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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VALERIE B. BOSTON,

Plaintiff and Respondent,

v.

ROSALYN LUCILE BINNING et al.,

Defendants and Appellants.

G049362

(Super. Ct. No. 30-2013-00649361)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Hart King, C. William Dahlin and Rhonda H. Mehlman for Defendants and Appellants.

Valerie B. Boston, in pro. per., for Plaintiff and Respondent.

Rosalyn Lucile Binning, individually and as trustee of the Rosalyn Lucile Binning Revocable Trust (hereafter referred to in the singular as Binning), appeals from an order denying her special motion to strike (anti-SLAPP motion),<sup>1</sup> an action filed against her by her daughter Valerie B. Boston concerning ownership of residential real property. Boston has lived in the property owned by her mother, Binning, for 37 years but she claims the property belongs to her—given to her by her mother as a wedding gift with title remaining in her mother’s name so as to avoid potential claims by or against Boston’s now ex-husband. When their relationship soured and Binning threatened Boston with eviction, Boston filed the instant action seeking among other things to quiet title to the property. Binning contends Boston’s complaint arose out of protected activity—namely, the service upon her daughter of a 60-day notice to quit followed by filing an unlawful detainer action—and because Boston made no showing she had a probability of prevailing, the trial court should have granted the anti-SLAPP motion. We find no error and affirm the order.

## FACTS AND PROCEDURE

### *The Complaint*

The operative complaint is the first amended complaint filed June 3, 2013 (the complaint). Boston has at all times been acting in propria persona. As the trial court aptly observed in its ruling “the [pleading] is a mess.” It is a 17-page disjointed rant about a family’s broken promises, rife with inconsistencies, followed by some 65 pages of exhibits. But from it we can discern the following factual allegations and legal claims.

The complaint alleged that in 1974, Boston got pregnant. Binning promised Boston if she married the father, Binning would buy her a house, but if Boston

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

did not marry the father, Boston would be disinherited and banished from the family. Boston chose the former option and married the man in 1974.

Boston alleged Binning purchased the subject property in 1977, a duplex in Costa Mesa. Boston “accepted said property as a delayed ‘Wedding Gift’ upon moving in. [Binning] promised [Boston] she could live in said property her entire life, and at a later date, give the gift of said property to her children and/or sell said property if [Boston] so desired.” Boston and her family lived in one unit and Boston managed the property by renting the other unit, which generated income to provide funds to pay the mortgage and insurance. Binning told Boston she need only provide enough funds to cover expenses. Around the time the property was purchased, Boston and her husband began divorce proceedings. Boston’s husband “had a drinking problem [and Boston] did not want to [lose] her home because of any incident involving [him].” Accordingly, she and Binning agreed “it would be best to leave [the] property in the ‘TRUST.’” Boston and her husband’s divorce became final in 1978.

For the next 37 years, Boston lived in the property and she was “[m]anager . . . providing an un calculate [*sic*] amount of moneys, time, labor, paint, supplies of many kinds to maintain said property, as per her promise to [Binning].” Boston relied on her mother’s promise the property was hers.

Boston alternately alleged she “maintained [the] property as per the agreement[,]” and that as “trustee” Binning failed to live up to her part of the agreement by failing to maintain the property “from the beginning of the promise, after [Boston] took possession of the Gift (said property).” Binning took out a \$102,000 loan on the property for repairs but did not perform them. Boston alleged the property was overtaken with “‘Black Mold,’” a “Suspicious White Powder,” rats, and other vermin—and it was so bad that by 2013, she had to sleep in the yard.

Boston alleged she was a “[six] time [c]ancer [s]urvivor.” In 2006, when Boston was “believed to be on her death [bed,]” Binning said she would alter the

“Trust” to make sure all Boston’s assets would go equally to her children, but she did not do so. Boston’s complaint contained allegations her mother was fickle and would make frequent “reversal[s]” of promises she made. Boston alleged that over the years, her mother “with regularity (every 5-6 years) [would] threaten [Boston] to take legal action to remove [her] and her family from the property . . . .” Boston alleged Binning, now 85 years old, was being improperly influenced by a specific realtor who wanted to broker a sale of the property. Boston alleged her mother and the realtor were just trying to outlast her—waiting for her to die so they could sell the property out from under Boston’s children. Before Boston’s last cancer surgery, “[Binning] was tire [sic] of [Boston] and wanted to dissolve there [sic] relationship (as [Binning] did with [Boston’s] sister previously) and sell said property, suggesting [Boston] should look for property in Hawaii.” In 2012, Boston found property in Hawaii and a buyer for the Costa Mesa property, but Binning changed her mind. Boston’s complaint included as an exhibit a 60-day notice to quit served on her by Binning in March 2013, and made references to the notice to quit.

Boston’s complaint contained three causes of action. The first was to quiet title. Boston essentially alleged she was the equitable owner of the property given to her as a gift by virtue of her mother’s promise 37 years earlier, which was “consummated upon [Boston’s] occupancy of [the] property . . . .” Service of the 60-day notice to quit would deprive her of “full and exclusive enjoyment of said property a Wedding Gift.” Boston alleged “she has the right to, and at all times claimed to have the right to occupy and use said property; as [she] has done so continuously and uninterrupted for 37 years, and has established prescriptive and adverse rights to said property.” She sought to “quiet title against [Binning] on said property . . . as of the date this [c]omplaint was filed.”

The complaint's second cause of action was for declaratory relief, seeking "a judicial determination of the rights and duties of the respective parties regarding their [sic] interests in said property, and a declaration as to which party's contents [sic] and interpretation of the promise is correct." "Without such a judicial declaration, [Binning's] claims and actions create a cloud on [Boston's] right to said property."

The complaint's third cause of action for injunctive relief alleged, "On or around April 29, 2013, and continuing to this date, [Binning] has threatened and taken action . . . against [Boston] regarding her possession of said property," including taking a loan against the property that had previously been paid in full through Boston's hard work and diligence in managing and maintaining the property, but also by failing to maintain the property (allowing black mold, vermin etc. to infest the premises), "interfere[ing] with [Boston's] right to the healthy, peaceful and quiet enjoyment of said property, and creates a cloud on [her] right title and interest in said property."

The complaint's prayer for relief sought to quiet title in the property in Boston in accordance with the "'Wedding Gift'" and sought various items of damage relating to needed maintenance and repairs to the property.

#### *The Anti-SLAPP Motion*

Binning filed an anti-SLAPP motion seeking to strike Boston's complaint. She contended all Boston's causes of action arose out of the protected activity of serving a 60-day notice to quit in preparation for filing an unlawful detainer action. She also contended Boston would be unable to meet her burden of demonstrating a probability of prevailing on any of the causes of action.

Binning's anti-SLAPP motion was supported by her declaration stating the property was owned by her personally "even before 1974" and after 1989 was owned by her trust. At no time did Binning promise the property to Boston as a gift, and it was never in any way conveyed to Boston. Since 1974, Boston occupied the property as a

“permissive month to month resident.” Binning requested Boston to vacate the property “most recently” in early 2013, but Boston refused. On March 15, 2013, Binning served Boston with a 60-day notice to quit, and she was currently proceeding with an unlawful detainer action (*Binning et al. v. Boston* (30-2013-00653779-CL-UD-HLH), the Unlawful Detainer Action).

Boston did not file opposition to the anti-SLAPP motion. The motion was heard on July 26, 2013, and the trial court took the matter under submission.

On August 20, 2013, Boston filed an ex parte application, which is not in the record but that apparently pertained to a request by Boston for possession of the property. The ex parte application was denied. In her opposition to the ex parte application, Binning requested that the trial court take judicial notice of documents from the Unlawful Detainer Action. The documents included a judgment in Binning’s favor entered August 13, 2013, and a writ of possession for the property issued August 14, 2013. The documents also included the August 9, 2013, minute order that followed the trial in the Unlawful Detainer Action. The court gave an extensive recitation of the evidence presented in the unlawful detainer trial concerning Binning’s purchase of the property in 1976 and its continuous ownership by Binning and/or her trust; Binning’s payment of all mortgage expenses, taxes, insurance, utilities, and maintenance expenses since 1976; and evidence concerning Boston’s claim the property was promised to her as a wedding gift. The court in the Unlawful Detainer Action rejected Boston’s claim she had any ownership interest in the property and found Binning was at all times the sole owner of the property.

### *The Ruling*

On August 29, 2013, the trial court issued its minute order denying Binning’s anti-SLAPP motion but specifically suggested Binning should “pursue [some] other procedural remedy.” The court found Boston’s complaint did not “arise out of” protected activity by Binning. Although Boston’s complaint referenced Binning’s

service of a notice to quit “the essence of the legal claim is one of property ownership. [Boston] asserts ownership of the property. She requests the [c]ourt to determine her interest in the [p]roperty, based on promissory estoppel and/or her adverse possession of the property. [¶] The claim does not appear to ‘arise from’ [Binning’s] serving of a notice to quit, but digging deeper into the past, it arises from the allegation that [Binning] gifted the [p]roperty to [Boston] 36 years ago with an oral promise that it would belong to her if she performed specified acts, that [Boston] alleges she performed.” “[Boston’s] claim of ownership and title are not based on [Binning’s] serving a 60-day notice, or threatening her with eviction. Those protected acts may have triggered [Boston] to file this suit, but do not appear to be the bases of her claim of ownership.” Binning appeals from the order denying her anti-SLAPP motion.<sup>2</sup>

## DISCUSSION

### *A. General Principles*

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

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<sup>2</sup> In her reply brief, Binning points out defects in Boston’s respondent’s brief and its failure to comply with the California Rules of Court, and requests we strike the respondent’s brief. Binning did not file a motion to strike the brief, and we may disregard the noncompliance. (Cal. Rules of Court, rule 8.204(e)(2)(B).)

complaints 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*).) We review a trial court’s ruling on an anti-SLAPP de novo. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675.)

### *B. Arising Out of Prong*

Binning contends the trial court erred by concluding she did not satisfy the “arising out of” prong. We disagree.

“[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*).)

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 in 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).)

In determining whether a defendant has met its first prong burden, the trial court “shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2); see *City of Cotati*, *supra*, 29 Cal.4th at p. 79; *Equilon Enterprises*, *supra*, 29 Cal.4th at p. 67.) Although 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 activity[.]” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 7:991, p. 7(II)-56; see *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458), we agree with the trial court Binning did not make that showing here.

Binning contends Boston’s complaint arises entirely from her protected act of serving a 60-day notice to quit and then filing an unlawful detainer action. There can be no dispute service of an eviction notice and/or pursuit of an unlawful detainer action is protected petitioning activity. (See *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281-282 (*Birkner*) [eviction notice, if legally required before instituting unlawful detainer action, and prosecution of unlawful detainer action is protected petitioning activity]; see also *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1245 (*Copenbarger*); *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1483 (*Feldman*).) But whether the “arising from” requirement is satisfied depends on the “‘gravamen or principal thrust’” of the claim. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 (*Episcopal Church Cases*).) A cause of action does not arise from protected activity for purposes of the anti-SLAPP statute if the protected activity is merely incidental to the cause of action. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

*Episcopal Church Cases, supra*, 45 Cal.4th 467, is instructive. In that case, when a local parish church disaffiliated with the larger general church, a dispute arose over ownership of the local church building and property. The diocese of the general church sued the individuals associated with the local church to resolve the property dispute. (*Id.* at pp. 474-476.) The California Supreme Court rejected the argument the action arose out of the local church’s protected activity of expressing its disagreement with and disaffiliating from the general church. The Court concluded the action was based on a property dispute and the property dispute, rather than any protected activity, was the gravamen or principal thrust of the action. (*Id.* at p. 477.) The Court observed, “[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.] 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.’ [Citation.] In filing this action, the . . . [d]iocese sought to resolve a *property dispute*. The property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is ‘the gravamen or principal thrust’ of the action. [Citation.] The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit.” (*Id.* at pp. 477-478.)

Similarly here, while Binning’s service of a 60-day notice to quit and her subsequent prosecution of the Unlawful Detainer Action are part of the factual background of the present dispute, and may have prompted Boston’s filing of her complaint, they are not the gravamen of the dispute. The dispute here is primarily about ownership of the real property and whether a mother’s alleged 37-year-old promise to gift real property to her daughter is enforceable.

The cases cited by Binning applying the anti-SLAPP statute in the landlord-tenant context are distinguishable. In *Birkner, supra*, 156 Cal.App.4th 275, landlord served tenants with a 60-day notice to terminate a tenancy under a rent control ordinance. Tenants notified landlord they were protected tenants under the ordinance and could not be evicted, but landlord refused to rescind the termination notice. Tenants filed a complaint for wrongful eviction, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress. (*Id.* at pp. 278-279.) The appellate court held that because the *sole basis* for tenants' lawsuit was the service of the termination notice and landlord's refusal to rescind it, the complaint arose out of protected activity under the anti-SLAPP statute. (*Id.* at pp. 281-283.)

In *Feldman, supra*, 160 Cal.App.4th 1467, after plaintiffs subleased a rent-controlled apartment and took possession, landlord defendant informed them they were unapproved subtenants and demanded they pay higher market rent. Landlord then commenced an unlawful detainer action but dismissed it when tenants vacated the premises. (*Id.* at p. 1475.) Tenants sued landlord for retaliatory and wrongful eviction, negligence, breach of contract, and unfair business practices. The appellate court concluded that with one minor exception, tenants' complaint was "based upon the filing of the unlawful detainer, service of the three-day notice, and [landlord's] statements in connection with the threatened unlawful detainer. These activities are not merely cited as *evidence* of wrongdoing or activities 'triggering' the filing of an action that arises out of some other independent activity. These *are* the challenged activities and the bases for all causes of action . . . ." (*Id.* at p. 1483.)

In *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169 (*Wallace*), the court considered only whether the allegations pertaining to only two of the complaint's 13 causes of action arose from protected activity. Those two causes of action explicitly cited the "three-day notice to quit and [the] filing of the unlawful detainer action" as wrongdoing in and of themselves, and thus the allegations made sufficient reference to

such activity to make it more than “incidental” to the two claims at issue, bringing them within the ambit of the anti-SLAPP statute. (*Id.* at pp. 1178, 1182-1184, 1194.)

Here, unlike *Birkner*, *Feldman*, and *Wallace*, the complaint’s quiet title cause of action makes references to Binning’s threats to evict Boston from the property and her service of a 60-day notice to quit, but the essential allegations are about a dispute over property ownership. Boston claimed ownership of the property based on promissory estoppel and/or adverse possession. The dispute arose not from Binning’s commencing eviction proceedings, but from the allegation Binning gifted the property to her 37 years earlier with the oral promise that if Boston married the father of her child (which she did) the property would be hers. Similarly, the complaint’s second cause of action for declaratory relief seeks a determination of the ownership of the property, based largely on the claimed promises of a gift made by Binning years and years ago. And the complaint’s third cause of action for injunctive relief makes no reference to the unlawful detainer proceeding but instead objects to the threat posed to Boston’s possession of the property by the loan Binning took out against the property and her failure to adequately maintain it, allowing it to become uninhabitable. (See *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154 [complaint challenging landlord activity preceding termination notice not subject to anti-SLAPP motion]; *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308 [same].) Accordingly, we conclude the trial court correctly determined the allegations of the complaint did not arise out of protected activities and thus the complaint was not subject to an anti-SLAPP motion.

### *C. Probability of Prevailing*

The limit of our holding here is that because Binning did not meet her threshold burden of demonstrating the acts on which Boston’s complaint is based are protected for purposes of the anti-SLAPP statute, the complaint is not subject to a special

motion to strike. Accordingly, we need not consider whether Boston met her burden of demonstrating a probability of prevailing. (*Copenbarger, supra*, 215 Cal.App.4th at p. 1250.)

#### DISPOSITION

The order denying the anti-SLAPP motion is affirmed. In the interests of justice, the parties shall bear their own costs on this appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.