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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JR ENTERPRISES, L.P.,

Plaintiff, Cross-defendant and
Appellant,

v.

MICHAEL LAWRENCE et al.,

Defendants, Cross-complainants and
Respondents.

G046180

(Super. Ct. No. 30-2011-00454420)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Tam
Nomoto Schumann, Judge. Affirmed.

Horvitz & Levy, Jeremy B. Rosen, Steven S. Fleischman; Barnes, Crosby,
Fitzgerald & Zeman, Larry S. Zeman and Eric P. Francisconi for Plaintiff, Cross-
defendant and Appellant.

Julander, Brown & Bollard, William C. Bollard, Richard L. Brown and
Dustin M. Monroe for Defendants, Cross-complainants and Respondents.

* * *

Plaintiff and cross-defendant JR Enterprises, L.P. (tenant) appeals from the denial of its special motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16; all further statutory references are to this code unless otherwise stated) the breach of contract claim in the cross-complaint filed by defendants and cross-complainants Michael Lawrence and Victoria Lawrence (landlords). Tenant contends the court erred in sustaining landlords' evidentiary objections and finding tenant had not met its burden under the first prong of the anti-SLAPP statute to demonstrate the breach of contract cause of action was based on protected activity. Finding no error, we affirm.

FACTS

Disputes over the interpretation of a long-term ground lease for a 14-acre parcel of real property resulted in landlords suing tenant in 2008 (underlying action). In January 2011, the court entered judgment in tenant's favor and an amended judgment filed that March awarded tenant almost \$130,000. Landlords appealed. (*Lawrence v. JR Enterprises, Inc., L.P.* (G044999, app. pending) and *Lawrence v. JR Enterprises, L.P.* (G045163, app. pending)).

Before judgment was entered, landlords notified tenant in November 2010 payment was owed for utilities and other expenses for a one-acre portion of the property. Landlords followed up with a second letter on January 17, 2011, and demanded \$30,705.99 be placed into their attorney's client trust fund. Three days later, an entity called Plan 53, LLC served a notice of judgment lien on tenant, claiming it had a contractual lien against the recovery of any fees earned by landlords' attorney and advised "any payment in connection with this case . . . must include Plan 53, LLC as a payee."

Tenant sent a letter to landlords explaining why it did not owe the \$30,705.99, and also one to Plan 53 LLC asking whether the \$30,705.99 demanded by

landlords was subject to Plan 53 LLC's lien. When tenant did not receive responses, it filed a complaint for interpleader, declaratory relief, and unjust enrichment, denying "the \$30,705.99 is owed to [landlords], but [claiming] if it is owed [tenant] is unable to determine to whom those funds should be paid."

In response, landlords filed a cross-complaint, asserting, *inter alia*, a first cause of action for breach of contract and request for lease termination. They also served a notice of termination of the lease. Tenant in turn filed its own cross-complaint for declaratory relief and an anti-SLAPP motion directed to the first cause of action for breach of contract.

In support of its anti-SLAPP motion, tenant sought to introduce the notice of termination by attaching it to the declaration of counsel, who asserted it was a "true and correct copy of the [one] signed by [landlords] that was subsequently mailed to [tenant]" Tenant argued the motion should be granted because the notice of termination said tenant's "willful, grossly negligent or fraudulent breach of duty is proven in part by [its] bad faith filing of an improper [i]nterpleader action" (*italics omitted*) and the filing of the interpleader action is protected activity under the anti-SLAPP statute.

Landlords then filed a cross-complaint to tenant's cross-complaint for declaratory relief. A month later, landlords dismissed its original cross-complaint with prejudice before the hearing on the anti-SLAPP motion.

The trial court sustained three of landlords' four evidentiary objections to the notice of termination. It thereafter denied the anti-SLAPP motion, finding tenant had not satisfied its burden under the first prong of the anti-SLAPP statute.

DISCUSSION

1. Introduction

Under section 425.16, subdivision (b)(1), a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free speech or petition may be stricken unless the plaintiff establishes the probability of prevailing on the claim. The statute first requires a moving party to demonstrate “the challenged cause of action is one arising from protected activity.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If that is done, the burden shifts to the party defending against the motion to show a probability of prevailing on its claim. (*Ibid.*) This second step need not be reached if the moving party fails to establish the complaint arose out of protected activity. (See *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 801.)

We review the court’s ruling de novo, considering “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.]” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Mootness

Tenant contends landlords’ dismissal of its first cross-complaint with prejudice did not moot its anti-SLAPP motion. We agree. Tenant was “entitled to have the merits of [its anti-SLAPP] motion heard as a predicate to a determination of [its] motion for attorney[] fees and costs under subdivision (c) of . . . section” 425.16. (*Liu v Moore* (1999) 69 Cal.App.4th 745, 751.) Landlords do not address this issue, implicitly

conceding it. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16.)

3. Evidentiary Objections

Tenant argues the court abused its discretion in sustaining landlords' evidentiary objections to the notice of termination on the grounds it was hearsay, not lodged "in an original form as required," and not requested to be judicially noticed under Evidence Code section 452. We conclude no abuse of discretion occurred in excluding the document because it was not properly authenticated.

A writing must be authenticated before it or "secondary evidence of its content may be received in evidence." (Evid. Code, § 1401.) The declaration of tenant's attorney that the document was a "true and correct copy of the [one] signed by [landlords] that was subsequently mailed to [tenant]" failed to show he had personal knowledge to authenticate the document. (Evid. Code, § 1413.) Tenant thus did not carry its burden of establishing the authenticity of the document. (Evid. Code, § 403, subd. (a)(3).)

Tenant contends landlords' failure to specifically object on the ground the document was not properly authenticated precludes our consideration of it on appeal. We disagree. In reviewing a "trial court's evidentiary ruling for abuse of discretion [citation] . . . we review 'the ruling, not the rationale.' [Citation.]" (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427.) This applies to the exclusion of evidence. "If evidence is excluded on an improper objection but the evidence excluded is subject to objection on a different ground, it does not matter that the reason advanced by counsel or relied upon by the court was wrong. [Citations.] If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless of the particular considerations which may have motivated the trial court to its

decision. [Citations.]” (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173.)

The authorities cited by tenant for its claim landlords waived any objection not specifically made are inapposite because none address the issue of evidence properly excluded on a legal theory not considered by the court. Rather, they either pertain to the erroneous admission of evidence (see Evid. Code, § 353; *People v. Boyette* (2002) 29 Cal.4th 381, 424; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226-1227 & fn. 3; *People v. Mattson* (1990) 50 Cal.3d 826, 854, superseded by statute on other grounds as stated in *People v. Bolin* (1998) 18 Cal.4th 297, 315, fn. 2; *People v. Dorsey* (1974) 43 Cal.App.3d 953) or involve a claim evidence was erroneously excluded on a ground not previously raised (*People v. Valdez* (2004) 32 Cal.4th 73, 108; *Interinsurance Exchange v. Velji* (1975) 44 Cal.App.3d 310, 317-318).

Even if the trial court had abused its discretion in excluding the document, that would not affect the outcome of this case because the gravamen of the case remains tenant’s failure to pay, as we shall explain below.

4. Protected Activity

To satisfy its burden under the first prong of section 425.16, tenant had to make “the threshold showing” the breach of contract cause of action cross-complaint “arises from protected activity.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) “[T]he 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.)

Landlords' first cause of action alleged tenant breached the lease by failing “to pay all utilities and other obligations” despite several demands for payment. “As a result, [they] served in accordance with the lease a notice of termination and a notice of forfeiture and has demanded that [tenant] immediately vacate the premises and surrender[] same to [landlords]. . . . [Tenant has] failed to comply with the lease provisions, . . . [has] not surrendered the premises and . . . [has] continued to fail to pay the amount of the utility obligations owed to [landlords]. . . . Said breach of [tenant's] duty is willful, fraudulent or grossly negligent and it therefore deprives [it] from any ability to redeem [its] obligations and restore [its] lease rights under Civil Code section 3275.” These allegations show the cause of action was based on tenant's failure to pay the utility and other expenses, not its filing of the interpleader action.

Tenant notes landlords' prayer for relief requested a “judicial order that [tenant] breached the lease agreement and all rights there[]under are terminated and forfeited based on a willful, fraudulent or grossly negligent breach of duty which deprived [tenant] of redemption rights under Civil Code [s]ection 3275.” According to tenant, a mere breach of contract or an honest dispute over the amount owed is insufficient under Civil Code section 3275, and “[t]he *only* basis alleged in the cause of action justifying the extraordinary relief of lease termination under [that statute] is the [n]otice of [t]ermination, which alleges that [tenant] engaged in ‘bad faith’ by filing the interpleader complaint.” On the contrary, landlords pled tenant repeatedly failed to pay despite their several notices to do so including the notice of termination, which could reasonably give rise to an inference of willful failure to comply with the terms of the lease. (See *Fowler v. Vaughan* (1948) 86 Cal.App.2d 772, 777 [“no question” the

defendant's failure to pay was willful under Civil Code section 3275 where "[i]nstead of merely failing to pay [a defendant] refused to pay and consistently maintained that he was under no obligation to pay, that he had full ownership of the property, and that the [plaintiff] had no rights whatever"; *Taylor v. United States Fidelity & Guaranty Co.* (1927) 86 Cal.App. 382, 390 [affirming willfulness finding under Civil Code section 3275 where "breach . . . was spontaneous and voluntary"].)

Further, the relief sought in a complaint is not determinative of whether the anti-SLAPP statute applies to a particular cause of action. (See *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 162 [noting an anti-SLAPP motion is directed at a cause of action, not "the remedy sought," and rejecting the defendants' argument that the plaintiffs' prayer for injunctive relief triggered application of the anti-SLAPP statute] (*Marlin*).) Tenant distinguishes *Marlin* on the basis that here it "is not seeking to strike the prayer for relief." But neither were the defendants in *Marlin*. Rather, the *Marlin* defendants sought to specially strike the plaintiffs' entire complaint based on the prayer for relief. (*Marlin, supra*, 154 Cal.App.4th at p. 158.)

Tenant also claims *Marlin* is inapposite because landlords were seeking to enforce the primary right of terminating the long-term lease. But the allegations of the cross-complaint, as opposed to the prayer for relief, do not bear that out. Rather, they demonstrate landlords were attempting to enforce the primary right of being paid under the lease. Nor do the cases cited by tenant holding that civil petitions for injunctive relief are subject to section 425.16 persuade us otherwise because the anti-SLAPP motion in those cases did not rely on the remedy being sought in the prayer for relief. (See (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 617; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 646-652.)

Tenant maintains landlords’ “cross- complaint specifically refers to the [n]otice of [t]ermination.” But it only did so in the context of alleging that such notice was sent “[a]s a result” of tenant’s refusal to pay despite several notices. The fact the cross-complaint did not claim entitlement to termination of the lease until after the allegation the notice of termination was sent does not, as tenant asserts, show the cause of action was “*based on*” (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78) the filing of the interpleader action. Notably, the allegation tenant’s breach of duty was “willful, fraudulent or grossly negligent” came after the paragraph alleging it “continued to fail to pay” despite the notice of termination.

Moreover, we have already concluded the trial court did not abuse its discretion in sustaining landlords’ objections to the notice of termination. But even if error occurred, that would not change the result. “[I]t 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.” (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188.)

The notice of termination states: “**NOTICE IS HEREBY GIVEN THAT** no right to redeem by [tenant] exists pursuant to Civil Code section 3275, *based on* [tenant’s] pre-meditated willful, grossly negligent or fraudulent *failure to pay* the subject \$30,755.99. This willful, grossly negligent or fraudulent breach of duty is *proven in part* by their bad faith filing of an improper [i]nterpleader action . . . wherein they admit receipt of the [n]otice of the outstanding amount of the \$30,755.99, and backup records, yet they willfully refuse to pay [owner].” (Italics added.) The plain language of the document shows landlords were seeking to terminate the lease “based on” tenant’s

“failure to pay,” not because tenant had filed an interpleader complaint. The fact owner would attempt to prove “in part” tenant’s bad faith with evidence of the interpleader suit does not show the first cause of action was “based on” protected activity. Rather, such language was merely incidental and collateral to the unprotected activity of tenant’s alleged failure to pay.

We also reject tenant’s argument “it was only *after* the filing of the interpleader complaint that landlords began asserting a claim for lease termination under [Evidence Code] section 3275” Tenant cites the letters it and landlords sent, and the fact landlords did not serve the notice of termination or file their cross-complaint until about two months following tenant’s filing of the interpleader complaint. “[T]he 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.]” (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.)

Nor has tenant shown the cause of action is a “mixed” one. “When a cross-complainant presents a mixed cause of action that involves protected and non-protected activities, . . . the question presented is ‘whether the gravamen of the cause of action targets protected activity. [Citation.] If liability is not based on protected activity, the cause of action does not target the protected activity and is therefore not subject to the SLAPP statute. [Citations.]’ [Citation.] Stated differently, the question is whether the protected activity is merely an incidental part of the cause of action. [Citation.]” (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 767.) The problem here is tenant has not established the subject cause of action is based on any protected conduct.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.