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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

REGINA F. MEYER,

Plaintiff and Respondent,

v.

RICHARD TATHAM,

Defendant and Appellant.

G045546

(Super. Ct. No. 30-2011-00463461)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Corey S. Cramin, Judge. Affirmed. Motion for sanctions. Denied.

Gates, O'Doherty, Gonter & Guy and K. Robert Gonter, Jr., for Defendant
and Appellant.

Regina F. Meyer, in pro. per., for Plaintiff and Respondent.

* * *

INTRODUCTION

In August 2007, plaintiff Regina F. Meyer was instrumental in the removal of defendant Richard Tatham from his position on the board of the Los Portillos Homeowners Association (the board) and was herself elected to the board. For more than three years since his removal from the board, Tatham was vocal about his opposition to the board, and to Meyer in particular, by disrupting board meetings and posting negative information about the board and Meyer on a public Web site.

In April 2011, Meyer filed a petition under Code of Civil Procedure section 527.6, which sought a temporary restraining order and a preliminary injunction (the petition) against Tatham, enjoining Tatham's allegedly harassing conduct, which included his blocking Meyer from exiting a board meeting, swinging his hands near her, frequently looking inside the windows of Meyer's condominium, and looking in the garbage area assigned to Meyer's unit. (All further statutory references are to the Code of Civil Procedure.) The trial court denied Meyer's request for a temporary restraining order but issued an order to show cause whether a preliminary injunction for civil harassment should issue against Tatham. Tatham filed a special motion to strike, brought under California's anti-SLAPP (strategic lawsuit against public participation) statute (§ 425.16) (the anti-SLAPP motion), in response to the petition.

At the hearing on both the anti-SLAPP motion and the petition, the trial court denied the anti-SLAPP motion and also dismissed the petition without prejudice, on the ground Meyer failed to prove civil harassment under section 527.6. Tatham appeals from the court's order denying the anti-SLAPP motion, arguing the trial court erred because the petition was based on protected activity and Meyer failed to demonstrate a probability of prevailing on the merits of the petition. Tatham argues he was therefore entitled to prevailing party attorney fees under section 425.16, subdivision (c)(1). Meyer

has not appealed from the court's order dismissing the petition, but has filed a motion for sanctions against Tatham on the ground Tatham's appeal is untimely and frivolous.

We affirm. The gravamen of the petition did not arise from protected activity under section 425.16. The petition was based on Tatham's physically intimidating conduct which included blocking Meyer's path at a board meeting, swinging his hands near her, frequently walking outside her condominium, and looking in her window and garbage area. Such conduct is not protected activity under section 425.16, and Tatham does not argue otherwise. The petition also referred to Tatham's negative postings about Meyer on a public Web site. Assuming for purposes of our analysis that Tatham's negative postings constituted protected activity, such conduct was merely incidental to the unprotected conduct described *ante*. Therefore, the trial court did not err by denying the anti-SLAPP motion. We deny Meyer's motion for sanctions because the appeal was timely filed, it was not taken for an improper motive, and it was not indisputably meritless.

BACKGROUND

I.

MEYER FILES THE PETITION; THE TRIAL COURT DENIES MEYER'S REQUEST FOR A TEMPORARY RESTRAINING ORDER BUT SETS AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION UNDER SECTION 527.6 SHOULD NOT ISSUE.

On April 5, 2011, Meyer filed the petition under section 527.6, seeking a temporary restraining order and a preliminary injunction on the ground Tatham had threatened to commit acts of violence as described in "Attachment 6C" (the attachment) to the petition. The attachment described Meyer and Tatham's acrimonious relationship since August 2007, when Meyer was instrumental in the successful effort to remove Tatham as president of the board and Tim Callan as vice-president of the board. Tatham

and Callan had served on the board in various positions for over seven years before they were removed. Meyer was elected onto the board.

The attachment stated that since October 2007, Tatham attended monthly meetings at which he was disruptive. It further stated, “Tatham’s anger began to escalate because [Meyer] refused to step off the board.” Tatham created a public Web site called “losportillosonline” (the Web site). In February 2010, Tatham posted on the Web site the homeowners association’s budget report, which created difficulties for the board in securing bids for contract work, and, in May 2010, he posted litigation-related information involving Meyer. In October 2010, Tatham posted the board’s agenda, identifying “delinquent account numbers”; Meyer had one of the delinquent accounts. He also posted “the calculations . . . to identify the physical address for all addresses listed as delinquent on the agenda.”

The attachment also stated that on November 9, 2010, Tatham, his wife, and Callan appeared at the monthly meeting and accused Meyer and the board “of preparing a website countering the negative accusatory attacks and comments of Tim Callan and Richard Tatham” on the Web site. During the meeting, Tatham and his wife yelled and refused to allow the meeting to proceed. The board decided to dismiss the meeting and meet at a different location. Tatham blocked the door preventing Meyer and another person from leaving the room. Meyer got past Tatham and out of the room, but Meyer found herself surrounded by Tatham, his wife, and Callan, who all taunted her and swung their hands into her face, but “stopped short of hitting [her].”

The attachment further stated that Meyer was afraid Tatham’s anger toward her was “progressively escalating towards physical violence.” Tatham was seen frequently walking past Meyer’s condominium, looking through the window, and digging around in the trash area designated for her condominium unit.

The petition also asserted a second ground in support of a preliminary injunction against Tatham, stating he had engaged in a “course of conduct” that harassed

Meyer and caused substantial emotional distress within the meaning of section 527.6, subdivision (b)(1). The petition described Tatham's harassing course of conduct as "1) Rick Tatham comes to each meeting disgruntled about everything and makes accusatory comments; 2) He has threatened [Meyer] more personally on 11/9/2010; and 3) now he walks past [her] unit and looks through [her] trash." The petition stated the "[d]ate of most recent harassment" was March 18, 2011," when Tatham posted on the Web site "more harassing comments and . . . financial (association) information."

The petition sought a "Personal Conduct Order[]" to prevent Tatham from harassing; attacking; threatening; assaulting; hitting; following; stalking; destroying Meyer's personal property; keeping Meyer under surveillance; blocking her movements; or contacting her, directly or indirectly, including telephoning her and sending messages, mail, or e-mail to her. The petition also sought an order that Tatham stay 120 yards away from Meyer, her adult children, and her home. The petition added that Meyer sought an order "[t]hat Richard Tatham and his family and friends do not walk by [her] home, dig[]/search around [her] garbage area; and remove the personal and nasty comments, that are only meant to harm [her] from their losportillosonline website." Meyer attached to the petition the declarations of her daughter, a board member, and a resident, corroborating some of the information contained in the petition. She also attached to the petition "a list of e-mails memorializing the meeting incidents and request for help from association counsel." (Capitalization omitted.)

The trial court denied Meyer's request for a temporary restraining order, but set a hearing date for the court's order to show cause why a preliminary injunction under section 527.6 should not issue.

II.

TATHAM FILES THE ANTI-SLAPP MOTION WHICH IS OPPOSED BY MEYER.

Tatham filed the anti-SLAPP motion seeking to strike the petition on the ground "the allegations against respondent Tatham arise from the exercise of First

Amendment rights in connection with a public issue” within the meaning of section 425.16. The anti-SLAPP motion was supported by Tatham’s declaration, stating that he contributed to the Web site which provided information to members of the Los Portillos Homeowners Association as to “how the new Board is conducting its business,” including reports of conflicts of interest and falsifications of board documents. He described, in detail, correspondence he had received in 2010 from the homeowners association’s counsel, threatening legal action if the information on the Web site was not removed. He also described a letter from Meyer’s attorney in March 2011, threatening legal action including a lawsuit for defamation, intentional and negligent interference with prospective economic relationships, and invasion of privacy. Tatham further stated: “I have never threatened Ms. Meyer with physical injury of any kind. I have never cursed at her, raised my voice at her, or ‘peered into her windows.’” He stated: “My intent in contributing to the website was to inform the other members of the Homeowners Association of what I considered questionable conduct with respect to the current Board” and that he bore Meyer “no ill will and did not intend to vex, annoy, or injure her.”

In opposition to the anti-SLAPP motion, Meyer submitted, inter alia, her own declaration, stating that after the Web site “went live” in approximately July 2008, she “personally reviewed” it and “felt it was best that [she] ignore this site.” She said she also ignored Tatham’s disruptive conduct at meetings. She further stated that Tatham’s harassment began in November 2010. She also stated that in addition to a preliminary injunction preventing Tatham from walking around her unit’s trash area, the court should order Tatham to remove “untrue and altered documents” from the Web site.

III.

THE TRIAL COURT DENIES THE ANTI-SLAPP MOTION AND DISMISSES THE PETITION WITHOUT PREJUDICE; TATHAM APPEALS.

After conducting the hearing on the anti-SLAPP motion and the petition, the trial court denied the anti-SLAPP motion, and also dismissed the petition without

prejudice on the ground Meyer failed to prove the “factors necessary” under section 527.6. In its discretion, the court declined to award Meyer prevailing party attorney fees as to the anti-SLAPP motion and declined to award Tatham prevailing party attorney fees as to the dismissal of the petition. Tatham appealed from the court’s order denying the anti-SLAPP motion. Meyer filed a motion for sanctions on the ground Tatham filed an untimely and frivolous appeal.

DISCUSSION

I.

SECTION 425.16 AND STANDARD OF REVIEW

Section 425.16 provides for 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 under the United States Constitution or the California Constitution in connection with a public issue.” (§ 425.16, subd. (b)(1).) “Section 425.16, subdivision (b)(1) requires the court to engage 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. 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. [Citation.] 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. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.’” (*Kajima Engineering*

& Construction, Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 928.)

“[A]nti-SLAPP motions may be filed challenging petitions for injunctive relief brought under section 527.6, because they constitute ‘causes of action’ under the anti-SLAPP law, and there is nothing in section 425.16 which would exempt such petitions from the broad reach of this remedial statute.” (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 642.)

We independently review the trial court’s order denying the anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) “‘We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citation.]” (*Id.* at p. 326.) We further observe that the anti-SLAPP statute is to be broadly construed. (§ 425.16, subd. (a).)

II.

THE GRAVAMEN OF THE PETITION DID NOT ARISE FROM PROTECTED ACTIVITY UNDER SECTION 425.16.

For the reasons we will explain, the trial court did not err by denying the anti-SLAPP motion because the gravamen of the petition did not arise from protected activity. A defendant can meet the burden of making a threshold showing that a cause of action is one arising from protected activity by demonstrating the act underlying the plaintiff’s cause of action falls within one of the four categories identified in section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The third category identified in section 425.16, subdivision (e)(3), which Tatham argues applies in this case, involves statements or writings made “in a place open to the public or

a public forum,” and concern a matter of public interest. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117-1118.)

“[W]here a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 *unless the protected conduct is “merely incidental” to the unprotected conduct* [citations]’ [Citation.] ‘*It is the principal thrust or gravamen of the plaintiff’s cause of action that determines whether the anti-SLAPP[P] statute applies.*’ [Citation.] “[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.’” [Citation.] Conversely, *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.] We conclude it is the *principal thrust or gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1369, first, second, and third italics added.)

The petition sought a preliminary injunction for civil harassment under section 527.6 which provides, at subdivision (a)(1), that “[a] person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.” Subdivision (b)(3) of section 527.6 defines harassment as “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.” The

term “Unlawful violence” is defined in section 527.6, subdivision (b)(7) as “any assault or battery, or stalking as prohibited in Section 646.9 of the Penal Code, but shall not include lawful acts of self-defense or defense of others.”

The term “Credible threat of violence” is defined as “a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” (§ 527.6, subd. (b)(2).) The term “Course of conduct” is defined in section 527.6, subdivision (b)(1) as a “pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of ‘course of conduct.’”

The petition asserted two bases in support of Meyer’s claim for a civil harassment preliminary injunction. First, the petition asserted Tatham threatened to commit acts of violence as described in the attachment. The attachment described the acrimonious relationship that developed between Tatham and Meyer after Tatham was removed from his position on the board. The attachment described Tatham’s disruptive conduct at meetings and the launching of the Web site on which Tatham posted his opinions about Meyer and the board along with negative information about Meyer.

The attachment stated that Tatham’s “disgruntled behavior escalated” on November 9, 2010, when he, along with his wife and Callan, attended a meeting at which they accused the board and Meyer, in particular, of creating a counter Web site to the Web site. The attachment further stated Tatham yelled and refused to allow the meeting to proceed. When the members decided to dismiss the meeting and meet elsewhere, Tatham physically blocked the door so that Meyer could not leave the room. Tatham, his

wife, and Callan later surrounded Meyer and began taunting Meyer and swinging their hands into her face, but stopped short of hitting her.

The attachment also stated, “[s]ince the November 9, 2010 meeting [Meyer] ha[s] been scared Richard Tatham and Tim Callan’s anger towards [her], is progressively escalating towards physical violence. The meetings since either have had security or were held at the local Starbucks or City Hall where law enforcement is within proximity.” Since November 9, 2010, Tatham “is constantly seen walking past [Meyer’s] window and digging around the trash area designated for [her] unit” and Tatham’s conduct scared Meyer and her children. Meyer asked Tatham to stop such conduct but he did not. The attachment further stated Meyer is “in fear of [her] safety and the safety of [her] children, not just at the meetings but while generally at home on days other than monthly meetings” and “Tatham is working himself up for a physical confrontation.”

The petition was also based on the ground Tatham “engage[d] in a course of conduct that harassed” her and caused her substantial emotional distress described as follows: “1) Rick Tatham comes to each meeting disgruntled about everything and makes accusatory comments; 2) He has threatened me more personally on 11/9/2010; and 3) now he walks past my unit and looks through my trash.”

In opposition to the anti-SLAPP motion, Meyer submitted her own declaration in which she stated, inter alia, that before the November 9, 2010 meeting, she had reviewed the initial content of the Web site that went live in July 2008, and decided to ignore it as well as Tatham’s other conduct. It was her position that Tatham’s harassment began in November 2010. She also stated in her declaration that on March 11, 2011, a neighbor told her that Tatham had posted “very nasty stuff” about her on the Web site. Meyer stated she went online and found that Tatham had posted incomplete and untrue information about her.

In support of the anti-SLAPP motion, Tatham submitted his own declaration describing Meyer’s efforts before filing the petition to have the negative

information about her removed from the Web site. He denied having ever threatened Meyer with physical injury, cursed at her, raised his voice at her, or “peered into her windows.”

Having reviewed the petition and the parties’ declarations supporting and opposing the anti-SLAPP motion, we conclude the gravamen of the petition was based on Tatham’s conduct of acting physically aggressive toward Meyer at the November 9, 2010 meeting, followed by his pattern of frequently walking by her condominium and looking in her window, and looking through her unit’s designated trash area. Such conduct is not protected under section 425.16, and Tatham does not contend otherwise. We note the petition and the evidence Meyer submitted in opposition to the anti-SLAPP motion cited the negative information about Meyer, which Tatham posted on the Web site, as well as Meyer’s request that the court order him to remove that information. Even assuming Tatham’s posting conduct constituted protected activity, it was merely incidental to the unprotected conduct underlying the petition.

Furthermore, we observe that Tatham’s conduct of posting the negative information about Meyer on the Web site did not constitute a credible threat of violence, “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys or harasses the person, and that serves no legitimate purpose,” or an act of unlawful violence, within the meaning of section 527.6, subdivision (b)(2), (3), and (7). Meyer did not present evidence or argue that Tatham’s postings on the Web site constituted direct or indirect threats against her. Evidence of Tatham’s postings showed the context of his otherwise arguably neutral conduct of walking by her condominium, looking through her window, and looking through her unit’s trash area. (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 542 [““[C]ontext is critical in a true threats case and history can give meaning to the medium””].) This case is therefore distinguishable from *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1255, in which the appellate court concluded postings on a Web

site that “singl[ed] out and threaten[ed the plaintiff were] the type of harassment the Legislature intended to proscribe in section 527.6.”

Thus, the Web site postings are not the type of conduct described in section 527.6, which would support the issuance of a preliminary injunction. The petition did not arise from the Web site postings within the meaning of section 425.16. Hence, the trial court did not err by denying the anti-SLAPP motion.

In his opening brief, Tatham argues the record shows that in denying the anti-SLAPP motion, the trial court did not analyze or make any findings as to the two-step process required under section 425.16, subdivision (b)(1). The record does not show the court failed to apply the proper standards in denying the anti-SLAPP motion. Furthermore, the court was not required to issue a statement of decision because a hearing on an anti-SLAPP motion is not a “trial of a question of fact,” within the meaning of section 632. (See *Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 624 [section 425.16 does not require the trial court to issue a statement of decision in ruling on an anti-SLAPP motion].) In addition, no party requested a statement of decision on the ruling on the anti-SLAPP motion, or as to the dismissal of the petition itself. (§ 632 [“The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial”].) As discussed *ante*, we have concluded in our de novo review of the order denying the anti-SLAPP motion that the gravamen of the petition was based on unprotected conduct as a matter of law.

Tatham also argues the trial court misunderstood that the court was required, under section 425.16, subdivision (c), to award prevailing party attorney fees to a successful moving party; Tatham argues the court mistakenly understood such fees were discretionary. The record does not show the trial court misunderstood the applicable law. A prevailing party attorney fees award is required under section 425.16, subdivision (c)(1) in favor of a successful moving defendant. Here, because the trial

court denied the anti-SLAPP motion, Tatham was not a prevailing party entitled to such an award. Section 425.16, subdivision (c)(1) authorized the trial court to award Meyer prevailing party attorney fees as to the anti-SLAPP motion, only “[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay.” Also, section 527.6, subdivision (r) provided the court discretion to award prevailing party attorney fees “in any action brought under this section.” The trial court refused to award attorney fees in the case. We find no error.

III.

MOTION FOR SANCTIONS

Meyer seeks monetary sanctions against Tatham on the ground this appeal is untimely and frivolous or was taken for an improper motive. Although we are affirming the trial court’s order, Tatham briefed the matter well and raised colorable arguments. We conclude the appeal was not prosecuted for an improper motive or was not indisputably without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 646, 650.) Meyer’s motion for sanctions is therefore denied.

DISPOSITION

The order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.