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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VIOLETA PADUA et al.,

Plaintiffs and Respondents,

v.

VICTORIA TRAN SOOD,

Defendant and Appellant.

H037221
(Santa Clara County
Super. Ct. No. CV191086)

Appellant Victoria Tran Sood appeals a trial court’s order denying her special motion to strike a complaint under the anti-SLAPP law.¹ (Code Civ. Proc., § 425.16.)² Respondents are Violeta Padua, successor trustee to the Conrada A. Lopez Revocable Trust, along with 12 beneficiaries of the trust. Appellant argues that the trial court erred in denying her motion to strike since she met her initial burden to show that respondents’ complaints over her alleged professional negligence and breach of fiduciary duty arose from petitioning activity protected under section 425.16, and because respondents failed to meet their burden to demonstrate they had a probability of prevailing on their claims. For reasons set forth below, we find that appellant’s complaint does not fall within the purview of the anti-SLAPP law and will affirm the trial court’s order.

¹ “SLAPP” stands for “ ‘strategic lawsuits against public participation.’ ” (Navellier v. Sletten (2002) 29 Cal.4th 82, 85 (Navellier).)

² All further unspecified statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying case involves the administration and distribution of the Conrada A. Lopez revocable trust, dated February 27, 2004. The trust included several parcels of real property, including one located at 1368 Havenwood Drive in San Jose, California (hereafter Havenwood property). Conrada Lopez, the settlor of the revocable trust, passed away on September 29, 2005. The trust named Teresita Aspuria, Lopez's sister, as the first successor of the trust. The trust further named Padua, one of the respondents, also Lopez's sister, as the alternate successor trustee.

Aspuria later retained appellant, a licensed attorney, who then represented Aspuria as trustee of the trust in adversarial proceedings regarding the Havenwood property.³ Appellant also advised Aspuria over general administration of the trust, including preparation of the trust's second accounting. According to respondents' complaint, appellant also represented the trust itself.

On January 4, 2011, respondents, which include 12 beneficiaries of the trust and relatives of the trust settlor, filed a complaint against appellant and Aspuria. The complaint alleged several causes of action including breach of fiduciary duty, imposition of constructive trust, misrepresentation by concealment, and professional negligence.⁴ The complaint alleged that appellant overcharged the trust, failed to advise Aspuria as to conflicts of interests, and charged the trust for legal representation in matters that would not benefit the trust. The complaint further alleged that appellant failed to exercise proper care and skill in handling trust matters.

³ According to appellant's special motion to strike, the litigation related to the Havenwood property involved tenants who resided in the property and later claimed an ownership interest in the property after Conrada Lopez passed away.

⁴ The cause of action for professional negligence was only alleged against appellant and various Doe defendants. The other causes of action were alleged against both appellant and Aspuria.

On March 2, 2011, appellant filed a special motion to strike respondents' complaint under section 425.16, the anti-SLAPP law. Appellant claimed that the activity at the focus of respondents' complaint was protected under section 425.16, as the complaint arose from appellant's use of the judicial process to defend her client, Aspuria, in litigation related to the trust and in the probate action brought by respondents challenging the administration of the trust.

In an opposition to the special motion to strike filed July 6, 2011, respondents asserted that appellant's motion should be denied since appellant failed to demonstrate that respondents' complaint arose from protected activity defined under section 425.16. Appellant filed a reply on July 12, 2011.

The trial court conducted a hearing on the special motion to strike on July 19, 2011. After the hearing, the trial court denied appellant's special motion to strike, finding that she failed to meet her burden of establishing that respondents' claims arose out of protected activity. Appellant filed a timely notice of appeal from the trial court's denial on August 5, 2011.

STANDARD OF REVIEW

An appellate court reviews an order granting or denying a special motion to strike pursuant to section 425.16 under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) In assessing whether the challenged complaint arises out of protected activity, the reviewing court "considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 (*Cotati*); see also § 425.16, subd. (b)(2).)

DISCUSSION

Before we discuss appellant's claims on appeal, we must first consider her request for judicial notice of the trial court's final statement of decision on the underlying probate matter.

Request for Judicial Notice

Appellant requests that this court take judicial notice of the Santa Clara County Superior Court's ruling in *In re: The Conrada A. Lopez Trust* (Sup. Ct. Santa Clara County, 2012, No. 1-06-PR-159773), which includes a final statement of decision and order signed by Judge Aaron Persky.⁵ This final statement of decision and order resolves respondents' dispute with Aspuria over objections to Aspuria's second accounting, their allegations that appellant received disproportionately high attorney fees, and their claim that Aspuria be charged with losses related to the Havenwood property litigation.

Under Evidence Code section 452, subdivision (d), a court may take judicial notice of records of any court of the state and of any court within the United States. The final statement of decision of the probate court is indisputably a record of a court within the state of California. Nonetheless, a reviewing court typically only takes judicial notice of those documents that are *relevant* to the underlying issue on appeal. “ ‘Although a court may judicially notice a variety of matters [citation], only *relevant* material may be noticed. “But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand.” ’ ” (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569.)

In their opposition to appellant's request, respondents assert that the final statement of decision may not be judicially noticed because it was not part of the original trial court record, nor was it submitted to the trial court. Documents submitted to the trial court or judicially noticed by the trial court are items that this court may properly

⁵ On April 20, 2012, this court granted appellant's earlier request for judicial notice of the proposed statement of decision and order by Judge Aaron Persky in the same case, signed and filed on February 8, 2012. In this earlier request, appellant asserted that the proposed statement of decision was relevant to this appeal because it outlined respondents' prior litigation activity against the trust and against appellant, and helps establish the first prong of the anti-SLAPP law (that the complaint arises from protected activity).

judicially notice. (Evid. Code, § 459.) However, these two types of items do not encompass the entire scope of what a reviewing court may properly judicially notice. As described above, a reviewing court may take judicial notice of any record made by any court of the state under Evidence Code section 452, so long as it is relevant.

Here, the final statement of decision issued by the trial court concerning the administration of the trust in the underlying probate case is relevant to this current appeal because it describes the procedural history of the probate case, which gave rise to respondents' complaint against appellant. The order also discusses the trial court's findings with regards to issues such as the sufficiency of Aspuria's second accounting for the trust, and whether or not Aspuria paid appellant excessive legal fees. These issues are similar to the arguments raised in the complaint respondents lodged, which ultimately became the subject of the special motion to strike. We will accordingly grant appellant's request for judicial notice, and will take judicial notice of the existence of the order as well as the truth of the facts asserted in the order. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.)

Section 425.16 and Protected Activity

Under section 425.16, subdivision (b)(1), “[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.”

This statutory scheme “requires that a court engage in a two-step process when determining whether a defendant’s anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has

demonstrated a probability of prevailing on the claim.” (*Cotati, supra*, 29 Cal.4th at p. 76.)

For the first step, “the party moving to strike a cause of action has the initial burden to show that the cause of action ‘aris[es] from [an] act . . . in furtherance of the [moving party’s] right of petition or free speech.’ ” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) As noted earlier, the court, in deciding whether or not the cause of action “arises from” a protected activity, considers the pleadings along with supporting and opposing affidavits. (§ 425.16, subd. (b)(1).) For an action to “arise” out of protected activity, the action *itself* must have been “an act in furtherance of the right of petition or free speech.” (*Cotati, supra*, 29 Cal.4th at p. 78.) Accordingly, in the anti-SLAPP context the “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.” (*Ibid.*)

If this first step is satisfied, the burden shifts to the party defending against the special motion to strike to show that they have a probability of prevailing on the claim. (*Cotati, supra*, 29 Cal.4th at p. 78.) This second step need not be reached if the moving party fails to establish the first step of the test and does not demonstrate the complaint arose out of protected activity. (See *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 801.)

Legal Malpractice Claims Not Protected Activity

The trial court denied appellant’s special motion to strike after finding that she failed to establish that respondents’ cause of action arose out of protected activity, the first step under section 425.16. On appeal, appellant argues that the trial court erred in finding that respondents’ complaint did not arise out of protected activity. She claims that respondents’ complaint arises from her legal representation of Aspuria as the trustee of the trust. Appellant asserts that this activity is protected under the anti-SLAPP law.

Respondents’ complaint against appellant alleged that appellant, as attorney to the trustee (Aspuria) and the trust, performed “legal services intended to conceal [Aspuria’s]

activities and to keep the beneficiaries from discovering the true facts,” overcharged the trust for her legal services, and failed to exercise proper care and skill when dealing with trust matters. Respondents’ complaint centered on appellant’s alleged legal malpractice and professional negligence, as well as her purported breach of fiduciary duty.

The Legislature has defined what constitutes protected activity under section 425.16, specifically stating that it encompasses “[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” (§ 425.16, subd. (b)(1).) This 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” (*Id.* subd. (e).) Accordingly, certain litigation-related activities may be protected under the anti-SLAPP statute.

In *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, the Fourth Appellate District considered a case where the defendant law firm brought an anti-SLAPP motion against the plaintiff’s legal malpractice complaint. There, the court concluded that just because “the malpractice allegedly occurred in the course of petitioning activity does not mean the claim arose from the activity itself.” (*Id.* at p. 1535.) The appellate court reasoned that “[i]n a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client’s interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously. This is vastly different from a third party suing an attorney for petitioning activity, which clearly could have a chilling effect.” (*Id.* at p. 1540.) Accordingly, the *Kolar* court found that the law firm failed to meet the first step of the

anti-SLAPP statute by demonstrating that the action arose out of protected activity. (*Ibid.*)

However, not all malpractice actions have been deemed outside the scope of protected activity under the anti-SLAPP statute. The appellate court in *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658 (*Peregrine*) held that the defendant law firm met its initial burden to demonstrate that the *Peregrine* plaintiffs' complaint arose from protected petitioning activity. (*Id.* at pp. 674-675.) The plaintiffs in *Peregrine*, investors and a bankruptcy trustee that lost money under a Ponzi scheme run by a company represented by the defendant law firm, sued the law firm alleging malpractice and breach of fiduciary duty. (*Id.* at pp. 665-668.) The *Peregrine* plaintiffs essentially alleged that the defendant law firm committed two wrongful acts: the law firm drafted letters advising the Ponzi scheme company about how to avoid state and federal registration requirements, and the law firm breached its fiduciary duty to the plaintiffs by representing the company in opposing the Security Exchange Commission's investigation into the matter. (*Id.* at pp. 670-671.) Specifically, the plaintiffs alleged that the firm's "stalling and stonewalling tactics delayed the progress of the SEC's investigation and lawsuit and enabled the scheme's perpetrators to solicit--and steal--more money from investors." (*Id.* at p. 671.)

The appellate court concluded that a significant part of the *Peregrine* plaintiffs' litigation arose from the defendant law firm's representation of the company with regards to the SEC investigation, which the court considered protected petitioning activity under the anti-SLAPP law. (*Peregrine, supra*, 133 Cal.App.4th at p. 675.) The court thereby shifted the burden onto the plaintiffs to demonstrate that they had a probability of prevailing on the claims. (*Ibid.*) The court ultimately concluded that the plaintiffs failed to demonstrate they were likely to prevail on their claims, and directed the trial court to enter an order granting the law firm's special motion to strike. (*Id.* at pp. 676-688.)

Nonetheless, this court has specifically held that malpractice actions are not protected under section 425.16 in *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*PrediWave*). *PrediWave*, a corporation, sued the law firm of Simpson Thacher & Bartlett LLP (Simpson) over their previous representation of the corporation and its former president and CEO, Jianping “Tony” Qu. (*Id.* at p. 1209.) *PrediWave* accused Simpson of enabling Qu’s fraudulent use of corporate funds, charged Simpson with failing to inform them of conflicts of interests in representing both Qu and *PrediWave*, and claimed that Simpson failed to competently represent the corporation. (*Id.* at pp. 1210-1215.) Simpson thereafter filed a special motion to strike under section 425.16, arguing that the cause of action arose out of protected speech and petitioning activity, and that *PrediWave* simply sought to impose liability on them for filing pleadings and motions in their pursuit of litigation. (*PrediWave, supra*, at p. 1216.)

The trial court in *PrediWave* granted the anti-SLAPP motion, finding that the “ ‘claims asserted against defendants are based in significant part upon protected petitioning activities.’ ” (*PrediWave, supra*, 179 Cal.App.4th at p. 1217, citing *Peregrine, supra*, 133 Cal.App.4th 658.) We reversed the trial court’s decision, finding that the anti-SLAPP statute was not applicable to a client’s “causes of action against attorneys based upon the attorneys’ acts on behalf of those clients.” (*PrediWave, supra*, at p. 1227.) We distinguished among “(1) clients’ causes of action against attorneys based upon the attorneys’ acts on behalf of those clients, (2) clients’ causes of action against attorneys based upon statements or conduct solely on behalf of different clients, and (3) nonclients’ causes of action against attorneys. In the first class, the alleged speech and petitioning activity was carried out by attorneys on behalf of plaintiffs in the lawsuits now being attacked as SLAPP’s, although the attorneys may have allegedly acted incompetently or in violation of the Professional Rules of Conduct. The causes of action in this first class categorically are not being brought ‘primarily to chill the valid

exercise of the constitutional rights of freedom of speech and petition’ (§ 425.16, subd. (a).)” (*Ibid.*)

In *PrediWave*, we disagreed with *Peregrine* “to the extent that it indicates that the anti-SLAPP statute applies to clients’ causes of action against their former attorneys based upon the attorneys’ statements made or conduct undertaken in representing the clients.” (*PrediWave, supra*, 179 Cal.App.4th at p. 1228.) Here, like the *PrediWave* plaintiffs’ complaint, respondents’ cause of action was not primarily brought to chill the valid exercise of freedom of speech and petition and, instead, alleged appellant breached her fiduciary duty and committed professional negligence, which ultimately led to the trust becoming overcharged with attorney fees and losing value. Respondents’ claims, unlike the claims brought by the *Peregrine* plaintiffs, do not primarily arise from appellant’s protected petitioning activity. Respondents do not allege that appellant exercised her constitutionally protected right to petition on behalf of the trustee and the trust. Instead, it is appellant’s alleged malpractice and negligent rendering of legal services that is the *activity* that gives rise to the asserted liability. In short, whatever petitioning activity that took place as a result of her alleged malpractice is *not* the basis for respondents’ complaint. Accordingly, appellant’s complaint does not arise out of protected petitioning activity under section 425.16.

Appellant argues that there are “no grounds for application of the rule elucidated in *PrediWave*” and that the complaint cannot be a malpractice action since she never represented respondents. However, the issue of whether or not a plaintiff who brings a complaint subject to the special motion to strike has standing to pursue his or her complaint is not a relevant analysis to the first step of the anti-SLAPP law. Standing may very well be vital to the determination of whether or not a plaintiff has a probability of prevailing on his or her claims. But the issue of standing does not address whether or not the complaint itself *arises* out of protected petitioning activity. Additionally, appellant’s argument fails because “[t]he anti-SLAPP statute’s definitional 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." (*Navellier, supra*, 29 Cal.4th at p. 92.)

Accordingly, appellant failed to satisfy the first prong of section 425.16 in demonstrating that respondents' complaint arose out of protected petitioning activity.

No Need to Assess Respondents' Likelihood of Prevailing on Claims

Since we have determined that respondents' complaint did not arise out of protected petitioning activity, it is not necessary to address appellant's argument that respondents failed to demonstrate a likelihood of prevailing on their claims. Though a party who files the complaint at issue has the burden of demonstrating a probability of prevailing on their claims, this step need not be reached if the party bringing the special motion to strike fails to demonstrate the complaint arose out of protected activity under section 425.16. (See *Wang v. Wal-Mart Real Estate Business Trust, supra*, 153 Cal.App.4th at p. 801.)

DISPOSITION

Appellant fails to demonstrate that respondents' complaint arose out of protected petitioning activity. Accordingly, the trial court's order denying appellant's special motion to strike is affirmed. Respondents are awarded their costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.