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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DANIEL C. SUSOTT,

Plaintiff and Appellant,

v.

EVAN AULD-SUSOTT,

Defendant and Respondent.

H037066

(Monterey County

Super. Ct. No. M103418)

I. INTRODUCTION

Respondent Evan Auld-Susott is the nephew of appellant Daniel C. Susott. They had a dispute regarding the care of 89-year-old Kathryn Susott, who was Evan's grandmother and Daniel's mother.¹ Evan held a durable power of attorney for Kathryn. He was also the trustee of several Sussott family trusts as well as the general partner of the Susott family's limited partnership. Daniel was a beneficiary of the Sussott family trusts and a limited partner of the family partnership.

At the time the Susott family decided to move Kathryn from her Carmel home into an assisted living facility, Daniel was residing in Kathryn's home. On the day Kathryn moved out, Evan caused a three-day notice to quit to be served on Daniel. Evan also

¹ Since the Susott family members have the same or a similar surname, we will refer to them by their first names for purposes of clarity and not out of disrespect.

sought a temporary restraining order (TRO) limiting Daniel's contact with Kathryn in the assisted living facility.

Daniel subsequently filed a first amended complaint naming Evan as one of the defendants. He alleged, among other things, that Evan had breached his fiduciary duty as a trustee and general partner. Evan responded to the complaint by bringing a special motion to strike under Code of Civil Procedure section 425.16,² the anti-SLAPP³ statute, which provides that a cause of action arising from constitutionally protected speech or petitioning activity is subject to a special motion to strike unless the plaintiff establishes a probability of prevailing on the claim. (§425.16, subd. (b)(1).) The trial court granted the motion and also awarded Evan attorney's fees in the amount of \$20,000.

On appeal, Daniel contends that the trial court erred in granting Evan's anti-SLAPP motion because the cause of action for breach of fiduciary duty does not arise from petitioning activity protected under section 425.16. Daniel also contends that the award of attorney's fees was unreasonable. For the reasons stated below, we find no merit in Daniel's contentions and therefore we will affirm the trial court's orders.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The First Amended Complaint

In May 2010, Daniel filed a first amended complaint (hereafter, the complaint) naming Evan as one of the defendants.⁴ Our summary of the complaint focuses on the allegations concerning Evan, since he is the only defendant involved in this appeal.

According to the complaint, Evan was appointed trustee of several Susott family trusts and managed millions of dollars of assets held in the Susott family limited

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

³ "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

⁴ Only the first amended complaint is at issue in this appeal.

partnership, The Susott FLP. In 2006, Evan began serving as Kathryn's agent under a durable power of attorney, which gave him sole responsibility for her standard of living and medical care.

From 1994 until 2009, Kathryn lived at her home in Carmel, where she was cared for by live-in staff. Daniel alleged that Evan and other members of the Susott family devised a plan to remove Kathryn from her home in order to save \$100,000 in her annual care costs. At that time, Daniel, a physician, was living in Kathryn's home as her "invited guest." He believed that Kathryn should remain in her home and not be moved to an assisted living facility.

On January 27, 2009, Kathryn was admitted into an assisted living facility in Monterey. On the same day, Evan "as trustee executed a three-day notice to [Daniel] to quit" Kathryn's residence. According to Daniel, "[Evan] did this despite his knowledge that [Daniel] was residing there as a guest of his mother [Kathryn] and had been providing for her medical care and well-being, and despite [Evan's] knowledge that [Kathryn] was an owner of the premises and that she did not desire the eviction of her son from the premises."

Thereafter, on February 2, 2009, Evan allegedly filed a request in superior court for an order barring Daniel from any contact with Kathryn and requiring him to stay away from Kathryn's Carmel home and the assisted living facility where she resided. Daniel also alleged that Evan and the other defendants "demanded and received an order that [Kathryn] be subjected to a prolonged, invasive and undignified medical examination for anal rape . . . solely as a pretext, justification and means to obtain grounds for a court order"

The complaint further stated that "defendants requested and received orders barring [Daniel] from communicating with employees or residents of [the assisted living facility]. . . ." Defendants also, on February 5, 2009, allegedly "sought, obtained and caused a Temporary Restraining Order to be served on [Daniel], barring his access to his

mother [Kathryn], who was at that point being held against her express will and desires as a virtual prisoner at [the assisted living facility].” According to Daniel, on February 8, 2009, he was told by Evan that there was nothing he could do about the TRO “until a stipulated agreement was accomplished.” Kathryn died at the assisted living facility in February 2009.

Based on these allegations, the complaint stated causes of action against Evan for intentional infliction of emotional distress, conspiracy, aiding and abetting, breach of fiduciary duty, and wrongful death.

B. Evan’s Special Motion to Strike Under Section 425.16

In October 2010, Evan filed a special motion to strike the complaint under the anti-SLAPP statute, section 425.16.

1. Memorandum of Points and Authorities

In his memorandum of points and authorities, Evan argued that the complaint satisfied the two-part test for determining whether a complaint may be stricken under section 425.16 because (1) it arose from petitioning activity—the filing of a TRO and an eviction notice—that is protected under section 425.16, subdivision (e); and (2) Daniel could not demonstrate a probability of prevailing because all causes of action were barred by the litigation privilege (Civ. Code, § 47, subd. (b)).

Evan also argued that the fourth cause of action for breach of fiduciary duty was barred by the doctrines of res judicata and collateral estoppel because the superior court had issued an October 9, 2009 order approving Evan’s report on the first accounting for the Kathryn C. Susott Living Trust, the John L. Susott Exempt Marital Trust, and the John L. Susott Non-Exempt Marital Trust.

2. Evan’s Supporting Declaration

In his supporting declaration, Evan asserted that in 2009 Kathryn was frail and suffering from Alzheimer’s disease. She lived in her home with caregivers present nearly “24/7.” According to Evan, Daniel “was a frequent if not perpetual visitor at the house.

He did not pay rent and used the residence as a place where he could entertain his friends. He also used Kathryn's credit card on many occasions”

Daniel and his brother, John Susott (Evan's father), were hostile to each other. Evan stated that the decision to move Kathryn into an assisted living facility was a family decision and “was made partly as a temporary move to see how she adjusted and partly to diffuse the ill will coming from [Daniel] and to provide respite from the conflict existing between [Daniel] and [John]. The move was not motivated solely by finances.”

Evan further stated that as trustee, he made the decision to evict Daniel from Kathryn's home after their negotiations failed, in order “to protect Kathryn and her property.” However, Evan did not take any action to enforce the three-day notice to quit, and Daniel voluntarily moved from Kathryn's home a few days after Kathryn was admitted to the assisted living facility on January 27, 2009.

On February 2, 2009, while Kathryn was in the assisted living facility, “at approximately 3 am, [Daniel] broke into [the assisted living facility] and tried to kidnap Kathryn. He was confronted by staff and refused to leave. When the police were called, [Daniel] left.” Thereafter, Evan sought a TRO to protect Kathryn. According to Evan, “[l]egal proceedings against [Daniel] were the result of his conduct, not because I or anyone else wanted to cause him harm. I needed him to stop his selfish behavior and to work within the family for Kathryn's sake—and his.” However, the TRO hearing was vacated after Daniel agreed to abide by a negotiated stipulation that allowed him to continue visiting Kathryn under certain restrictions.

Evan additionally asserted that Daniel “was fairly and evenly treated by me as trustee, as general partner of the limited partnership and as agent for Kathryn. In retribution for my use of the legal process, he filed this complaint.” Further, Evan stated, “[m]y fiduciary position and obligations as a Trustee were fully disclosed through the requisite accounting that had to accompany my Petition to Resign as Trustee. . . . [Daniel] had the opportunity to review, object, and even hire counsel to challenge any or

all of the information as presented. No objections or opposition was made to said Petition.”

C. The Hearing on the Motion

Daniel did not file written opposition to Evan’s anti-SLAPP motion. Instead, he filed a second amended complaint. At the hearing on the motion held on October 29, 2010, Daniel’s counsel explained that “[m]y error [was] in assuming mistakenly that the second amended complaint would moot the issues of the special motion to strike” Daniel therefore requested a continuance to allow him to file an opposition to the anti-SLAPP motion. The trial court denied the request for a continuance, based on the decision in *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1280, in which the appellate court ruled that a plaintiff may not avoid a pleadings challenge pursuant to section 425.16 by amending the complaint before the anti-SLAPP motion is heard.

However, the trial court allowed Daniel to argue in opposition to Evan’s anti-SLAPP motion during the hearing. Daniel generally argued that defendants’ alleged conduct was not constitutionally protected petitioning activity within the meaning of section 425.16 because their conduct constituted illegal extortion. With respect to the cause of action against Evan for breach of fiduciary duty, Daniel asserted that Evan’s anti-SLAPP motion was untimely filed. Daniel also maintained that his lawsuit had a probability of success because, if he were permitted to submit evidence in opposition to the motion, the evidence would show that there were alternatives to the TRO and the attempt to evict Daniel.

The trial court ruled from the bench as follows regarding Evan: (1) no party was prejudiced by any “timeliness issues there may have been”; (2) the request for judicial notice of the filing of the TRO was granted; (3) Evan’s anti-SLAPP motion was granted on the ground that the complaint arose from protected activity, including Evan’s actions as a trustee in pursuing the eviction notice and the TRO; (4) the gravamen of the cause of

action for breach of fiduciary duty was protected activity; and (5) counsel were invited to submit an ex parte motion for attorney's fees.

D. The Trial Court's Orders

The order granting Evan's anti-SLAPP motion to strike the complaint was filed on March 7, 2011. The order also states, "Fees are mandatory per the Statute; Moving Party to proceed on an Ex Parte Application basis to present request for reasonable attorneys fees and costs, including notice of application hearing."

On May 9, 2011, Daniel filed a notice of appeal from the March 7, 2011 order granting Evan's anti-SLAPP motion. The notice of appeal includes this note: "Appeal will also be taken from an order granting mandatory attorney fees. An order has not yet issued as of the time of this appeal." Subsequently, on August 8, 2011, the trial court entered its order granting Evan's motion for attorney's fees and costs and awarding him attorney's fees of \$20,000 and costs of \$250.

III. DISCUSSION

On appeal, Daniel contends that the trial court erred in granting Evan's anti-SLAPP motion to strike the fourth cause of action for breach of fiduciary duty.⁵ He does not challenge the trial court's order with respect to the any other cause of action. Daniel also contends that the trial court erred by awarding an unreasonable amount of attorney's fees to Evan.

We will begin our evaluation of Daniel's contentions with an overview of section 425.16, the anti-SLAPP statute, followed by a discussion of the applicable standard of review.

⁵ An order granting a special motion to strike under section 425.16 is appealable. (§ 425.16, subd. (i).)

A. Section 425.16

Section 425.16 was enacted in 1992 in response to a “disturbing increase” in lawsuits brought for the strategic purpose of chilling a defendant’s rights of petition and free speech. (§ 425.16, subd. (a).)⁶ SLAPPs are unsubstantiated lawsuits based on claims arising from defendant’s constitutionally protected speech or petitioning activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

Section 425.16 applies to any 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” (§ 425.16, subds. (b)(1), (e)(4).) The stated purpose of section 425.16 is to encourage protected speech by permitting a court to promptly dismiss unmeritorious actions or claims that are 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); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278 (*Soukup*).)

Under section 425.16, the trial court evaluates the merits of a possible SLAPP by “using a summary-judgment-like procedure at an early stage of the litigation.” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The procedures authorized in the statute allow a defendant to stay discovery before litigation costs mount, obtain

⁶ Section 425.16, subdivision (a) provides: “The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.”

early dismissal of the lawsuit, and recover attorney’s fees. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197-198.)

A defendant seeking the protection of the anti-SLAPP statute has the burden of making the initial showing that the lawsuit arises from conduct “in furtherance of [a] person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue” (§ 425.16, subs. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at pp. 87-88.) Once the defendant has shown that the plaintiff’s claim arises from one of the section 425.16, subdivision (e) categories of protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.)

Thus, “ ‘[s]ection 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.] ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

B. *The Standard of Review*

“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.’ (§ 425.16, subd. (b)(2).) 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.]” (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3.)

Where, as here, the plaintiff has failed to submit written argument and evidence in opposition to the anti-SLAPP motion, the moving party defendant does not automatically prevail. As explained in *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869 (*Law Offices*), “[e]ven though plaintiff had not filed an opposition to defendants’ anti-SLAPP motion, defendants’ success was not guaranteed. In their motion to strike, defendants were required to make a ‘threshold showing that the challenged cause of action is one arising from protected activity. . . .’ [Citation.] Only if defendants met this requirement would plaintiff have been required to demonstrate a probability of prevailing on the claim in order to defeat the motion. [Citation.]” (*Id.* at p. 878.)

To demonstrate a probability of prevailing, the plaintiff “must show both that the claim is legally sufficient and that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. [Citations.]” (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271.) “An assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time. [Citation.] Such evidence must be *admissible*. [Citation.]” (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.)

Applying this standard of review, we will independently determine from our review of the record whether the breach of fiduciary cause of action in the complaint constitutes a SLAPP under section 425.16.

C. The Threshold Showing of Protected Activity

1. The Parties’ Contentions

On appeal, Daniel argues that Evan’s anti-SLAPP motion should be denied because the cause of action for breach of fiduciary duty is not a SLAPP since it does not arise from petitioning activity protected under section 425.16. Daniel asserts that he “is not suing because defendant [Evan] filed the eviction action, but because defendant [Evan] did not properly protect [Daniel’s] interests.” Daniel further explains that his “breach of fiduciary duty cause of action is based on, among other things, defendant

[Evan’s] failure ‘to make full and fair disclosure to [Daniel] of all material matters, to deal fairly, justly and honestly with [Daniel] and to be loyal to the interests of [Daniel] and to place [Daniel’s] interests before his own interests and to refrain from placing the interests of others before the interests of [Daniel]’”

Daniel also points to his allegation that Evan conspired with the other defendants “to evict and divest [Daniel] of his interest and deplete the value of his expectancy in real estate, personalty [*sic*] and family trust and partnership assets, by placing his and others’ financial and economic interests ahead of [Daniel’s] interests.” Alternatively, Daniel contends that the cause of action for breach of fiduciary duty is not barred by the doctrines of *res judicata* or collateral estoppel.

Evan disagrees. He argues that he made a *prima facie* showing in his anti-SLAPP motion that the cause of action for breach of fiduciary duty arises from acts in furtherance of his right to petition—the eviction and TRO proceedings—that fall within section 425.16, subdivision (e). In support of this argument, Evan emphasizes that the complaint’s allegations regarding his conduct revolve around his acts of obtaining the stay-away order and the TRO, as well as obtaining the assistance of local law enforcement and the courts.

As we will explain, we determine from our independent review that Evan’s anti-SLAPP motion satisfied the first prong of the anti-SLAPP statute by making a threshold showing that the breach of fiduciary duty cause of action arises from a category of activity protected under section 425.16, subdivision (e).

2. Section 425.16, subdivision (e)

Section 425.16, subdivision (e) provides in pertinent part: “As used in this section, ‘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”

Since “[t]he filing of lawsuits is an aspect of the First Amendment right of petition” (*Soukup, supra*, 39 Cal.4th at p. 291), a claim based on actions taken in connection with litigation fall “squarely within the ambit of the anti-SLAPP statute’s ‘arising from’ prong. (§ 425.16, subd. (b)(1).” (*Navellier, supra*, 29 Cal.4th at p. 90, fn. omitted.) Thus, service of a three-day notice to quit constitutes protected activity under section 425.16, subdivision (e). (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1480; see also *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1182 [notice of eviction is protected activity].) Similarly, it has been held that the filing of an application for a temporary restraining order involved a “ ‘written or oral statement or writing made before a . . . judicial proceeding’ (§ 425.16, subd. (e)(1)) and therefore constituted protected activity under the anti-SLAPP statute.” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 888.)

The California Supreme Court has instructed that “ ‘[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.’ [Citation.]” (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) Moreover, as this court has stated, the “ ‘ “focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” ’ [Citations.]” (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 575.)

3. Analysis

Our review of the complaint and the evidence submitted by Evan in support of his anti-SLAPP action (since Daniel did not submit any evidence) shows that but for Evan’s litigation-related activities—the attempt to evict Daniel from Kathryn’s home by serving a three-day notice to quit and to restrict his contact with Kathryn while she was in the

assisted living facility by a TRO, as well as by seeking other court orders—Daniel’s cause of action for breach of fiduciary duty would have no basis. Daniel’s general allegations that Evan breached his fiduciary duty by failing to protect Daniel’s interests and by placing the interests of others ahead of Daniel’s interests do not specify any other activities by Evan as the basis for those claims. Evan’s anti-SLAPP motion therefore satisfied the requirement that he make a “ ‘threshold showing that the challenged cause of action is one arising from protected activity. . . .’ ” (*Law Offices, supra*, 178 Cal.App.4th at p. 878.)

We are not convinced by Daniel’s argument that the anti-SLAPP statute does not apply in this case because he contends that Evan’s acts constitute “a form of extortion,” which the California Supreme Court ruled in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*) is not protected under the anti-SLAPP statute. *Flatley* established that where “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.” (*Id.* at p. 320; see also *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 971 [the term “illegal” in *Flatley* means criminal].)

Here, Evan has not conceded, and the evidence does not establish, that his assertedly protected activities constitute illegal extortion. “ ‘Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.’ (Pen. Code, § 518; see also [*Flatley, supra*, 39 Cal.4th at p. 326].” (*Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1169-1170.) There is no evidence or even an allegation to support Daniel’s contention that Evan’s protected activities constitute extortion.

In his reply brief, Daniel also argues for the first time that the cause of action for fiduciary duty cannot be stricken because it does not arise from the exercise of First Amendment rights in connection with a public issue or an issue of public interest, as

required by section 425.16, subdivision (e). “ ‘[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.’ ” (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Here, Daniel offers no reason why he did not include all of his arguments in his opening brief. However, we will briefly consider the issue raised in the reply brief.

A public issue within the meaning of section 425.16 includes speech activity that takes place before, during, or in connection with an “official proceeding authorized by law.” (§ 425.16, subd. (e)(1), (e)(2); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116-1117.) “Statements and writings made in connection with litigation are therefore covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]” (*GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907.) Since, as we have discussed, the cause of action for breach of fiduciary duty is based upon Evan’s protected litigation-related activities, he was not required to show that those activities concerned a matter of public interest.

We reiterate that the California Supreme Court has instructed that “ ‘[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.) In this case, we have determined that Evan’s anti-SLAPP motion satisfied the first prong because the motion made a sufficient showing that the cause of action for breach of fiduciary duty arises from protected petitioning activity. Under the second prong, plaintiff has the burden to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) We need not determine whether the second prong has been met, however. In his opening brief, Daniel asserts that he was not required to establish a probability of prevailing on the merits of the cause

of action for fiduciary duty and he has made no effort to do so. For that reason, we need not address Daniel's challenges to the affirmative defenses of res judicata or collateral estoppel that Evan asserts.

We therefore conclude that the cause of action for breach of fiduciary duty constitutes a SLAPP and trial court did not err in granting Evan's anti-SLAPP motion to strike the complaint.

D. Attorney's Fees

1. Background

The record reflects that the trial court initially granted Evan's ex parte application for attorney's fees on November 30, 2010. Daniel filed a motion to vacate the attorney's fees order that the trial court granted without prejudice to a new attorney's fees request.

Thereafter, in June 2011, Evan filed a motion for attorney's fees and costs pursuant to section 425.16, subdivision (c). The motion was supported by a memorandum of points and authorities (which was not included in the record), as well as the declarations of Evan's former attorney, James R. Stupar, and his current attorney Paul Sheng.

In his declaration, attorney Stupar stated that he had spent a total of "27.8 hours conducting research, fact investigation, and preparation of [Evan's] Anti-SLAPP Motion for a total of \$10,425." Attorney Sheng stated in his declaration that attorney Stupar's hourly billing rate was \$375 and that the hourly billing rates for his law firm, Clapp, Moroney, Bellagamba, Vucinich, Beeman & Scheley, were \$155 for partners and \$145 for associates, which were "very reasonable rates for attorneys practicing in the San Francisco Bay Area." Sheng also stated that the hours expended by his law firm with respect to Evan's anti-SLAPP motion were as follows: (1) 82.7 hours of partner time, for a total of \$12,818.50 in attorney fees; and (2) 48.5 hours of associate time, for a total of \$7,032.50. Based on this billing information, Evan sought a total award of \$31, 976.74 in attorney fees and costs, which included Stupar's attorney's fees claim of \$10,425.

The record does not reflect that Daniel filed opposition to Evan's June 2011 motion for attorney's fees. However, the record includes Daniel's May 2011 opposition to Evan's prior application for attorney's fees. In that opposition, Daniel argued that Evan's supporting evidence was insufficient to support his attorney's fees claim.

A hearing on Evan's June 2011 motion for attorney's fees was held on July 15, 2011. The record does not include a reporter's transcript for that hearing. On August 8, 2011, the trial court issued its order granting Evan's motion as follows: (1) Evan was the prevailing party and therefore he was entitled to an award of mandatory attorney's fees pursuant to section 425.16, subdivision (c)(1); (2) the court had reviewed the documents submitted by the parties and "made a complete and thorough independent review of the file in this action"; (3) the court did not receive and therefore did not review Evan's "fee records"; (4) the court exercised its discretion to award Evan "a reasonable amount of attorneys' fees" in the amount of \$20,000 and also awarded costs of \$250; and (5) the court vacated its prior order awarding Stupar attorney's fees of \$17,831.25 and costs of \$683.61.

Before turning to Daniel's appellate challenge to the August 8, 2011 attorney's fees order, we will review the rules governing the award of mandatory attorney's fees to the prevailing party on an anti-SLAPP motion.

2. Mandatory Attorney's Fees

Section 425.16, subdivision (c) provides that a defendant who prevails on a special motion to strike is "entitled to recover his or her attorney's fees and costs." (§ 425.16, subdivision (c)(1).)⁷ The California Supreme Court has therefore instructed that "any

⁷ Section 425.16, subdivision (c) provides: "(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing (continued)"

SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (*Ketchum*)). However, “the fee ‘provision applies only to the motion to strike, and not to the entire action.’ ” (*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381, citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.)).

The award of fees may include “the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16.” (*Ketchum, supra*, 24 Cal.4th at p. 1141.) In other words, the defendant may recover those fees “ ‘necessary to establish and defend the fee claim.’ ” (*Ibid.*) Recoverable attorney’s fees under section 425.16, subdivision (c), also include those incurred on appeal. (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785 (*Dove Audio*)).

Although the prevailing defendant is entitled to attorney’s fees, the amount of the fee award is left to the trial court’s discretion. (*Ketchum, supra*, 24 Cal.4th at p. 1134.) In exercising that discretion, the trial court should apply the lodestar adjustment approach to determine the amount. (*Id.* at p. 1136.) “[T]he lodestar is the basic fee for comparable legal services in the community; . . .” (*Id.* at p. 1132.) The trial court calculates the lodestar figure “based on the reasonable hours spent, multiplied by the hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type. [Citation.]” (*Id.* at p. 1133, italics omitted.)

on the motion, pursuant to Section 128.5. [¶] (2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney’s fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney’s fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.”

The lodestar figure may be adjusted based on various factors, including “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award. [Citation.]” (*Ketchum, supra*, 24 Cal.4th at p. 1132.) “To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether.” (*Id.* at p. 1138, fn. omitted.)

We review the trial court’s determination of the appropriate fee for an abuse of discretion. (*Ketchum, supra*, 24 Cal.4th at pp. 1130, 1134, 1138; see also *Dove Audio, supra*, 47 Cal.App.4th at p. 785.) “ ‘[T]he appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.’ [Citation.]” (*Dove Audio, supra*, at p. 785.) We also recognize that “[t]he ‘experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’ [Citations.]” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 (*Serrano*)).

3. The Parties’ Contentions

Daniel argues that the trial court’s award of attorney’s fees is unreasonable because the hours of attorney time claimed in Sheng’s declaration in support of the June 2011 attorney’s fees motion are inconsistent with the hours claimed by his law firm in a prior attorney’s declaration filed in 2010. Additionally, Daniel contends that the award of attorney’s fees is not supported by substantial evidence because Evan’s motion for attorney’s fees was not supported by billing records showing the work performed, and also because Sheng’s declaration lacks sufficient personal knowledge. Daniel further argues that some of the work performed by Evan’s attorneys was unnecessary, the amount of attorney’s fees claimed is excessive, and “privilege” cannot be invoked by the party moving for attorney’s fees.

In response, Evan contends that the appeal of the attorney's fees award is premature because the notice of appeal was filed on May 9, 2011, before the attorney's fee award was entered on August 8, 2011. Alternatively, Evan argues that the trial court did not abuse its discretion because the declarations of attorney Sheng and attorney Stupar provided "verification for those hours related to Evan's anti-SLAPP motion, costs incurred, and an itemization of the costs."

4. Analysis

We first consider the threshold issue of the appealability of the attorney's fees award. The general rule is that "[a] postjudgment order awarding attorney fees is separately appealable. [Citations.] The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. [Citation.] However, when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order. [Citation.]" (*R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158 (*R. P. Richards*).)

The trial court stated in its March 7, 2011 order granting the anti-SLAPP motion that "[f]ees are mandatory per the Statute; Moving Party to proceed on an Ex Parte Application basis to present request for reasonable attorneys fees and costs, including notice of application hearing." Accordingly, the court awarded attorney's fees to Evan but did not determine the amount until the court awarded attorney's fees of \$20,000 in its August 8, 2011 order. We believe that Daniel's appeal from the March 7, 2011 therefore encompassed the subsequent August 8, 2011 order, and we may consider the merits of his appeal from the attorney's fees award. (See *R. P. Richards, supra*, 83 Cal.App.4th at p.158.)

We observe that the record does not reflect that Daniel opposed Evan's June 2011 motion for attorney's fees, a failure that would ordinarily result in forfeiture of the issues

he raises in challenging the attorney's fees award on appeal. (See *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.) However, even assuming that Daniel has not forfeited his appellate challenge, we find no merit in his contention that the trial court erred in awarding \$20,000 in attorney's fees.

To begin with, Daniel does not address the trial court's significant reduction of Evan's attorney's fees claim from \$31, 976.74 to \$20,000. He therefore makes no specific showing that the amount of \$20,000 exceeds the bounds of reason. (*Dove Audio, supra*, 47 Cal.App.4th at p. 785.)

Moreover, we find no merit in Daniel's contention that the attorney's fees award is not supported by substantial evidence due to the lack of billing records and assertedly inadequate attorney declarations. " 'Although a fee request ordinarily should be documented in great detail, it cannot be said . . . that the absence of time records and billing statements deprive[s] [a] trial court of substantial evidence to support an award. . . .' [Citation.] '[T]he verified time statements of [an] attorney[], as [an] officer[] of the court, are entitled to credence in the absence of a clear indication the records are erroneous.' [Citation.]" (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 784-785.)

In other words, as this court has stated, " 'The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration unsubstantiated by time records and billing statements. Although a fee request ordinarily should be documented in great detail, it cannot be said in this particular case that the absence of time records and billing statements deprived the trial court of substantial evidence to support an award; we do not reweigh the evidence.' [Citation.]" (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398.)

Here, Evan's motion for attorney's fees was supported by the verified declarations of attorney Sheng and attorney Stupar regarding the number of hours spent by Evan's

attorneys with respect to the anti-SLAPP motion and the hourly billing rates of the attorneys who performed the work. The trial court stated in its order that the court had reviewed the documents submitted by the parties and “made a complete and thorough independent review of the file in this action,” and determined that a reasonable amount of attorney’s fees was \$20,000. We reiterate that “[t]he ‘experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, . . .’ ” (*Serrano, supra*, 20 Cal.3d at p. 49.) Since Daniel has failed to establish that the attorney’s fees order was “clearly wrong,” we will affirm the order. (*Ibid.*)

IV. DISPOSITION

The March 7, 2011 order granting the special motion to strike the first amended complaint and the August 8, 2011 order awarding attorney’s fees are affirmed. Costs on appeal are awarded to respondent Evan Auld-Susott.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.