at p. 618.) The court then held that the exemption did not apply when the city sought protective orders under section 527.8 on behalf of some of its employees to shield them from workplace violence. (*City of Los Angeles*, at pp. 617-620.)

Here, the City’s enforcement action was brought in its capacity, not as an employer, but as a public prosecutor seeking to enforce municipal code requirements aimed at public safety. As pointed out by the court in *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442 (*Health Laboratories*), “a public prosecutor’s enforcement action is not motivated by a retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition. The prosecutor’s motive derives from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected. [Citations.]” (*Id.* at p. 450.) “Nothing in the legislative history of section 425.16” the court in *Health Laboratories*

concluded, “implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions.” (*Ibid.*)

We agree with the court’s analysis in *Health Laboratories* and conclude that the City’s action was exempt from the anti-SLAPP statute pursuant to section 425.16, subdivision (d). The trial court did not err by denying White’s anti-SLAPP motion on that basis.

3. Protected activity

White’s anti-SLAPP motion was also properly denied because she failed to meet her threshold burden of demonstrating that the City’s action arises out of protected activity. The gravamen of the City’s enforcement action against White is to enjoin allegedly unpermitted and unlawful grading and construction activity on White’s property. None of the City’s causes of action for public nuisance, municipal code violations and declaratory relief arises out of White’s rights of petition or free speech. The trial court did not err by denying White’s anti-SLAPP motion on that basis.

III. Attorney fees

White challenges the order awarding the City its attorney fees after successfully opposing White’s anti-SLAPP motion on the grounds that the motion should have been granted and that the trial court lacked jurisdiction to award fees after White had appealed the denial of the motion.⁴

White’s jurisdictional challenge is without merit. The filing of a notice of appeal did not deprive the trial court of jurisdiction to decide the City’s motion for attorney fees. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360-361.)

Section 425.16 provides for an award of reasonable attorney fees to a party that successfully opposes a anti-SLAPP motion: “If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.” (§ 425.16, subd. (c)(1).) The “reference to section 128.5 in section

⁴ White does not challenge the order awarding the City its attorney fees as the prevailing party on its anti-SLAPP motion.

425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.” (*Decker, supra*, 105 Cal.App.4th at p. 1392.) A determination of frivolousness requires a finding the anti-SLAPP “motion is ‘totally and completely without merit’ (§ 128.5, subd. (b)(2)), that is, ‘any reasonable attorney would agree such motion is totally devoid of merit.’ [Citation.]” (*Decker*, at p. 1392.) We review the order awarding the City its attorney fees for an abuse of discretion. (*Id.* at p. 1391.)

For reasons discussed, White’s anti-SLAPP motion was properly denied. The City is entitled to its reasonable attorney fees in opposing this meritless motion. White has failed to establish any abuse of discretion by the trial court in awarding such fees.

DISPOSITION

The order granting the City’s anti-SLAPP motion is reversed in part as to causes of action 7, 8, 9, and 16 of the cross-complaint. That order is also reversed in part as to cause of action 21, to the extent that it is premised on allegations that the City unlawfully entered White’s property and violated her Fourth Amendment rights and her right to privacy. In all other respects, the order is affirmed. The order denying White’s anti-SLAPP motion is affirmed, as is the order awarding the City its attorney fees in opposing White’s anti-SLAPP motion. The City is awarded its costs on appeal in connection with White’s anti-SLAPP motion and her challenge to the attorney fee award.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT