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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHERYL HAMEL et al., Plaintiffs and Respondents, v. RON BEESON et al., Defendants and Appellants.	H037386 (Santa Cruz County Super. Ct. No. CV170415)

Defendants Ron Beeson, Deanna Copeland, and Daniel Copeland appeal from the superior court's order denying their special motion to strike (Code Civ. Proc., § 425.16)[1] the complaint of plaintiffs Cheryl Hamel and Eli Hamel, a minor, by and through his guardian ad litem, Cheryl Hamel.[2] They argue that the complaint or at least some of the causes of action arose out of their exercise of free speech rights and plaintiffs cannot establish a probability of prevailing on the merits. We affirm the judgment.

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[1] These motions are also referred to as anti-SLAPP motions. "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 16, fn. 1.)

[2] Because some of the parties share a last name, we will refer to them by their first names.

I. Background[3]

In July 2009, plaintiffs began renting a residential property from Daniel and Deanna, who were leasing it from Beeson, the owner.[4] Cheryl provided full time care for her son Eli, who has autism. Defendants were aware of Eli's disability. Due to the severity of Eli's disability, he required teachers and others with specialized training to provide services at plaintiffs' residence. However, Deanna informed Cheryl that she and Beeson had a policy that any visitor to plaintiffs' residence was required "to check in with and be cleared by" Deanna prior to entering the residence. As a result of this policy, Eli did not receive assistance from these specialists on many occasions.

Eli's autism was often calmed by the use of swings, small trampolines, and similar devices. However, when Cheryl tried to provide these items for Eli, Deanna's daughter told her that they were not allowed on the property because they violated defendants' policy.

In November 2010, Deanna told Cheryl that she and Beeson no longer wanted the liability of having an autistic tenant on the property and served her with a 60-day notice to terminate the tenancy. Cheryl believed this action was discriminatory and submitted a pre-complaint questionnaire to the Department of Fair Employment and Housing on December 23, 2010.

Fearful that she would be evicted and knowing that she would need money for a security deposit on another rental property, Cheryl did not pay rent for the month of December 2010. On January 3, 2011, plaintiffs were served with a three-day notice to pay rent or quit the premises. Three days later, Cheryl submitted a formal complaint to the Department of Fair Employment and Housing.

On January 7, 2011, Deanna and Daniel filed an unlawful detainer action against Cheryl. Since Cheryl did not have funds to contest the action, she did not respond. On

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[3] This summary is based on the pleadings and Cheryl's declaration.

[4] Ron Beeson is now deceased.

January 19, 2011, a default judgment in favor of the Deanna and Daniel was entered by the clerk pursuant to Code of Civil Procedure section 1169.

Following their eviction, plaintiffs lived in a kitchen of a warehouse and hotels at various times. However, they were essentially homeless. When Eli's condition deteriorated due to the changes in his living environment, the Department of Social Services placed him in a group home. Since Cheryl was no longer Elia's custodial caregiver, she was not eligible for social security income. Without this income, Cheryl was unable to afford housing and could not provide a safe and stable environment for Eli.

On February 28, 2011, plaintiffs filed a complaint for damages. The complaint alleged seven causes of action: (1) negligence, (2) breach of the implied covenant of quiet enjoyment, (3) violation of the California Disabled Persons Act (Civ. Code, § 54 et seq.), (4) violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12920 et seq.), (5) intentional infliction of emotional distress, (6) negligent infliction of emotional distress, and (7) breach of the implied warranty of habitability (Civ. Code, § 1941.1). Plaintiffs requested dismissal of the negligence cause of action without prejudice in April 2011.

Defendants filed an anti-SLAPP motion, which was accompanied by a memorandum of points and authorities. Defendants also requested that the court take judicial notice of the unlawful detainer complaint, attached as exhibit A,[5] and the judgment on the unlawful detainer complaint, attached as exhibit B. Defendants argued that plaintiffs' complaint arose from protected activity and they could not meet their burden to show a probability of success on the merits.

Plaintiffs filed opposition to the motion, which included a memorandum of points and authorities and Cheryl's declaration. They argued that a landlord's termination of a tenancy due to a tenant's disability is not protected by First Amendment rights. They

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[5] However, exhibit A is not the complaint, but the summons.

also argued that the doctrines of res judicata and collateral estoppel did not apply, since defendants had obtained a clerk's judgment by default for possession only.

Defendants' reply contended that the unlawful detainer action was a key element of plaintiffs' causes of action and that the litigation privilege prevented recovery on any cause of action.

After the trial court denied the special motion to strike, defendants filed a timely appeal.

II. Discussion

A. Anti–SLAPP Statute

In enacting Code of Civil Procedure, section 425.16,[6] the Legislature found that "it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) 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." The Legislature has also mandated that section 425.16 "shall be construed broadly." (§ 425.16, subd. (a).)

The anti-SLAPP statute provides a means for the trial court to evaluate the merits of a possible SLAPP "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), thereby providing a defendant with the opportunity to limit the costs of litigation. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 196.) The trial court

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[6] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

must apply a two-part test in ruling on a motion to strike under section 425.16. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*), quoting § 425.16, subd. (b)(1).) "The 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 v. Sletten* (2002) 29 Cal.4th 82, 92.) "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*, at p. 76.) This court reviews a trial court's denying a motion to strike under section 425.16 de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

B. Protected Activity

Defendants argue that they met their initial burden of establishing that the action arose from the exercise of their right of petition because the issues raised in the complaint arose from defendants' filing of an unlawful detainer lawsuit. We disagree.

As relevant here, the statutory definition of protected activity includes "any written or oral statement or writing made before a . . . judicial proceeding," "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body," and any "conduct in furtherance of the exercise of the constitutional right of petition . . . ." (§ 425.16, subds. (e)(1), (2) & (4).)

Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC (2007) 154 Cal.App.4th 1273 (*DFEH*) is instructive. In *DFEH*, the defendant decided to remove its apartment building from the rental market. (*DFEH*, at p. 1276.) In response to notice of its decision, a disabled tenant requested additional time to vacate pursuant to Government Code section 7060.4. (*DFEH*, at p. 1277.) When the defendant requested confirmation of the tenant's disability, the tenant refused on the ground that the

request was discriminatory. (*DFEH*, at pp. 1278-1279.) After the defendant filed an unlawful detainer action, the DFEH filed an action on behalf of the tenant for disability discrimination. (*DFEH*, at p. 1280.) The defendant responded by filing a motion to strike under section 425.16, which the trial court denied. (*DFEH*, at pp. 1280-1281.)

DFEH reasoned: "We will assume [the defendants's] acts of filing and serving notices of its intent to remove its residential units from the rental market, its investigation and communications made necessary by the rent control removal process, and its filing and prosecuting its unlawful detainer actions against [the tenant] constituted protected petitioning or free speech activity. 'But the mere fact an action was filed after protected activity took place does not mean it arose from that activity.' Instead, '"'the act underlying the plaintiff's cause' or 'the act which forms the basis for the plaintiff's cause of action' must *itself* have been an act in furtherance of the right of petition or free speech." [Citation.]' In other words, '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. [Citations.]'" (*DFEH*, *supra*, 154 Cal.App.4th at pp. 1283-1284, fns. omitted.) *DFEH* concluded that "the pleadings and the affidavits submitted by the parties establish the gravamen of DFEH's action against [the defendant] was one for disability discrimination, and was not an attack on any act [the defendant] committed during the rental property removal process or during the eviction process itself." (*Id.* at p. 1284.)

DFEH also noted that "if this kind of suit could be considered a SLAPP, then landlords and owners, if not [the defendant], could discriminate during the removal process with impunity knowing any subsequent suit for disability discrimination would be subject to a motion to strike and dismissal. We are confident the Legislature did not intend for section 425.16 to be applied in this manner either. As the trial court aptly observed, 'I just feel like to rule for the defendant in this case would be to say that section

425.16 provides a safe harbor for discriminatory conduct and I don't think that's what it's intended to do.'" (*DFEH*, *supra*, 154 Cal.App.4th at p. 1288.)

Similarly, here, the gravamen of plaintiffs' complaint was disability discrimination. Plaintiffs' allegations were based on defendants' conduct during their tenancy. This conduct included restricting plaintiffs' ability to have teachers and other specialists provide services to Eli at his residence as well as refusing to allow certain recreational devices that were therapeutically required for Eli's autism. Plaintiffs' complaint also arose from defendants' basis for terminating their tenancy. Defendants told plaintiffs that they "did not want to assume the liabilities of housing an autistic tenant" and served them with a 60-day notice to terminate their tenancy. Thus, it was defendants' alleged acts of discriminating against plaintiffs that formed the basis for the complaint, not the filing of the unlawful detainer action. These acts by defendants were not acts in furtherance of their rights of petition or free speech.[7]

Marlin v. Aimco Venezia, LLC (2007) 154 Cal.App.4th 154 (*Marlin*) supports this conclusion. In *Marlin*, the defendants gave notice to the City of Los Angeles under the Ellis Act that they intended to remove several units from the rental market. (*Marlin*, at p. 157.) The defendants also notified the plaintiffs of their intent and that they were required to vacate their apartment. (*Ibid.*) The plaintiffs then filed a declaratory action, contending that the defendants could not invoke the Ellis Act to evict them. (*Marlin*, at pp. 157-158) The defendants responded by filing a special motion to strike under section 425.16, arguing that the complaint arose from their filing and serving the Ellis Act notices. (*Marlin*, at p. 158.) *Marlin* rejected the defendants' argument: "The filing and service of the notices may have triggered plaintiffs' complaint and the notices may be evidence in support of plaintiffs' complaint, but they were not the cause of plaintiffs'

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[7] Plaintiffs' cause of action for breach of the implied warranty of habitability alleged that defendants failed to provide adequate garbage receptacles, and thus this cause of action was also not directed at defendants' protected activity.

complaint. Clearly, the cause of plaintiffs' complaint was defendants' allegedly wrongful reliance on the Ellis Act as their authority for terminating plaintiffs' tenancy. *Terminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech*." (*Marlin*, at pp. 160-161, fns. omitted, italics added.) Similarly, here, the cause of plaintiffs' complaint was defendants' alleged disability discrimination during their tenancy and as the basis for terminating their tenancy.

Since defendants have not met their threshold burden of showing this lawsuit is based on protected activity, we need not consider whether plaintiffs have demonstrated a probability of prevailing on its causes of action.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Duffy, J.*

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* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.