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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CATANZARITE LAW CORPORATION,

Plaintiff and Appellant,

v.

MICHELMAN & ROBINSON, LLP, et al.,

Defendants and Respondents.

G048540

(Super. Ct. No. 30-2012-00578759)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed in part, reversed in part.

Catanzarite Law Corporation, Kenneth J. Catanzarite and Eric V. Anderton, for Plaintiff and Appellant.

Michelman & Robinson, Marc. R. Jacobs and Robin James for Defendant and Respondent Michelman & Robinson, LLP.

Law Office of Dana Delman and Dana Delman for Defendant and Respondent Dana Delman.

## **INTRODUCTION**

This is an appeal from an order granting an anti-SLAPP motion to two respondent law firms, Michelman & Robinson, LLP, and the Law Office of Dana Delman, as well as to Dana Delman individually (the law firms). Appellant Catanzarite Law Corporation sued the law firms, among others, for interference with contractual relations after former Catanzarite clients did not honor a contingency fee agreement.

The law firms took over the representation of Catanzarite's former clients in a series of Los Angeles Superior Court lawsuits after Catanzarite withdrew from their representation. Subsequent to Catanzarite's withdrawal, a portion of the lawsuits settled, and, apparently, Catanzarite did not get paid from the settlement proceeds.

The law firms moved to dismiss the lawsuit under the anti-SLAPP statute, Code of Civil Procedure section 425.16,<sup>1</sup> a motion the trial court granted. The court also awarded the law firms their attorney fees, pursuant to section 425.16, subdivision (c)(1).

We affirm the order granting the motion. The activity of which Catanzarite complains is protected under the anti-SLAPP statute and privileged under Civil Code section 47. The attorney fee award, however, must be reversed. The law firms represented themselves in the motion proceedings, and a self-represented party cannot recover attorney fees in this context.

## **FACTS**

In July 2011, Catanzarite substituted into five actions pending in Los Angeles Superior Court, representing a group of clients that included Ronald Weinstock. Catanzarite alleged it had a written fee agreement with these clients providing that the firm would be paid on contingency. Its compensation was to include membership interests in Newlife Sciences, LLC, at that point in the (allegedly wrongful) possession of

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

some of the adverse parties.<sup>2</sup> Catanzarite also alleged it had a lien on any recovery in the five Weinstock actions. The Weinstock actions included malpractice claims against two attorneys, John Markham and Elizabeth Read, and their law firm, Markham & Read.

In February 2012, Catanzarite moved to withdraw from representing the Weinstock parties, and the trial court granted the motion. The law firms substituted in for Catanzarite at this point.

The Weinstock parties then settled with Markham, Read, and their law firm in April 2012. According to the complaint, the Weinstock parties received money and membership interests in Newlife Sciences as consideration for settling. The Markham/Read parties were dismissed pursuant to the settlement.

Catanzarite sued the law firms (among others) for interfering with its contract with the Weinstock parties and the recovery on the lien, the assumption apparently being that the Weinstock parties paid the law firms for their services out of the settlement proceeds, without first paying Catanzarite what it was owed under the contingency fee agreement.

The law firms filed anti-SLAPP motions, which the trial court granted, in addition awarding them attorney fees.<sup>3</sup> The trial court dismissed Michelman & Robinson, LLP, from the interference action. There is no record of what happened to the law office of Dana Delman or to Dana Delman individually after the trial court granted their anti-SLAPP motion.

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<sup>2</sup> Catanzarite did not attach a copy of the fee agreement to its complaint and did not set out the relevant passages in haec verba. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 518, p. 650.) The agreement was also not an exhibit to the opposition to respondents' anti-SLAPP motions. Thus, it is not possible to tell what the agreement actually provided with respect to payment for legal services, whether the agreement was enforceable under Business and Professions Code section 6147, or whether it created an enforceable lien. (See Rules Prof. Conduct, rule 3-300.)

<sup>3</sup> Dana Delman moved for dismissal as "Dana Delman, dba Law Office of Dana Delman." Delman and the law office were separately named as defendants.

## DISCUSSION

The California Legislature enacted the anti-SLAPP statute to counteract “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (§ 425.16, subd. (a).) The Legislature created a special motion to strike, filed at the outset of litigation, to nip these suits in the bud, before defendants incurred crippling attorney fees and other expenses. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65.) A court may order a cause of action “arising from any act . . . in furtherance of the . . . right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue” to be stricken by means of this special motion. (§ 425.16, subd. (b)(1).) We review the order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The trial court uses a two-part test to evaluate an anti-SLAPP motion. First, the court determines whether the complaint or cause of action is “one arising from protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) As our Supreme Court has emphasized, “[T]he critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.” (*Id.* at p. 89.) The court has also cautioned, “[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) A cause of action “arising from” protected activity “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.” (*Id.* at p. 78.)

The defendant bears the burden of showing that the cause of action arises from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) If the defendant makes that showing, the court then proceeds to the second part of the inquiry: whether it is probable that the plaintiff will prevail on the claim. The

plaintiff need not prove its claim, but it must produce enough evidence to establish a prima facie case. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).)

## **I. Protected Activity**

The actions of which Catanzarite complains took place during and immediately after settlement negotiations in a set of ongoing lawsuits in Los Angeles Superior Court. Neither of the law firms was a party to these proceedings. Instead, they represented Catanzarite's former clients after Catanzarite withdrew. The law firms' personal right to petition the courts for redress is therefore not at issue. Nevertheless, the anti-SLAPP statute covers attorneys who are being sued because of statements "'made in connection with an issue under consideration or review by a . . . judicial body' within the meaning of section 425.16, subdivision (e)(2).'" (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420; see also *Rusheen, supra*, 37 Cal.4th at p. 1056 [section 425.16 applies to "qualifying acts committed by attorneys in representing clients in litigation"].)

Catanzarite argued that the conduct at issue is obtaining money from the settlement proceeds paid to the Weinstock parties, which is not protected activity, rather than participating in the settlement negotiations. This argument fails for two reasons. First, Catanzarite does not look at the big picture. The law firms did not walk in off the street and take money from the Weinstock parties. They represented these parties in settlement negotiations and were paid for their services.<sup>4</sup> Their involvement with the Weinstock parties and the dispersal of any settlement proceeds arose solely from this legal representation.

More importantly, however, getting paid for legal services does not qualify as the conduct necessary to support a claim for interference with contractual relations. The conduct on which the tort focuses is what the alleged tortfeasor did to disrupt the

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<sup>4</sup> Catanzarite produced no evidence that the law firms were paid for their services from the settlement proceeds. The only evidence before the trial court on this question was declarations from the lawyers involved in the litigation that they never possessed or controlled any of the consideration from the settlement.

relationship between the contracting parties and whether the contract was, in fact, breached or disrupted as a result. It is therefore important to be clear about what would constitute a breach. In this case, the breach would be the refusal of the Weinstock parties to pay Catanzarite pursuant to the fee agreement.

The only opportunity for the law firms to interfere with the payment Catanzarite claims it should have received from the Weinstock parties occurred in connection with the law firms' representation of their clients during or just after settlement negotiations. Representing clients during settlement negotiations clearly qualifies as protected activity for anti-SLAPP purposes. (See, e.g., *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 154 [“[L]egal advice and settlement made in connection with litigation are within section 425.16 . . . .”]; *Dowling v. Zimmerman, supra*, 85 Cal.App.4th at p. 1420.) We therefore conclude the law firms presented sufficient evidence to move the analysis to the second prong.

## **II. Probability of Prevailing**

Catanzarite alleged a single cause of action for interference with contractual relations. The elements of a cause of action for interference with contractual relations are ““(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.’ [Citation.]” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.)

Catanzarite misapprehends the conduct that would support a cause of action for interference with contractual relations. It argued below and argues here that the settlement negotiation itself was irrelevant; the wrongful act was receiving money from the settlement proceeds from which Catanzarite evidently expected to be paid. But if the contract between Catanzarite and the Weinstock parties was breached, it was not breached when the Weinstock parties paid the law firms, regardless of where the money

came from; it was breached when the Weinstock parties did not pay Catanzarite.<sup>5</sup> (See *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1127 [actionable wrong lies in inducement to break contract or sever relationship].)

What Catanzarite needed to establish probability of prevailing on an interference with contract claim was evidence to create a prima facie case that the law firms, knowing about the contract, somehow convinced or persuaded the Weinstock parties not to pay Catanzarite pursuant to the fee agreement. Catanzarite presented no such evidence. As stated above, the evidence before the trial court regarding the law firms' involvement in the settlement established only that the law firms represented Catanzarite's former clients in their negotiations with the opposing parties. Catanzarite had no evidence whatsoever that the law firms persuaded the Weinstock parties to do anything at all with the proceeds.

The trial court found in the law firms' favor on the second prong because any statements made were absolutely privileged under Civil Code section 47, subdivision (b)(2).<sup>6</sup> We agree. “[T]he 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, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or

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<sup>5</sup> Catanzarite attempts to explain its position as follows: “Appellant’s cause of action for interference of contract does not arise from ‘settlement negotiations’ but from [sic] money being paid in manner [sic] which evaded Appellant’s attorney lien. . . . Statements *made by Appellant’s counsel* in settlement negotiations do not satisfy Respondents’ burden to show that Section 425.16 applies.” The identity of Appellant’s (i.e., Catanzarite’s) counsel is not specified. More important, Catanzarite has lost sight of the elements of the cause of action. The crucial point for interference with contractual relations is not that the law firms got paid, but that Catanzarite did not.

<sup>6</sup> Civil Code section 47 provides in pertinent part: “A privileged publication is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding . . . .”

other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.] [Citation.] Thus, ‘communications with “some relation” to judicial proceedings’ are ‘absolutely immune from tort liability’ by the litigation privilege [citation]. It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.” (*Rusheen, supra*, 37 Cal.4th at p. 1057.)

Assuming it could establish the elements of a cause of action for interference with contractual relations – including knowledge of the contract and steps taken to induce a breach or disruption – Catanzarite still could not prevail. It is suing the law firms for, in essence, telling the Weinstock parties, “Don’t pay any of the settlement proceeds to Catanzarite. Ignore the lien.” In other words, Catanzarite is suing the law firms for legal advice they gave their clients in connection with settlement negotiations in some ongoing lawsuits. (See *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1329 [attorney not liable as matter of law for advising client to breach contract].)

Even if the law firms gave the Weinstock parties this advice and gave it for the most venal of motives, the privilege of Civil Code section 47 would apply. The privilege is an absolute one; it does not depend on the “motives, morals, ethics, or intent” of those invoking it. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 220 (*Silberg*).) For example, in *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, the court found that even if an attorney knowingly made groundless statements in a complaint solely to harass the other side, the statements were still privileged. (*Id.* at pp. 774, 777.) In *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, an attorney’s allegedly fraudulent statement about the limits of an insurance policy, made to induce settlement for a fraction of policy limits, was absolutely privileged. (*Id.* at p. 24; see also *Silberg, supra*, 50 Cal.3d at p. 218 [rejecting “‘interest of justice’” test for privilege as inconsistent with cases applying privilege to fraudulent communications and perjury].)

Catanzarite cannot establish a possibility of prevailing on its interference claim. First, it has no evidence that the law firms did anything to cause the Weinstock parties to breach their contract with Catanzarite. Even if it could overcome this obstacle, Catanzarite cannot overcome the bar of the litigation privilege. The court properly granted the law firms' anti-SLAPP motion.

### **III. Attorney Fees**

Section 425.16, subdivision (c)(1), permits a defendant prevailing in an anti-SLAPP motion to recover attorney fees and costs. The law firms, however, represented themselves in the motion proceeding. “[A] party, whether or not he is an attorney, who is not represented by counsel and who litigates an anti-SLAPP motion on his own behalf may not recover attorney fees under the statute.” (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 494; see also *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524.) As the law firms litigated the motions themselves, they were not entitled to a fee award.

### **DISPOSITION**

The portion of the order granting attorney fees is reversed. In all other respects, the order is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

I CONCUR:

THOMPSON, J.

MOORE, J., Concurring and Dissenting.

I respectfully dissent to the anti-SLAPP analysis in the majority opinion. This case does not arise from protected activity. Defendants are not being sued because of free speech or petitioning activity during or after settlement, but because defendants allegedly did not respect a lien and pay plaintiff what it claims it is owed.

“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* (2002) 29 Cal.4th 82, 89.) To conclude the “‘arising from’” prong is met, the action must actually allege the harm was caused by the protected acts. “[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.) The gravamen of this action has nothing to do with protected activity – it is a garden variety attorney fees dispute.

Further, it is well settled that not all litigation-related conduct is protected activity. (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036-1037; *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 189-194.) “None of the purposes of the anti-SLAPP statute would be served by elevating a fee dispute to the constitutional arena . . . .” (*Drell v. Cohen* (2014) 232 Cal.App.4th 24, 30.)

I am solely concerned with the question of whether defendants here are entitled to the extraordinary remedy of expedited disposition by special motion to strike under Code of Civil Procedure section 425.16. (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859.) As I perceive numerous problems with plaintiff’s pleading (*Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974), I do not foreclose the appropriateness of another pretrial disposition such as summary judgment.

Nonetheless, I concur with my colleagues with respect to the attorney fees award analysis.

MOORE, J.