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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HFOP CITY PLAZA, LLC,

Plaintiff and Respondent,

v.

BRADY, VORWERCK, RYDER &
CASPINO,

Defendant and Appellant.

G047928

(Super. Ct. No. 30-2012-00596407)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Motion to strike portions of reply brief. Request for judicial notice. Order affirmed. Motion to strike denied. Request for judicial notice denied.

Brady, Vorwerck, Ryder & Caspino, Ravi Sudan and Glen A. Stebens for Defendant and Appellant.

Freedman + Taitelman, Bryan J. Freedman, Jesse A. Kaplan and Jordan Susman for Plaintiff and Respondent

* * *

Defendant Brady, Vorwerck, Ryder & Caspino appeals from the denial of its special motion to strike plaintiff HFOP City Plaza, LLC's complaint for declaratory relief. (Code Civ. Proc., § 425.16; all further statutory references are to this code unless otherwise stated.) Defendant contends the trial court erred in finding it had not met its burden under the first prong of the analysis to demonstrate the complaint was based on protected activity. It also requests judicial notice of an Orange County Register news article dated January 15, 2010, contending it shows plaintiff cannot sustain its burden to establish a probability of prevailing on the merits. Plaintiff opposes the request on the ground the news article is irrelevant to the issues on appeal. We agree and deny defendant's request for judicial notice.

Plaintiff further moves to strike portions of defendant's reply brief referring to matters not in the appellate record or occurring after the court issued its order, namely that plaintiff has no standing to continue the action because it is no longer the real party in interest, having sold its interest in the lease, requiring the dismissal of the first amended complaint. In its opposition, defendant claims the transfer of ownership is properly before the court because standing can be raised at any time and affects plaintiff's right to bring an action on the lease and ability to carry its burden of establishing a probability of prevailing on the merits. But because we conclude defendant has failed to show the complaint was based on protected activity, the burden never shifted to plaintiff to demonstrate a probability of prevailing. We thus affirm the order denying defendant's anti-SLAPP motion and deny plaintiff's motion to strike section II of defendant's reply brief as being unnecessary to our decision.

FACTS AND PROCEDURAL BACKGROUND

Defendant leases office space from plaintiff under a written commercial lease agreement (lease). In July 2012, defendant informed plaintiff it disliked the

appearance and behavior of certain individuals who appeared to be employees of tenants in the building. The next month, defendant sent plaintiff letters about the discourteous conduct of “unsavory gentlemen” and smokers in the building, stating “it may be necessary to have a full time security guard to keep sentry over the smokers”; complaining that someone, described as a “skin head,” had parked in a space reserved for defendant and that this person, as well as others, had changed their clothing in the parking lot; and advising that a “disheveled group” had been seen walking around the front of the building, which made family members of one of defendant’s employees feel “unsafe.” Defendant reiterated the complaint about smokers “not staying in the smoking area” and, claiming a new tenant had employed “a number of convicted felons,” requested plaintiff to “conduct a safety risk assessment, offered by independent consultants” and to “put a security guard in the smoking area” to ensure compliance with the smoking rules.

Plaintiff disagreed it owed these obligations and did “not believe a risk assessment [was] necessary” given the information before it and the level of security currently in place, which was “consistent with [that] . . . offered at comparable office buildings.” It was aware of no incidents indicating employees of tenants posed a risk to other building occupants and stated that although defendant’s employees had “complained . . . about some rudeness, . . . [it did] not equate rudeness to a safety threat that would indicate that there is inadequate security at the [b]uilding.” Defendant responded by letter that it took “great umbrage to the manner in which [plaintiff] addressed the issue concerning [its employee’s family]” and e-mailed plaintiff that it would be retaining counsel to resolve the dispute.

In September, defendant e-mailed plaintiff about a racially-motivated incident purportedly witnessed by one of defendant’s employees and demanded plaintiff “take immediate action on this dangerous condition in the building.” (Capitalization omitted.) Thereafter, defendant circulated a flyer to other tenants inviting them to attend

a “meeting to discuss forging a unified front in demanding change” due to plaintiff’s refusal to address “[p]roblems with smoking in public areas; [i]nappropriate conduct and language in public areas; [a]n unacceptable business dress code; [p]otential security/safety issues; and, [a] general lack of overall business decorum.” Following that meeting, defendant sent plaintiff a letter stating that “[a]ll tenant representatives . . . at the meeting[] unanimously request . . . [plaintiff] retain an independent security consultant to perform an assessment of security needs” A newspaper article indicated defendant “is on the lookout for office space after alleging its current location at . . . [defendant’s] tower has become an unsafe and unpleasant working environment. . . . The firm doesn’t plan to see out the lease”

On Halloween day, defendant e-mailed plaintiff complaining about a tenant’s employees’ inappropriate costumes. Plaintiff responded by stating it “does not get involved with [t]enant attire,” did not see any of the tenant’s employee’s in Halloween attire, and asked for “more clarity as to why this was a violation of building rules and regulations[.]” Defendant replied that it was a third party beneficiary to the dress code provision in the lease between the offending tenant and plaintiff.

Plaintiff filed a complaint for declaratory relief. Defendant demurred to the complaint on the grounds it was uncertain and failed to state a viable cause of action for declaratory relief because there was no actual justiciable controversy between the parties and an adequate remedy existed to resolve their disputes. Plaintiff filed a first amended (operative) complaint to clarify the dispute and relief requested, namely “a declaration that it is not in breach of its obligations under the [l]ease; that it is not required to perform any of the actions demanded of it by [defendant] and, that it is not liable for the acts of third party tenants as alleged by [defendant].” Neither the original nor the first amended complaint sought damages, although both requested attorney fees and costs based on a provision in the lease.

Defendant moved to strike the amended complaint on the ground it constituted a Strategic Lawsuit Against Public Participation, or SLAPP, in violation of section 425.16 (anti-SLAPP motion) because it arose from an act in furtherance of defendant's right of free speech in connection with an issue of public interest; it did not address whether plaintiff could carry its burden to establish a probability it would prevail in the action. Plaintiff opposed the motion, arguing in part that its amended complaint did not arise out of defendant's speech. The court agreed and denied the motion, finding the action did not "arise from [d]efendant's speech" but rather arose "from a controversy . . . reflected by [d]efendant's speech[.] (Italics and bold omitted.) As such, it found "no need to determine if that speech is protected under . . . [section] 425.16[, subdivision] (e)."

DISCUSSION

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 may be stricken unless the plaintiff establishes the probability of prevailing on the claim. The statute "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. . . . 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." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

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.”” (Flatley v. Mauro (2006) 39 Cal.4th 299, 325-326.)

“[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.” (City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78.) To determine whether a defendant has met its burden on this issue we look at the “gravamen of the lawsuit” (Kronemyer v. Internet Movie Database Inc. (2007) 150 Cal.App.4th 941, 947) to “distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint without being a basis of liability.” (Graffiti Protective Coatings, Inc. v. City of Pico Rivera (2010) 181 Cal.App.4th 1207, 1214-1215.) “[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.” (Episcopal Church Cases (2009) 45 Cal.4th 467, 477.)

Defendant contends plaintiff’s declaratory relief action was based on conversations, correspondence, and e-mails between it and plaintiff, as well as the newspaper article about the safety of the building. According to defendant, these “are the bases of any liability, not just evidence thereof. The speech did not just trigger the action, it is at its core. The whole issue raised revolves around that speech; without it there would be no action. It is a blatant attempt to silence [defendant] in its efforts to improve the health and safety conditions at the leased location.” We disagree.

In *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301 (*D'Ausilio*), the court held that the anti-SLAPP statute did not apply to the city's declaratory relief cause of action. The parties had entered into a settlement agreement after the defendant sued the city for civil rights violations. As part of the settlement agreement, the defendant agreed not to participate in certain indisputably protected speech and petitioning activities against the city. (*Id.* at p. 1303.) After discovering the defendant had engaged in the prohibited activities, the city sued him for breach of contract and declaratory relief. The court concluded that the city did not sue the defendant because he had engaged in the protected activities, but because it believed he had breached a contract and a dispute existed "as to the scope and validity of that contract." (*Id.* at p. 1308.)

D'Ausilio relied on *City of Cotati v. Cashman, supra*, 29 Cal.4th 69, in which mobile home park owners filed a lawsuit in federal court against the city challenging the legality of a rent stabilization ordinance. The city then filed a declaratory relief action against the owners in state court, seeking a declaration that the ordinance was valid. (*Id.* at pp. 72-73.) The city's complaint made no reference to the federal suit. The Supreme Court held that the city's action was not subject to a special motion to strike, reasoning that the owners' lawsuit was not the actual controversy underlying the city's state court action for declaratory relief; rather, the underlying basis for both actions was the controversy regarding the legality of the city's ordinance. (*Id.* at p. 80.)

Here, the amended complaint shows plaintiff sued defendant for declaratory relief, not because defendant had engaged in protected activities, but because it believed an actual dispute existed as to whether it owed the "numerous duties and obligations" defendant claimed it did, including "provid[ing] additional security," "perform[ing] a safety risk assessment," "maintain[ing] decorum and professionalism in the building," plus "polic[ing] people who smoke around the building[and] the attire, demeanor, and deportment of tenants to prevent them from giving dirty looks, discussing unprofessional subjects, or looking disheveled." Because plaintiff did not believe it owed these

obligations, it “request[ed] a declaration that it is not in breach of its obligations under the [l]ease; that it is not required to perform any of the actions demanded of it by [defendant]; and, that it is not liable for the acts of third party tenants as alleged by [defendant].”

Given these allegations, we reject defendant’s claim that *D’Ausilio* is distinguishable because defendant’s speech in this case was the basis of the complaint. It was not.

Defendant’s reliance on *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267 is misplaced. There, the plaintiff sued his ex-wife for breaching a settlement agreement by making statements to the court and the internal affairs investigator in connection with an application for a temporary restraining order filed by his ex-wife’s new boyfriend. (*Id.* at pp. 270-271.) The court rejected plaintiff’s attempt to analogize the case to *D’Ausilio*: “plaintiff’s claim is not for declaratory relief to determine the disputed meaning of the settlement agreement but for damages for having allegedly breached the agreement. Plaintiff seeks to impose liability on [ex-wife] for having made her statements to the internal affairs investigators and in her family court papers. Because plaintiff is seeking to impose liability on [ex-wife] for having engaged in this protected activity, the action is ‘based on’ that activity and comes within the scope of section 425.16.” (*Vivian* at p. 274.) Here, in contrast, plaintiff does not seek to impose liability on defendant for its communications but rather requests a declaration of its obligations under the lease.

For the same reason, we are not persuaded by defendant’s analogy of this case to *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1480, and *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281, both of which held the basis of the actions before them was the prosecution of an unlawful detainer action. Rather, this case is more like *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, which distinguished those cases in reversing the trial court’s grant of the defendant’s anti-SLAPP motion because although the service of a three-day notice may have preceded and triggered the complaint, it was not based on service of that notice. (*Id.* at pp. 1245-1247.)

Because defendant failed to show plaintiff's declaratory relief action arose from its communications, we need not decide if those communications qualify as protected speech under any of the categories in section 425.16, subdivision (e) or whether, under the second prong of the anti-SLAPP analysis, plaintiff can establish a probability of prevailing on the action.

DISPOSITION

The order is affirmed. Plaintiff is entitled to its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.