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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEBORAH ELLIS,

Plaintiff and Appellant,

v.

MERCURY INSURANCE COMPANY et
al.,

Defendants and Respondents.

E059990

(Super.Ct.No. RIC1300252)

OPINION

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhardt,
Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant
to art. VI, § 6 of the Cal. Const.) Affirmed.

Deborah Ellis, in pro. per., for Plaintiff and Appellant.

O'Connor, Schmeltzer & O'Connor, Lee P. O'Connor and Timothy J. O'Connor
for Defendants and Respondents.

INTRODUCTION

Plaintiff Deborah Ellis filed a first amended complaint against defendants Mercury Insurance Company and June Lee for breach of contract and various torts. The complaint was based on Mercury having sued Ellis in an earlier action for reimbursement of medical expenses and submitting a declaration under Code of Civil Procedure section 98, which allows prepared testimony in lieu of direct testimony.¹ The trial court granted defendants' anti-SLAPP motion to strike Ellis's complaint pursuant to section 425.16. After Ellis filed an appeal from the judgment, the trial court also awarded defendants \$3,668.50 in attorney's fees and costs under section 425.16, subdivision (c).

We affirm the order granting defendant's anti-SLAPP motion and the judgment. Defendants met their burden of demonstrating the acts underlying the complaint arose from protected litigation activity. As Ellis failed to meet the burden of establishing a probability of prevailing on the complaint, the trial court did not err by granting the anti-SLAPP motion. Furthermore, even if Ellis had filed a timely appeal of the trial court's order granting defendants' motion for attorney's fees under section 425.16, subdivision (c), we would decide Ellis failed to show the trial court abused its discretion in the amount of mandatory fees awarded to defendants under the statute.

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

II

FACTUAL AND PROCEDURAL BACKGROUND

Mercury issued an automobile insurance policy to Ellis with medical expense coverage of \$2,000. After Ellis was involved in a car accident in 2004 with Gerit Batley, Mercury paid \$2,000 for Ellis's medical costs, including \$929.75 that was paid to the hospital, although Ellis had already paid that amount herself. After Ellis received an arbitration award of \$4,100 against Batley², Mercury asked for reimbursement from Ellis. Ellis refused, reporting to Mercury that her medical costs were greater than \$2,000, and she also claimed lost earnings of \$1,500, which Batley's insurer refused to pay. It was Ellis's understanding that Mercury waived its subrogation rights and closed her claim in December 2007. Nevertheless, after Ellis would not reimburse Mercury for \$2,000, Mercury filed a complaint against Ellis in 2010 and obtained a judgment in 2011. As part of its collection suit against Ellis, Mercury submitted a declaration in lieu of testimony under section 98. Ultimately, Mercury's judgment against Ellis was reversed and Mercury dismissed the collection case on June 28, 2013.

All eight causes of action in the first amended complaint are based either on allegations that: 1) Mercury improperly filed the collection action for medical coverage reimbursement (the first, second, fourth, sixth, and seventh causes of action); or, 2) that

² The parties alternatively spell his name as Batley and Bartley.

defendants—and the court—committed fraud in using the section 98 declaration to effect the collection judgment (the third, fifth, and eighth causes of action.)

III

DISCUSSION

A. *Standard of Review*

“Section 425.16, subdivision (b)(1), requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.’” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928; *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 537.)

We independently review the trial court’s order granting the anti-SLAPP motion de novo. (*Mallard v. Progressive Choice Ins. Co.*, *supra*, 188 Cal.App.4th at p. 537, citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) ““We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] 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.” [Citation.]’ [Citation.]” (*Flatley*, at p. 326.)

B. Protected Activity

To carry the initial burden in bringing an anti-SLAPP motion, “[t]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech.” (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 61.) Section 425.16, subdivision (e)(2), provides that an act ““in furtherance of a person’s right of petition or free speech”” includes a “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.”

Here, Ellis’s claims are entirely based on defendants’ alleged conduct in connection with judicial proceedings—the collection action brought by Mercury against Ellis. Ellis argues the voluntary arbitration between Ellis and Batley was not an official

proceeding. However, the arbitration conducted in the underlying case against Batley, involving motor vehicle injury, had nothing to do with the character of Mercury's collection action against Ellis. It is manifestly clear that the collection action, and the related section 98 declaration, are acts that qualify as written statements or writings made in connection with an issue under consideration or review by a judicial body, and are subject to anti-SLAPP protection. (§ 425.16, subd. (e)(2).)

C. Probability of Prevailing

Next we review whether Ellis carried her burden of demonstrating a probability of prevailing on her claims. We conclude she failed to carry her burden because her claims are defeated by the litigation privilege.

The litigation privilege, codified at Civil Code section 47, subdivision (b), “applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege is not limited to statements made inside a courtroom, but “applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.” (*Ibid.*) “[C]ommunications with “some relation” to judicial proceedings’ are ‘absolutely immune from tort liability’ by the litigation privilege.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

Again the record shows that defendants' alleged acts—the basis of Ellis's claims—are wholly concerned with the collection litigation. Hence, Ellis cannot show a possibility of prevailing on her claims, and the trial court did not err by granting defendants' anti-SLAPP motion.

D. Attorney's Fees

Although Ellis did not file a timely appeal of the postjudgment order awarding attorney's fees, in the interests of judicial economy, we determine there is no merit in Ellis's challenge to the award. Section 425.16, subdivision (c), makes an award of attorney's fees and costs to a defendant who prevails on an anti-SLAPP motion mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

We review the amount of attorney's fees awarded for abuse of discretion. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1322.) A fee award will not be set aside "absent a showing that it is manifestly excessive in the circumstances." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 782.)

Ellis calls the trial court's order granting defendants their fees under the anti-SLAPP statute excessive, "outrageous," and "unconscionable." Ellis does not identify which fees she considers inappropriate or provide any explanation for her argument. "The assertion [that] is unaccompanied by any citation to the record or any explanation" is insufficient to disturb the trial court's discretionary award of fees. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th

1219, 1248.) Even if she had filed a timely appeal, Ellis cannot show the trial court abused its discretion in the amount of mandatory fees granted to defendants.

IV

DISPOSITION

The trial court's orders and judgment are affirmed. As prevailing parties, defendants shall recover their costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.