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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOT RODS, LLC,

Plaintiff and Respondent,

v.

NORTHROP GRUMMAN SYSTEMS
CORPORATION,

Defendant and Appellant.

G044976

(Super. Ct. No. 30-2009-00118853)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Malissa Hathaway McKeith, Ernest Slome and Matthew B. Stucky for Defendant and Appellant.

Palmieri, Tyler, Wiener, Wilhelm & Waldron, Patrick A. Hennessey, Michael I. Kehoe and Erica M. Sorosky for Plaintiff and Respondent.

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Plaintiff Hot Rods, LLC (Hot Rods) sued Northrup Grumman Systems Corporation (Northrup) on a number of causes of action arising out of the sale of property contaminated with hazardous waste. Years after the sale, Northrup became involved with the California Regional Water Quality Control Board (Board) in remediation efforts to clean up the contamination in the land and water below the land. Northrup brought a special motion to strike the complaint under Code of Civil Procedure¹ section 425.16, the anti-SLAPP statute, contending Hot Rods' causes of action arose out of Northrup's petitioning conduct with the Board. The JAMS referee denied the motion, the superior court confirmed the referee's order, and Northrup appealed. We affirm.

I

FACTS

According to Hot Rods' complaint, Daniel and Kathy Welden purchased the real property at 301 E. Orangethorpe Avenue in Anaheim, from Northrup in December 1995 and assigned their rights to Hot Rods. Northrup previously operated an aerospace manufacturing facility on the property. All parties were aware the property had been contaminated with hazardous materials, but remediation had taken place and the buyers believed the property was not significantly contaminated by the time of the purchase. The property sales agreement contained a provision whereby Northrup remained solely responsible for remediation requirements and Northrup agreed to hold the Weldens and their assignees harmless from "any claims, demands, penalties, fees, fines, liability, damages, costs, losses, or other expenses . . . arising out of (a) any Environmental Action(s) and or Remediation involving an environmental condition of liability involving the Real Property caused by an act or omission of [Northrup]"

The complaint further alleged the property was "substantially more contaminated" than Hot Rods had been informed, Northrup was aware of that fact and

¹ All undesignated statutory references are to the Code of Civil Procedure.

made material misrepresentations to the buyers about the extent of the contamination. In 2007, Hot Rods became aware monitoring wells on the property showed an increase in contamination levels and the presence of volatile organic compounds. Air quality samples from inside a building on the property showed the “presence of certain contaminants.” Hot Rods alleged Northrup resisted its attempts to have Northrup determine the full extent of the contamination.

Northrup installed a soil vapor extraction system on the property in an effort to remediate soil contamination. According to the complaint, installation of the system caused “extensive damage” to the property and to structures on the property, including the drilling of wells through concrete building pads, and trenches dug through concrete and asphalt. It was also alleged the areas had not been restored. The complaint further alleged a tenant on the property incurred expenses due to hazardous materials on the property and the purchase sales agreement requires Northrup to reimburse Hot Rods for those claims pursuant to the indemnification clause of the property sales agreement.

Hot Rods alleged an area of contamination was exposed by drilling a well for the soil evaporation system through a building pad, resulting in a “strong, sickening odor” coming from inside the hole, and the source of the odor may be an underground storage tank. An undisclosed underground storage tank was discovered before, despite Northrup’s obligation to disclose all such tanks.

The complaint alleged contaminated groundwater and land existed in the area surrounding the property, and that Northrup was presently involved in litigation brought by the Orange County Water District (Water District) against Northrup. Hot Rods asserted Northrup intended to install equipment on the property to draw contaminated water from the surrounding area onto the property to clean the water. Hot Rods alleged it incurred expenses and losses from the presence of the contamination and equipment on the property.

The complaint contained causes of action for breach of contract, fraud, negligent misrepresentation, private nuisance, public nuisance, trespass to land, unfair business practice, and declaratory relief. Pursuant to section 638, the parties stipulated to the appointment of the Honorable Edward J. Wallin (Ret.) as a judicial referee for all purposes. Northrup moved for summary adjudication (§ 437, subd. (c)) on the breach of contract and declaratory relief causes of action, alleging Hot Rods' breach of contract claims were based on the environmental indemnification paragraph of the purchase sales agreement and the paragraph applied only to claims asserted against Hot Rods and to third party claims against Hot Rods for personal injury or property damage arising out of contamination of the property, and that no such claims had been made. The referee denied Northrup's motion, finding triable issues of fact exist as to issues connected with those causes of action.

Almost six months later, Northrup stipulated to permit Hot Rods to amend its complaint, adding causes of action for breach of contract, trespass, negligent misrepresentation, fraud, declaratory relief, and injunctive relief. Hot Rods thereafter filed an amendment to the complaint adding the six additional causes of action. The additional breach of contract claim alleged the property sales agreement required Northrup to provide Hot Rods with copies of reports and draft plans for remediation prior to submission of the same to a governmental agency. The agreement also called for Northrup to give Hot Rods "reasonable advance notice of any meeting with" governmental agencies and an opportunity to attend the meetings and participate in negotiations concerning remediation of contamination. Hot Rods maintained Northrup has not complied with those provisions of the agreement.

Northrup filed a special motion to strike the complaint pursuant to the state's anti-SLAPP² statute, section 425.16, alleging "many of the [complaint's]

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

allegations seeking relief arise out of [Northrup's] constitutionally protected conduct.” Northrup argued Hot Rods sued it for positions it took in administrative hearings with the Board and in litigation with Water District in connection with remediation of Hot Rods' property. According to Northrup, the lawsuit is based on its petitioning activity of submitting work plans to the Board and the Board's approval of those plans.

The referee denied Northrup's motion, concluding Hot Rod's lawsuit “is not a SLAPP lawsuit.” Because the referee found the causes of action did not arise from any exercise of Northrup's constitutional rights, the referee did not determine whether Hot Rods demonstrated a reasonable probability of prevailing on its causes of action. The superior court confirmed the referee's order and Northrup filed a timely notice of appeal.

II

DISCUSSION

Section 425.16

In order to combat what the Legislature described as “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances,” it enacted section 425.16.

(§ 425.16, subd. (a).) That section provides for early dismissal of a SLAPP via a special motion to strike causes of action “arising from” the exercise of the right of free speech or the right to petition. (§ 425.16, subd. (b)(1).)

The determination of whether an action is a SLAPP involves a two-step process. The defendant bears the initial burden of demonstrating the challenged cause of action arose from protected activity set forth in subdivision (e) of section 425.16.³ “[T]he

³ “As used in this section, ‘act in furtherance of a person's right of petition or free speech under the United States or California Constitution 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

the statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, 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. [Citation.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) “[I]t is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies [citation]” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

If a defendant makes this showing, the burden then shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Navellier v. Sletten* (2009) 29 Cal.4th 82, 88.) The plaintiff’s burden corresponds to the burden borne by a party opposing a motion for summary judgment. (*Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 947; *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 317.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech of petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89; (§ 425.16, subd. (b)(1).)

We review *de novo* an order granting or denying a motion to strike under section 425.16, and consider the pleadings and affidavits submitted in support of and in opposition to the motion, accepting as true 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. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

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).)

As an initial matter, we reject Hot Rods' contention that Northrup's motion to strike was untimely as to the first eight causes of action (those contained in the original complaint) because Northrup did not file its motion to strike until after Hot Rods filed its amendment to the complaint. Subdivision (f) of section 425.16 provides that a special motion to strike "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any time later upon terms it deems proper." The referee, fully aware of the procedural time line of the case, permitted the motion to be filed and Hot Rods has not demonstrated an abuse of discretion on the referee's part. Further, this court has already held a broad reading of the 60-day period provided by the statute permits the motion to be brought after the service of an amended complaint. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835.)

The Complaint is not a SLAPP

The complaint in this matter was filed after Northrup engaged in remediation through the Board and involved in litigation with the Water District. However, "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In 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, supra*, 29 Cal.4th at p. 89.) Hot Rods' causes of action are not "based on" Northrup's petitioning activities.

The complaint alleges a number of causes of action arising out of the sale of real property pursuant to a purchase sales agreement. Hot Rods alleged causes of action for fraud and neglect misrepresentation. These causes of action are based upon representations by Northrup, both before and after Northrup began its petitioning activity

with the Board and Water District. As the representations that give rise to these causes of action were made to Hot Rods, they do not involve Northrup's petitioning activities. Here, any petitioning activity of Northrup is, at most, merely evidence related to liability and not the activity that gives rise to liability. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 92; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215.) "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.]" (*Martinez v. Metabolife Internat., Inc., supra*, 113 Cal.App.4th at p. 188.)

The breach of contract and declaratory relief causes of action also arise out of the purchase sales contract and not Northrup's petitioning action. The declaratory relief causes of action are based on disputes arising under the property sales agreement and seek a ruling on the rights and obligations of the parties to the contract. The thrust or gravamen of the breach of contract causes of action and the disputes between the parties and purportedly in need of resolution by the court involve Northrup's alleged *failure* to remediate the contamination of the property,⁴ failure to indemnify Hot Rods for losses caused by the contamination of the property, failure to provide Hot Rods with copies of draft remediation reports "before submitting such reports to a governmental agency," and failure to provide Hot Rods with reasonable advance notice of meetings with representatives of the governmental agency, as required by the purchase sales agreement. Northrup's petitioning activity was not the basis of these causes of action. Rather, the petitioning activity was incidental to these causes of action. (*Martinez v. Metabolife Internat., Inc., supra*, 113 Cal.App.4th at p. 187.) For example, it was not the fact that Northrup had meetings with a government agency or provided reports to that agency that

⁴ In section 3.3.1 of the purchase sales agreement Northrup represented that to the best of its information and belief, there were no hazardous materials in the property or in the groundwater requiring remediation.

Hot Rods alleged violated the purchase sales agreement, it was Northrup's alleged failure to comply with the provision in the purchase sales agreement requiring Northrup to provide the reports to Hot Rods *before* they were given to the government agency,⁵ thus permitting Hot Rods to take part in the remediation (petitioning) process. If one may validly waive in a contract the right to engage in certain petitioning activity (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 94), one may validly contract to give advance notice to another party of such activity. The breach of that agreement does not give rise to the anti-SLAPP statute's protection.

The gravamen of the public and private nuisance causes of action are based on the contamination of Hot Rods' property and the groundwater, not Northrup's petitioning activities. The gravamen of the remaining causes of action are not based on Northrup's petitioning activity either. The trespassing causes of action are based on the contamination and Northrup's actions *on Hot Rods' property*.⁶ The requested injunctive relief is not based on Northrup's petitioning activity or designed to curtail any such activity on Northrup's part. Rather, Hot Rods seeks to require Northrup's compliance with the provision of the property sales agreement obligating Northrup to provide Hot Rods notice of hearings and the documentation to be provided to the governmental agencies.

⁵ Northrup argues in its opening brief that the basis of one of the breach of contract cause of actions (the ninth cause of action) was alleged to have been committed as part of Northrup's defense to the Water District litigation. However, the allegation in the amended complaint to which Northrup refers alleges Northrup's failure to give Hot Rods the notice required by the property sales agreement occurred because Northrup did not want Hot Rods to interfere in its dealings with the Board or Northrup's plans for remediation. Hot Rods thus alleged the petitioning activity merely provided the *motive* for Northrup to violate the terms of the contract.

⁶ A remediation plan submitted to the Board by Northrup stated Northrup had "not yet negotiated access to the site with the [Hot Rods]," and extraction well and piping construction within the building on the property could be difficult.

The bottom line is that Hot Rods' complaint is based on the purchase sales agreement and the contamination of its property caused by Northrup. It is not a SLAPP. The complaint is more appropriately characterized as one seeking compliance with the property settlement agreement — including giving Hot Rods reasonable notice of hearings and advance copies of reports prepared for governmental agencies — so that Hot Rods may exercise *its* petitioning rights in connection with the remediation efforts on *its* property. (See *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 429 [adequate notice to defendants required due process so they may protect their property].)

III

DISPOSITION

The order confirming the denial of Northrup's special motion to strike is affirmed. Hot Rods shall recover its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.