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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

OSAMA A. ALKASABI,

Plaintiff and Respondent,

v.

CHANDLER HEIGHTS AZ, LLC,

Defendant and Appellant.

D061435

(Super. Ct. No. 37-2011-00099949-
CU-FR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Steven R.

Denton, Judge. Affirmed.

Defendant Chandler Heights AZ, LLC (Chandler) appeals from an order denying its special motion to strike the complaint filed by Osama A. Alkasabi under Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. (All undesignated statutory references are to the Code of Civil Procedure.) We affirm the order denying the motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation concerns a home located in La Jolla, California (the property). We begin with the history of the home as this information is relevant to the issue on appeal.

In 2003, Thomas Armstrong, a builder, purchased the property using real estate agent Karen Dodge of Prudential Dunn Realtors (Dunn). Armstrong began remodeling the property and listed it for sale with Dodge before its completion. In 2006, Jerry Ayoub purchased the property with the understanding that Armstrong would be constructing an entirely new home. Ayoub later assigned his interest in the property to Chandler.

In 2008, Chandler sued Armstrong and his related entities for fraud and breach of contract (the Armstrong case). Chandler alleged that certain walls were left in place from the old house and that the home was not new construction, but a remodel. In early 2010, the Armstrong case settled and the trial court entered a stipulated judgment for \$150,000 in favor of Chandler.

In March 2010, Alkasabi, a real estate broker, entered into an exclusive listing agreement with Chandler to sell the property. The listing agreement was set to expire on March 12, 2011. Thereafter, Alkasabi discovered that the square footage of the property had been embellished. The square footage of the home was claimed to be 3840, when it was actually 3272. In August 2010, Alkasabi met with Chandler's counsel regarding Alkasabi's discovery of the square footage discrepancy. Two months later, Chandler sued Dodge, Dunn and others (the Dunn case), alleging fraud

and other claims related to the inflated square footage representation. After the listing agreement expired, Alkasabi attempted to extend it; however, the parties did not sign another listing agreement.

In October 2011, Alkasabi filed this action against Chandler, alleging causes of action for intentional and negligent misrepresentation, breach of fiduciary duty, breach of contract and negligence. The causes of action for intentional and negligent misrepresentation and negligence alleged that Chandler falsely represented certain characteristics of the property to Alkasabi for the purpose of inducing him to enter into the listing agreement. Alkasabi asserted that Chandler knew its representations to him regarding the property were false because it alleged these falsehoods as the plaintiff in the Armstrong case. Alkasabi claims that he relied on Chandler's false representations by listing the property for sale and that he was damaged by the loss of his six percent commission. Alkasabi's breach of fiduciary duty cause of action recast the above allegations, asserting that Chandler breached fiduciary duties owed to him by failing to disclose the problems surrounding the property.

In his breach of contract claim, Alkasabi alleged that he performed all the duties required of him under the listing agreement, such as marketing the property, hiring an appraiser to remeasure the square footage, holding open houses, and bringing in cash buyers. Among other things, he claimed that Chandler breached the listing agreement and an extension thereto by, not paying his commission, withdrawing the property from sale thereby making the property unmarketable during the listing period, claiming it was unaware of any pending or threatened action that may affect its ability

to transfer the property, and not paying his commission from its funds or escrow proceeds.

The trial court issued a tentative ruling denying Chandler's motion to strike. It concluded that the gravamen of the action was Chandler's alleged false statements concerning the value of the listing and that suppression of the underlying litigation may evidence fraud, but that the action was premised on Chandler's nonlitigation conduct. The court heard oral argument, took the matter under submission and later confirmed its prior ruling. Chandler timely appealed.

DISCUSSION

I. *Burden of Proof and Standard of Review*

A special motion to strike under section 425.16 allows a defendant to gain early dismissal of a lawsuit that qualifies as a SLAPP. (§ 425.16, subd. (a).) In ruling on an anti-SLAPP motion, the trial court must first decide whether the moving defendant has made a prima facie showing that the plaintiff's suit is subject to section 425.16, i.e., that the challenged claims arise from an act or acts in furtherance of his or her 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 (1) written or oral statements made before a legislative, executive, or judicial proceeding, (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of

petition or free speech in connection with a public issue or an issue of public interest.
(§ 425.16, subd. (e).)

To determine whether a defendant has met its initial burden, we consider the pleadings and any supporting and opposing affidavits stating facts upon which the liability is based. (§ 425.16, subd. (b)(2); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 (*City of Cotati*)). "[T]he 'arising from' requirement is not always easily met" and "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Equilon, supra*, 29 Cal.4th at p. 66.) A claim "arises from" an act when the act ""forms the basis for the plaintiff's cause of action". . . ." (*Ibid.*) The "principal thrust or gravamen" of the claim determines whether section 425.16 applies. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188, italics omitted.)

A cause of action that is based on both protected activity and unprotected activity is subject to section 425.16 "unless the protected conduct is 'merely incidental' to the unprotected conduct." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 (*Mann*)). "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Id.* at p. 106.) If the defendant establishes the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon, supra*, 29 Cal.4th at p. 67.) We review de novo the trial

court's rulings on an anti-SLAPP motion. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.)

II. Analysis

A. Causes of Action for Fraud, Negligence and Breach of Fiduciary Duty

Chandler contends that these claims fall within subdivision (e)(1), (e)(2) and (e)(4) of section 425.16 because they reference the Armstrong case. We disagree.

Although separated into different theories of recovery, Alkasabi's claims for fraud, negligence and breach of fiduciary duty are all based on the allegation that Chandler knew certain details about the property that impacted its marketability, but withheld this information from Alkasabi to induce him to enter into the listing agreement. The trial court correctly concluded that the gravamen of these claims was Chandler's alleged false statements concerning the value of the listing and that Alkasabi's reference to the Armstrong case evidenced Chandler's alleged fraud.

There is a distinction "between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.) The latter is a SLAPP suit, the former is not. (*Ibid.*) Here, the allegations Chandler made against the defendants in the Armstrong case are *evidence* of the fraud that Chandler allegedly perpetrated on Alkasabi. Simply put, Chandler has not shown that Alkasabi's claims for fraud, negligence and breach of fiduciary duty arose from Chandler's protected activity as defined by subdivision (e)(1), (e)(2) and (e)(4) of section 425.16. (*City of Cotati, supra*, 29 Cal.4th at p. 78

["That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such."].)

Although Chandler's briefing is not a model of clarity, it also appears to argue that Alkasabi's conduct of injecting himself into Chandler's litigation by acting as an investigator, advocate, witness and claimant all arise from Chandler's exercise of its constitutional rights in connection with litigation and that his complaint against Chandler was filed to chill the exercise of its constitutional rights. While Alkasabi may have injected himself into Chandler's litigation, his fraud, negligence and breach of fiduciary duty claims do not arise from the Armstrong case. Additionally, these causes of action have no connection to the Dunn case, which was filed by Chandler well after it and Alkasabi entered into the listing agreement.

Because these claims do not arise from protected activity, there is no need to reach the second prong of the anti-SLAPP analysis regarding whether Alkasabi can show a probability of prevailing on these causes of action.

B. Cause of Action for Breach of Contract

Alkasabi's breach of contract claim alleges that Chandler breached certain provisions of the listing agreement. Paragraph 4A3 of the listing agreement provided that Chandler agreed to pay Alkasabi his commission "[i]f without [Alkasabi's] written consent, the Property [was] withdrawn from sale, . . . , or made unmarketable by a voluntary act of [Chandler] during the Listing Period, or any extension." This cause of action incorporated by reference all of the prior allegations of the complaint, including the allegation that the individuals and entities that Chandler sued in the Dunn case are

potential DOE defendants in Alkasabi's action. Another introductory paragraph in the complaint mentions the Dunn case in passing as Alkasabi had included a reference to the Dunn case in his proposed extension to the listing agreement.

Although Alkasabi's reference to the Dunn case in his complaint appears to be incidental, we are not limited to the face of the complaint and may consider the supporting and opposing affidavits. (§ 425.16, subd. (b)(2).) In support of its motion, Chandler presented a declaration from its attorney stating the Dunn case was still pending as of the date of the motion. Attached to the declaration were a number of e-mails from Alkasabi requesting that Chandler engage in mediation of his claim that it breached, among other things, paragraph 4A3 of the listing agreement.

Chandler also presented the declaration of a Chandler representative that had received a number of e-mails from Alkasabi. Namely, Alkasabi sent an e-mail to Chandler stating that the Dunn case impacted the marketability of the property. This evidence supports Chandler's argument that Alkasabi's breach of contract cause of action includes a claim that it breached paragraph 4A3 of the listing agreement by filing the Dunn Case and making the property unmarketable. Thus, part of the breach of contract cause of action arises from protected activity.

Where, as here, a cause of action is based on both protected activity and unprotected activity, it is subject to section 425.16 unless the allegations of loss resulting from protected activity are merely incidental to unprotected activity. (*Mann, supra*, 120 Cal.App.4th at p. 103.) Here, Alkasabi alleged that Chandler breached several provisions of the listing agreement. Each alleged breach, including the

allegation that Chandler made the property unmarketable by filing the Dunn case and thereby breached paragraph 4A3 of the listing agreement, could be an adequate basis for liability under the cause of action even if Alkasabi could not prove any of his other allegations. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) Accordingly, we cannot conclude that the alleged breach of paragraph 4A3 by filing the Dunn case is merely incidental to the entire cause of action.

Since the protected activity is not merely incidental, the first prong is satisfied and the burden shifts to Alkasabi to show a probability of success on the merits. "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on any part of its claim, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann, supra*, 120 Cal.App.4th at p. 106, italics omitted.) "[O]nce a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands." (*Ibid.*)

Here, Alkasabi presented his own declaration and a declaration from Dr. Joseph Dean Klatt, a licensed real estate broker. Dr. Klatt stated that in June and July 2010, Chandler cancelled or attempted to cancel the listing agreement in violation of paragraphs 4A and 4A3 of the listing agreement. He stated that the standard practice in the real estate profession is that the seller cancelling or attempting to cancel the contract is required to pay the listing broker the agreed upon commission. An e-mail from a Chandler representative to Alkasabi sent in January 2011 states that Chandler

"removed the house from the market by notice to you" in June 2010 and requested that Alkasabi stop showing the house and return the keys. This evidence, if believed by a trier of fact, is sufficient to constitute a prima facie showing of facts supporting a judgment in Alkasabi's favor for breach of contract as it suggests Chandler breached paragraph 4A3 of the listing agreement by removing the house from the market in June 2010 before the end of the listing agreement.

Although Chandler withdrew its cancellation the following day, the fact of the cancellation, without Alkasabi's prior written consent, constituted a prima facie case of breach of contract that supports Alkasabi's claim of indebtedness in the amount of the agreed upon commission under the terms of the listing agreement. (*Blank v. Borden* (1974) 11 Cal.3d 963, 969 ["[A] withdrawal-from-sale clause in an exclusive-right-to-sell contract is lawful and enforceable, a claim for compensation under such a clause being not a claim for damages for breach of that contract but a claim of indebtedness under its specific terms."].) We also reviewed Chandler's evidence and conclude that it does not defeat Alkasabi's showing as a matter of law. (*Mann, supra*, 120 Cal.App.4th at pp. 105–106.)

Chandler filed 47 pages of seemingly boilerplate evidentiary objections to Alkasabi's evidence, which the trial court did not address. Chandler did not expressly renew these "unruled" upon objections in its opening brief; rather, it simply noted that it made objections that the court never addressed. Under these circumstances, we deem the evidentiary objections forfeited. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534 [in summary judgment context, presumptively overruled objections can still

be raised on appeal with the burden on the objector to renew the objections in the appellate court].)

Because Alkasabi showed a probability of prevailing on a portion of his breach of contract cause of action, the trial court correctly denied the anti-SLAPP motion.

DISPOSITION

The order is affirmed. Respondent is entitled to his costs on appeal.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.