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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

McGREGOR AND ASSOCIATES
INSURANCE ADMINISTRATION, INC.,

Plaintiff and Appellant,

v.

RONDA L. ADAIR,

Defendant and Respondent.

D060467

(Super. Ct. No. 37-2011-00089213-
CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Luis R. Vargas, Judge. Affirmed.

Plaintiff McGregor and Associates Insurance Administration, Inc. (McGregor) is a company that administers certain employment benefits programs offered by the San Diego Unified School District (the School District). In response to a budget crisis, the School District began to evaluate cost-saving alternatives to the programs that McGregor manages. McGregor then sued defendant Ronda L. Adair, the School District's employee benefits supervisor, alleging she made statements that interfered with its long-term relationship with the School District. Adair filed a special motion to strike the complaint

(commonly known as an "anti-SLAPP" motion), arguing that her alleged conduct was protected speech and that McGregor failed to establish a probability of prevailing on its claims. The trial court granted the motion and dismissed the complaint.

On appeal, McGregor asserts (1) the conduct for which Adair was sued was not constitutionally protected speech within the meaning of the anti-SLAPP statute because it was part of a conspiracy to "reap kickbacks"; (2) even if the case involved constitutionally protected speech, McGregor established a probability of succeeding on its claims; and (3) the trial court abused its discretion in denying McGregor's request to amend its complaint. We affirm.¹

FACTUAL BACKGROUND

A. Adair's Position with the School District

Adair began working in the benefits department of the School District in June of 2005. In January of 2007, the School District promoted her to her current position of employee benefits supervisor.

In that position, Adair is responsible for overseeing the School District's employee benefits programs. Her responsibilities include identifying areas in which the School District might operate in a more efficient manner, as well as identifying potentially cost-saving alternatives to the current programs.

Adair is also responsible for overseeing and managing the School District's participation in an employee benefits trust called the "Southern California Schools

¹ McGregor has requested that we take judicial notice of certain documents. The request is denied.

Voluntary Employee Benefits Association" (VEBA). VEBA is a trust fund formed under federal and state tax provisions that enables participating school districts to pool their employees in order to purchase benefits programs, including health and other insurance.

The School District has participated in VEBA since 1994. The contracts giving rise to that participation are trilateral "Participation Agreements" signed by representatives of the School District, VEBA, and the labor unions that represent certain of the School District's employees.

With more than 17,000 employees and retirees, the School District is VEBA's largest participant. At the time of the trial court proceedings, the School District paid roughly half of the annual premiums received by VEBA. Thus, the participation of the School District was "critical to VEBA's existence," and impacted the rate structure offered to other participating districts.

However, the School District and the labor union may withdraw from VEBA by submitting written notice upon "the expiration of the collective bargaining agreement providing for participation in this VEBA." The School District's participation in VEBA is thus voluntary. Nothing in the governing agreements prohibits the School District from "shopping around" for other, more cost-efficient options.

B. McGregor's Role as Administrator of VEBA

Since 1994 the Board of Directors of VEBA has contracted with McGregor for the provision of administration and management services. McGregor receives substantial revenue in exchange for those services. Specifically, VEBA pays McGregor a monthly fee based on the number of participating employees, with a guaranteed minimum of

\$75,000 per month. McGregor also charges an hourly rate for other management services it provides. Under that payment structure, VEBA paid McGregor more than \$2 million for management fees and more than \$1 million for other services in each of the two years preceding this action.

C. The Dispute Between McGregor and the School District

In 2005 McGregor and the School District began to have disputes over McGregor's billings. McGregor claimed that the School District owed VEBA approximately \$2 million for "back premiums." After an investigation of the issue by the School District, McGregor ultimately abandoned its claim.

Several years later, however, McGregor asserted again that the School District had underpaid premiums owed to VEBA by roughly \$3.5 million over the preceding two years. An independent auditor was retained to investigate McGregor's new claim. The auditor concluded that shortcomings on the part of both VEBA and the School District led to an underpayment in the amount of \$2.7 million. The parties ultimately resolved the matter for a payment to McGregor of \$2.6 million.

In January 2011 the School District's deputy superintendent of business, Philip Stover, wrote McGregor a letter raising concerns regarding an "inordinate amount of eligibility errors" that arose during an open enrollment period. Stover notified McGregor that many members of the School District's staff suffered "extreme hardship" because they found themselves without health insurance cards and without access to coverage for drugs, and many of them were not in their carrier's system. McGregor responded with a

nine-page letter, taking the position that the School District was to blame for essentially all of the problems raised in Stover's letter.

Shortly thereafter, representatives of eight different school districts—including Adair—signed an e-mail to McGregor to address the deep frustrations they all experienced during the open enrollment process.

D. The Budget Crisis and the School District's Efforts To Cut Costs

In late 2009 several members of the School District's Board of Education (the School Board) initiated a review of expenditures and an investigation of potential cost-saving measures. As part of that effort, certain School Board members met with a benefits firm called Keenan & Associates to discuss options in the area of employee benefits. The firm made a presentation to the superintendent, Adair, and other staff, and suggested that the School District might save up to \$10 million by implementing certain measures. After the presentation, the superintendent asked Adair for her suggestions, and she recommended that the firm's ideas be presented to the School Board and that the School District contact other firms to elicit additional ideas.

A union representative then raised concerns that the School District's efforts might violate the terms of the governing collective bargaining agreement. The School District's general counsel responded to those concerns by explaining in an e-mail to the union representative that the School District had no intention of violating any of its obligations.

When George McGregor (Mr. McGregor), the president of McGregor, heard of the School District's efforts, he sent an e-mail to a member of the School Board and several other individuals. He raised concerns that the School District was seeking quotes from

other insurance carriers and questioned whether it was considering withdrawal from VEBA.

The School District's general counsel responded that the School District had not "changed its desire to seek information on health benefits options" and to evaluate, "with due respect to its bargaining obligations, any and all options to ensure that [it is] maximizing [its] scarce health insurance dollars." Mr. McGregor responded that VEBA "understands and supports managements [*sic*] right to consider all options."

E. Events Giving Rise to This Lawsuit.

A few months later, the School District formed "Tiger Teams" comprised of employees, management, and members of the community to further evaluate school operations in light of the ongoing budget crisis. Adair volunteered to participate in a Tiger Team that was assigned to evaluate the School District's human resources department.

Members of the Tiger Team prepared periodic memoranda that were presented to the School Board. Two of those memoranda expressed the Tiger Team's conclusion that "[a]n opinion exists that administrative services being provided [to VEBA] are not in line with expectations." The memos also posed this question: "Is the [School District] overpaying for administrative services it is not receiving?" The memos recommended that the School Board consider either changing the administrator of VEBA (i.e., McGregor), or renegotiating administrator fees. The memos also questioned how the School District knew it was getting the "best deal" since "VEBA is the only allowed

medical insurance purchasing option" and recommended that the School Board review the "VEBA exclusivity arrangement."

PROCEDURAL BACKGROUND

A. McGregor's Complaint

In April 2011 McGregor filed a complaint asserting causes of action for interference with prospective business advantage, unfair competition, and conspiracy. McGregor thereafter filed an amended complaint, which asserted an additional cause of action for negligent interference with prospective business advantage. The complaint alleged that Adair, who was also an insurance broker, made defamatory statements about McGregor to induce the School District to withdraw from VEBA, so that she could sell insurance to the School District herself. However, the administrative services agreement between VEBA and McGregor remained in effect through June of 2012, nearly one year after the trial court entered its minute order dismissing McGregor's lawsuit.

B. Adair's Anti-SLAPP Motion

Adair responded to McGregor's complaint by filing an anti-SLAPP motion to strike McGregor's complaint. She contended that, given the current budget crisis, the cost to the School District to participate in VEBA was a matter of widespread public interest. Adair also asserted that the lawsuit arose from her alleged speech on that issue, that such speech was constitutionally protected, and that the lawsuit was therefore barred by the anti-SLAPP statute.

Adair also argued that McGregor could not establish a probability of succeeding on its claims. In this regard, Adair argued (1) that her alleged statements were privileged

under the authority of Civil Code section 47; (2) that she was entitled to discretionary immunity from liability according to provisions of the Government Code; (3) that McGregor could not prevail on its interference claims because there was no actual interference with its relationship with VEBA or the School District; and (4) that the claim for civil conspiracy failed because the interference claims lacked merit.

In its opposition, McGregor argued that its lawsuit against Adair was not based on protected speech relating to matters of public interest, but rather "defamatory" speech related to McGregor's performance of its contract with VEBA. McGregor also argued that Adair's statements were not privileged by Civil Code section 47, or by the immunity provisions of the Government Code. McGregor asserted that all of its causes of action had the "minimal merit" required to overcome an anti-SLAPP motion.

In a footnote, McGregor also asserted its complaint could be amended "to add an interference with contract claim because Adair's actions made McGregor's performance of its contract with VEBA more expensive and difficult."

In her reply brief, Adair argued: (1) that she had met her burden of establishing that the conduct giving rise to the action concerned a matter of public interest; and (3) that most of the evidence submitted by McGregor with its opposition was inadmissible.

C. The Tentative Ruling Against Adair and the Hearing on the Motion

The court issued a tentative ruling denying Adair's motion. The court found that according to McGregor's allegations the ultimate goal of Adair was to terminate the School District's participation in VEBA so that she could sell insurance to the School District herself, thereby earning substantial commissions. The trial court concluded that

the alleged conspiracy was directed to facilitate Adair's financial gain and that her conduct was therefore not protected.

At the hearing on the motion, Adair's counsel urged the trial court to take the matter under submission and to reconsider its ruling in light of this court's opinion in *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219 (*Tuchscher*), which had been cited in Adair's briefing. According to Adair's counsel, the *Tuchscher* opinion held that the type of conduct for which Adair was sued constituted protected speech within the meaning of the anti-SLAPP statute. Adair's counsel also argued that McGregor's allegations with respect to Adair's motives were irrelevant to the analysis. The trial court took the motion under submission.

D. Court's Order Granting the Motion

After taking the matter under submission, the court reversed its tentative ruling and granted Adair's anti-SLAPP motion. With respect to the issue of whether Adair's conduct was protected activity, the court stated:

"After considering not only the pleadings, but also the admissible evidence, the court is persuaded this lawsuit arises from [Adair's] exercise of free speech in connection with an issue of public interest. Due to the current economic crisis, [the School District's] employee benefits, or cost savings thereto, are issues of public interest. [Adair's] conduct, regardless of the motive behind the conduct, arises from protected activity."

The court also found that McGregor had failed to establish a likelihood of prevailing on its claims, stating McGregor failed "to address the essential elements of its causes of action to establish the probability of prevailing on the merits." The court also found that that the interference claims failed because there was no evidence that Adair

committed any "wrongful act" that was independent from the alleged interference, or that there was any "actual disruption of" McGregor's business relationships.

The court declined to address each of Adair's objections to McGregor's evidence individually. However, the trial court stated that it "did not consider any hearsay or statements submitted based upon information and belief submitted by McGregor. The court also did not consider documents not properly authenticated by McGregor or [McGregor's attorney] in their declarations."

DISCUSSION

I. *Burden of Proof and Standard of Review*

A special motion to strike under Code of Civil Procedure section 425.16² allows a defendant to gain early dismissal of a lawsuit that qualifies as a SLAPP. (§ 425.16, subd. (a).) The moving defendant must make a prima facie showing that the challenged claims arise from an act or acts in furtherance of his or her constitutional right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*)). These acts include "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

Resolution of a special motion to strike "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving

² All further statutory references are to the Code of Civil Procedure.

defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon, supra*, 29 Cal.4th at p. 67.) In other words, "the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once [but only if] it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation." (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.)

"Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon, supra*, 29 Cal.4th at p. 67.) The court, however, does not weigh credibility or compare the weight of the evidence; rather, it must accept as true that evidence favorable to the plaintiff. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

However, a plaintiff opposing an anti-SLAPP motion must ""state[] and substantiate[] a legally sufficient claim."" (*Tuchscher, supra*, 106 Cal.App.4th at p. 1235.) The plaintiff must therefore show that the complaint is legally sufficient and that its allegations are ""supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."" (*Ibid.*)

In determining if a plaintiff has met its burden on the second prong, courts will consider only evidence that is both competent and admissible. (*Tuchscher, supra*, 106 Cal.App.4th at p. 1236.) In *Tuchscher*, we noted that "[a]n assessment of the probability of prevailing on the claim looks to trial, and the evidence that will be presented at that time." (*Id.* at p. 1236, italics omitted.) We also concluded that "[s]uch evidence must be admissible." (*Ibid.*) Thus, courts will not consider hearsay, documents submitted without sufficient foundation, or statements in declarations supported by nothing more than the declarant's "understanding" or "information and belief." (*Id.* at p. 1238.)

Whether section 425.16 applies to a particular complaint generally presents a legal question subject to a de novo review standard on appeal. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)

II. Analysis

A. Step I: "Protected Activity"

As we have stated, *ante*, the anti-SLAPP statute affords protection for acts committed in the furtherance of free speech that were made "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

The term "issue of public interest" is interpreted broadly. (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 716 (*Rivera*)). An act concerns a matter of public interest as long as the "conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic." (*Ibid.*) Indeed, the term is so broad that there is no requirement that the issue be "significant." (*Nygaard, Inc.*

v. Uusi-Kerttula (2008) 159 Cal.App.4th 1027, 1042.) Rather, "it is enough that [the issue] is one in which the public takes an interest." (*Ibid.*)

Moreover, it is well-settled that a matter of "public interest" includes private communications. (*Rivera, supra*, 187 Cal.App.4th at p. 716; see also *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736 ["subdivision (e)(4) of section 425.16 applies to private communications concerning issues of public interest"].)

Our opinion in *Tuchscher* is instructive. There, the plaintiff development company entered into an exclusive agreement with the City of Chula Vista to negotiate a possible contract for the development of real property at Crystal Bay. (*Tuchscher, supra*, 106 Cal.App.4th at p. 1227.) The plaintiff sued the San Diego Unified Port District and one of its commissioners, claiming that the commissioner interfered with that agreement. (*Id.* at p. 1226.) In that case, the plaintiff alleged some of the same causes of action alleged by McGregor here (intentional and negligent interference with prospective business advantage and violation of the unfair competition law). (*Id.* at pp. 1227-1228.)

The defendants responded to the complaint by filing an anti-SLAPP motion. (*Tuchscher, supra*, 106 Cal.App.4th at p. 1228.) They argued that all of the plaintiff's causes of action were based on oral and written statements that related to governmental review of the development projects in issue, which was a matter of public interest. (*Ibid.*) The plaintiff opposed the motion by submitting e-mails and other correspondence to argue that the Port District commissioner had convinced the City to halt negotiations with the plaintiff in favor of a different developer. (*Id.* at pp. 1228-1229.)

This court affirmed the trial court's order granting the motion to strike, holding that the proposed development of Crystal Bay was a matter of public interest. (*Tuchscher, supra*, 106 Cal.App.4th at pp. 1233-1234.) We reasoned that the term "public interest" has been "broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (*Id.* at p. 1233.)

Likewise in this case, the statements that the complaint attributed to Adair amounted at most to criticisms of the manner in which McGregor performed its obligations as the administrator of VEBA. McGregor made similar allegations that Adair was the source of other statements made in the Tiger Team memos and in Stover's letter that criticized McGregor's performance and that also urged the School Board to consider other options.

All of those statements related to the issue of whether the School District might save money by implementing changes in the administration of its benefits programs. That issue impacts property owners who reside in the district and who pay taxes that support the operations of the School District. It also impacts the parents of students within the school district as the budget crisis could impact the teachers of their children. Thus, members of the public had an interest in the issue involved here, and therefore that issue was a matter of public interest.

McGregor attempts to distinguish the *Tuchscher* opinion by contending that its holding was limited to "truthful" statements made in connection with the development projects at issue. However, the *Tuchscher* decision did *not* discuss whether the

statements involved there were truthful. (*Tuchscher, supra*, 106 Cal.App.4th at pp. 1233-1234.) There is no requirement that the statements be true to make them protected under the anti-SLAPP statute.

McGregor also contends that Adair's conduct was not "in furtherance" of her free speech rights in connection with a public issue because Adair's conduct was "undertaken in furtherance of a conspiracy wherein she stands to reap kickbacks masked as insurance agency 'commissions,'" which placed Adair in a conflict of interest.

However, that contention focuses on Adair's motive, not the nature of her speech. Even if the motive "allegation is true, it is irrelevant to the determination of [a statement's] status as protected speech. If the actionable communication fits within the definition contained in the statute, the motive of the communicator does not matter." (*Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 851.)

McGregor also cites two cases to argue that criminal conduct is not protected by the anti-SLAPP statute. Neither case supports McGregor's position.

First, in *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, the members of the defendant organization harassed and intimidated employees of the plaintiff drug company by publishing private information about them and their children on a Web site, and by invading their homes at night. (*Id.* at pp. 1289-1291.)

In *Flatley v. Mauro* (2006) (2006) 39 Cal.4th 299, the defendant attorney sent the plaintiff a draft civil complaint alleging the plaintiff had sexually assaulted the attorney's client. (*Id.* at pp. 306, 307-308.) The attorney also sent a letter threatening to report the

plaintiff to the authorities and to publicly accuse him of a variety of criminal offenses, including tax and immigration crimes. (Id. at pp. 308-309.)

McGregor claims that Adair's conduct was similar because an alleged "conflict of interest" stemming from Adair's alleged motive to sell insurance directly to the School District violated laws prescribing government officials from influencing government decisions in which they have an interest. But, it is undisputed that Adair, as a public employee, could not receive commissions from insurers. Rather, she would have to *quit her job* to "reap the kickbacks" of the alleged conspiracy. Thus, in her position as employee benefits supervisor she could not influence any governmental decisions in which she had a present interest. Here, then, unlike the *Novartis* and *Flatley* cases, there was no evidence that any conduct committed by Adair was illegal.

Given the broad interpretation of the term "public issue" by courts of this state, the issue of the potential for the School District to save funds in its benefits programs falls within that definition. All of Adair's conduct as alleged in the complaint related to that issue. Thus, the trial court correctly concluded that Adair's conduct was "protected activity" within the meaning of the anti-SLAPP statute.

B. Step II: Probability of Success

Because Adair has shown that her actions and statements are protected activity within the meaning of the anti-SLAPP statute, the burden now shifts to McGregor to show a probability of success on its causes of action. (*Equilon, supra*, 29 Cal.4th at p. 67.) We conclude McGregor cannot make such a showing.

1. *Intentional and negligent interference with prospective economic advantage*

To prevail on these claims, McGregor must prove that its relationship with VEBA or the School District was *actually* disrupted in some manner. One element of interference claims is that the defendant "caused damage to [the] plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

As we have discussed, *ante*, there is no evidence of any disruption to McGregor's relationship with either VEBA or the School District. Throughout the trial court proceedings, the School District continued to participate in VEBA. At most Adair was *proposing* severing ties with McGregor and/or VEBA. Thus, any claim for interference with prospective economic advantage was premature.

Indeed, McGregor continued to serve as the administrator of VEBA through the time that the trial court dismissed the complaint, and for almost a full year after that. Because there was no evidence that McGregor's economic relationship with VEBA was actually disrupted, the court correctly found that McGregor could not establish its required showing of a probability of success on its interference claims.

The interference causes of action also failed because McGregor did not show that Adair engaged in conduct that was "wrongful by some legal measure other than the fact of [the] interference itself." (*Tuchscher, supra*, 106 Cal.App.4th at p. 1242.) In arguing otherwise, McGregor again relies on its argument that Adair had a conflict of interest that violated statutes precluding officials from influencing decisions in which they have an

interest. However, as discussed, *ante*, Adair's conduct was not wrongful because she had no present interest in any of the School District's decisions, as insurers do not pay commissions to public employees.

McGregor also claims that the wrongful conduct element was met because Adair allegedly made defamatory statements undertaken with malice in a letter dated January 31, 2011. That letter, however, was sent by Stover, not Adair. McGregor submitted no evidence that Adair was involved in any way with the drafting of that letter.

Finally, McGregor argues that the School District will have to breach its Participation Agreement with VEBA and a collective bargaining agreement with the labor union if Adair is to succeed in the alleged "conspiracy." McGregor contends further that such conduct would constitute a wrongful act that would be independent of the alleged interference. However, there is no evidence in the record that the School District has breached any of its contractual obligations. Likewise, there is no evidence that Adair would somehow be capable of implementing such a breach herself.

2. *Unfair competition*

As McGregor acknowledges, it based its cause of action for violation of the unfair competition law on its claims for interference with prospective business advantage. Thus, because the interference causes of action lack merit, the unfair competition claim fails as well.

3. *Conspiracy*

A cause of action for civil conspiracy is not an independent tort. Rather, such a cause of action must be based on other torts and "cannot be alleged as a tort [that is]

separate from the underlying wrong it is organized to achieve.'" (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 955.) Thus, the conspiracy cause of action fails for the same reason as the unfair competition claim.³

C. Request for Leave To Amend Complaint

McGregor asserts that the trial court erred in not giving it an opportunity to amend its complaint to state a cause of action for interference with contract. This contention is unavailing.

As we have noted, *ante*, in a footnote in its opposition to the motion to strike, McGregor asserted that it could amend its complaint "to add an interference with contract claim because Adair's actions made McGregor's performance of its contract with VEBA more expensive and difficult."

However, courts have rejected such an attempt to amend complaints in response to anti-SLAPP motions to strike because the Legislature, in enacting the anti-SLAPP statute, intentionally declined to provide for a procedure to amend pleadings so that parties opposing such a motion cannot "read[ily] escape" the "quick dismissal remedy" set forth in the statute. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074 (*Simmons*); *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004)

³ Based upon our holding, we need not address Adair's contention that much of the evidence McGregor presented in opposition to her motion to strike was inadmissible or address her affirmative defenses that she was immune from liability and that her actions were privileged. However, we have, as noted, *ante*, denied McGregor's request for judicial notice of certain documents.

122 Cal.App.4th 1049, 1055; *Schaffer v. City & County of San Francisco* (2008) 168 Cal.App.4th 992, 1004-1005.)

For example, in *Simmons*, the appellant had filed a cross-complaint alleging that the respondent conspired to force him out of business by filing frivolous lawsuits, waging a media war, and making defamatory statements and refusing to pay claims. (*Simmons, supra*, 92 Cal.App.4th at p. 1071.) The respondent filed a motion to strike the cross-complaint, and in response the appellant requested leave to amend. The Court of Appeal, in response to the appellant's request for leave to amend the cross-complaint, held that "[a]llowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy." (*Id.* at p. 1073.) "Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend." (*Ibid.*) "By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. . . . This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits." (*Id.* at p. 1074.) The *Simmons* court concluded that "the omission of any provision in section 425.16 for leave to amend a SLAPP complaint was not the product of inadvertence or oversight." (*Ibid.*)

McGregor attempts to distinguish these cases by relying on *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858. In the *Nguyen-Lam* case, however, the trial court granted the defendant's anti-SLAPP motion "with leave to amend" because the plaintiff had submitted evidence that established a probability of success on its claims but neglected to plead an essential *element* of the claim that was established by that evidence. (*Id.* at pp. 862-863, 865-866.) Here, however, McGregor's evidence failed to establish a probability of prevailing on any cause of action.

McGregor contends that its evidence would support a cause of action for intentional interference with contract. But, as stated, *ante*, an essential element of that cause of action is "actual breach or disruption of the contractual relationship." (*Tuchscher, supra*, 106 Cal.App.4th at p. 1239.) As we have pointed out, however, McGregor cannot establish this element of such a cause of action.

McGregor also contends that it could amend its complaint to allege a viable claim for violation of the unfair competition law. But, again, McGregor bases this contention on the allegation that Adair's conduct violated statutes precluding government officials from influencing decisions in which they have an interest. As we have discussed, *ante*, because there was no evidence that Adair had an interest in any of the School District's decisions, McGregor has failed to demonstrate that its proposed amendment would be viable.

Additionally, McGregor has waived this contention by failing to make that argument in the trial court. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498 [appellants may not raise a new legal theory of liability on appeal].)

Finally, in a footnote, McGregor contends that it was "effectively denied" the opportunity to expand on its arguments with respect to leave to amend its complaint in the trial court because the tentative ruling was in its favor. But McGregor failed to make such an argument by other means, such as a motion for reconsideration.

DISPOSITION

The judgment is affirmed. Adair shall recover her costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.