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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SAMUEL CHRISTEN,

Plaintiff and Respondent,

v.

JAMES VINCENT WEIXEL,

Defendant and Appellant.

E059989

(Super.Ct.No. INC1304362)

OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman,
Judge. Affirmed.

Kronenberger Rosenfeld, Karl S. Kronenberger and Jeffrey M. Rosenfeld for
Defendant and Appellant.

Samuel Christen, in pro. per., for Plaintiff and Respondent.

I

INTRODUCTION

Plaintiff and respondent Samuel Christen sued a suspended lawyer, William S.

Bonnheim,¹ for nonpayment of a loan. Bonnheim had pledged to Christen the money from the settlement of securities arbitration as security for the debt. Christen named appellant James Vincent Weixel, another lawyer, as a Doe defendant on the theory that Weixel should not have disbursed to Bonnheim a portion of the settlement proceeds because Bonnheim had initially represented the clients before Weixel became substitute counsel.

The trial court denied Weixel's anti-SLAPP motion to strike. (Code Civ. Proc., § 425.16.)² Based on our independent review, we conclude Weixel cannot obtain anti-SLAPP protection because Weixel cannot establish Christen's cause of action arises from an act or conduct by Weixel in furtherance of a constitutional right to petition or free speech. We affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

Christen filed a complaint against Bonnheim and Weixel alleging breach of contract and additional claims for fraud, elder abuse, conspiracy, and aiding and abetting, and seeking damages of \$157,590.63. The bulk of the complaint is directed at Bonnheim.

¹ The State suspended Bonnheim from practice on October 9, 2011, and disbarred him on October 16, 2014. (<http://members.calbar.ca.gov/fal/Member/Detail/68693> [as of December 30, 2014].)

² All statutory references are to Code of Civil Procedure unless stated otherwise.

Christen alleges that, in July 2012, he loaned Bonnheim \$150,000 and Bonnheim executed an assignment to him of attorney's fees from the pending securities arbitration, *Schuhmann Trust v. Merrill Lynch & Co.*, FINRA No. 10-02140, although Bonnheim had already assigned the fees to Weixel and to a third lawyer. Furthermore, because Bonnheim was suspended from practicing law, the assignment to Weixel constituted illegal fee splitting. Christen loaned Bonnheim an additional \$16,000 in November 2012. Bonnheim did not repay Christen.

Christen alleges that Bonnheim and Weixel conspired with and aided and abetted one another to defraud Christen. The fourth cause of action is for elder abuse, and alleges that Bonnheim took advantage of Christen by inducing him to loan Bonnheim money based upon his apparent position as an attorney. The fifth and sixth causes of action are for "conspiracy" and "aiding and abetting," based on the same set of facts. Christen's primary contention is that Weixel bears some liability to him arising out of Weixel's conduct in making settlement disbursements to Bonnheim from the *Schuhmann* arbitration.

B. The Anti-Slapp Motion

In support of Weixel's anti-SLAPP motion, he submitted his declaration in which he explained that, in November 2012, he substituted in as counsel for the *Schuhmann* claimants to replace Bonnheim. After the case was settled in January 2013, Weixel paid Bonnheim \$26,000 for fees earned by Bonnheim before Weixel was involved. Weixel had no involvement with and no knowledge of an agreement between Christen and

Bonnheim. Weixel first learned about Christen's claim in May 2013, when Christen left a voicemail message explaining that Bonnheim had pledged to him the fees from the *Schuhmann* matter.

Weixel argued that any claims against him "arise entirely out of Weixel's statements and conduct in connection with the *Schuhmann* arbitration claim. Those statements and conduct were thus made in connection with Weixel's participation as counsel in an official proceeding authorized by law, and are thus within the scope of the anti-SLAPP statute, Code of Civil Procedure section 425.16" and are covered by the litigation privilege.

In opposition to the motion, Christen submitted a copy of the written assignment from Bonnheim to Christen, executed in July 2012. Christen argued that his claims against Weixel did not come under section 425.16.

The court made a tentative written ruling—which it ultimately adopted—denying the anti-SLAPP motion: "This complaint . . . is based upon allegations that plaintiff loaned defendant William Bonnheim \$150,000 to start a business; that as collateral for that loan Bonnheim pledged his attorney fee for representing plaintiff in a binding arbitration (*Schuhmann Trust* case); that Bonnheim, who unbeknownst to plaintiff was suspended from the practice of law, had already pledged the case and proceeds to defendants Jessica Albert and James Weixel and intended to split fees with them even though he was not licensed to practice law and unlicensed lawyers are prohibited from fee-splitting with other lawyers; that the *Schuhmann Trust* case resolved and Weixel did

in fact pay Bonnheim \$26,000.00 in attorney's fees within weeks of receiving the proceeds; that Bonnheim made the initial interest only payments and one payment towards the principal

“The action is not protected by the anti-SLAPP statute. . . . only ‘[s]tatements and writings made during judicial proceedings are protected by the anti-SLAPP statute.’ [Citation.] Furthermore, ‘[s]peech or petitioning activity that is “illegal as a matter of law” is not constitutionally protected and defendant therefore cannot use the anti-SLAPP statute to avoid liability.’ [Citation.] An attorney is prohibited from sharing legal fees with a person who is not a licensed attorney. [Citation.] Thus, defendant’s allegedly tortious and unlawful act of splitting attorney’s fees with an unlicensed lawyer is not protected by the anti-SLAPP statute.”

III

THE ANTI-SLAPP STATUTE

Section 425.16, the anti-SLAPP statute, protects litigants and others involved in judicial proceedings from being intimidated by meritless actions. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

“Review of an order granting or denying a motion to strike under section 425.16 is de novo.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) This court considers “‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’” The court does not weigh or compare the

evidence, but rather accepts as true the evidence favorable to the plaintiff while evaluating the defendant's evidence "only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Ibid.*, citing § 425.16, subd. (b)(2).) The appellate court employs the same two-prong procedure as the superior court in determining how the motion should have been decided. (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

A court's consideration of an anti-SLAPP motion involves a two-pronged analysis. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) The court's first task is to determine whether the challenged claim arises from conduct protected by subdivision (e) of section 425.16. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) The "gravamen" or "principal thrust" of the claim is what governs, not individual factual allegations. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

First, the moving party must show that the challenged cause of action arises from activity protected by the statute. (§ 425.16, subd. (e); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "Arising from" means that "'the act underlying the plaintiff's cause" or "the act which forms the basis for the plaintiff's cause of action" must have been an act in furtherance of the right of petition or free speech.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928-929.) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause

fits one of the categories spelled out in section 425.16, subdivision (e).’ [Citations.]”
(*Cotati*, at p. 78; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.)

Subdivision (e) of section 425.16 defines an “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ [as]: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [or] (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[.]” (§ 425.16, subd. (e), *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) All that is necessary for the statute to apply is that the cause of action arises from an act in furtherance of the constitutional right to petition or free speech. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at pp. 58-59; *Dickens v. Provident Life & Accident. Ins. Co.* (2004) 117 Cal.App.4th 705, 716.)

If the defendant demonstrates that a cause of action falls within the anti-SLAPP statute’s protection, the burden then shifts to the plaintiff to prove that he has a probability of prevailing on the merits. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) The plaintiff must “‘state[] and substantiate[] a legally sufficient claim.’” (*Jarrow Formulas Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 741.) This requires the plaintiff to “‘‘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.””” (Ibid.)

IV

DISCUSSION

As we read the complaint, the essential aspect of Christen’s claim is that, in January 2013, Weixel paid Bonnheim \$26,000 for attorney’s fees that Bonnheim had pledged to Christen in July 2012. Additionally, and somewhat inconsistently, Christen alleges Weixel could not pay the money to Bonnheim because Bonnheim’s right to practice as an attorney had been suspended. If that were so, however, then Bonnheim might not be entitled to any fees as a suspended attorney and would not have been able to pledge to Christen any fees owed to him. Nevertheless, we are not considering a demurrer and we evaluate Christen’s claims using the anti-SLAPP principles enunciated above.

Our threshold task is to determine whether the basis for Christen’s claim was an act or conduct in furtherance of Weixel’s right of petition or free speech, in connection with a public issue and before, or being considered by, a legislative, executive, judicial, or other authorized official proceeding. (§ 425.16, subd. (e).) Contrary to what Weixel asserts, the conduct Christen attributes to Weixel did not arise out of Weixel’s right of petition or free speech. Weixel’s payment to Bonnheim of his share of the *Schuhmann* settlement proceeds had no connection with a public issue before, or being considered by, a legislative, executive, judicial, or other authorized official proceeding. A fee dispute

does not qualify for anti-SLAPP protection. (*Drell v. Cohen* (Dec. 4, 2014, B253688) ___ Cal.App.4th ___ [2014 Cal. App. LEXIS 1105, *8], citing *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182.) Instead, the payment was a private transaction between two lawyers. Even when adopting “a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908), we cannot conclude Weixel’s disbursement of fees from the *Schuhmann* settlement to Bonnheim had anything to do with Weixel’s right of petition, free speech, or a public issue.

None of the cases cited by Weixel supports his position on this point. Communications about pending litigation, including settlement negotiations, are protected by the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90; *Dowling v. Zimmerman, supra*, 85 Cal.App.4th at pp. 1418-1420; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841-842; *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907-908; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963; *Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 136; *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 158.) However, “garden-variety attorney malpractice” does not qualify as protected speech or conduct. (*Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 632.)

Furthermore, the anti-SLAPP statute does not operate where the gist of plaintiff’s complaint is that “defendant did something wrong by breaching the settlement agreement

after the underlying action had been concluded . . . because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant's right of petition or free speech, as those rights are defined in section 425.16. Thus, the instant suit is based on alleged conduct of defendant that is *not* protected activity.”

(Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc. (2008) 164

Cal.App.4th 1108, 1118.)

This case is most analogous to *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* The substance of Christen's claim is that, after the securities arbitration was settled, Weixel wrongly disbursed attorney's fees from part of the settlement proceeds to Bonnheim. But Weixel's conduct was not in furtherance of the right of petition or free speech—as those rights are defined in section 425.16—and is not protected activity.

Because Weixel has not met his burden of showing that the causes of action set out in Christen's complaint were based on protected activities undertaken by Weixel, the burden of showing a probability of prevailing on his claims never shifted to Christen and we do not need to discuss the second prong of section 425.16. (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc., supra*, 164 Cal.App.4th at pp. 1118-1119.) Because we independently decide the case under the first prong, we do not need to discuss the additional arguments about the application of the litigation privilege or the trial court's conclusion about the legality of Weixel paying his share of the attorney's fees to Bonnheim after Bonnheim had been suspended.

V

DISPOSITION

We affirm the judgment. In the interests of justice, the parties shall bear their own costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.