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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

ASHUR YOUKHANA,

Plaintiff and Respondent,

v.

ANTHONY BORGES,

Defendant and Appellant.

F070888

(Super. Ct. No. 2008741)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Offices of Brunn & Flynn, Gerald E. Brunn and Mahanvir S. Sahota for Defendant and Appellant.

Law Offices of Ronald Sarhad and Ronald Sarhad for Plaintiff and Respondent.

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Appellant, Anthony Borges, challenges the trial court's denial of his special motion to strike one of three causes of action in the complaint filed against him by

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\* Before Levy, Acting P.J., Kane, J. and Smith, J.

respondent, Ashur Youkhana, under the anti-SLAPP statute. (Code Civ. Proc. <sup>1</sup>, § 425.16.) This cause of action is a so-called “mixed cause of action” that combines allegations of activity protected by the statute with allegations of unprotected activity. The trial court ruled that, because Youkhana has a probability of prevailing on the part of the cause of action based on the unprotected activity, the entire cause of action should remain. Thereafter, on its own motion, the trial court struck the allegations based on protected activity under section 436.

When the trial court made this ruling, the law was uncertain regarding how a special motion to strike operates against a mixed cause of action. However, the California Supreme Court recently answered what had been a perplexing question for the courts of appeal. In *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*), the court held that a section 425.16 motion may be used to strike allegations of protected activity while allowing the theories based on unprotected activity to remain. Based on the *Baral* court’s holding, we will reverse the order denying Borges’s motion to strike.

### **BACKGROUND**

At issue is the first amended complaint filed by Youkhana against Borges. This complaint states three causes of action, breach of contract, reformation of agreement, and intentional misrepresentation.

In his complaint, Youkhana alleges that he agreed to sell his business, a Sno White Drive In, to Borges and that the parties executed a sale agreement. This agreement states that the purchase price is \$20,000. Youkhana then alleges that Borges agreed to pay further consideration and executed a \$60,000 promissory note.

Youkhana bases his breach of contract and reformation causes of action on the allegation that Borges owes the \$60,000 and has not made any payments on that debt.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

The third cause of action for intentional misrepresentation is based in part on the alleged \$60,000 debt. However, it also includes a separate incident, Borges's filing a request for a restraining order, to support the claim. Paragraph 21 of the first amended complaint states:

“On February 14, 2014 defendant Borges initiated a lawsuit against plaintiff in Stanislaus Superior Court no 2006135 to seek a restraining order against plaintiff wherein Borges falsely claimed ‘under penalty of perjury’ that plaintiff had hired people to come to the Sno White Drive In in Oakdale, Ca and to ‘beat up and to take the equipment’ and was threatening employees of Sno White Drive In. These allegations by Borges were false and Borges knew he had no facts to support these allegations when he filed case no 2006135 against Plaintiff.”

Youkhana then alleges in paragraph 22 that a hearing was held on the restraining order request and that the court found there were no facts to support Borges's allegations and dismissed the case. Paragraph 23 states “Defendant Borges acted fraudulently as alleged hereinabove in that said defendant was seeking to coerce plaintiff into forgiving the \$60,000 owed plaintiff by said defendant .... Defendant knew that plaintiff had not threatened defendant Borges and/or the employees of Sno White Drive In.”

Borges filed a special motion to strike the third cause of action under section 425.16 on the ground that it was based, in part, on protected activity.

Following a hearing, the trial court denied the motion to strike. The court reasoned that, because the third cause of action alleges both protected and non-protected activity and Youkhana established a probability of prevailing on the non-protected activity, the entire claim should remain under *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 (*Mann*). The court acknowledged that a more recent case, *Cho v. Chang* (2013) 219 Cal.App.4th 521 (*Cho*), was contrary to *Mann*, but found the *Mann* case to be better reasoned. Thereafter, the trial court, on its own motion under section 436, struck paragraphs 21 and 22 of the first amended complaint in their entirety and struck the language “as alleged hereinabove” from paragraph 23. The trial court

acknowledged that, because it was striking the improper allegations under section 436 rather than section 425.16, Borges was not entitled to attorney fees.

### **DISCUSSION**

Section 425.16, California's anti-SLAPP statute, provides a procedure for the early dismissal of certain unmeritorious claims. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669.) Section 425.16, subdivision (b)(1), provides: "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." A prevailing defendant on a special motion to strike is entitled to recover his or her attorney fees and costs. (§ 425.16, subd. (c)(1).)

In applying this statute, the trial court engages 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.... 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.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

A defendant can meet the burden of showing that the plaintiff's cause of action arises from an act in furtherance of the defendant's right of petition or free speech by demonstrating that the act underlying the plaintiff's cause 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. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.) As pertinent here, the constitutional right to petition includes the basic act of filing litigation or otherwise seeking administrative action. (*Id.* at p. 1115.) Accordingly, Youkhana's claim of intentional misrepresentation based on Borges's filing for a restraining order in the

superior court arises from Borges's right of petition. Therefore, it is subject to a special motion to strike.

As outlined above, the trial court concluded that the part of the third cause of action based on the restraining order proceeding arose from protected activity. Nevertheless, because that cause of action was also based in part on non-protected activity and Youkhana demonstrated a probability of prevailing on that part of the claim, the trial court denied the special motion to strike. Nevertheless, the trial court struck the allegations arising from protected activity on its own motion under section 436.

At the time the trial court made its ruling, the law was uncertain regarding how a special motion to strike operates against a mixed cause of action such as is present here. In *Mann*, the court declared: "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann, supra*, 120 Cal.App.4th at p. 106.) In other words, an anti-SLAPP motion may not be used like a motion to strike under section 436 to eliminate those parts of a cause of action that a plaintiff cannot substantiate. (*Ibid.*) Rather, the *Mann* court believed an anti-SLAPP motion must defeat an entire cause of action as pleaded in the complaint. (*Baral, supra*, 1 Cal.5th at p. 385.)

However, the court in *Cho*, reached a contrary result. The *Cho* court concluded "the guiding principle in applying the anti-SLAPP statute to a mixed cause of action case is that 'a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one "cause of action."'" (*Cho, supra*, 219 Cal.App.4th at p. 527.)

In *Baral*, the California Supreme Court decided the issue. The court disapproved the *Mann* rule and agreed with *Cho* that a section 425.16 special motion to strike, like a conventional motion to strike, may be used to attack parts of a count as pleaded. (*Baral, supra*, 1 Cal.5th at pp. 393, 395-396.) Therefore, the trial court applied the incorrect law

when it denied Borges's special motion to strike in its entirety based on *Mann*. Accordingly, the trial court must reconsider its ruling in light of *Baral*.

#### **DISPOSITION**

The order denying the special motion to strike is reversed and the matter remanded for further proceedings.