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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PAUL EARLY et al,

Plaintiffs and Respondents,

v.

THOMAS OWINGS,

Defendant and Appellant.

E060918

(Super.Ct.No. RIC1311889)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge.

Affirmed.

Atkinson, Andelson. Loya, Ruud & Romo and Kellie S. Christianson for
Defendant and Appellant.

Law Offices of Gary S. Bennett and Gary S. Bennett for Plaintiffs and
Respondents.

Defendant and appellant Thomas Owings appeals from the trial court’s denial of his special motion to strike two causes of action under the anti-SLAPP¹ statute. (Code Civ. Proc., § 425.16, subd. (a).)²

Plaintiffs and respondents Paul Early and Anne Schneider sued Owings for intentional interference with contractual relations and intentional infliction of emotional distress. Owings demurred to these claims and concurrently filed an anti-SLAPP motion, arguing that the claims were brought to chill the exercise of his First Amendment rights. The trial court sustained Owings’s demurrer without leave to amend and denied his anti-SLAPP motion.

On appeal, Owings contends that the trial court erred in denying his anti-SLAPP motion and that he is entitled to reasonable attorney fees and costs incurred in bringing the motion and this appeal. We reject these contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The underlying complaint in this action was brought by three former City of Moreno Valley employees against the city and three individuals—Owings (former mayor of Moreno Valley and former councilman of the Moreno Valley City Council), Marcelo Co (former councilman of the Moreno Valley City Council), and Suzanne Bryant (Moreno Valley’s acting city attorney at the time of the complaint). The complaint

¹ “SLAPP is an acronym for “strategic lawsuit against public participation.”” (Flatley v. Mauro (2006) 39 Cal.4th 299, 305, fn. 1 (Flatley).)

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

involves, *inter alia*, the alleged wrongful termination of the plaintiffs. Only plaintiffs Early and Schneider (respondents) and defendant Owings (appellant) are parties to this appeal. The following is taken from respondents' allegations in the complaint and the declarations filed in connection with Owings's anti-SLAPP motion.³

1. *Respondents' involvement in the prosecution of defendant Co*

Before their layoffs in 2013, Early was employed by the city as a deputy city attorney and Schneider as the building official. During their employment, Early and Schneider were involved with investigating defendant Marcelo Co for alleged municipal code violations at several of his properties.⁴ Co was elected to the city council in November 2010. After his election, prosecution of the actions pending against him was transferred to the district attorney's office. After this transfer, Early and Schneider continued to work on the Co investigation in cooperation with the district attorney.

In or around September 2011, Co entered into a plea bargain with the district attorney regarding the code violations and was placed on probation. In order to monitor Co's compliance with the terms of his probation, Schneider would conduct periodic drive-by inspections of his properties and review city records "to determine if compliance

³ As explained *post*, the issues in an anti-SLAPP motion are framed by the pleadings. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.) We independently review a trial court's ruling on an anti-SLAPP motion—we do not weigh credibility; we review the pleadings and evidence submitted by both sides in connection with the motion. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

⁴ The complaint at times refers generally to "code violations" and at others to "Building Code" violations.

had been achieved for any items in the probation.” From this information, she would prepare updates on the status of Co’s compliance and provide them to Early, who would send them to the district attorney. Schneider monitored Co’s compliance with the terms of his probation through January 2013. In November 2012, Owings was elected to the city council and also appointed Mayor.⁵

On January 7, 2013, Schneider conducted a drive-by inspection of one of Co’s properties and took photographs, which she forwarded to Early later that day. On January 23, Schneider received a request from the district attorney for an update on the status of Co’s properties. Schneider called Early and asked him to forward the pictures she had taken on January 7 to the district attorney, and Early agreed to do so. About an hour after this conversation, Owings ordered Early into a meeting with himself and defendant Bryant.

2. The January 23 meeting

During this meeting Owings “chastise[d], threaten[ed], and intimidate[d] Early for 45 minutes about why the photographs of Co’s property were sent to the District Attorney’s Office, and why Early was cooperating with the District Attorney’s Office in regard to Co.” When Early informed Owings that Schneider had asked him to send the photographs to the district attorney, Owings “insisted that Early call Schneider to come up to the meeting.” When Schneider arrived at the meeting, Owings asked her a series of questions about her interactions with the district attorney. At some point during the

⁵ Owings was sworn in as Mayor on January 2, 2013.

interview, Co's attorney called Owings on his cellular phone and Owings told him that he was "getting to the bottom of this."

3. The March 6 city council meetings

On March 6, 2013, the city council held a study session on "Code Enforcement Remedies," which Early was told not to attend. During this session, Owings "made comments that Plaintiff Early was a full-time prosecutor and that he sees him all the time in court, standing around." Early alleges that these comments were "intended to besmirch his professional reputation . . . [and] harass him based on his previous persecutions against . . . Co."

On or about that same day, Early "was asked to sit in as counsel for" a special meeting of the city council regarding interviews for seats on the city's planning commission. At this meeting, Owings "continued to make harassing comments toward Plaintiff Early in front of other Council members, members of the public, and Planning Commission candidates."

4. Termination of respondent's employment and their claims against Owings

On March 14, 2013, both Early and Schneider received layoff notices. On October 21, 2013, Early and Schneider filed the underlying complaint in this action, which included two causes of actions against Owings. In the fifth cause of action, intentional interference of contractual relations, Early alleges that his employment was governed by contract, and that, because of his cooperation with the District Attorney in Co's prosecution, Owings conspired with defendants Co and Bryant to concoct a scheme

to terminate his employment.⁶ In the sixth cause of action, intentional infliction of emotional distress, Early and Schneider allege that Owings and the other defendants “abused their authority and intentionally with malicious motives engaged in conduct that was calculated to cause [them] to suffer humiliation, physical and mental anguish, and severe emotional distress for a long duration.”⁷

5. *Owings’s demurrer and anti-SLAPP motion*

On January 17, 2014, Owings filed a demurrer to and an anti-SLAPP motion to strike, the claims against him for intentional interference of contractual relations and intentional infliction of emotional distress. In his anti-SLAPP motion, he argued that these claims arise from activity that is protected under section 425.16, subdivision (e)(2).⁸ At the hearing, the trial court sustained the demurrer and dismissed the fifth and sixth causes of action without leave to amend. The court denied the anti-SLAPP motion, however, concluding that the anti-SLAPP statute did not apply to the fifth and sixth causes of action because those claims arise from Owings’s conduct (as opposed to his statements) and Owings failed to demonstrate that this conduct was in

⁶ Early also asserted this claim against defendant’s Co and Bryant.

⁷ Early and Schneider asserted this claim against all of the defendants to the complaint.

⁸ As explained *post*, section 425.16, subdivision (e)(2), protects statements “made in connection with an issue under consideration or review by a legislative, executive, or judicial body”

“furtherance of [his] right to petition or free speech.” Owings contends this ruling was error.

DISCUSSION

1. *The anti-SLAPP issue is not moot*

At the outset, we reject respondents’ argument that Owings’s appeal is moot because the claims against him have already been dismissed on demurrer and their argument that attorney fees would be improper because “the City has indemnified Mr. Owings and is paying his attorney fees” First, “resolution of the underlying action does not moot a fee request under the SLAPP statute.” (*Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal.App.4th 477, 480; see *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220 [where trial court sustains a demurrer without leave to amend, a pending anti-SLAPP motion is not moot].) Second, if Owings prevails on his claim that the anti-SLAPP statute applies here, he is entitled to the attorney fees provided by the statute, regardless of any alleged fee arrangement with the city. Because the purpose of the anti-SLAPP statute’s fee provision is to discourage meritless lawsuits, “any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, italics added; see *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1348 [the anti-SLAPP statute’s fee recovery provision applies to government entities that prevail on anti-SLAPP motions and ensures “that the government will be reimbursed for its defense of those [strategic lawsuits against public participation] that are filed”].)

2. *The anti-SLAPP statute*

The purpose of section 425.16, the anti-SLAPP statute, is to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech, petition, and redress of grievances. (*Flatley, supra*, 39 Cal.4th at p. 312.) The statute is to be broadly construed (§ 425.16, subd. (a)); however, it “does not apply in every case where the defendant may be able to raise a First Amendment defense to a cause of action. Rather, it is limited to exposing and dismissing SLAPP suits—lawsuits ‘brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances’ ” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

The anti-SLAPP statute permits a special motion to strike 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” (§ 425.16, subd. (b)(1).) The statute applies to four categories of protected activity, which are set forth in section 425.16, subdivision (e). However, as Owings has framed the appeal, only two of those categories are at issue,⁹ namely:

⁹ Owings notes in his reply brief that while respondents analyze the claims under all four categories of protected activities under section 425.16, subdivision (e), he addresses only two categories because the claims “fall squarely” within those categories.

Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, judicial body, or any other official proceeding authorized by law (§425.16, subd. (e)(2)); and

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)(4).)¹⁰

In determining whether an action is a SLAPP, courts engage in a two-step process. The court first decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from one of the protected activities enumerated in section 425.16, subdivision (e)). (§ 425.16, subd. (b)(1).) If the defendant does not meet this burden, the court must deny the motion. (*Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.)

If an adequate step one showing is made, the court must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 87-89.) We note that because the claims at issue here have been dismissed without leave to amend, respondents necessarily cannot demonstrate a probability of success. Thus, our conclusion as to whether Owings

¹⁰ The other two categories are: any written or oral statement or writing made before a legislative, executive, judicial or other official proceeding (§425.16, subd. (e)(1)); and 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 (§425.16, subd. (e)(3)).

is entitled to attorney fees under the anti-SLAPP statute depends solely on our analysis of whether he has made a threshold showing that the claims arise from protected activity. In other words, in this appeal we need only decide step one.

We review a trial court's ruling on a SLAPP motion de novo. (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 676.) Accordingly, in analyzing whether the defendant has met his or her burden of showing that the "arising from" or threshold requirement is satisfied, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We do not weigh credibility or compare the weight of the evidence; rather, we must accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence to determine whether it defeats the plaintiff's evidence as a matter of law. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

3. *Analysis of respondents' claims under the anti-SLAPP statute*

On appeal, Owings contends that respondents' claims arise from activity protected under section 425.16, subdivision (e)(2) and (e)(4). For the reasons explained *post*, we conclude that Owings has failed to satisfy step one of the anti-SLAPP analysis.

In step one, "[o]ur focus is on the principal thrust or gravamen of the causes of action, i.e., the allegedly wrongful and injury-producing conduct that provides the foundation for the claims," and whether defendant has demonstrated that the conduct falls under one of the protected activities enumerated in section 425.16, subdivision (e). (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491; see *City of Cotati v.*

Cashman (2002) 29 Cal.4th 69, 78 [“the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech”] original italics.) In the following sections we discuss each of the claims against Owings in turn, focusing on the gravamen of those claims.

a. *The intentional infliction of emotional distress claim*

The gravamen of Early and Schneider’s intentional infliction of emotional distress claim is Owings’s statements and allegedly threatening demeanor during the private January 23 meeting among Owings, Bryant, Early, and Schneider. Owings contends that his actions at the January 23 meeting fall under section 425.16, subdivision (e)(2) and (e)(4). We disagree.

i. *Statements made in connection with an issue under consideration by a government body (§ 425.16, subd. (e)(2))*

Owings contends that the topic of Co’s compliance with municipal code requirements was an “issue under consideration” by the district attorney and that his statements and conduct during the January 23 meeting fall under section 425. 16, subdivision (e)(2), because they were “in connection with” that issue.

In order for conduct to be “in connection with” an issue under consideration, it must be *directly relevant* to the issue. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866.) A remote relationship is not sufficient. As the court in *Paul* stated, section 425.16, subdivision (e)(2), does not apply to any statement “having any connection, however remote, with an official proceeding.” (*Ibid.*)

In that case, Paul, a securities broker, sued several of his former clients and their lawyer, Friedman, for disclosures that occurred in the context of an arbitration. (*Paul v. Friedman, supra*, 95 Cal.App.4th at pp. 856-858.) Friedman represented the clients in an arbitration against Paul, in which the clients sought damages from Paul for allegedly negligent investment recommendations. (*Id.* at pp. 856-857.) In conducting the investigation for the arbitration, Friedman uncovered and publically disclosed embarrassing private facts about Paul, “including his financial affairs, spending habits, taxes and tax liabilities, relations with his clients, and close personal relationship with another individual (as well as the allegations made in the arbitration).” (*Id.* at p. 857.) Paul was successful in the arbitration, and later sued Friedman and the brokerage clients, alleging, *inter alia*, several tort claims based on Friedman’s “ ‘investigation’ ” and disclosure of private facts. (*Id.* at pp. 856-857.)

Friedman filed an anti-SLAPP motion arguing that his disclosures and conduct during the arbitration fell under section 425.16, subdivision (e)(2), because they were made in connection with the issue of Paul’s liability, which was under consideration by the arbitrator. (*Paul v. Friedman, supra*, 95 Cal.App.4th at pp. 858-859.) The trial court granted Friedman’s anti-SLAPP motion, ruling that Friedman’s conduct “all seems to be related to investigating Mr. Paul with respect to [the securities] claims.” (*Id.* at p. 860.)

On appeal, the court concluded that Friedman’s motion to strike was erroneously granted as to Paul’s tort claims because Friedman did not make a prima facie showing that the claims fell within section 425.16, subdivision (e)(2). (*Paul v. Friedman, supra*,

95 Cal.App.4th at pp. 861, 865.) The court rejected Friedman’s claim that his investigation of Paul’s personal financial affairs and drug and alcohol use was relevant to issues in the arbitration—specifically, Paul’s credibility and whether his judgment was impaired and, by extension, to whether he gave fraudulent or negligent investment advice to his clients. (*Id.* at pp. 867-868.)

Although the arbitration panel had permitted some testimony concerning Paul’s conviction for driving under the influence and other “ ‘distractions’ ” in his personal life, the appellate court explained, “a lawyer’s attempt to inject an issue into a proceeding does not render the issue relevant, nor can the attempted injection of an irrelevant matter transform it into an issue ‘under consideration or review’ [(§ 425.6, subd. (e)(2))] in the proceeding.” (*Paul v. Friedman, supra*, 95 Cal.App.4th at pp. 867-868.) The court found that the information Friedman uncovered and divulged about Paul was “irrelevant” to the securities claims at issue in the arbitration. (*Id.* at 868.) “By definition, irrelevant matters have no tendency in reason to prove or disprove any disputed fact of consequence to the determination of a matter, and are specifically excluded from consideration. Irrelevant matters thus are not ‘under consideration or review’ in an official proceeding.” (*Ibid.*, fn. omitted.) In sum, the court concluded that, “[t]he issues actually under review by the arbitrators *bore no relationship* to the allegations in Paul’s lawsuit.” (*Id.* at p. 868, italics added.)

Here, even assuming that Co’s municipal code compliance was an issue “under consideration” by the district attorney for purposes of section 425.16, subdivision (e)(2),

Owings’s conduct and statements during the January 23 meeting bear no relationship to that issue. As alleged in the complaint, Owings was chastising Early and Schneider for sending photographs of Co’s property to the district attorney and attempting to intimidate them into not further cooperating with the district attorney on Co’s case. Such statements and threatening conduct relate to Early and Schneider’s job performance and Owings’s attempt to influence how they carried out their duties—they are irrelevant to the actual state of Co’s property and whether Co was in compliance with the terms of his probation. As was the case with the lawyer in *Paul*, Owings cannot “inject” his statements and conduct into an issue before the district attorney simply because Co, the subject of a district attorney investigation, was mentioned during the meeting. (*Paul v. Friedman*, *supra*, 95 Cal.App.4th at pp. 867-868.)

- ii. *Conduct in furtherance of the right to petition or free speech in connection with an issue of public interest (§ 425.16, subd. (e)(4))*

Owings next contends that the topic of Co’s compliance with municipal code requirements was “an issue of public interest” and that his statements and conduct during the January 23 meeting fall under section 425.16, subdivision (e)(2), because they were “in furtherance” of exercising his free speech rights “in connection with” that issue.

In order to fall under section 425.16, subdivision (e)(4), it is not enough to demonstrate that the alleged statement pertains or refers to an issue of public significance; rather, “the statement must in some manner itself *contribute to the public*

debate.” (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898, italics added; see, e.g., *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 114-118 [report that an employee was removed for financial mismanagement was informational, it was not connected to any discussion, debate, or controversy on the public issue of “labor disputes”]; *Rivero v. American Federation of State, County and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 924 [reports that a supervisor was fired after union members complained of his activities did not contribute to a debate on the issue of policies against unlawful workplace activities].)

Here, assuming that the topic of Co’s compliance with municipal code requirements was an issue of public importance, Owings’s statements and conduct during the January 23 meeting in no way contributed to any kind of public debate or dialogue on that issue. First, as just explained *ante*, Owings’s statements and conduct during the meeting were irrelevant to the issue of Co’s municipal code compliance, and second, they were directed only to the individuals at the meeting (Early, Schneider, and Bryant) and thus could not have been intended to spark public debate or contribute to the public dialogue about that issue.

We thus conclude that Owings has failed to make a showing that the statements and conduct on which the intentional infliction of emotional distress claim are based are protected by the anti-SLAPP statute.

b. *The intentional interference with contractual relations claim*

The gravamen of Early’s intentional interference with contractual relations claim is Owings’s statements and conduct¹¹ in furtherance of the scheme to terminate his employment—specifically, Owings’s statements and conduct during the private January 23 meeting and the two March 6 city council meetings. Owings contends that this claim, too, arises from activity protected under section 425.16, subdivision (e)(2) and (e)(4). (See § 425.16, subd. (e).) Again, we disagree.

i. *Statements made in connection with an issue under consideration by a government body (§ 425.16, subd. (e)(2))*

With regard to section 425.16, subdivision (e)(2), Owings argues that: (1) his statements about Early at the March 6 city council study session were made in connection with the issue of “code enforcement remedies” under consideration by the city council at that time; and (2) his statements about Early at the March 6 city council special meeting were made in connection with the issue of candidacy for the city’s planning commission.

As explained *ante*, in order for statements to be “in connection with” an issue under consideration, they must be directly relevant to the issue. (*Paul v. Friedman, supra*, 95 Cal.App.4th at p. 866.) Here, Owings’s statements at both meetings are

¹¹ We note that the complaint does not allege that Owings engaged in any specific *conduct* to further the scheme to terminate Early’s employment, rather the complaint alleges that Owings made a number of statements meant to harass Early and tarnish his professional reputation and, more generally, that Owings “used [his] official position[] with the . . . City to conspire and concoct a scheme to lay off [Early] from his contractual employment.”

irrelevant to the issues before the city council. Owings has not demonstrated any logical connection between his personal remarks about a deputy district attorney's job performance and the city's municipal code or its enforcement. Similarly, there is no conceivable connection between the "harassing comments toward . . . Early" that Owings made in the special meeting of city council and the issue of candidacy for the city's planning commission. Early was not running for a seat on the planning commission, he was there in his role as counsel for the city. Thus any personal remarks about him that Owings allegedly made would have been irrelevant to that issue.¹²

- ii. *Conduct in furtherance of right to petition or free speech in connection with an issue of public interest (§ 425.16, subd. (e)(4))*

Owings contends that Early's claim arises from activity protected by section 425.16, subdivision (e)(4), because the statements and conduct alleged in the complaint to have been part of his scheme to terminate Early's employment were in furtherance of his free speech rights in connection with any or all of the following public issues: budget, personnel, and layoffs.

As explained *ante*, activity does not fall under section 425.16, subdivision (e)(4), unless it contributed to the public debate or dialogue on a public issue. (See, e.g.,

¹² To the extent that Owings's statements and conduct at the January 23 meeting form the basis of Early's intentional interference with contractual relations claim, those statements and conduct do not fall under section 425.16, subdivision (e)(2), for the reasons discussed, *ante*.

Wilbanks v. Wolk, supra, 121 Cal.App.4th at p. 898.) Even assuming that such broad, amorphous issues as budget, personnel, and layoffs are public issues for anti-SLAPP purposes,¹³ Owings has not demonstrated that his personal remarks about Early contributed to any kind of public debate or dialogue on those issues. As alleged in the complaint, Owings’s statements about Early’s capabilities as a deputy city attorney at the March 6 city council meetings were not made in the context of a dialogue about, nor were they related in any way to, the city’s budget, personnel or layoff issues. Similarly, engaging in conduct to ensure the termination of this deputy city attorney’s employment in no way contributes to a public debate about those issues.

We thus conclude that Owings has failed to make a showing that intentional interference with contractual relations claim arises from activity protected by the anti-SLAPP statute.¹⁴

¹³ Generally, a “ ‘broad and amorphous public interest’ . . . is not sufficient to meet the statutory requirements’ of the anti-SLAPP statute.” (*World Financial Group Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570.)

¹⁴ We note here that throughout his briefs Owings seems to be making the argument that the anti-SLAPP statute applies to respondents’ claims based simply on the fact that he held a public office at the time that the injury-producing conduct took place. Such a sweeping argument has no bearing on our conclusion because it fails to demonstrate how the claims at issue arise from activity that falls under one of the anti-SLAPP statute’s four categories, which is Owings’s burden on appeal.

DISPOSITION

The judgment is affirmed.

Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.