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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLORA FLORES,

Plaintiff and Respondent,

v.

EDWARD R. MUNOZ et al.,

Defendants and Appellants.

G051221

(Super. Ct. No. 30-2013-00671911)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Charlston, Revich & Wollitz and Tim Harris for Defendants and Appellants.

James F. Rumm and Diana Lopez for Plaintiff and Respondent.

* * *

Francisco Flores (Francisco)¹ and his wife Flora leased property from Albert DeMascio and sublet the property. The subtenants sued the Floreses for breach of the sublease. Francisco retained defendant, Attorney Edward R. Munoz and his law firm (Munoz), to represent him in the action by the subtenants and to bring an unlawful detainer action against the subtenants. The complaint alleged Munoz thereafter undertook representation of DeMascio, advised DeMascio to breach the lease he had with the Floreses and to enter into a lease with the Floreses' subtenants, the effect of which was to strip the Floreses of their interest in the restaurant on the property.

The second amended complaint of Francisco and Flora allege a number of causes of action, including malpractice, breach of contract, breach of fiduciary duty, and interference with prospective economic advantage. Flora is not named as a plaintiff in the malpractice, breach of contract, breach of a fiduciary duty, and constructive fraud causes of action. Francisco and Flora are each named in the remaining causes of action. Munoz filed an anti-SLAPP special motion to strike Flora's allegations pursuant to Code of Civil Procedure section 425.16.² The superior court denied the motion. We affirm, finding the charged acts of advising DeMascio to break his lease with the Floreses and to enter into a lease with the Floreses' subtenants is not protected activity within section 425.16.

I

FACTS AND PROCEDURAL SETTING

The following facts are taken from the complaints in this matter and evidence submitted in connection with Munoz's anti-SLAPP motion to strike. Albert DeMascio owns property on which a restaurant is located (the property). He leased the

¹ We use the first names of Francisco and his wife Flora, who later became a plaintiff as well, for ease of reading and because they share the same last name.

² All further undesignated statutory references are to the Code of Civil Procedure unless otherwise indicated.

property to Francisco and Flora. The Floreses subleased the property to two subtenants, Salvador Barajas and Salvador Morales (subtenants). On November 1, 2012, the subtenants filed a complaint against the Floreses for fraud, breach of contract, rescission, specific performance, and for an accounting in connection with the sublease. That complaint alleged Francisco told the subtenants he had a long-term lease on the property. Under the terms of the sublease, the subtenants were to pay Francisco \$10,000 a month for one year with a right to purchase the restaurant business at the end of the one-year period. When the subtenants attempted to purchase the business, Francisco informed them he did not have a long-term lease on the property and therefore, could not sell the restaurant business.

Francisco retained Munoz on November 8, 2012, to represent him in the lawsuit brought by the subtenants, and to file an unlawful detainer action against the subtenants. Although the second amended complaint alleged Munoz told Francisco only the owner can bring an unlawful detainer action, Francisco testified at his deposition that Munoz told him it would be *quicker* to have the owner initiate the unlawful detainer. The complaint further alleged Munoz subsequently entered into an attorney-client relationship with DeMascio and disclosed to DeMascio confidential information obtained from Francisco, in violation of Munoz's duties to Francisco. Presumably that confidential information consisted of the fact that the Floreses had sublet the property. The complaint also alleged Munoz advised DeMascio to breach his lease with the Floreses and enter into a lease agreement directly with the Floreses' subtenants, and that DeMascio did as Munoz advised.

Munoz demurred to Francisco's original complaint in this matter, alleging Francisco's wife Flora was an indispensable party to the litigation. The court sustained the demurrer with leave to amend and directed Francisco to either join Flora as a party or plead facts explaining why the action can proceed without her. Francisco thereafter filed a first amended complaint, alleging nine causes of action, including malpractice, breach

of contract, breach of fiduciary duty, and interference with prospective economic advantage.

Francisco further alleged in the first amended complaint that Flora assigned all her claims against Munoz to him. Shortly after he filed the first amended complaint, Francisco testified in his deposition that no assignment had taken place. Munoz then brought a motion to dismiss the complaint, which Judge Robert D. Monarch treated as a motion to compel joinder. Francisco conceded Flora had an interest in the litigation, and the court ordered Flora joined in the complaint.

On May 14, 2014, the Floreses filed a second amended complaint. The legal malpractice, breach of fiduciary duty, breach of contract, and constructive fraud causes of action were alleged only by Francisco. Both Floreses were named as plaintiffs in the causes of action for interference with contractual relations, negligent interference with contractual relations, interference with prospective economic advantage, negligent interferences with prospective economic advantage, and negligent infliction of emotional distress.

Munoz filed a special anti-SLAPP motion to strike the causes of action alleged against him by Flora pursuant to section 425.16. The court's tentative decision was to deny the anti-SLAPP motion to strike based on Munoz's failure to demonstrate the causes of action arose from protected activity as required by section 425.16. The court noted that after Munoz forced Flora to be joined as a plaintiff she appeared to assert her own causes of action based on the attorney-client relationship established by her husband in connection with the property.

Munoz admitted a cause of action for legal malpractice is generally not subject to scrutiny under section 425.16, but argued Flora is not named as a plaintiff in the malpractice cause of action. The court stated it appeared Munoz was taking contrary positions in relation to Flora: first Munoz insisted she was a necessary party to the litigation in his demurrer, and now he seeks to have her dismissed from the complaint.

The court concluded the issue of whether Flora has a cause of action of her own would “stand or fall based on the discovery that [will be] undertaken.” The court acknowledged it is possible that Flora has claims independent of Francisco, but that it is also possible her claims are derivative of Francisco’s as she was married to him and his entering into an agreement with Munoz affected her rights as well.³ The court denied Munoz’s motion, concluding it was not clear that his conduct was protected.

II

DISCUSSION

“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) The Legislature has made SLAPP suits subject to a special motion to strike. (*Id.* at pp. 1055-1056.) “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.” (§ 425.16, subd. (b)(1).) A motion to strike pursuant to section 425.16 protects not only those individuals engaging in free speech or petitioning activity, but also an attorney’s acts in assisting the client’s exercise of the protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056 [“qualifying acts committed by attorneys in representing clients in litigation” qualifies as protected activity].)

³ In opposing Munoz’s demurrer to his original complaint, Francisco argued his lawsuit (now joined by Flora) was for “legal malpractice and derivative causes of action.” Although Flora is not named as a plaintiff in the legal malpractice cause of action alleged in the second amended complaint, she is named as a plaintiff in a number of the “derivative” causes of action.

In addressing the merits of a special motion to strike, the court engages in a two-step process. We engage in the same analysis in our de novo review. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) First, the court determines whether the cause of action arises from protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) 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).) “‘A cause of action “arising from” defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike.’ [Citations.] ‘Any act’ includes communicative conduct such as the filing, funding, and prosecution of a civil action. [Citation.]” (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) In determining whether the defendant is being sued for protected activity, we do not consider the merits of the plaintiff’s claims. (*Coretronic Corp. v. Cozen O’Connor* (2011) 192 Cal.App.4th 1381, 1389-1390.)

The second step—the plaintiff’s likelihood of prevailing—is reached only if the defendant demonstrates his activity is protected. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) This requires the plaintiff to show the complaint states a legally sufficient cause of action and to produce sufficient evidence to support a prima facie showing of facts that could support a judgment against the defendant. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.)

Flora's husband, Francisco, is also a plaintiff in this matter. It appears Munoz did not file a special motion to strike Francisco's causes of action (the same as Flora's except for the fact that he also alleged legal malpractice, breach of a fiduciary duty, and breach of contract causes of action) because legal malpractice suits brought by former clients are not generally subject to section 425.16. (See *Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 155 [cause of action arose from "undertaking a representation in which [the defendant] had an irreconcilable conflict of interest," not from protected activity]; *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 503 [agreeing with earlier cases that legal malpractice action does not arise out of protected activity]; *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 491 ["growing body of case law holds that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits"]; *Coretronic Corp. v. Cozen O'Connor, supra*, 192 Cal.App.4th at p. 1392 [protected activity was the setting of the claim, but not the "root" of the complaint for violating duty owed to plaintiff]; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1227 [conflicted representation does not arise out of protected activity]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1619-1620 [representation of party in violation of conflict of interest based on representation of former client does not arise out of protected activity]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 [defendant attorney's litigation activity was collateral to the core allegation that he breached a duty of loyalty owed to plaintiffs, his former clients]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 ["breach occurs not when attorney steps into court to represent the new client, but when he or she abandons the old client"]; but see Justice Perluss's dissent in *Sprengel v. Zbylut, supra*, 241 Cal.App.4th at p. 158.) A malpractice action does not have a chilling effect on advocacy. Rather, the threat of a malpractice action "encourages the attorney to petition competently and zealously." (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532,

1540.) As the *Kolar* court noted, “This is vastly different from a third party suing an attorney for petitioning activity, which clearly could have a chilling effect.” (*Ibid.*)

We now turn to the issue of whether Flora’s causes of action arise from Munoz’s participation in protected activity. In doing so, we are mindful of the requirement of the anti-SLAPP statute that we construe its provisions “broadly.” (§ 425.16, subd. (a).) Accordingly, we look to “the principal thrust or gravamen” of Flora’s causes of action. (*Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 153.) The thrust or gravamen of a cause of action is determined by finding “what the cause of action is ‘based on.’ [Citation.]” (*Id.* at pp. 153-154.) In other words, “[d]etermining the gravamen of the claims requires examination of the specific acts of alleged wrongdoing and not just the form of the plaintiff’s causes of action. [Citation.]” (*Coretronic Corp. v. Cozen O’Connor, supra*, 192 Cal.App.4th at p. 1389.)

Here, Flora alleged Munoz violated a duty of loyalty owed to Francisco, her cotenant and husband, but the thrust of her claim is that Munoz interfered with their lease with DeMascio and their sublease with their subtenants by representing DeMascio (an alleged conflict of interest) and convincing him to negotiate a lease with the Floreses’ subtenants, cutting out the middle men—the Floreses—to their detriment. Negotiating a lease does not generally involve protected activity. It did not involve a statement or writing made before a legislative, executive, or judicial body (§ 425.16, subd. (e)(1)), and was not undertaken in connection with an issue under review by a legislative, executive or judicial body (*id.*, subd. (e)(2)),⁴ or made in a place open to the public or in a public forum on a issue of public interest (*id.*, subd. (e)(3)). Therefore, to be considered protected activity, Munoz’s conduct must qualify as having been made “in furtherance of

⁴ DeMascio was not a party to the Floreses’ subtenants’ lawsuit against the Floreses.

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.” (*Id.*, subd. (e)(4).)

We can summarily dispose of the free speech issue. The lease or sublease with the Floreses’ subtenants was not a public issue or an issue of public interest. It was purely a private matter.

We now turn to the issue of whether Munoz’s alleged conduct occurred in furtherance of DeMascio’s right of petition. “Filing a lawsuit is an exercise of one’s constitutional right of petition, and statements made in connection with or in preparation of litigation are subject to section 425.16. [Citation.]” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) Subdivision (e)(4) of section 425.16 does not require the petitioning activity be done on a defendant attorney’s own behalf. Attorneys are protected for their activities in furtherance of their client’s right of petition. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479-480.) Still, not all acts undertaken by attorneys constitute protected activity. Negotiating a lease, in and of itself, is not protected activity within the meaning of section 425.16. (Cf. *Moore v. Shaw* (2004) 116 Cal.App.4th 182 [drafting an agreement terminating a trust is not protected activity].) Because the drafting of a lease between DeMascio and the Floreses’ subtenants was not an act in furtherance of petitioning, it was not protected activity and Flora’s causes of action were not subject to scrutiny under section 425.16. Consequently, the superior court did not err in denying Munoz’s special motion to strike.

Because we conclude Flora’s complaint was not subject to an anti-SLAPP special motion to strike, we need not address Munoz’s contention that Civil Code section 47, subdivision (b), bars her actions. As stated above, the viability of a plaintiff’s complaint is only an issue in a special motion to strike pursuant to section 425.16 if the defendant carried his or her burden of demonstrating the action arose out of protected activity. (*Loanvest I, LLC, v. Utrecht, supra*, 235 Cal.App.4th at p. 505; *Coretronic Corp. v. Cozen O’Connor, supra*, 192 Cal.App.4th at p. 1393.)

III
DISPOSITION

The order of the superior court is affirmed. Flora Flores shall recover her costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.