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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PATHOLOGY, INC.,

Plaintiff, Cross-defendant and
Appellant,

v.

AVIIR, INC. et al.,

Defendants, Cross-complainants and
Respondents.

G048824

(Super. Ct. No. 30-2012-00593826)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Cooley, Seth A. Rafkin, Kraig D. Jennett and Lindsay P. Parker for Plaintiff, Cross-defendant and Appellant.

AlvaradoSmith, Theodore E. Bacon, Nanette B. Barragan and W. Michael Hensley for Defendants, Cross-complainants and Respondents.

* * *

The trial court denied Pathology, Inc.'s motion to strike a cross-complaint under the anti-SLAPP (strategic lawsuit against public participation) statute. (See Code Civ. Proc., § 425.16.)¹ Because the relevant causes of action do not arise from protected activity, we affirm the court's order.

FACTS

There are three parties to this appeal. Appellant Pathology, Inc. (Pathology), is a full-service independent women's health laboratory, providing services in reproductive donor testing as well as anatomic, molecular, and digital pathology services. Respondents Aviir, Inc. (Aviir), and West Pacific Medical Laboratory, LLC (WestPac), compete with Pathology in the same geographic areas. At the most general level, this litigation concerns employee mobility between these competitors.

Pathology's Complaints

In August 2012, Pathology filed two nearly identical complaints, the first against Aviir and individual Savita Devlin, and the second against WestPac and individuals Cristina Guerrero and Robin Champion-Scott. The complaints set forth the same nine causes of action, only two of which survived demurrers: trade secret misappropriation by all defendants and breach of contract by the individual defendants.

Pathology alleged that the individual defendants worked as sales account executives for it before resigning to work for Aviir and WestPac. In the course of its operations, Pathology developed certain trade secrets (including customer lists, knowledge of key decision makers at customers, revenue data, prospective customer lists, and internal customer-specific data) to which the individual defendants had access while

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

at Pathology. The individual defendants agreed (pursuant to written confidentiality and employment agreements, attached as exhibits to the complaints) not to use confidential or trade secret information for their own benefit or to the detriment of Pathology. The individual defendants agreed to return all confidential or trade secret information upon termination of their respective employment at Pathology. The individual defendants agreed not to solicit Pathology's customers during their employment at Pathology and for a period of one year after termination of employment. The individual defendants agreed not to compete with Pathology or to assist any competitor during their employment with Pathology. The individual defendants, however, took confidential and trade secret information with them to their new employers and used this information to target Pathology customers, causing substantial damages to Pathology.

Aviir's and WestPac's Cross-complaint

Aviir and WestPac responded with a cross-complaint for unfair competition under Business and Professions Code section 17200. Appending one of the employment agreements referenced in Pathology's complaints (the Devlin employment agreement), respondents alleged such agreements included illegal restrictive covenants not to compete. Pathology employees honor the illegal components of these agreements on the mistaken belief in their legality. As a result, customers who would have transferred their business away from Pathology have not done so, thereby unfairly enriching Pathology. Moreover, these agreements unfairly restrict respondents' ability to hire former Pathology employees. For purposes of the issue before this court, the key allegation in the initial cross-complaint is that "Pathology has threatened certain of its employees with a lawsuit if they leave Pathology's employ and try to compete in violation of the (illegal) covenants not to compete set forth in those employee's employment agreements with Pathology."

Aviir's and WestPac's Amended Cross-complaint

After Pathology demurred, respondents voluntarily amended the cross-complaint. This pleading sets forth three causes of action: (1) unfair business practices in violation of Business and Professions Code section 17200; (2) unlawful business practices in violation of section 17200; and (3) common law unfair competition. The amended cross-complaint again appends the Devlin employment agreement as an exhibit, explaining that this agreement contains examples of the illegal covenants utilized by Pathology. The amended cross-complaint seeks declaratory relief, injunctive relief, damages, and costs of suit.

The allegations of the amended pleading are similar to the original, with some additional detail. Pathology required all of its sales representatives to sign similar employment agreements with similar illegal covenants not to compete and non-solicitation clauses. The covenants purport to restrict Pathology's employees from competing with Pathology if they leave to work for a competitor, such as Aviir or WestPac. The covenants purport to restrict the employees' ability to work in Pathology's field for an indefinite period of time after leaving the employment of Pathology. The covenants deprive respondents of the opportunity to hire former Pathology employees. Some of Pathology's employees are under the mistaken belief that the covenants are enforceable; they have honored the covenants by either remaining with Pathology or not competing with Pathology when they otherwise would have followed a different course. This has caused respondents to suffer lost sales, revenue, and market share. On the other hand, respondents' employees have left to work for Pathology because respondents have not used the same illegal tactics as Pathology.

The second cause of action specifically identifies the following clause in Devlin's employment agreement as an illegal covenant not to compete: "During the term of his employment with Company, and for a period of one (1) year after, Representative shall not directly, or indirectly . . . contact, solicit or induce, or attempt to contract, solicit

or induce, any existing or prospective Customer of Company, to enter into any agreement for the development, marketing, purchase or sale of any products that compete with or otherwise may be used in substitution for any Products or Services of the Company. . . . ‘Customer’ means any person or entity (a) with whom Representative or any Company Representative has had any contact or discussions for the purpose of selling, or offering to sell any of the Company’s Products or Services.”

We quote several factual allegations in their entirety, as they are central to Pathology’s anti-SLAPP motion: “Pathology has threatened certain of its employees with a lawsuit if they leave Pathology’s employ and try to compete in violation of the (illegal) covenants not to compete set forth in those employee’s employment agreements with Pathology.” Pathology “unfairly competes with [respondents] by depriving them of the opportunity to retain former Pathology employees who, but for the unlawful covenants and threats of litigation by Pathology, would become employed by [respondents].” In the first and third causes of action, respondents allege: “Pathology also threatened its current employees and current employees of Aviiir or WestPac with litigation if they solicit any Pathology customers after leaving its employ, even in situations where the customer is the one who first contacts the former employee seeking lab services. Such contact is unfair and against California’s public policy of open competition.”

Pathology’s Anti-SLAPP Motion

Pathology moved to strike the amended cross-complaint, arguing that each of the causes of action arises from Pathology’s right to petition or free speech. The premise of this motion is that the cross-complaints are retaliatory responses to Pathology’s complaint and to threats of litigation made by Pathology. The evidence for this position is obvious: (1) the cross-complaints were filed as responsive pleadings to the complaints, and (2) the amended cross-complaint specifically alleges threats of

litigation by Pathology as a factual basis for the unfair competition claims. Pathology asserts there is no probability of respondents prevailing on the merits of the amended cross-complaint because: (1) the litigation privilege extends to communications made in anticipation of litigation; (2) respondents lack standing to bring the claims alleged; and (3) the employment agreements do not violate Business and Professions Code section 16600. In its moving papers, Pathology did not submit any evidentiary materials beyond the judicially noticeable pleadings and procedural history of the case.

Respondents opposed the motion, arguing Pathology failed to make its prima facie showing that the amended cross-complaint arose from protected activity and that, even if it did, respondents had a probability of prevailing on the merits.

Pathology submitted evidentiary material with its reply papers, including deposition excerpts and the letters it sent to defendants (i.e., Aviir, WestPac, and the individual employee defendants) prior to the filing of the complaints. The deposition excerpts establish (through the testimony of respondents' persons most knowledgeable) that (unspecified) nonsolicitation provisions are used in employment contracts in the relevant industry. The testimony also suggests Aviir and WestPac use some form of nonsolicitation clause in their employment agreements. The letters (written by current counsel for Pathology) generally advise their recipients of the alleged legal obligations of the individual defendants to Pathology with regard to trade secret and confidential information. The letters also express Pathology's intention to enforce its legal rights in the event such action becomes necessary (e.g., "Any disclosure or use of confidential information . . . could expose you to an injunction and significant liabilities such as the payment of money damages").

Ruling

In its tentative ruling, the court indicated its intention to deny the motion: "All three causes of action alleged in the [amended cross-complaint] are based on the

allegation that Pathology used illegal noncompete/nonsolicit agreements with its employees to unfairly/unlawfully compete with its competitors in violation of the UCL/common law. The allegation that Pathology also threatened to enforce those agreements is merely collateral to the principal thrust of the claims.” After taking the matter under submission following the hearing, the court subsequently confirmed by minute order that it would abide by its tentative ruling. Pathology timely filed a notice of appeal of the court’s order.

DISCUSSION

“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 shall be subject to a special motion to strike” (§ 425.16, subd. (b)(1).) Our review of the court’s order denying the motion is de novo, and entails an independent review of the entire record. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197; § 425.16, subd. (b)(2) [“court shall consider the pleadings, and supporting and opposing affidavits”].)

The anti-SLAPP statute “requires the court to engage in a two-step process. First, the court decides whether the [moving party] has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . [Citation.] If the court finds such a showing has been made, it then determines whether the [responding party] has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “The merits . . . should play no part in the first step of the anti-SLAPP analysis. [Citation.] The first step only determines whether section 425.16’s *procedural* protection applies; the second step of the analysis addresses whether there is sufficient merit to the claims at issue to allow the litigation to proceed.” (*City of Costa Mesa v. D’Alessio Investments, LLC* (2013) 214

Cal.App.4th 358, 371.) We reach only the first step in this case because Pathology did not make a threshold showing that the causes of action in the amended cross-complaint arose from protected activity.

As used in the anti-SLAPP statute, “‘act in furtherance of a person’s right of petition or free speech . . . 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 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 on an issue of public interest.*” (§ 425.16, subd. (e), italics added.)

The filing of Pathology’s complaints is self-evidently protected activity. Moreover, “[s]tatements made before an ‘official proceeding’ or in connection with an issue under consideration or review by a . . . judicial body . . . as described in clauses (1) and (2) of section 425.16, subdivision (e), are not limited to statements made after the commencement of such a proceeding. Instead, statements made in anticipation of a court action or other official proceeding may be entitled to protection under the anti-SLAPP statute.” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 886-887.) “There is no question that ‘a prelitigation statement falls within clause (1) or (2) of section 425.16, subdivision (e) if the statement “‘concern[s] the subject of the dispute’ and is made ‘in anticipation of litigation “contemplated in good faith and under serious consideration”” [citation].”” (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1162; see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1259-1260, 1268 [letter concerning potential litigation because of former employee’s use

of trade secrets is protected activity].) Hence, it is also fair to say that the prelitigation letters penned by Pathology's counsel are also protected activity.

The amended cross-complaint clearly was triggered by Pathology's protected activity, i.e., its complaints and prelitigation correspondence. But we are not tasked with determining the catalyst for the filing of the amended cross-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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77.) Neither respondents' subjective intent in filing the amended cross-complaint nor their subjective litigation goals enter into our analysis. (*Id.* at p. 78.)

Instead, "[i]n 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." (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89; see *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520 [courts "examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies"].) The parties competing viewpoints on this matter can be summarized by a simple question: Are the three similar causes of action in the amended cross-complaint based on business practices or litigation conduct? The implementation of business strategies in the marketplace, including strategies pertaining to employees and trade secrets, is not protected activity under section 425.16. More specifically, the acts of drafting, executing, and reminding employees of contracts that purport to limit their economic freedom are not protected activity. On the other hand, threatening to sue one's

ex-employees and competitors is usually protected activity; actually following through with a lawsuit is always protected activity. Is the amended cross-complaint about the former (business) activity or the latter (litigation) activity?

Our de novo review of the amended cross-complaint leads us to conclude that the basis for and thrust of respondents' causes of action is Pathology's alleged practice of forcing its employees to sign allegedly illegal employment contracts, which harm respondents as a result by diminishing the available labor pool and reducing respondents' ability to compete for customers. Respondents make broad based claims not limited to the specific individual defendants named in Pathology's complaints and not limited to Pathology's prelitigation communications. Notwithstanding Pathology's insistence that the pleadings must have been referring to counsel's letters to the defendants sued in Pathology's complaints, the amended cross-complaint does not reference any specific communications threatening litigation or the lawsuits that were actually filed by Pathology.² Respondents' allegations do not focus on threats of litigation contemplated in good faith and under serious consideration; the allegations contemplate ongoing threats against current and former Pathology employees regarding potential future conduct. In sum, respondents do not allege that the filing of Pathology's

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Recall the relevant allegations from the amended cross-complaint. "Pathology has threatened certain of its employees with a lawsuit if they leave Pathology's employ and try to compete in violation of the (illegal) covenants not to compete set forth in those employee's employment agreements with Pathology." Pathology "unfairly competes with [respondents] by depriving them of the opportunity to retain former Pathology employees who, but for the unlawful covenants and threats of litigation by Pathology, would become employed by [respondents]." "Pathology also threatened its current employees and current employees of Aviiir or WestPac with litigation if they solicit any Pathology customers after leaving its employ, even in situations where the customer is the one who first contacts the former employee seeking lab services. Such conduct is unfair and against California's public policy of open competition."

complaint or its prelitigation threats gave “rise to any additional liability.” (*Aguilar v. Goldstein, supra*, 207 Cal.App.4th at p. 1161.)

To the extent the amended cross-complaint can be said to reference the specific prelitigation communications sent to parties to this litigation, such references are incidental to the causes of action therein. (See *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 272 [“If the mention of protected activity is ‘only incidental to a cause of action based essentially on nonprotected activity,’ then the anti-SLAPP statute does not apply”].) These are not “mixed cause[s] of action,” which are subject to an anti-SLAPP motion because they include both protected and unprotected conduct as the basis for the lawsuit. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1288 [“bulk of the allegations” consisted of protected conduct; cause of action therefore arose from protected activity even though one factual basis for claim was not protected activity], *id.* at p. 1287; see also *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1182-1187 [causes of action based on filing unlawful detainer action and other protected activity, even though allegations also included unprotected conduct].)

The only question we answer is whether the three causes of action in the amended cross-complaint arise out of Pathology’s protected activity. And all we hold is that these same causes of action are not based on protected activity. We will not inquire into the merits, viz, (1) whether Pathology’s employment contracts are illegal as against public policy; (2) whether respondents have “standing” to challenge these employment contracts by way of any of their causes of action; or (3) whether respondents can prove they suffered damages as a result of the violations alleged. We reject Pathology’s clever (but unsupported) contention that because an examination of “standing” precedes merits considerations in other contexts, the standing inquiry must logically occur in the first step of the anti-SLAPP analysis. We are certain that Pathology can identify an appropriate procedural vehicle whereby the trial court can evaluate these issues.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.