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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE LEAGUE OF CALIFORNIA
HOMEOWNERS,

Plaintiff and Respondent,

v.

THE BETTER BUSINESS BUREAU OF
THE SOUTHLAND,

Defendant and Appellant.

E053423

(Super.Ct.No. CIVDS1016960)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza,
Judge. Affirmed.

Leopold, Petrich & Smith and Walter R. Sadler for Defendant and Appellant.

Weiss & Lurie, Weisslaw, Jordan L. Lurie and Leigh A. Parker for Plaintiff and
Respondent.

I. INTRODUCTION

Defendant, The Better Business Bureau of the Southland (the BBB), appeals from an order denying its special motion to strike an entire complaint pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 426.16.)¹ We agree with the trial court that the gravamen of the complaint is not based on an act in furtherance of the BBB's protected activities in connection with an issue of public interest. (§ 425.16, subds. (b)(1), (e)(3), (4).) We therefore affirm the order denying the anti-SLAPP motion.

II. BACKGROUND

A. *The Allegations of the Complaint*

The complaint, a class action, was filed by The League of California Homeowners (the LCH) on behalf of itself and other businesses (plaintiffs) who paid membership fees to the BBB since in or around 2005. The LCH is a “non-profit, consumer organization” formed for the purpose of advising homeowners concerning what “should and should not be in a contract for home improvement and repair.”

The BBB is a “non-profit, voluntary membership organization,” and is the largest chapter of The Better Business Bureau in the United States, serving the counties of Los Angeles, Orange, Riverside and San Bernardino. “The goals of the BBB are to advocate truth in advertising as well as to promote integrity in the performance of business

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

services.” Among other things, the BBB investigates and acts on consumer complaints of deceptive or unethical business practices.

According to the complaint, around 2005, the BBB adopted a “pay to play” ratings system, assigning all businesses a letter grade of “A” through “F.”² The grades were supposed to be unbiased indicators of the overall reliability of the rated business, but were in fact based in part on whether the business paid membership fees to the BBB.

The complaint specifically alleges that the BBB assigned “extra ratings points” and awarded higher letter grades and business ratings to BBB members or accredited businesses (i.e., to businesses that paid membership dues to the BBB) than it awarded to non-member or non-accredited businesses that did not pay membership dues.

“Businesses that paid dues to the BBB gained extra ratings points unavailable to non-members. A+ ratings were awarded to businesses that paid membership dues, and F ratings were issued to punish businesses that refused to pay.” The complaint further alleges that the BBB falsely represented that its letter grade ratings system was a “reliable indicator of a business’[s] integrity and trustworthiness,” when, in fact, the ratings system was a “pay to play” system, and the LCH and others paid the BBB for memberships “that do not have the characteristics advertised.”

In addition to issuing letter grades or ratings for all businesses, the BBB issues “reliability reports” for its “accredited” or member businesses. Beginning in April 2009,

² Before it adopted the letter grade rating system, the BBB rated businesses as “satisfactory” or “unsatisfactory” based on the number and resolution of consumer complaints concerning the business.

the BBB's reliability reports were revised to identify BBB member businesses as "accredited" businesses. According to BBB president William G. Mitchell, "being listed as an 'accredited' business means the business has agreed in writing to abide by the BBB's strict rules regarding operation of their business and [has] made a commitment to make a good faith effort to resolve any consumer complaints."

According to the complaint, "[a]ccreditation fees ranged from four hundred dollars to thousands of dollars depending on the size of the business," and according to its 2009 tax filing, the BBB "raked in over \$6.2 million in accreditation fees in 2008." The BBB has represented that "one of the most important aspects of the [reliability] report is the rating we assign to the company. The ratings range from A+ to F and are determined by the company's composite score of such factors as its type of business, length of time in business, compliance with competency licensing requirements, complaint volume, complaint history, seriousness of complaints, response to complaints, and our experience with the company's industry in general. The scoring system takes into account the importance we feel each factor is to the company's reliability and the rating assigned is our opinion of the company's overall reliability." The BBB has also represented that "BBB Accreditation is an honor," "not every company is eligible" for BBB accreditation, and "all BBB accredited businesses have agreed to live up to our Principles of Trust."

Finally, the complaint alleges that in November 2010, then-Connecticut Attorney General Richard Blumenthal "criticized the BBB's rating system following an extensive

investigation. Blumenthal noted that ‘the BBB’s current rating system is based, in part, on the payment of inadequately disclosed accreditation fees’ and that ‘this financial influence is potentially harmful and misleading to consumers.’ Blumenthal stated that ‘I find no reasonable basis for tying rating points to a membership fee - in essence, creating what could be viewed as a “pay to play” system, rather than a transparent and equitable ‘rating system.’

“... On or about November 12, 2010, ABC News aired an investigation of the BBB’s rating system. As reported by ABC News, a group of Los Angeles business owners, determined to prove that the accreditation system was a sham, paid \$425 apiece to buy BBB memberships for a number of fictitious firms [The BBB] awarded a membership and an A minus rating to a non-existent sushi restaurant in Santa Ana, California and an A+ to a bogus firm named after Stormfront, a white supremacist group.

“... The ABC News investigation also showed how two small Los Angeles businesses, with an ABC News producer and camera present, were told by BBB telemarketers that their C grades could be raised to an A+ if they paid to join the BBB. Terri Hartman, the manager of Liz’s Antique Hardware, says she was told only a payment could change her grade, which was based on one old complaint that had already been resolved. After Hartman paid the \$565 membership fee the next business day, her C grade was replaced with an A+ and the one complaint was wiped off the record.”

The complaint pleads six causes of action: (1) unfair or deceptive business practices (Bus. & Prof. Code, § 17200 et seq.); (2) false and misleading advertising (Bus.

& Prof. Code, § 17500 et seq.); (3) interference with actual or prospective economic advantage; (4) common counts, assumpsit, and unjust enrichment; (5) negligent misrepresentation; and (6) declaratory relief. In addition to injunctive, declaratory, and other relief, the complaint seeks refunds of the membership or accreditation fees that the plaintiffs paid to the BBB.

B. The BBB's Motion to Strike

The BBB moved to strike the entire complaint under section 425.16. The BBB argued that all of the plaintiffs' claims were based on the BBB's protected activity, namely, its "valid exercise of its constitutional right of free speech on matters of 'public interest' (*i.e.*, its rating system for businesses)," and the plaintiffs could not demonstrate a probability of prevailing on any of their causes of action.

The trial court denied the motion on the ground the BBB did not meet its initial burden of demonstrating that the allegations of the complaint arose from its exercise of its right of free speech in connection with an issue of public interest. (§ 425.16, subd. (e)(3), (4).) Accordingly, the court did not determine whether the plaintiffs demonstrated a probability of prevailing on any of their causes of action. The BBB timely appealed. (§ 425.16, subd. (i).)

III. DISCUSSION

The BBB claims its special motion to strike the entire complaint was erroneously denied because the allegations of the complaint arose from and were based on acts in furtherance of the BBB's right to freedom of speech on a matter of public interest

(§ 425.16, subd. (e)(3), (4)), namely, the BBB’s use or publication of its business ratings system. We disagree.

A. *Section 425.16*

A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish the exercise of the constitutional rights to freedom of speech or to petition the government for redress of grievances. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.) In enacting section 425.16 (known as the anti-SLAPP statute) the Legislature created a remedy known as a special motion to strike as a procedural means of disposing of SLAPP suits at the earliest possible stage of the litigation. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 443.)

Section 425.16 prescribes a two-step process for striking a cause of action. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The court first determines whether the defendant has demonstrated that the allegations of the challenged cause of action or complaint arise from protected activity. (§ 425.16, subd. (b)(1).)³ The defendant meets this burden by showing that the act underlying the challenged cause of action fits one or more of the categories spelled out in subdivision (e) of section 425.16.⁴

³ Section 425.16, subdivision (b)(1) states: “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.”

[footnote continued on next page]

(*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*)). In making this determination, the court considers “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability . . . is based.” (§ 425.16, subd. (b)(2).)

If the court finds the defendant has made this initial showing, it proceeds to the second step of the anti-SLAPP analysis and determines whether the plaintiff has demonstrated a probability of prevailing on its claims. (*Navellier, supra*, 29 Cal.4th at p. 88.) If, however, the defendant does not meet its burden on the first step, the court must deny the motion and need not address the second step. (*Ibid.*; *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1594 [Fourth Dist., Div. Two].) “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.” (*Navellier, supra*, at p. 89.)

B. *Standard of Review*

We review the denial of a special motion to strike de novo, engaging in the same two-step analysis as the trial court. We first determine whether the defendant met its

[footnote continued from previous page]

⁴ Section 4251,6, subdivision (e) provides that, as used in the statute, the phrase, “act in furtherance of a person’s right of petition or free speech” “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.”

initial burden of demonstrating that the challenged cause or causes of action constitute a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step of the anti-SLAPP analysis. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

C. Plaintiffs' Claims Do Not Arise from Protected Activities

The BBB argues that it met its burden of demonstrating that the allegations of the complaint and each of its six causes of action arise from and are based on the BBB's free speech right to publish reviews of businesses in accordance with its letter grade ratings system and reliability reports. (§ 425.16, subd. (e)(3), (4).) We disagree that any of the causes of action alleged in the complaint are based on protected activities.

As pertinent, section 425.16 defines "any act . . . in furtherance of [a] person's right of . . . free speech" (§ 425.16, subd. (b)(1)) as including "(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)(3), (4)).

The BBB emphasizes that its business ratings and reliability reports are matters of public interest within the meaning of subdivision (e)(3) and (4) of section 425.16, because they impact or influence large numbers of persons. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650 [matters of public interest "may . . . include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals."].) We agree.

The critical question, however, is whether any of the causes of action alleged in the complaint are *based on* the BBB's protected activities of developing, using, and publishing its business ratings and reliability reports. (See *Navellier, supra*, 29 Cal.4th at p. 89.) As our state courts have explained, ““the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]’ [Citation.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.)

Consistent with this principle, we examine the *principal thrust or gravamen* of the plaintiffs’ cause of action to determine whether the anti-SLAPP statute applies, and we assess the principal thrust or gravamen by “identifying ‘[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.’ [Citation]. If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

Here, the alleged wrongful or injury-producing conduct constituting the principal thrust or gravamen of the complaint, and each of its causes of action, is *not* the BBB’s activities in developing, using, or publishing its letter-grade business ratings or reliability reports. Rather, it is the BBB’s alleged *false representation*—to the LCH and to others who paid membership dues to the BBB—that the BBB’s business ratings and reliability

reports were not to any extent based on whether the businesses being rated paid membership dues to the BBB.

The BBB stresses that the allegations of the complaint are necessarily based on the BBB's protected activities in developing and publishing its business ratings and reliability reports—because the plaintiffs' core false representation claims would not exist “but for” the BBB's business ratings and reliability reports. This “but for” standard is not the proper test for determining the principal thrust, gravamen, or core injury-producing conduct underlying the complaint however.

Instead, the question is whether the BBB's protected activities in developing and publishing its business ratings and reliability reports are *merely incidental* to its alleged false representation that the ratings and reports were not dependent upon whether the business paid membership dues to the BBB. “Where a cause of action is based on both protected activity and unprotected activity, it is subject to section 425.16 ““unless the protected conduct is “merely incidental” to the unprotected conduct.”” [Citations.]” (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1187.)

In general, protected activity is merely incidental to unprotected activity if the plaintiff does not assert liability or seek damages based on the protected activity. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1550, 1553 [“If liability is not based on protected activity, the cause of action does not target the protected activity and is therefore not subject to the SLAPP statute”]; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287 [mixed causes of action are subject to a

special motion to strike protected under § 425.16 if “at least one of the underlying acts is protected conduct”].)

As counsel for the LCH stressed at oral argument, the LCH is not suing the BBB because any of the plaintiffs received a poor letter-grade business rating, or were the subject of an unfavorable reliability report. Rather, the LCH is suing the BBB because it allegedly engaged in a “pay to play” scheme, and falsely represented to the plaintiffs that its ratings and reports were not dependent upon whether the subject businesses paid membership dues to the BBB. On this basis, the plaintiffs seek restitution of the membership dues they paid to the BBB.⁵

Thus here, the BBB’s protected activities in developing, using, and publishing its business ratings and reliability reports are *merely incidental* to its unprotected activities in making false representations to the plaintiffs. The BBB’s protected activities do not form the factual basis of any of the causes of action alleged in the complaint—independent of the allegations of unprotected activities. (Cf. *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures, supra*, 184 Cal.App.4th at p. 1553 [cause of action for breach of fiduciary duty based on protected activities where the protected activities were acts for which the plaintiff asserted liability and sought damages]; *City of Colton v.*

⁵ At oral argument, counsel for the BBB pointed out that in *Entertainment Career Connection, Inc. v. Better Business Bureau of the Southland, Inc.* (Mar. 24, 2011, B218169) [nonpub. opn.], the Second District Court of Appeal, Division Five, affirmed an anti-SLAPP motion striking the plaintiff’s complaint against the BBB. In that case, however, the plaintiff’s complaint was based on the BBB’s protected activity in issuing an unfavorable rating of the plaintiff’s business.

Singletary (2012) 206 Cal.App.4th 751, 772-774 [Fourth Dist., Div. Two] [part of cause of action based on protected activity may be stricken when plaintiff fails to demonstrate probability of prevailing on that portion of its cause of action].)

In sum, the BBB did not meet its burden of demonstrating that the complaint or any of its causes of action arose from protected activities. (§ 425.16, subd. (e).) It is therefore unnecessary for this court to address whether the LCH demonstrated a reasonable probability of prevailing on the merits of any of its causes of action.

(*Navellier, supra*, 29 Cal.4th at p. 88.)

IV. DISPOSITION

The order denying the BBB's special motion to strike is affirmed. LCH shall recover its costs on appeal.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.