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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FIRST AMERICAN TITLE INSURANCE, Plaintiff, Cross-complainant and Respondent, v. GREGORY LYONS, Defendant, Cross-defendant and Appellant.	F062445 (Super. Ct. No. 07CECG04150) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Orrin Leigh Grover for Defendant, Cross-defendant and Appellant.

Law Offices of Michael J. Lampe and Michael P. Smith for Plaintiff, Cross-complainant and Respondent.

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Appellant, Gregory Lyons, challenges the trial court's denial of his motion to strike the fraud and negligent representation action filed by respondent, First American

Title Insurance Company (First American), as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure[1] section 425.16.

In its first amended complaint and cross-complaint, First American seeks to recover the money it paid to clear a judgment lien that encumbered property on which Lyons had obtained a title insurance policy issued by First American. According to First American, Lyons misrepresented his prior knowledge of the judgment lien when he obtained, and thereafter made a claim under, the title insurance policy. Lyons moved to strike this action on the ground that First American's claim against Lyons was based on prelitigation activities that were protected under the litigation privilege.

The trial court found that Lyons had not met his threshold burden of showing that the action arose from a protected activity. The court concluded that, at the time of the claim, there was no issue under consideration pending before any official proceeding. The court further ruled that the insurance claim was not protected under the litigation privilege.

The trial court's ruling was correct. Accordingly, the order denying Lyons's motion to strike will be affirmed.

BACKGROUND

In 1994, a judgment lien was recorded against real property located in Mendota in favor of the City of Mendota. In 1995, the successor-in-interest to the Mendota property, Arnold Stewart, entered into an agreement with the City of Mendota to modify this judgment lien. When Stewart filed for bankruptcy in 1998, he was represented by Lyons.

In 2002, Lyons purchased the Mendota property from Stewart. In executing the escrow instructions, Lyons represented that all liens, judgments and other obligations had

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

been disclosed to First American. First American then issued a title insurance policy to Lyons.

In 2005, Lyons sold the Mendota property to a third party. By letter dated September 14, 2005, Lyons, through his attorney, informed First American of the existence of the judgment lien and made the following claim:

> "There is a pending escrow for my client to sell the subject property that was scheduled to close shortly before this wrinkle developed. My client will suffer substantial financial loss if he is unable to deliver title clear of the City of Mendota judgment. We need to assure that this lien is cleared before October 5, 2005 in order for the escrow to close on time."

In September 2007, First American paid $591,000 to clear the judgment lien. In December 2007, First American filed suit against Stewart seeking indemnity. Stewart then filed a cross-complaint against Lyons. First American filed a cross-complaint against Lyons in December 2009 and thereafter amended the complaint to substitute Lyons for a Doe defendant.

In the underlying first amended complaint and cross-complaint, First American alleges that Lyons knew about the judgment lien, which was not reflected on the preliminary title report, when he purchased the Mendota property in 2002 and falsely represented that all liens, judgments and other obligations had been disclosed to First American. Based on these allegations, First American sets forth causes of action for fraud, negligent misrepresentation, and indemnity.

Lyons responded to First American's action by filing a motion to strike the lawsuit as a SLAPP under section 425.16. Lyons argued that First American's causes of action were based on Lyons's prelitigation claim activities that were protected under the litigation privilege.

The trial court denied the motion. The court found that Lyons had not met his threshold burden of showing that the action arose from a protected activity. The court

further concluded that the insurance claim was not protected under the litigation privilege.

DISCUSSION

1. *The anti-SLAPP statute.*

Section 425.16 was enacted in 1992 to provide a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) It is California's response to meritless lawsuits brought to harass those who have exercised these rights. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68.) This type of suit, referred to under the acronym SLAPP, or strategic lawsuits against public participation, is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.)

When served with a SLAPP, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

The court first decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 76.) The moving defendant must 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 Constitution or the California Constitution in connection with a public issue …." (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) A defendant

can meet this burden by demonstrating that the act underlying the plaintiff's cause of action arises from any statement or writing made in, or in connection with an issue under consideration or review by, a legislative, executive, judicial or other official proceeding or body. (§ 425.16, subd. (e); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 (*Briggs*).) There is no need to separately demonstrate the existence of a "public issue." (*Sipple v. Foundation for Nat. Progress, supra,* 71 Cal.App.4th at p. 237.)

If the court concludes that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

The questions of whether the action is a SLAPP suit and whether the plaintiff has shown a probability of prevailing are reviewed independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

2. *Lyons failed to meet his burden of establishing that his insurance claim is entitled to protection under section 425.16.*

First American's lawsuit against Lyons is based on the allegations that: Lyons either intentionally or negligently misrepresented the status of the Mendota property in 2002 when he was aware of, but did not disclose, the existence of the judgment lien; and Lyons either intentionally or negligently misled First American regarding his prior knowledge of the judgment lien when he made the September 14, 2005 claim. Lyons argues that First American's action against him is a SLAPP because it arises from his September 14, 2005 claim. According to Lyons, that claim was made in anticipation of litigation and thus was an act in furtherance of his right of petition. First American disagrees with Lyons's position on the genesis of its lawsuit. First American states that it sued Lyons solely to recoup its damages, not to punish Lyons for exercising his constitutional rights. We agree with First American's characterization. Nevertheless, even assuming that First American's action is based solely on the September 14, 2005

claim, Lyons has failed to establish that this claim is entitled to protection under section 425.16.

An act in furtherance of a person's right of petition includes "any written or oral statement or writing made before a … judicial proceeding" or "any written or oral statement or writing made in connection with an issue under consideration or review by a … judicial body." (§ 425.16, subd. (e)(1), (2).) The filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16. (*Briggs, supra,* 19 Cal.4th at p. 1115.) Communications preparatory to or in anticipation of litigation are also within the protection of section 425.16. (*Briggs, supra,* at p. 1115.)

In determining the scope of the protection afforded statements or writings made in, or in connection with an issue under consideration or review by, a judicial proceeding or body under section 425.16, courts have looked to the litigation privilege under Civil Code section 47, subdivision (b). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323.) As noted by the court in *Briggs*, " '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], … such statements are equally entitled to the benefits of section 425.16.' " (*Briggs, supra,* 19 Cal.4th at p. 1115.)

Lyons argues that the September 14, 2005 letter was a preliminary demand made in anticipation of his imminent claim for damages against First American and thus falls within the litigation privilege. Lyons relies on the litigation privilege to meet his initial burden of showing that First American's action falls within section 425.16.

Civil Code section 47, subdivision (b), provides an absolute privilege to communications made in judicial or quasi-judicial proceedings by litigants or other authorized participants to achieve the objects of the litigation and that have some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) In its application to communications made in a "judicial proceeding," the privilege

is not limited to statements made in a courtroom. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) The litigation privilege encompasses not only in-court testimony and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit. (*Ibid*.) However, to be protected, prelitigation statements must relate to litigation that is contemplated in good faith and under serious consideration. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) Thus, the privilege does not retroactively protect any and all communications preceding the litigation. (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1473.) Although there is always at least the *potential* for a lawsuit anytime there is a dispute between individuals or entities, the "privilege only arises 'at the point in time when litigation is no longer a mere possibility, but has instead ripened into a *proposed proceeding* that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute.' " (*Ibid*.)

Here, the September 14, 2005 letter gave no indication that a lawsuit was actually contemplated and under serious consideration. Lyons was requesting First American to clear the lien, which First American did two years later. Lyons was not even brought into the action until four years after he sent this letter. Accordingly, this claim cannot reasonably be construed as relating to litigation that had ripened and was under serious consideration. Thus, the letter is neither privileged nor protected as petitioning activity under section 425.16.

In sum, the trial court correctly denied Lyons's special motion to strike. Lyons failed to make a prima facie showing that the causes of action in the lawsuit arose from protected activity. In light of this determination, we need not consider Lyons's contention that First American cannot demonstrate a probability of prevailing on the underlying suit.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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GOMES, J.