

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEVINE CARMELLE,

Plaintiff and Appellant,

v.

MICHAEL COLETTI et al.,

Defendants and Respondents.

G049266

(Super. Ct. No. 30-2013-00623307)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed. Motions denied.

Stanley D. Bowman for Plaintiff and Appellant.

Law Offices of Manuel H. Miller and Max A. Sauler for Defendants and Respondents.

Nevine Carmelle appeals from the order dismissing her complaint against the Law Offices of Manuel H. Miller and Michael Coletti (Defendants) after the trial court granted a special motion to strike the complaint as a strategic lawsuit against public participation (anti-SLAPP motion) (Code Civ. Proc., § 425.16).¹ Carmelle argues the trial court erred in granting the anti-SLAPP motion because Coletti's acts were not taken in furtherance of his right of free speech because his speech was illegal and there was a probability she would prevail on her claims because the litigation privilege did not apply. Defendants contend Coletti's statements arose from protected activity because they were connected to and related with the underlying litigation and his statements were not illegal as a matter of law.

We ordered the parties to submit supplemental letter briefs on issues raised at oral argument, including a discovery matter in the underlying litigation, *Estrada v. Coastal Neurological Medical Center, Inc., et al.* (Super. Ct. L.A. County 2012, No. BC478328) (the *Estrada* litigation), and whether Coletti's statements were made in connection with an issue under consideration by a judicial body. The parties submitted briefs, and Defendants filed a motion to augment the record with and request for judicial notice of documents in the *Estrada* litigation. Those motions are denied. As we explain below, we conclude Coletti's statements were in furtherance of his right to petition and Carmelle did not demonstrate a probability of prevailing. The order is affirmed.

FACTS

In the *Estrada* litigation, the Law Offices of Manuel H. Miller and Manuel H. Miller and Michael Coletti represented plaintiff, and the Law Offices of Garry Lawrence Jones and Garry L. Jones represented defendants (Coastal). Carmelle worked

¹ Code of Civil Procedure section 425.16 (section 425.16) authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action. Section 425.16 is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1.)

for Jones as a paralegal. In that case, plaintiff employee sued employer for “rape/sexual battery, employment based harassment and retaliation, false imprisonment and intentional infliction of emotional distress.” Plaintiff sought economic and non-economic, and punitive damages for the intentional torts. The record is silent as to the current status of the *Estrada* litigation.

Coletti wrote a letter to Jones on November 19, 2012 (the Letter), concerning several discovery matters. As relevant here, Coletti stated Dr. Nader Armanious and Coastal “may be” transferring assets in anticipation of an adverse judgment. He said Carmelle, who is an expert in the transfer of assets, failed to appear for her noticed deposition. He “believed” Carmelle was helping Armanious “hide assets.” He added, “A brief perusal of . . . Carmelle on the [I]nternet indicates that she has a criminal past and has been accused of a multitude of scams.”

On December 20, 2012, the day Armanious was scheduled to be deposed, Coletti objected to Carmelle’s attendance but because Armanious wanted her present, Coletti agreed if she observed and did not participate in any manner. After Jones stipulated and said everyone agreed, Carmelle said, “No, but you said I could talk to you [Jones].” Coletti ended the deposition.

The following month, Carmelle filed a complaint against Defendants alleging two causes of action, libel and intentional infliction of emotional distress (“IIED”). The basis for the libel action was the Letter, which was attached as an exhibit. The basis for the IIED claim was, in addition to the Letter, that at Armanious’s deposition, Coletti asked Jones, “whether [Carmelle] was born a man or a woman.”

Defendants filed a motion to strike portions of the complaint, a demurrer, and an anti-SLAPP motion. The anti-SLAPP motion was supported by declarations from Coletti and Max Sauler, attorney with Law Offices of Manuel H. Miller, and numerous exhibits. The exhibits included the complaint, the Letter, a photocopy of Carmelle’s

business card, a transcript of Armanious's December 20, 2012, deposition, and the results of Internet searches involving Carmelle.

In his declaration, Coletti stated he sought to depose Carmelle because Coastal was not insured for the types of claims alleged in the *Estrada* litigation and he believed Carmelle was hiding assets in violation of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439) (UFTA). Coletti relied on Carmelle's business card, which stated her services included domestic and international asset protection and offshore banking. As to the deposition, Coletti said that when Jones and Carmelle appeared without Armanious, Coletti spoke with Jones privately in another office. Coletti stated Jones asked him why he wanted to depose Carmelle, and Coletti reiterated his concerns about Carmelle hiding assets in violation of the UFTA. Coletti told Jones that he had conducted Internet searches that indicated Carmelle had previously been involved in "fraudulent activities." Coletti "inquired of . . . Jones if he was aware of the [I]nternet information, particularly regarding certain pages that indicated that . . . Carmelle had a criminal history and that she had changed both her name and her gender in connection with these activities." Coletti said he did not "state, or imply" the Internet information was true but only that he was concerned. He concluded, "I did not, on December 20, 2012[,], or on any other date, ask . . . Jones if he was aware 'whether [Carmelle] was born a man or a woman.'"

Defendants' anti-SLAPP motion argued the Letter and statements were speech "intimately intertwined with a judicial proceeding" and thus were protected. They added Carmelle could not establish a probability of prevailing and Coletti's statements were protected by the litigation privilege (Civ. Code, § 47).

Carmelle filed an opposition supported by Jones's declaration. In his declaration, Jones referenced the Letter. He also stated that during an *October* 2012 deposition, Coletti stated the following: "You need to be careful with your employee Carmelle because I know all about her. She is a criminal and she has been engaging in

criminal activities.” Coletti told Jones to check the Internet because Carmelle’s criminal background was documented on the Internet. Finally, Jones asserted Coletti “made comments to [him] implying that . . . Carmelle was really a man and not a woman.”

In her opposition, Carmelle argued Coletti’s statements did not arise from protected activity because they were “clearly extraneous to the underlying litigation[]” and “they were not made ‘in connection’ with an issue under consideration.” Carmelle asserted she was not connected to the litigation and Defendants fabricated a connection to harass her. She recited the elements for libel and IIED and argued she had a probability of prevailing on both causes of action. She concluded the litigation privilege does not apply because she did not have “substantive involvement” in the litigation. She added her sexuality had “absolutely no connection” with the matter.

Defendants filed a reply in which they argued the only fact supporting the libel cause of action was the sending of the Letter, and Carmelle’s other claims, including Coletti’s alleged rude and intemperate behavior, were irrelevant. They also asserted there is an inconsistency concerning the statement of her sexuality. In her complaint, Carmelle said Coletti “asked” Jones whether Carmelle was born a man or a woman. However, Jones, in his declaration, stated Coletti “impl[ied]” Carmelle was a man and not a woman. Defendants assert the inconsistency undermined the IIED cause of action.

The trial court issued a tentative opinion granting the anti-SLAPP motion. At a hearing, the trial court indicated it had read and considered the written submissions, and the court heard argument. The court adopted its tentative opinion as its final ruling. The trial court entered judgment granting Defendants’ anti-SLAPP motion and denied Defendants’ request for costs and sanctions.

DISCUSSION

Section 425.16

Section 425.16, subdivision (b)(1), states, “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, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Section 425.16 is to be “construed broadly.”

Consideration of a section 425.16 anti-SLAPP motion anticipates 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. (§ 425.16, subd. (b)(1).) 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 (*Equilon Enterprises*).

“‘Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] 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.]” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326 (*Flatley*).

Arising From

“[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.] . . . [T]he 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. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’ [Citations.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*)). In meeting its burden “[d]efendant need only make a prima facie showing that plaintiff’s complaint ‘arises from’ defendant’s constitutionally-protected free speech or petition[ing] activity.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 7:991, pp. 7(II)-56; see *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458.)

As used in section 425.16, an “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution 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 an issue of public interest.” (§ 425.16, subd. (e).) Defendants relied on the first two

categories, which as we explain below “[a]re [c]oextensive with the [l]itigation [p]rivilege.” (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124 (*A.F. Brown*), italics omitted.)

“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.]” [Citations.]’ [Citation.]” (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1162; see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114-1115 [prelitigation statements protected under § 425.16, subd. (e)(2)]; *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1412-1413 [prelitigation statements protected under § 425.16, subd. (e)(2)]; *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 823-824 [prelitigation statements protected under § 425.16, subd. (e)(1) & (e)(2)]; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268 [prelitigation letter to customers regarding former employee’s improper contact and disclosure of trade secrets protected under § 425.16, subd. (e)(2)] (*Neville*); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [prelitigation statements entitled to benefits of section 425.16].)

“If a prelitigation statement concerns the subject of the dispute and is made in anticipation of litigation contemplated in good faith and under serious consideration, it falls within the scope of . . . section 425.16. [Citation.] The ‘good faith [and under] serious consideration’ requirement is not a test for malice. [Citation.] Instead, it focuses on whether the litigation was genuinely contemplated. [Citation.] The requirement guarantees that hollow threats of litigation are not protected. [Citation.]” (*People ex rel. Fire Insurance Exchange v. Anapol, supra*, 211 Cal.App.4th at p. 824.) In *A.F. Brown, supra*, 137 Cal.App.4th at pages 1125-1126, another panel of this court recognized courts have adopted a “‘fairly expansive view’” of litigation-related conduct to which section

425.16 applies. “Ordinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16. [Citation.]” (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293.)

Here, Coletti’s statements concerned and were made in anticipation of good faith litigation under the UFTA. The *Estrada* litigation concerned plaintiff’s suit against defendants for alleged sexual misconduct. Jones represented the employer, and Carmelle worked for Jones as a paralegal. Because defendants’ insurance may not cover intentional torts, Coletti, plaintiff’s attorney, was concerned Armanious was or may transfer Coastal’s assets to escape paying a judgment. Coletti believed Carmelle would assist Armanious in transferring assets because she is an expert in asset protection and offshore banking. In the Letter, Coletti also stated his Internet research “indicate[d]” Carmelle has a criminal history involving fraud. At the deposition, relying on his research, Coletti either implied Carmelle was a man or “inquired” whether Jones knew Carmelle changed her gender and name to avoid detection for her fraudulent activities.

In his declaration accompanying Defendants’ anti-SLAPP motion, Coletti stated the impetus for both the Letter and his statements to Jones were his concern Carmelle was hiding assets in violation of the UFTA. In their supplemental letter brief, Defendants assert they sought to depose Carmelle because of their “good faith belief” Carmelle may have been helping Coastal transfer assets in violation of the UFTA. Defendants alleged the plaintiff in the *Estrada* litigation was a tort claimant creditor under the UFTA and was entitled to discovery in anticipation of a UFTA claim against Coastal. Therefore, the record before us includes evidence to support the conclusion Coletti sought to depose Carmelle in anticipation of filing a UFTA cause of action, and his statements were in furtherance of his good faith intent to pursue that action.

However, Coletti's handling of this matter left much to be desired. Coletti could have certainly informed Jones of his concerns in a more circumspect manner and advised Jones why he wanted to take Carmelle's deposition. And the Internet research in the record before us includes much offensive material that goes well beyond Coletti's concern Carmelle at some point changed her gender identity. Nevertheless, because Carmelle held herself out as an asset protection and offshore banking expert, her involvement concerned anticipated litigation under the UFTA. Thus, Coletti's statements concerned and were made in anticipation of good faith litigation under the UFTA.

Neville, supra, 160 Cal.App.4th 1255, is instructive. In that case, an employer's attorney sent a letter to the employer's customers stating that an ex-employee misappropriated customer lists to start his own competing business. (*Id.* at p. 1259.) The letter informed customers the ex-employee may have already or may attempt to contact them and that to avoid involvement in the litigation customers should cease dealing with the ex-employee. (*Id.* at p. 1260.) The employer filed the suit several months later, and the ex-employee filed a cross-complaint against the employer and the employer's attorney for defamation arising from the letter. (*Ibid.*) The employer's attorney moved to strike the cross-complaint, arguing the letter was "constitutionally protected" pursuant to section 425.16. (*Neville, supra*, 160 Cal.App.4th at p. 1260.) The ex-employee argued the letter was made in connection with an issue under consideration or review by a judicial body as required by section 425.16, subdivision (e)(2), because the letter was written four months before the employer sued the ex-employee, the employer's attorney did not state the employer had a contemplated litigation in good faith, and the letter was addressed to customers who were not parties to an anticipated lawsuit. (*Id.* at p. 1262.)

The *Neville* court reviewed several cases that considered both the scope of section 425.16, subdivision (e)(2), and Civil Code section 47, subdivision (b). The court opined that under section 425.16, subdivision (e)(2), "a statement is 'in connection with' litigation . . . if it relates to the substantive issues in the litigation and is directed to

persons having some interest in the litigation.” (*Neville, supra*, 160 Cal.App.4th at p. 1266, fn. omitted.) Similarly, a statement is privileged under Civil Code section 47, subdivision (b), if it is “‘reasonably relevant’ to pending or contemplated litigation[,]” which makes Civil Code section 47, subdivision (b)’s requirement “‘analogous to the ‘in connection with’ standard of section 425.16, subdivision (e)(2).” (*Neville, supra*, 160 Cal.App.4th at p. 1266.) The court concluded the letters “related directly” to the employer’s claims against the ex-employee, they were written to the employer’s customers, “persons whom [the employer] reasonably could believe had an interest in the dispute,” and they did not contain any statements of fact about the ex-employee that were not the based on the employer’s claim against the ex-employee. (*Id.* at pp. 1267-1268.) The court held the letters were “‘in connection with’” the employer’s underlying claim against the ex-employee under section 425.16, subdivision (e)(2). (*Neville, supra*, 160 Cal.App.4th at p. 1268.) The court also concluded the fact the employer ultimately filed a claim against the ex-employee is evidence he had a “good faith” belief at the time he sent the letters that litigation was probable. (*Id.* at pp. 1269-1270.)

Like *Neville*, Coletti’s statements, both in the Letter and at the deposition, were concerned with and in good faith anticipation of litigation under the UFTA. Coletti made his statements to Jones, who certainly had an interest in the dispute. Finally, although Coletti could have been far more diplomatic in his approach, Carmelle’s expertise in asset protection and her alleged efforts to escape detection for prior fraudulent asset protection activity was relevant to a claim under the UFTA.

Carmelle’s reliance on *Flatley, supra*, 39 Cal.4th 299, and *Paul v. Friedman* (2002) 95 Cal.App.4th 853 (*Paul*), is misplaced. *Flatley, supra*, 39 Cal.4th at page 305, concerned plaintiff’s suit for civil extortion and related claims against defendant. In concluding defendant could not avail himself of the anti-SLAPP statute because his speech was illegal as a matter of law and unprotected, the court stated: “We conclude, therefore, that where a defendant brings a motion to strike under section 425.16

based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra*, 39 Cal.4th at p. 320.) Here, Defendants did not concede and the evidence does not conclusively establish Coletti's statements were illegal as a matter of law. (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654 [*Flatley* meant "'illegal'" to mean criminal].) Therefore, *Flatley* is inapposite.

Paul, supra, 95 Cal.App.4th at pages 867-868, is also inapt. In that case, the court opined, "[A] lawyer's attempt to inject an issue into a proceeding does not render the issue relevant, nor can the attempted injection of an irrelevant matter transform it into an issue 'under consideration or review' in the proceeding." Here, Coletti did not attempt to interject an irrelevant issue into the judicial proceeding. As we explain above, Carmelle's ability to hide Coastal's assets would be at issue in an anticipated UFTA cause of action. Thus, Coletti's statements in the Letter and at the deposition were in furtherance of his right of petition or free speech.²

Probability of Prevailing

To establish a probability of prevailing on one or more of her causes of action, Carmelle was required to make a prima facie showing of facts that would, if proved at trial, support a judgment in her favor. (§ 425.16, subd. (b).) The record shows Carmelle could not satisfy her burden because all the alleged acts fell within the litigation privilege of Civil Code section 47, subdivision (b). (*Flatley, supra*, 39 Cal.4th at p. 323 [litigation privilege substantive defense plaintiff must overcome to demonstrate

² Because of our conclusion, we deny Defendants' motion to augment the record on appeal and request for judicial notice.

probability of prevailing]; *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 381 (*City of Costa Mesa*) [same].)

As another panel of this court explained in *A.F. Brown, supra*, 137 Cal.App.4th at pages 1126-1127, “The litigation privilege shields any ‘publication or broadcast’ made ‘[i]n any . . . judicial proceeding.’ (Civ. Code, § 47, subd. (b).) ‘The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] Put another way, application of the privilege does not depend on the publisher’s “motives, morals, ethics or intent.” [Citation.] [¶] Under the “usual formulation,” the litigation “privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or 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.]’ [Citation.] The privilege extends to ‘any publication . . . that is required [citation] or permitted [citation] 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 invoked.’ [Citation.]”

Here, Coletti made his statements in his good faith anticipation of a claim under the UFTA. Contrary to Carmelle’s claim otherwise, the fact Coletti made the statements outside the courtroom is not fatal because the privilege extends to prelitigation statements. (*City of Costa Mesa, supra*, 214 Cal.App.4th at p. 381 [litigation privilege extends to prelitigation statements].) Second, Coletti, acting as plaintiff’s attorney, was authorized to participate in UFTA litigation. Third, Coletti made his statements in anticipation of a claim under the UFTA because he believed Carmelle, who was an expert in asset protection, was assisting Coastal in hiding assets. Finally, as we explain above, Coletti’s statements concerning Carmelle’s background, though unskillfully stated, were logically related to ensuring the plaintiff in the *Estrada* litigation could recover on a potential judgment under the UFTA. Carmelle’s claims allege communicative conduct

that is barred by the litigation privilege. Thus, we conclude the trial court properly granted the anti-SLAPP motion.

DISPOSITION

The order is affirmed. The motion to augment the record and request for judicial notice are denied. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.