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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CARMEN JOHN PALMIERI,

Plaintiff and Appellant,

v.

CHARLES G. LA BELLA et al.,

Defendants and Respondents.

D067201

(Super. Ct. Nos. GIC785226,
37-2013-00070243-CU-MC-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Carmen John Palmieri, in pro. per., for Plaintiff and Appellant.

McNamara Benjamin and Daniel M. Benjamin for Defendants and Respondents
La Bella & McNamara, Charles G. La Bella and Thomas W. McNamara.

Kamala D. Harris, Attorney General, Kristin G. Hogue, Assistant Attorney
General, Richard F. Wolfe and Douglas E. Baxter, Deputy Attorneys General, for

Plaintiffs and Respondents Jan Lynn Owen, James K. Openshaw, Dave Jones and Minerva Lopez.

Carmen John Palmieri, representing himself in propria persona, appeals from orders granting special motions to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16) filed by the defendants in this action.¹ Palmieri contends (1) the anti-SLAPP motions of some of the defendants should not have been considered because they were not timely filed; (2) the trial court abused its discretion by denying his ex parte application to conduct discovery during the pendency of the anti-SLAPP motions; and (3) the anti-SLAPP motion should not have been granted because he succeeded in establishing a probability of prevailing on the merits of his claims. We conclude that Palmieri's arguments are without merit, and accordingly we affirm the judgments.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Civil and Criminal Proceedings Against Palmieri*

In 2002, the California Department of Insurance and the California Department of Corporations conducted investigations into possible securities fraud and other criminal and civil misconduct by Palmieri and his business entities, including C. Palmieri Enterprises, Inc.; Sierra Funding Group, Inc.; National Medical Funding; Trust

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure. SLAPP is an acronym for strategic lawsuit against public participation. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109 & fn. 1.)

Management Services; and Sierra Funding Group. The suspected misconduct consisted of defrauding investors through the sale of viatical investments.²

On March 22, 2002, the People of the State of California, by and through the Commissioner of Corporations filed a civil lawsuit against Palmieri and his business entities (*People of the State of California, by and through the Commissioner of Corporations v. C. Palmieri Enterprises* (Super. Ct. San Diego County, 2002, No. GIC785226) (the Civil Action)). James Openshaw was lead counsel for the Department of Corporations in the Civil Action. The complaint alleged that Palmieri and his business entities were improperly selling securities in the form of viatical investments, and it sought temporary, preliminary and permanent injunctive relief, along with civil penalties and the appointment of a receiver to take possession of the property and assets of Palmieri and his business entities.³

² "According to a 2001 article in Forbes Magazine, viaticals are arrangements that allow dying persons with life insurance policies to sell their policies to investors for a percentage of the death benefits. As a practical matter, the sooner the viator dies, the greater the return on the investment. In the meantime, the viator obtains funds to pay for medical care or other expenses. Viatical settlement firms provide the capital used to purchase the policies, typically receiving a fee of 20 to 30 percent of the amount of the death benefits. The policies are sold through independent sales agents, or brokers The agents or brokers can receive sales commission of 9 percent or more. (Coolidge, *Death Wish* (Mar. 19, 2001) Forbes Magazine, at p. 206.)" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 889.)

³ The causes of action alleged in the Civil Action included unlicensed broker dealer activity (Corp. Code, § 25210), unlawful offer and sale or unqualified, nonexempt securities (Corp. Code, § 25110), unlawful offer and sale of securities by means of untrue statements or omissions of material fact (Corp. Code, § 25401), and unlicensed escrow agent activity (Fin. Code, § 17000, et seq.).

On March 27, 2002, the trial court issued a temporary restraining order, froze the assets of Palmieri and his business entities, and appointed Charles G. La Bella as receiver. The court later issued a preliminary injunction on the same terms as the temporary restraining order and confirmed La Bella's appointment.

While the Civil Action was pending, a criminal information was filed against Palmieri on February 5, 2003, charging him with 144 counts related to his sale of viatical securities. (*People v. Carmen John Palmieri* (Super. Ct. San Diego County, 2003, No. SCD170477) (the Criminal Proceeding)). Specifically, Palmieri was charged with 58 counts of grand theft (Pen. Code, § 487); 58 counts of securities fraud (Corp. Code, §§ 25401, 25540); and 28 counts of theft from an elder (Pen. Code, § 368, subd. (d)). The California Department of Insurance conducted the criminal investigation of Palmieri and cooperated with the Department of Corporations on the civil investigation. Minerva Lopez conducted the investigation for the Department of Insurance.

On November 12, 2003, Palmieri pleaded no contest to the 144 criminal counts alleged against him in the Criminal Proceeding. On January 13, 2004, the court sentenced Palmieri to 30 years in prison.

In May 2004, during the trial of the Civil Action, Palmieri entered into a stipulated judgment on behalf of himself and several of his business entities, and the court entered judgment against Palmieri and his business entities in the Civil Action on July 6, 2004. Palmieri stipulated to several facts as part of the stipulated judgment, including that the viaticals he sold were unqualified securities, that neither he nor his business entities were licensed to sell the securities, and that he made material misrepresentations of fact in

offering the securities. Further, Palmieri stipulated to the truth of all the facts that formed the basis of his no contest plea in the Criminal Proceeding. According to the stipulated judgment, Palmieri and his business entities were ordered to disgorge all profits and financial benefits from the sale of the securities, to pay restitution to defrauded investors, and to pay civil penalties of \$5 million.

In March 2007, La Bella reported to the court in the Civil Action that the work of the receivership was complete, and he had returned \$4,163,463.10 to the defrauded investors, representing 28.9 percent of the investors' losses. On March 16, 2007, the court entered an order discharging La Bella as receiver. The order stated that "Mr. La Bella and professionals retained by Mr. La Bella shall have no personal liability of any nature for any act, omission or matter pertaining to the Receivership."

B. *Palmieri's Complaint in This Action*

On October 7, 2013, Palmieri filed the instant action against the current Commissioner of the Department of Corporations, Jan Lynn Owen;⁴ the current Commissioner of the Department of Insurance, Dave Jones; Lopez (who conducted the investigation of Palmieri for the Department of Insurance); Openshaw (who litigated the Civil Action against Palmieri on behalf of the Department of Corporations); La Bella

⁴ The Department of Corporations has been merged with the Department of Financial Institutions to create the Department of Business Oversight, and the Corporations Commissioner is now the Commissioner of Business Oversight. (Fin. Code, § 321.) Palmieri's complaint refers to the Department of Corporations, not the new entity.

(who was appointed receiver in the Civil Action); and La Bella's law firm La Bella & McNamara LLP (which served as counsel to La Bella when he was receiver).⁵

Palmieri's complaint describes the events surrounding the institution of the Civil Action in 2002, focusing on the freezing of Palmieri's assets, the appointment of La Bella as a receiver, and La Bella's eventual sale of the assets of Palmieri and his business entities.

The complaint is primarily focused on Palmieri's assertion that despite his no contest plea in the Criminal Proceeding and the stipulated judgment in the Civil Action, he was not culpable for the securities fraud and other misconduct alleged in the Civil Action and the Criminal Proceeding. Palmieri's profession that he lacks culpability is set forth in several portions of the complaint.

First, Palmieri alleges that in "[a]pproximately November 2003, after Mr. Openshaw had been involved in the . . . investigation for two years, he realized [Palmieri's] forthrightness and that Plaintiff's business assets, and real personal assets were never 'tainted' with viatical money. So through a court proceeding, Mr. Openshaw had all of Plaintiff's remaining asserts returned back over to him."

Second, Palmieri alleges that "[i]n August of 2008, Andrew Robertson, the attorney for the receiver, contacted [Palmieri]. . . . Mr. Robertson told [Palmieri], he found from his investigation and the accounting, that [Palmieri] was never out to steal the

⁵ Palmieri attempted to add La Bella's former law partner, Thomas W. McNamara, as a defendant by substituting him for a Doe defendant in March 2014. McNamara disputes that his addition as a defendant was procedurally proper, but he nevertheless participated in the anti-SLAPP motion filed by La Bella and La Bella & McNamara LLP.

investors[] money. Mr. Robertson stated the results showed [Palmieri] did not use the investor[s'] money for his own personal use; that all funds were accounted for; that the money was not hidden, spent, or squandered; that [Palmieri] did not live a lavish-lifestyle; that the money was invested for the investors; and that [Palmieri] did not profit from the investor[s'] money." Palmieri alleged that "[f]rom 2008 [to] 2010," Robertson "was in constant contact" with him and supplied Palmieri with information from the Civil Action, which provided "[m]ore proof from Mr. Robertson that [Palmieri] was not out to steal, cheat, defraud or harm the investors as he was accused of by Defendants."

Third, a final section of the complaint titled "Conclusion" alleges that defendants engaged in a "rush to judgment . . . before a thorough enough investigation took place whereby, no specific intent to defraud the viatical investors, by [Palmieri] existed," which "violated [Palmieri's] due process rights to notice and a hearing." Further, in the same section of the complaint, Palmieri alleges that he "already had a justifiable procedure in place that would have paid the investors one hundred percent of their investment, plus the profit promised them," so that the action against him and the appointment of receiver was not warranted.

Based on these general allegations, the complaint sets forth what it describes as four different "cause[s] of action" against all of the defendants.

The first cause of action is titled "Violation of Right to Due Process." Although the first cause of action does not identify any particular factual basis, it generally alleges that all of the defendants violated Palmieri's "right to due process and equal protection, the right to be treated the same as other persons in similar circumstances, when there was

a complaint against him." Based on Palmieri's allegations in the "Conclusion" section, we understand the first cause of action to be based on Palmieri's allegation that the defendants denied him due process and equal protection because they did not sufficiently investigate whether Palmieri was actually culpable before proceeding against him in the Civil Action.

The second cause of action is titled "Insufficient Complaint." Palmieri alleges that the complaint in the Civil Action was "inaccurate, inconclusive, violated statutory law, [was] highly prejudicial to [Palmieri] and insufficient to p[er]petuate the actions by Defendants on [Palmieri], his business, his home and storage facilities on March 22, 2002." As a factual basis for the second cause of action Palmieri alleges (1) he was not present during the initial ex parte hearing in the Civil Action and there was no emergency to warrant ex parte relief; and (2) La Bella began selling Palmieri's assets and closed his business, which was purportedly outside of the scope of the court's order appointing the receiver.

The third cause of action is titled "Wrongful Receivership." Palmieri alleges that (1) no emergency situation existed warranting the ex parte appointment of a receiver; (2) the court's order appointing a receiver purportedly did not allow the receiver to dissolve Palmieri's businesses, but the defendants nevertheless relied on the order to do so; and (3) La Bella did not obtain the necessary bond for the receivership.

The fourth cause of action is titled "The Completed Investigation." Palmieri alleges that Robertson's investigation "demonstrates [Palmieri] did not do what he was originally accused of." He alleges that "Defendants did not make themselves fully aware

of [Palmieri's] actual situation before they descended upon [Palmieri's] business, home, and storage facilities" and therefore deprived him of due process.

As a remedy for each of his causes of action, Palmieri sought general and punitive damages.

C. *Defendants' Anti-SLAPP Motions*

As Palmieri's appellate brief claims there were procedural irregularities in the filing of the anti-SLAPP motions, we next detail the procedural history associated with defendants' anti-SLAPP motions.

On January 17, 2014, Owen filed an answer to the complaint, followed by Openshaw on February 4, 2014.⁶ Owen, Openshaw and Jones then filed an anti-SLAPP motion on February 18, 2014, which was noticed for hearing on August 29, 2014, before the Honorable Randa Trapp. Lopez filed an answer on April 18, 2014. At Judge Trapp's direction at a case management conference, a single consolidated anti-SLAPP motion by Lopez, Owen, Openshaw and Jones (collectively, the State Defendants) was filed on May 19, 2014.

On May 15, 2014, Palmieri filed a "Notice of Motion and Motion to Compel Response to Discovery" as to the State Defendants, in which he sought to conduct discovery despite the discovery stay that arises upon the filing on an anti-SLAPP motion (§ 425.16, subd. (g)). According to the parties, at a case management conference on May 16, 2014, Judge Trapp instructed Palmieri to revise his motion and file it as a motion

⁶ The clerk's transcript does not contain an answer to the complaint by Jones.

seeking relief from the discovery stay, instead of a motion to compel discovery. To give Palmieri time to file the revised motion and to have it heard, Judge Trapp moved the hearing date for the State Defendants' anti-SLAPP motion to November 7, 2014, and directed Palmieri to file his revised discovery motion to be heard on August 29, 2014.

On May 21, 2014, in response to a notice of related case filed by Owen and Openshaw, this action was consolidated with the Civil Action and transferred from Judge Trapp to the Honorable Ronald S. Prager. All pending hearing dates were vacated.

The State Defendants renoticed their anti-SLAPP motion to be heard by Judge Prager on December 5, 2014.⁷

On June 2, 2014, La Bella, McNamara and La Bella & McNamara LLP (collectively, the Receiver Defendants) filed an anti-SLAPP motion, scheduled for hearing on September 26, 2014. Palmieri did not file an opposition to the Receiver Defendants' anti-SLAPP motion.

⁷ Based on certain statements by Palmieri in the course of this appeal, we understand that Palmieri filed an opposition to the State Defendants' anti-SLAPP motion. However, neither Palmieri nor the State Defendants designated that document as part of the clerk's transcript on appeal, and accordingly, Palmieri's opposition is not before us. We note that on April 18, 2016, we received from Palmieri a copy of a "Notice Specifying Original Exhibits to be Transmitted to Reviewing Court" under California Rules of Court, rule 8.224(a), which he sent to the Superior Court on April 11, 2016, seeking to have that court transmit his opposition to the State Defendants' anti-SLAPP motion that he claims to have filed in the trial court on December 4, 2014. The proper procedure for Palmieri to have his opposition to the State Defendants' anti-SLAPP motion made part of the appellate record would have been to designate it originally as part of the clerk's transcript or to request to augment the clerk's transcript. A transmittal of exhibits under California Rules of Court, rule 8.224(a) is not a proper means for including a filed superior court pleading as part of the appellate record.

On September 22, 2014 (two days before the scheduled hearing on the Receiver Defendants' anti-SLAPP motion), Palmieri filed a "Notice of Ex Parte Application to Conduct Specified Discovery During Stay." Palmieri explained that he sought unspecified discovery from La Bella, Openshaw and Robertson,⁸ which he stated was needed "to prepare an adequate opposition to Defendants' anti-SLAPP Motions." Instead of providing information about the specific discovery he required to respond to the anti-SLAPP motions, Palmieri provided only general statements, explaining that he is "alleging malfeasance by Defendants but has been unable to conduct any sort of investigation to gather evidence that would be uncovered by the discovery process," and he "plans to work with Defendants during the discovery process to bolster claims and provide concrete evidence of issues raised in the Complaint." The Receiver Defendants filed an opposition to the ex parte application on September 24, 2014.

On October 29, 2014, the trial court denied Palmieri's ex parte application to conduct discovery, explaining that a motion for relief from the automatic discovery stay imposed under the anti-SLAPP statute must be made in a *noticed* motion, not by means of an ex parte application, and that, in any event, Palmieri had not established good cause

⁸ Although not clear from the record, it appears that Palmieri attempted to include Robertson as a defendant in this action, as a minute order dated December 5, 2014, refers to Palmieri's written request to dismiss Robertson.

to be permitted to conduct discovery. On the same date, the trial court granted the Receiver Defendants' anti-SLAPP motion.⁹

On December 5, 2014, the trial court held a hearing on the State Defendants' anti-SLAPP motion, and issued an order granting the motion.

Palmieri filed a notice of appeal from the orders granting the anti-SLAPP motions of both the Receiver Defendants and the State Defendants.¹⁰

⁹ The trial court originally held a hearing on the Receiver Defendants' anti-SLAPP motion and Palmieri's ex parte application on September 26, 2014, and issued a minute order ruling on those items. However, on October 6, 2014, the trial court issued a minute order stating that it had received a letter from Palmieri informing the court that he was not present on the telephone for the entire September 26 hearing on the Receiver Defendants' anti-SLAPP motion. Accordingly, the trial court scheduled an additional hearing on October 29, 2014, at which Palmieri was present, and thereafter issued its final order denying Palmieri's ex parte discovery motion and granting the Receiver Defendants' anti-SLAPP motion.

¹⁰ On February 29, 2010, the Receiver Defendants filed a request to take judicial notice. We hereby grant the request.

On January 29, 2016, Palmieri filed a request to augment the record under California Rule of Court, rule 8.155(a) with 13 exhibits. On February 24, 2016, we granted the request as to exhibits 1 through 7, but denied it as to exhibits 8 through 13. On March 8, 2016, Palmieri filed a renewed request to augment the record with exhibits 8 through 13. The State Defendants oppose the renewed request, except as to exhibit 13 which is a case assignment notice in this action. We hereby grant Palmieri's renewed request to augment the record as to exhibit 13. However, as to exhibits 8 through 12 we deny the request, as those documents were not filed or lodged in the superior court in this case.

II.

DISCUSSION

A. *Palmieri Has Not Established That the Anti-SLAPP Motions Were Untimely*

Palmieri's first contention is that the anti-SLAPP motions were untimely.

Specifically, Palmieri argues (1) the motions were improperly filed after some of the defendants had already filed answers to the complaint; and (2) the motion of the State Defendants was filed more than 60 days after they were served with the complaint. As we will explain, both of these arguments fail.

1. *An Anti-SLAPP Motion May Be Filed After an Answer to the Complaint*

The record establishes that Owen, Openshaw and Lopez filed answers to the complaint before they filed their anti-SLAPP motions. Palmieri contends that the anti-SLAPP motions were "procedurally wrong, and should not have been heard or granted" because the anti-SLAPP motions were filed after the defendants answered the complaint. The argument lacks merit.

Pursuant to section 425.16, subdivision (f), a special motion to strike under the anti-SLAPP statute "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." (§ 425.16, subd. (f).) Nothing in the anti-SLAPP statute indicates that a special motion to strike must be filed *before* a defendant answers the complaint. Indeed, as a defendant must normally file a responsive pleading within 30 days of personal service of the complaint (§ 412.20, subd. (a)(3)), a requirement that a special motion to strike must be filed before filing an answer would render *ineffective* the 60-day deadline in section 425.16, subdivision (b) for filing a

special motion to strike, effectively turning it into a 30-day deadline. We will not interpret a statute in a manner that leads to absurd consequences (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003) or that "renders part of the statute 'meaningless or inoperative.'" (*Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 716.)

Palmieri cites several cases in support of his argument that an anti-SLAPP motion must be filed before an answer. However, Palmieri's authorities are inapposite because they do not concern special motions to strike under the anti-SLAPP statute, and instead deal with motions to strike under section 435 or motions to dismiss for lack of personal jurisdiction, none of which involve a statutory 60-day period for filing a motion. (*Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 370-371 [motion to strike under § 435]; *Stafford v. Ware* (1960) 187 Cal.App.2d 238 [motion to strike under § 435]; *Lincoln v. Didak* (1958) 162 Cal.App.2d 225, 231 [motion to strike under § 435]; and *Roy v. Superior Court* (2005) 127 Cal.App.4th 337 [motion to dismiss for lack of personal jurisdiction filed after answering the complaint].)

2. *Palmieri Has Not Established That Any Defendant's Anti-SLAPP Motion Failed to Meet the 60-day Deadline*

Palmieri contends that the anti-SLAPP motions of the "State Defendants" were not timely because they were filed more than 60 days after service of the complaint. Specifically, without providing a record citation, Palmieri states that on "December 18, 2013, [he] effectuated service of his Complaint on the State Defendants" but they did not file an anti-SLAPP motion until February 18, 2014, which was 62 days later.

As an initial matter, we note that Palmieri cannot be claiming that Lopez's anti-SLAPP motion was untimely, as she did not file her anti-SLAPP motion on February 18, 2014, and as Palmieri stated in his ex parte discovery motion, Lopez was served on April 10, 2014, not December 18, 2013. Lopez's anti-SLAPP motion was filed on May 19, 2014, which is only 39 days later and therefore timely. Palmieri also cannot be arguing that Openshaw's anti-SLAPP motion was untimely, as Palmieri stated in his motion to compel discovery that Openshaw was served by the Sacramento County Sheriff's Department on December 23, 2013, which is 57 days before Openshaw's anti-SLAPP motion was timely filed on February 18, 2014.

Therefore, in arguing that the "State Defendants" did not timely file their anti-SLAPP motion, Palmieri is apparently referring to Jones and Owen. However, Palmieri's argument fails because the record does not establish when Jones and Owen were served or the manner in which they were served. Although Palmieri claimed in his motion to compel discovery that Jones and Owen were served by the Sacramento County Sheriff's Department on December 18, 2013, an unsupported statement such as that does not constitute actual evidence of service.¹¹

¹¹ Jones and Owen explain in their appellate brief that if Palmieri had raised a challenge to the timeliness of the anti-SLAPP motion in the trial court, they would have submitted evidence showing that they were served by *substitute service* on December 18, 2013. When a defendant is properly served by substitute service, the service is deemed complete 10 days later (§ 415.20, subd. (d)), which would mean that the service on Jones and Owen was complete on December 28, 2013, making their February 18, 2014 anti-SLAPP motion timely under section 425.16, subdivision (f).

Based on the above, we conclude that Palmieri did not establish that any of the defendants filed untimely anti-SLAPP motions.¹²

B. *The Ex Parte Application for Relief from the Discovery Stay Was Properly Denied*

Palmieri argues that the trial court erred in not affording him relief from the automatic discovery stay that arises upon the filing of an anti-SLAPP motion.

Section 425.16, subdivision (g) provides: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

Here, Palmieri filed an ex parte application for relief from the discovery stay, which the trial court denied because (1) it was not in the form of a noticed motion; and (2) Palmieri did not show good cause. We apply an abuse of discretion standard in reviewing the trial court's decision. (*Schroeder v. Irvine City Council* (2002) 97

¹² Moreover, because the 60-day deadline for filing an anti-SLAPP motion is not jurisdictional (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840), there is no merit to Palmieri's argument that the orders granting the anti-SLAPP motions should be reversed on the ground that the motions were untimely. Under the express language of section 425.16, subdivision (f), a trial court may consider an anti-SLAPP motion filed later than 60 days after service of the complaint, even without a request by the defendant. (§ 425.16, subd. (f) [anti-SLAPP motion must be filed with 60-days "or, in the court's discretion, at any later time upon terms it deems proper"]; *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 684 [the anti-SLAPP statute "authorizes the court, in its discretion, to consider an untimely motion without restriction as to whether or when the moving defendant so requests".]) Thus, had Palmieri been able to establish through admissible evidence in the trial court that any defendant's anti-SLAPP motion was filed more than 60 days after service was complete, the trial court would still have been within its discretion to consider and rule upon the motion.

Cal.App.4th 174, 191.) As we will explain, the trial court was well within its discretion to deny relief from the discovery stay on either ground that it cited.

First, as expressly stated in the statute, relief from the automatic discovery stay imposed under the anti-SLAPP statute must be made by *a noticed motion*. (§ 425.16, subd. (g).) Palmieri proceeded by means of an *ex parte* application, not a noticed motion. Therefore, the trial court properly denied relief. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1247-1248 [trial court did not abuse its discretion in denying request for discovery under the anti-SLAPP statute "because it was not made by noticed motion"].)

Second, relief from the automatic discovery stay under the anti-SLAPP statute requires a showing of good cause. "Decisions that have considered what constitutes such a showing of good cause have described it as a showing 'that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case' " to defeat an anti-SLAPP motion. (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593.) Here, instead of specifying what he expected to learn through discovery in order to oppose the anti-SLAPP motions, Palmieri's *ex parte* application only very vaguely stated that Palmieri wanted to propound discovery on La Bella, Openshaw and Robertson "to prepare an adequate opposition to Defendants anti-SLAPP motions" and that he "plan[ned] to work with Defendants during the discovery process to bolster claims and provide concrete evidence of issues raised in the Complaint." In light of Palmieri's lack of particularity as to the discovery sought and how it would help him oppose the anti-SLAPP motions, the trial court was well within its discretion to deny the *ex parte*

application for relief from the discovery stay. (See *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247 [trial court did not abuse its discretion in denying relief from the anti-SLAPP statute's automatic discovery stay when the defendant did "not explain what additional facts he expects to uncover, or why such far-ranging discovery is necessary to carry his burden" to establish a prima facie case of success on the merits].)

C. *The Anti-SLAPP Motions Were Properly Granted*

Finally, we consider Palmieri's contention that the defendants' anti-SLAPP motions should not have been granted because they lacked merit.

1. *Applicable Legal Standards*

The anti-SLAPP statute 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." (§ 425.16, subd. (b)(1).)

"The analysis of an anti-SLAPP motion thus involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected

speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820, 124 (*Oasis West*).

Section 425.16, subdivision (e) specifies the type of activity protected by the anti-SLAPP statute: An " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or 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 the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

"Review of an order granting or denying a motion to strike under section 425.16 is *de novo*. [Citation.] We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. *Protected Activity*

The first issue in the anti-SLAPP analysis is whether Palmieri's claims arise from protected activity. As we will explain, on our de novo review, we concur with the trial court's conclusion that Palmieri's claims arise from the defendants' protected activity.

As noted, protected activity includes "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" and "any other conduct in furtherance of the exercise of the constitutional right of petition" (§ 425.16, subd. (e)(1), (4).) In determining whether Palmieri's claims arise from protected activity we focus on the gravamen of the complaint. (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319 ["[t]he 'principal thrust or gravamen' test has been used to determine whether an action fits within the scope of the anti-SLAPP protection provided by section 425.16 when a pleading contains allegations referring to both protected and unprotected activity"]; *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551, fn. 7 ["where the defendant shows that the gravamen of a cause of action is based on nonincidental protected activity as well as nonprotected activity, it has satisfied the first prong of the SLAPP analysis"].)

The gravamen of Palmieri's complaint is (1) defendants wrongfully targeted Palmieri in the Civil Action without first investigating whether he was culpable; and (2) La Bella was improperly and unnecessarily appointed as receiver. Palmieri centers his complaint on the allegation that his right to due process was violated and he sustained other injuries when the defendants initiated and participated in the Civil Action and

obtained the appointment of a receiver, as he purportedly did not engage in any misconduct.

As the trial court properly concluded, the causes of action alleged against defendants in the complaint arise from protected activity under the anti-SLAPP statute because they are based on the defendants' statements and actions in connection with their participation in the Civil Action, implicating both their "written or oral statement or writing made before . . . judicial proceeding" and their "conduct in furtherance of the exercise of the constitutional right of petition" (§ 425.16, subd. (e)(1), (4).) In substance, the gravamen of Palmieri's claims against defendants in each cause of action amounts to a claim that Palmieri was maliciously and unnecessarily prosecuted in the Civil Action because he was not culpable. As our Supreme Court has observed, "by its terms, [the anti-SLAPP statute] potentially may apply to every malicious prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Accordingly, Palmieri's complaint is well within the scope of cases that have been identified as falling squarely within the scope of protected activity under the anti-SLAPP statute.

3. *Palmieri Has Not Satisfied His Burden on the Second Prong to Demonstrate a Probability of Prevailing on the Merits*

Having determined that defendants met their burden under the first prong of the anti-SLAPP statute, we turn to the second prong, under which Palmieri bears the burden. "To satisfy the second prong, 'a plaintiff responding to an anti-SLAPP motion must

" 'state[] and substantiate[] a legally sufficient claim.' " [Citation.] Put another way, the plaintiff "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." ' " (*Oasis West, supra*, 51 Cal.4th at p. 820, italics added.) In short, a plaintiff must " 'demonstrate[] a probability of prevailing on the claim.' " (*Ibid.*) If a plaintiff meets this burden, the action is allowed to go forward despite the fact that it arises from protected activity. (*Ibid.*)

a. *The Receiver Defendants*

Palmieri did not file an opposition to the Receiver Defendants' anti-SLAPP motion. Instead, he filed an unmeritorious ex parte application for relief from the discovery stay. Accordingly, Palmieri did not even *attempt* to meet his burden to substantiate his claims against the Receiver Defendants and did not demonstrate a probability of prevailing against them.

Accordingly, we conclude that Palmieri did not satisfy his burden on the second prong of the anti-SLAPP analysis, and the trial court accordingly properly granted the Receiver Defendants' special motion to strike.¹³

¹³ Further to the extent that Palmieri attempts to present arguments on appeal to substantiate the merit of his claims against the Receiver Defendants, any such argument has been forfeited by the failure to present it below. " ' "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." Thus, "we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived." ' " (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830; see also *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602

b. *The State Defendants*

As we have explained, Palmieri apparently filed an opposition to the State Defendants' anti-SLAPP motion, although that document is not in the appellate record. Although we could reject Palmieri's appellate arguments regarding the second prong of the anti-SLAPP as to the State Defendants on the ground that Palmieri has not supplied us with an adequate record (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534), we will nevertheless exercise our discretion to consider whether Palmieri has met his burden to demonstrate a probability of prevailing on his claims against the State Defendants.

The State Defendants set forth numerous legal grounds for their contention that Palmieri's claims against them lack merit. We will discuss three of those grounds, each of which have merit and establish that Palmieri cannot demonstrate a probability of prevailing on the merits against the State Defendants.

i. *Statute of Limitations*

Although Palmieri's complaint does not identify any proper statutory or common law basis for any of his four causes of action, as we understand the complaint, Palmieri is alleging two fundamental claims: (1) a cause of action for violations of his federal constitutional right to due process and equal protection under title 42 of the United States Code section 1983 (Section 1983); and (2) a cause of action for malicious prosecution.

[appellants' failure to timely oppose a motion waived any objections to the resulting order].)

A cause of action under Section 1983 carries the same statute of limitations as the state personal injury statute of limitations in the state where the alleged civil rights violation occurred. (See *Jackson v. Cedars–Sinai Medical Center* (1990) 220 Cal.App.3d 1315, 1323; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 747.) The current personal injury limitations period in California, where Palmieri's injury occurred, is two years from the injury-causing wrongful act. (§ 335.1.) Therefore, Palmieri's Section 1983 claim is subject to a two-year limitations period.¹⁴ A two-year limitations period also applies to malicious prosecution actions. (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197.)

"[S]tatutes of limitation do not begin to run until a cause of action accrues. . . . [¶] Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' . . . An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. . . . [¶] A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' " (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807, citations omitted.)

¹⁴ Palmieri's complaint also briefly refers to his due process and equal protection rights under article I, section 7 of the California Constitution. Claims for injury based on violation of state constitutional rights under Civil Code section 52.1 are "analogous to a federal claim for personal injury under 42 United States Code section 1983" and are subject to the same statute of limitations. (*Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 760 (*Gatto*).

Palmieri filed his complaint in October 2013. The events giving rise to Palmieri's causes of action occurred no later than 2002 to 2007 while the Civil Action was being litigated and while La Bella was acting as receiver. Thus Palmieri filed his complaint far later than two years after his claims accrued. However, as we understand Palmieri's argument, he contends that the discovery rule applies, postponing the accrual of his causes of action.

First, apparently attempting to invoke the discovery rule, Palmieri alleges in the complaint that from "2008 [to] 2010" Robertson supplied Palmieri with documents relevant to the Civil Action, which showed that Palmieri did not defraud investors. Second, in his appellate brief, Palmieri contends that in 2011, Lopez gave him documents she obtained during the Department of Insurance investigation. Palmieri states that based on those documents, "[i]t was not until August 8, 2011 . . . that [he] received 'Documentary Evidence' that led [him] to believe wrongs were committed in the . . . Receivership." Palmieri argues that "[t]his was the first actual evidence that led [him] to believe 'wrongful acts had occurred' in the receivership."

Putting aside the fact that the appellate record contains no evidence to support Palmieri's contention that he first learned of his claims against defendants in 2010 (from Robertson) or 2011 (from Lopez), this action was still not timely filed, even if Palmieri could provide supporting evidence. According to Palmieri's argument, the latest date that he learned of his claims against defendants was on August 8, 2011. However, this action was filed on October 7, 2013, which is more than two years later.

In sum, we conclude that Palmieri cannot demonstrate a probability of prevailing on the merits against the State Defendants because his claims are barred by the statute of limitations.¹⁵

ii. *Issue Preclusion*

To the extent that Palmieri's claims against the State Defendants are premised on the allegation that Palmieri was wrongfully named as a defendant in the Civil Action because he did not commit the alleged misconduct relating to the fraudulent sale of unlicensed viatical securities, those claims lack merit because they are precluded by the doctrine of issue preclusion.

"The doctrine of collateral estoppel, or issue preclusion, . . . is firmly embedded in both federal and California common law. It is grounded on the premise that 'once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed.' " (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 864, fn. omitted.) Issue preclusion applies "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally,

¹⁵ Were we to reach the merits of the second prong of the anti-SLAPP analysis as to the Receiver Defendants, the same statute of limitations bar would apply to Palmieri's claims against the Receiver Defendants.

the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

Here, based on the judgments in both the Civil Action and the Criminal Proceeding, all of the requirements for the application of issue preclusion are met as to Palmieri's allegation in his complaint that he did not defraud investors. As we have explained, in both the Civil Action and the Criminal Proceeding, Palmieri was a party. In both those actions, Palmieri admitted to defrauding investors, and a final judgment on the merits was entered against Palmieri in both proceedings. Accordingly, Palmieri is collaterally estopped under the doctrine of issue preclusion from relitigating in this action the issue of whether he, in fact, defrauded the investors and thus whether the State Defendants lacked a factual basis for filing the Civil Action.¹⁶

iii. *Failure to Comply with the Government Claims Act as to the State Law Causes of Action*

The Government Claims Act (Gov. Code, § 810 et seq.) establishes certain conditions precedent to the filing of a lawsuit against a public entity. "As relevant here, a plaintiff must timely file a claim for money or damages with the public entity. ([Gov. Code,] § 911.2.) The failure to do so bars the plaintiff from bringing suit against that

¹⁶ The doctrine of issue preclusion would apply equally to the second prong of the anti-SLAPP analysis as to the Receiver Defendants, had it been necessary for us to reach the second prong as to their anti-SLAPP motion. In addition, to be able to rely on the judgments establishing that Palmieri defrauded investors, the Receiver Defendants would also be able to invoke the doctrine of issue preclusion based on the order in the Civil Action discharging La Bella as receiver and stating that he and the professionals he retained "shall have no personal liability of any nature for any act, omission or matter pertaining to the Receivership."

entity. ([Gov. Code,] § 945.4.)" (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1237.) When the State of California is the subject of a claim for monetary damages, the claim must be filed with the California Victim Compensation and Government Claims Board (the Board) by either delivering it to an office of the Board or mailing it to the Board's principal office. (Gov. Code, § 915, subd. (b).) The same claim filing requirement applies in a suit for money damages against an employee of a public entity. Specifically, Government Code section 950.2 provides that, with certain exceptions not applicable here, "a cause of action against a public employee . . . for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred" under the statutory provisions in the Government Claims Act requiring the filing of claims with public entities. (Gov. Code, § 950.2.) Thus, when a plaintiff seeks monetary damages against employees of the State of California for acts within the scope of their employment, he must first file a claim with the Board.

The claim filing requirement of the Government Claims Act applies to claims based on state law, but does not apply to Palmieri's claims to the extent they arise under federal law pursuant to Section 1983. (*Gatto, supra*, 98 Cal.App.4th at pp. 764-765.)

Palmieri's complaint seeks money damages against the State Defendants, all of whom are alleged to have been acting as employees of the State of California for acts within the scope of their employment. Thus, Palmieri was required to file a claim with the Board before bringing his state law claims, by mailing or delivering the claim to the Board's offices. (Gov. Code, §§ 915, subd. (b), 950.2.)

"[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action." (*State of California v. Superior Court, supra*, 32 Cal.4th at p. 1243.)

Here, Palmieri's complaint does not allege facts demonstrating that he complied with the Government Claims Act by filing a claim with the Board; nor has he pointed to any evidence that he did so. Therefore, Palmieri does not have a probability of prevailing on the merits as to any of the state law claims alleged in his complaint against the State Defendants.

For all of the above reasons, the State Defendants' anti-SLAPP motion was properly granted.

DISPOSTION

The judgments are affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.