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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES R. PETERSON,

Plaintiff and Appellant,

v.

THE MABURY RANCH
HOMEOWNERS ASSOCIATION et al.,

Defendants and Respondents,

G044833

(Super. Ct. No. 30-2010-00380692)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Affirmed.

Victor E. Hobbs for Plaintiff and Appellant.

Slaughter & Reagan, William M. Slaughter and Gabriele M. Lashly for Defendants and Respondents.

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James Peterson was sued by the Mabury Ranch Homeowners Association (the Association) regarding maintenance of his home (*Peterson I*). Peterson then filed the instant lawsuit (*Peterson II*) while the Association's case was pending. *Peterson II* alleged numerous claims against the Association and other defendants relating to the Association's decision making and how it conducted *Peterson I* and claimed that case was frivolous. The Association later prevailed in *Peterson I*.

Defendants filed a special motion to strike the complaint in *Peterson II* under Code of Civil Procedure section 425.16,¹ the anti-SLAPP statute.² The trial court granted the motion, concluding that *Peterson II* arose from the Association's right to petition. The court also determined Peterson had not demonstrated the probability of prevailing on his claims. Peterson now appeals, arguing the trial court should have heard his motion to contest the legitimacy of Association elections prior to hearing the anti-SLAPP motion and further erred by granting the motion. He also argues the court should not have denied his motion for reconsideration for lack of jurisdiction, but also claims the court erred by hearing collateral matters after it had lost jurisdiction. We find Peterson's arguments are without merit and therefore affirm.

I

FACTS AND PROCEDURAL BACKGROUND

Peterson owns a home in the Association. Between March 2006 and August 2008, the Association repeatedly cited him for failing to maintain his property. In November 2008, the Association filed *Peterson I* to seek the enforcement of its declaration of covenants, codes and restrictions (the CC&Rs). (Super.Ct. Orange County case No. 30-2008-00115161.) This resulted in a judgment against Peterson which

¹ Unless otherwise indicated, subsequent statutory references are to the Code of Civil Procedure.

² "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

included the Association's costs and attorney fees. Peterson's appeal of that judgment is currently pending.³

In June 2010, while *Peterson I* was still ongoing, Peterson filed the instant case. His first amended complaint (the complaint) alleged causes of action for "1. Professional Negligence, 2. Negligence, 3. Violations of statues [*sic*] of the Davis-Stirling Act, 4. Violation of CC&Rs, 5. Filing a Frivolous Lawsuit in Violation of CBPC § 17200[,] 6. Breach [*sic*] of Contract[,] 7. Invalid Board in Violation of [Civil Code section] 1354.56[,⁴] 8. Perjury and Fraud[,] 9. Violation of [Civil Code section] 51 the Unrue [*sic*] Act[,] 10. Verbal Abuse[,] 11. Duress." *Peterson II* named the Association, the management company and individual property managers, the Association's attorneys, and former and present board members as defendants.

The complaint, as far as it can be ascertained,⁵ alleged that *Peterson I* was frivolous, and claimed, among other things, that defendants failed to follow the CC&Rs in arriving at the decision to file a lawsuit. Peterson also claimed the Association forged documents, tampered with evidence, committed perjury and fraud, withheld Association records, and attempted to force him to settle *Peterson I* under duress. He also asserted that the Association must prove to him that the board elections for the years 2007, 2008, 2009 and 2010 were valid.

Meanwhile, in July 2010, the court hearing *Peterson I* ruled in the Association's favor, concluding that Peterson was violating his obligation to maintain his

³ Having given notice to the parties and receiving no objection, we take judicial notice of the record submitted for the appeal in *Peterson I*, G044759, pursuant to Evidence Code sections 452, subdivision (d), and 459.

⁴ Civil Code section 1354.56 does not appear to exist, or ever to have existed.

⁵ The complaint can most charitably be characterized as rambling. Among other problems, it does not state which causes of action are against which defendants, refers to documents not attached as exhibits, sometimes refers to Peterson as "defendant," and lacks any apparent organization or structure. We shall do our best to parse its intent.

property under the CC&Rs. The court thereafter issued a number of interim orders directing Peterson to make repairs to the property and to keep it maintained.

Peterson served the complaint in this case, *Peterson II*, on the Association and the management company, Cardinal Property Management, on August 13, 2010. Except for the Association's attorneys, the individual defendants were not served. In August, Peterson filed an "Ex Parte Motion to Shorten Time to Hear Motion to Contest the Election of [the Association] Board of Directors held in February 2010, and to Examine Elections of 2007, 2008 and 2009 for Fraud. . . ." The motion was denied. In September, Peterson filed another motion to contest or otherwise challenge the elections of 2007, 2008, 2009 and 2010. The motion was originally scheduled to be heard on October 8, but after filing a notice of related cases, this matter was transferred to the same judge who presided over *Peterson I*. The hearing was vacated and subsequently calendared for October 22.

On October 12, the Association and Cardinal Property Management (collectively referred to hereafter as defendants), filed the instant motion. They argued that Peterson's complaint was subject to the anti-SLAPP statute because the lawsuit had been filed in retaliation for *Peterson I*, or in other words, the Association's exercise of its right to petition. Further, defendants set forth their legal reasoning as to why Peterson could not prevail on each of his 11 causes of action.

Shortly thereafter, Peterson filed a preemptory challenge against the judge. The case was therefore reassigned, and Peterson's motion regarding Association elections was rescheduled to be heard on December 28. The anti-SLAPP motion was moved to October 28, then to November 16, and after Peterson failed to file an opposition, it was moved again to December 21.

On December 3, judgment in the Association's favor was entered in *Peterson I*, granting injunctive relief, and leaving open the matter of attorney fees and costs. According to defendants, the Association was later awarded attorney fees.

Peterson's opposition to the instant motion, filed on December 8 and then "amended" on December 10 to add entirely new arguments, claimed the anti-SLAPP statute did not apply. He seemed to argue that defendants had not met their burden under the anti-SLAPP statute because they had not produced admissible evidence. He then argued as to why each of his causes of action was likely to succeed on the merits (without citing any case authority). He claimed he was entitled to attorney fees.

On December 10, Peterson filed an "Ex Parte Motion to Contest the Election for the 2011 [Association] Board of Directors held October 2010. . ." and three days later, he filed an ex parte application seeking expedited discovery. At Peterson's request, the hearings on these applications were continued to December 20, at which time they were denied. The December 10 application was specifically denied for lack of proper notice.

On December 21, the court granted defendants' anti-SLAPP motion. Peterson's motion to contest the election, still set for December 28, was taken off calendar.

On January 3, 2011, Peterson filed a motion for reconsideration of the order granting the anti-SLAPP motion, setting a hearing date of March 15, later continued to April 5. On January 19, Peterson filed an "Amended Ex Parte Motion and Motion to Contest the Election of 2010 of the Mabury Ranch Homeowners Association's Board of Directors held February 2010, and for Court to Take Possessions of Ballots" He then took the ex parte off calendar, refiling it on January 28 for a January 31 hearing. The court denied the ex parte application on the grounds that it had granted the anti-SLAPP motion. On February 18, Peterson filed a notice of appeal from the order granting the anti-SLAPP motion.

On April 5, the court denied Peterson's motion for reconsideration because Peterson had already filed a notice of appeal, and the court therefore lacked jurisdiction to reconsider the anti-SLAPP motion. The court heard defendants' motion for attorney

fees, which was denied without prejudice and later refiled. On July 8, 2011, Peterson dismissed the remaining unserved defendants, and judgment was then entered.

II

DISCUSSION

A. Motion to Contest Board Elections

Peterson claims the trial court erred by failing to hear his motion to contest the Association Board of Directors (Board) elections for the years 2006-2010 prior to ruling on the anti-SLAPP motion. He asserts the elections were invalid due to lack of quorum and improper inspectors of election. If the Board was not duly elected, Peterson argues, “they do not have standing and they do not have the authority to file or be in a lawsuit.”

Peterson relies on Corporations Code 7616, subdivision (c). That provision states: “Upon the filing of the complaint, and before any further proceedings are had, the court shall enter an order fixing a date for the hearing, which shall be within five days unless for good cause shown a later date is fixed. . . .” He therefore claims the court violated this provision by not hearing his motion regarding the Board’s legitimacy before the anti-SLAPP motion.

Peterson, however, ignores the next part of the same statute, which requires “notice of the date for the hearing and a copy of the complaint to be served upon the corporation *and upon the person whose purported election or appointment is questioned* and upon any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed, in the manner in which a summons is required to be served” (Corp. Code, § 7616, subd. (c), italics added.) There is no evidence whatsoever that any of the Board members whose election Peterson sought to challenge had been served. Indeed, in another part of his brief, Peterson admits the individual Board members were “dismissed by the Plaintiff as Defendants as they were not served.” Therefore, the court

could not have held a hearing on the legitimacy of the Board elections, as the statutory requirements to do so were not met.

Peterson claims this was the trial court's error and that he filed an ex parte application to extend the time for service in August 2010 which was apparently never ruled upon due to the courtroom shuffling occurring at the time. It was not, however, at all clear from the ex parte application that he was requesting to serve the individual Board members. In item 6 on the ex parte application, the applicant is directed to name each party as to whom an extension to serve is requested. Peterson's answer was "10/14/2010." Further, even if this was a clerical error by the court, there was no indication that Peterson ever called the court's attention to it or attempted to serve the individual Board members prior to the hearing on his motion challenging the elections. Indeed, as he admits, they were later dismissed from the case without ever being served. Without proper service, the court could not have granted Peterson's motion. Therefore, we find there was no reversible error in the court's failure to hold a hearing on the motion, either before the anti-SLAPP motion was heard or at any other time.

B. The Anti-SLAPP Motion

1. Section 425.16

The anti-SLAPP statute states: "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." (§ 425.16, subd. (b)(1).) The purpose of the anti-SLAPP statute is to dismiss meritless lawsuits designed to chill the defendant's free speech rights at the earliest stage of the case. (See *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2.) The statute is to be "construed broadly." (§ 425.16, subd. (a).)

Section 425.16, subdivision (e), specifies the type of acts included within the statute's ambit. An "act in furtherance of a person's right of petition or free speech . . . in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, (3) 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, or (4) 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).)

When the first two subsections of subdivision (e) are implicated by a defendant's alleged acts (speech or petitioning before a legislative, executive, judicial, or other official proceeding, or statements made in connection with an issue under review or consideration by an official body), the defendant is not required to independently demonstrate that the matter is a "public issue" within the statute's meaning. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 (*Briggs*).)

We engage in a two-step process to resolve anti-SLAPP motions. "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. (§ 425.16, subd. (b)(1).) 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.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 733.)

An order granting a special motion to strike is subject to immediate appeal. (§ 425.16, subd. (i).) We exercise independent judgment to determine whether the motion to strike should have been granted. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. *Timely Filing*

The initial complaint in this matter was filed on June 14, 2010. Peterson claims he was contacted by defendants' attorney "two days after receiving the complaint on June 16, 2011," but there are no proofs of service of the initial complaint in the record. The instant complaint was filed on June 21 and the proofs of service demonstrate a service date of August 13. The instant motion was filed on October 12.

Section 425.16 states that an anti-SLAPP motion "may be filed within 60 days of the service of the complaint" or at a later time with the court's leave. Peterson's argument is apparently that the 60-day time frame should run from his informal "service" of the initial complaint on defendants' attorney in June. Peterson supplies no authority to support the notion that informal service is sufficient. When seeking to hold one party to a technical deadline, it is beholden on the other party to demonstrate that all the technicalities have been honored.

Further, filing an amended complaint restarts the 60-day period. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314.) Some authority supports that the amendments must be "substantive" rather than merely clerical. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1115-1116.) According to Peterson, "[t]he first amended complaint was revised to eliminate potentially offensive causes of action under an anti-SLAPP motion" Thus, even if the informal service was sufficient to start the 60-day clock, filing the amended complaint restarted it because the amendments were sufficiently substantive. There is no dispute that defendants were served with the amendment complaint on August 13, the dates listed on the proofs of

service. The anti-SLAPP motion was filed on October 12, exactly 60 days later, and was therefore timely.

3. Applicability to Defendants

Peterson also argues that the court erred in not “rescinding” the special motion to strike when the individual defendants were dismissed. He apparently believes that entity defendants cannot avail themselves of the anti-SLAPP statute. He is wrong.

Although Peterson asserts that “[t]he legislative intent of the special motion to strike is to protect individuals from large corporations who can afford to tie up an individual in a Strategic Lawsuit to Prevent Public Participation,” he offers no authority for the proposition that entities such as corporations cannot file an anti-SLAPP motion against each other or against an individual. A brief review of case law concerning the anti-SLAPP statute reveals this is not the case. (See, e.g., *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 [oil company brought anti-SLAPP motion against incorporated consumer group]; *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790 [Wal-Mart brought anti-SLAPP motion against individual plaintiffs].) This argument is without merit.

4. Protected Activity

Turning to the two-prong test to decide whether defendants’ motion was properly granted, we must first consider whether the challenged claims arise from acts in furtherance of the defendants’ right of free speech or right of petition under one of the four categories set forth in section 425.16, subdivision (e). (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043.) In doing so, “[w]e examine the *principal thrust* or *gravamen* of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies” (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520.)

“We assess the principal thrust by identifying ‘[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.’ [Citation.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) We keep in mind that “[i]n the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity. [Citations.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) If the mention of protected activity is “only incidental to a cause of action based essentially on nonprotected activity,” then the anti-SLAPP statute does not apply. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.)

This is not a close case. The complaint is littered with references to *Peterson I* throughout. Under “General Allegations” the complaint alleged: “The defendants failed to follow the CC&Rs . . . by filing a lawsuit first when they promised in writing to follow the procedures called for in the CC&Rs.” “Defendant has evidence in their files of preparing a false and fraudulent internal dispute resolution document before the lawsuit was filed” “Defendant tampered with evidence” “Defendant attorneys gave bad legal counsel to Defendant . . . which they stated that a lawsuit had to be filed first” “Defendant decided to file the lawsuit on August 27, 2008 at a board meeting” “A review of the executive meeting minutes of August 27, 2008 reveal[s] that the board decided to file a lawsuit before having a review hearing” There are numerous references to “perjury” and “fraud” as well as manufacturing “false evidence” that reference *Peterson I*. The gravamen of Peterson’s complaint is attacking the Board’s actions both in contemplation of and the conduct of *Peterson I*, which directly implicates defendants’ right to petition. Thus, the anti-SLAPP statute applies.

Peterson’s arguments on this point are entirely unavailing. He claims the anti-SLAPP statute does not apply to the Association because: “The Defendant contends that the Defendant Corporation spoke in the past trial for which they claim protected speech occurred. Protected speech did not occur as the Corporation did not speak.

Individual Board of Directors spoke and were dismissed by the Plaintiff as Defendants as they were not served.” To the contrary, this case arises out of the Association’s actions that led up to *Peterson I* and the conduct of that case. The fact that an Association acts through its agents and directors does not mean the acts are not the Association’s. Indeed, if Peterson was correct, he would not have a lawsuit against the Association in the first place because the Association would not have undertaken any of the acts that allegedly harmed him.

Peterson also argues the anti-SLAPP statute “cannot be used to protect illegal actions or bad behavior” citing *Flatley v. Mauro, supra*, 39 Cal.4th at p. 320. That case, however, does not apply to “bad behavior.” As the case makes clear, it is a narrow exception that only applies to conduct that is illegal as a matter of law. Further, it applies only “where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence” (*Id.* at p. 316.) In *Flatley*, the conclusive evidence was an extortionate letter from the defendant. (*Id.* at pp. 307-309.) While Peterson claims the election irregularities he alleged qualify under the standard set forth in *Flatley*, he has come nowhere close to “conclusively” demonstrating through evidence that illegal conduct occurred.

Moreover, subsequently it has been recognized that “the Supreme Court’s use of the phrase ‘illegal’ [in *Flatley*] was intended to mean criminal, and not merely violative of a statute.” (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654.) The court noted: “[A] reading of *Flatley* to push any statutory violation outside the reach of the anti-SLAPP statute would greatly weaken the constitutional interests which the statute is designed to protect.” (*Ibid.*) We agree.

The only criminal conduct that Peterson points to is that of a Board member, who pled guilty to criminal vandalism against Peterson. Although he does not cite to admissible evidence of this incident, defendants appear to concede it took place. Even so, the Board member, presumably an unserved defendant later dismissed, was not

the party who sought the protection of the anti-SLAPP statute. Defendants are not therefore stripped of their right to seek relief under the anti-SLAPP statute because of the actions of another party.

Peterson also claims defendants filed false documents and committed perjury in the prior case (thereby essentially conceding this case arises out of the prior one), but he comes far short of the conclusive evidence necessary to substantiate such a claim and remove the case from the ambit of the anti-SLAPP statute. The documents he cites to are the Association Election Policies and Procedures and an unsigned internal dispute resolution form. The only evidence that these documents were “false” or perjured is the declaration of Peterson’s attorney, Victor E. Hobbs. The reference to the documents in the declaration is “Evidence that was tampered with or was false evidence has been provided as exhibits.” Whatever the intended import, which frankly escapes us, none of this comes anywhere close to the “conclusive” evidence referenced in *Flatley*.

In sum, we conclude the anti-SLAPP statute applies to Peterson’s complaint, because its gravamen is defendants’ conduct of the prior case. We therefore turn to the question of whether Peterson has sufficiently demonstrated a probability of prevailing on the merits of his case.

5. Probability of Prevailing

To establish the requisite probability of prevailing, the plaintiff must state and substantiate a legally sufficient claim. (*Briggs, supra*, 19 Cal.4th at pp. 1122-1123.) “Put another way, the plaintiff ‘must 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.’ [Citations.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) Peterson “must produce evidence that would be admissible at trial.” (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Peterson's argument on this point in his opening brief is, well, brief. His argument in its entirety states: "The evidence indicates that the Defendant Board has not been duly elected since 2006. A Motion to Contest the Election would have found that the board was illegal and did not have standing to be in a lawsuit. The threshold for probability of prevailing is low. By not holding the Motion to Contest the Election in accordance with Corporations Code §7616, in error the Plaintiff the Court has caused extreme prejudice to the Plaintiff who has been harmed in establishing probability of prevailing."

In his reply brief, Peterson expands this somewhat, but does not set forth the admissible evidence on each of his causes of action. He merely states that the threshold showing is low and states the "admissible evidence" includes "the Complaint, the First Amended Complaint, the Ex Parte Motion and Motion to Contest the Election [and its exhibits], the Opposition to the Special Motion to Strike and all of the documents filed for Judicial Notice by the respondent from the first lawsuit in C-18." He also points to various other documents.

Peterson's claim that certain documents are "admissible evidence" clearly does not make it so. A nonverified complaint, for example, is only evidence that a complaint was filed; it is not evidence of the facts stated therein. His reply brief argument on this point is so rambling as to be nearly incomprehensible, and argues new facts not raised in his opening brief. While such violations of appellate procedure are sufficient to deem this argument waived (see *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108), we shall nonetheless briefly address each of Peterson's causes of action.

We begin with Peterson's first cause of action, "Professional Negligence." He alleged: "Professional Negligence is alleged to be done by Plaintiff and Plaintiff's Attorney for Filing Lawsuit instead of following CC&R's as promised in a July 10, 2008 letter from Plaintiff's Law Firm. . . . [¶] At all times thereafter defendant law firm and all defendant Board members failed to exercise reasonable care and skill in performing those

legal skills for defendant [¶] Defendant’s attorney gave bad legal advice that a lawsuit needed to be filed” The allegations in this cause of action also accuse the Board of ignoring Peterson’s chronic medical condition, preventing him from gaining timely access to the Association’s records, and violating their fiduciary duty to “enhance the quality of life in the tract.”

It is difficult to know where to begin, given the confusing and probably mistaken “Plaintiff and Plaintiff’s Attorney” language in the first sentence, but we will take the leap of presuming this cause of action was intended to be against *defendants’* attorneys. An attorney’s duty to his or her clients is one of “undivided loyalty,” (*Mason v. Levy & Van Bourg* (1978) 77 Cal.App.3d 60, 66), but that duty does not extend to third parties or opposing parties. To the extent he argues defendants’ attorneys gave them bad advice, he has no standing to assert such a claim. As such, his “professional negligence” claim must fail.

Peterson’s second cause of action is for negligence. He claims, among other things, that defendants filed a “frivolous” lawsuit against him, did not provide the opportunity for alternative dispute resolution, did not give proper notice, were untimely in the lawsuit, committed fraud and perjury in *Peterson I*, and failed to provide him with documents. Defendants’ actions during and in contemplation of litigation were protected by the litigation privilege, Civil Code section 47, subdivision (b). As pertinent here, that section provides: “A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding” Prelitigation communications are also protected “when the statement is made in connection with a proposed litigation that is ‘contemplated in good faith and under serious consideration. [Citation.]’” (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 262.)

“The principal purpose of [Civil Code] section 47[, subdivision (b),] is to afford litigants . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]” (*Silberg v. Anderson*

(1990) 50 Cal.3d 205, 213.) “Although originally enacted with reference to defamation [citation], the privilege is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.] Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation [Citations.]” (*Id.* at p. 212.)

If Peterson had a problem with access to documents during the prior case, the time to address it was during that case. If he believed fraud or perjury were occurring, the time to raise it was at the time they occurred. The litigation privilege was designed precisely to discourage derivative litigation where one party complains about the other’s conduct in a prior lawsuit. Peterson offers no admissible evidence as to why defendants’ conduct was not subject to the privilege.

Further, the only thing “frivolous” about Peterson’s continued insistence that *Peterson I* was a frivolous lawsuit is that argument itself. The Association obtained a judgment against Peterson, and according to defendants, they were later awarded attorney fees. Even if that judgment is later reversed for some reason, the fact that a court initially found in the Association’s favor on the merits precludes any argument that the lawsuit was “frivolous.” Peterson’s negligence claim must also fail.

Peterson’s complaint next asserts defendants violated Civil Code section 1363, subdivision (g), regarding the delivery of correction notices. He also claims he was not given notice of board meetings, denying him due process, and was not timely served with various other documents. (Civ. Code, § 1363, subd. (h).) He also claims he was denied an alternative dispute resolution process and that the Association raised fines to unreasonable levels. Unfortunately, there is no admissible evidence of any of this, other

than Peterson's self-serving and conclusory declaration.⁶ By contrast, the declaration of Board member Vern Green, supported by documents, demonstrates that Peterson was repeatedly mailed letters and requested to attend meetings. Nor is there any factual evidence that the fines were unreasonable. As such, we deem it very unlikely that Peterson could prevail on the merits of this claim.

Next, Peterson claims defendants violated the CC&Rs by increasing fines, implementing an "unwritten rule change," filing a lawsuit against Peterson, and failing to conduct a final review meeting before filing that lawsuit. As noted above, filing a lawsuit is absolutely privileged. As to the rest of Peterson's claims, they are unsupported by admissible evidence.

We need not belabor Peterson's next claim, "frivolous lawsuit under Unfair Competition" for very long. The act of filing the lawsuit was itself privileged, and any claim that it was frivolous is belied by the Association's success. If his intent was to claim that *Peterson I* was untimely filed, that claim needed to be raised before the trial court while that case was pending.

Peterson's sixth cause of action is for breach of contract. He claimed defendants breached a contract by "increasing the fines and implementing and unwritten rule not in keeping with the CC&Rs and . . . discriminated against the Defendant [presumably, Peterson, not defendant]." He also alleged defendants wrongfully split correction notice items to charge higher fines. This is simply another way of restating his claim that defendants violated the CC&Rs, and as with that cause of action, it is unsupported by admissible evidence.

The next cause of action is for "Invalid Board in Violation of [Civil Code section] 1354.56." This statute, however, does not appear to exist, or ever to have

⁶ Peterson's declarations contain such statements as: "The lawsuit was filed too late and according to [Civil Code section] 1363[subdivision] (h) is to be deemed ineffective. Therefore it must be dismissed."

existed. Construing this claim as one for an “invalid Board” generally, Peterson alleged that “[t]he Votes for Board members must be presented to the Plaintiff with proof that the election was held in accordance with Davis Stirling, the CC&Rs, and the Bylaws.” Indeed, that is not what the relevant statutes state, nor can he challenge the elections for 2007 through 2010. Civil Code section 1363.09, subdivision (a), provides: “A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.” This action was filed in June 2010, therefore at a minimum, the statute of limitations had run on the elections of 2007 and 2008. He offers no legal argument regarding tolling.

As to the remaining years, Peterson has once again failed to point to any admissible evidence that the elections were invalid. His opposition to the anti-SLAPP motion included only counsel’s argument. Peterson’s supplemental declaration did not state it was based on his personal knowledge, nor did it include properly authenticated documents sufficient to back up his claims. Indeed, defendants raised objections to Peterson’s declaration that were sustained in their entirety. He does not attack those rulings on appeal. Without admissible evidence, Peterson has failed to sustain his burden in the second prong of the anti-SLAPP motion.

Peterson’s next cause of action, for “perjury and fraud,” states that “Defendant and Defendant’s attorney have committed perjury and fraud in the false declaration of Dan Lyding dated June 10, 2010. The court is asked to find that Defendants must make restitution for this action and be turned over to Criminal Court for further action. The court must find that the Defendant[‘s] attorney is to be removed from the original complaint as they have created and presented false evidence.” This claim

presents two problems.⁷ First, it ignores that the only person who can commit perjury is the person who signed the declaration, and because Dan Lyding is neither of the served entity defendants, they cannot be held liable for it. Second, perjury is not a tort, but a criminal act. (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1429.)

As to fraud, defendants' alleged act of fraud would apparently be submitting the purportedly perjured declaration, but even assuming the elements of fraud have been sufficiently pleaded (which they have not) that act is absolutely privileged. "The declaration functions as written testimony and thus constitutes communication, not conduct. This is exactly the sort of communication the privilege is designed to protect." (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th at pp. 1430-1431.)

Peterson's next claim asserted defendants violated the Unruh Act (Civil Code § 51, et seq.) because he suffers from diabetes and "the Defendant has not provided for the needs of protected persons" He also alleged Defendant has chosen to ignore this condition in how they conduct their business and have not adopted any policies in concert with [Civil Code section] 51" He claimed defendants' actions caused him stress.

Civil Code section 51, subdivision (b), states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Assuming a homeowner's association's actions, not related to physical facility access, falls under the ambit of the Unruh Act, Peterson has presented no

⁷ Indeed, more than two. If Peterson wanted defendants' attorneys disqualified, he was required to bring a noticed motion to that effect.

evidence of discrimination against him based on his medical condition. The evidence only demonstrates the Association's desire to enforce the CC&Rs.

Peterson's final two causes of action are simply not recognized as such. "Verbal Abuse" is not a recognized tort in California. To the extent we could construe this claim as one for intentional infliction of emotional distress, Peterson has offered no evidence of the extreme and outrageous conduct necessary to support such a claim. (See, e.g., *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259.) His final cause of action is for "Duress." While recognized as a defense to certain crimes and torts, Peterson offers no authority for the proposition this is a recognized tort. We therefore conclude he is unlikely to prevail on either claim.

Because Peterson has not met his burden under the second prong of the anti-SLAPP statute, the court correctly granted the motion. Peterson's claims all either fall within the ambit of the litigation privilege, are unsupported by any admissible evidence, or simply fail to state a recognized cause of action.

C. Motion for Reconsideration

Peterson alternately claims the trial court should not have denied his motion for reconsideration for lack of jurisdiction, and that the trial court lacked jurisdiction to hear an attorney fees motion or enter a judgment. Peterson is wrong on both counts.

As we noted above, Peterson filed a motion for reconsideration of the court's order granting defendants' anti-SLAPP motion on January 3, 2011, setting a March hearing date that was later continued to April. On February 18, Peterson filed a notice of appeal from the same order. The court denied the motion, reasoning that the notice of appeal stripped the trial court of jurisdiction.

The trial court was correct. As stated in section 916, subdivision (a): "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or

order appealed from or upon the matters embraced therein or affected thereby” “The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. [Citation.]” (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.) A motion for reconsideration is just such a motion — if the trial court granted the motion, it would render the appeal futile. It is a trial court proceeding that seeks to “enforce, vacate or modify” (*ibid.*) an existing order, and is thus precluded by filing a notice of appeal. Therefore, the court did not err by refusing to hear the motion for reconsideration after the appeal had been filed.⁸

The court also acted properly by hearing attorney fees motions, signing a final judgment, and allowed a notice of entry of judgment to be filed. Peterson reasons that if the court had indeed lost jurisdiction, it was unable to undertake any of these actions. To the contrary, as section 916, subdivision (a), states, “the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.” The attorney fees motions were not affected by the order. Signing the final judgment and allowing notice of entry of judgment were merely ministerial matters that

⁸ It appears that Peterson’s misunderstanding of this issue may arise from confusion as to the meaning of California Rules of Court, rule 8.108(e), which extends the time to file an appeal after a motion for reconsideration is filed. Peterson appears to believe this provision extends the trial court’s *jurisdiction*, rather than the appellant’s time to *file an appeal*. His opening brief states: “The Plaintiff replied to the Objection and stated that [rule] 8.104(2)(e) provided a 90 day extension of jurisdiction to the trial court from February 4, 2011 to April 4, 2011.” He is incorrect; the rule explicitly states it applies to a litigant’s deadline to appeal, not the trial court’s jurisdiction. “If any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties” (Rule 8.108(e)(2).)

did not “render[] [the] appeal futile.” (*Elsea v. Saberi, supra*, 4 Cal.App.4th at p. 629.)

We find no error.

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal. Pursuant to section 425.16, subdivision (c)(1), defendants may seek attorney fees in an appropriate motion before the trial court.

MOORE, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.