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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DALE LAUE, Plaintiff and Appellant, v. LILIANA A. ORTIZ, Defendant and Respondent.	H040705 (Santa Clara County Super. Ct. No. CV250570)

Plantiff Dale Laue, in propria persona, appeals from the trial court's order granting defendant Liliana A. Ortiz's special motion to strike the first amended complaint (anti-SLAPP motion) brought pursuant to Code of Civil Procedure section 425.16,[1] the so called anti-SLAPP statute.[2] (§§ 904.1, subd. (a)(13), 425.16, subd. (i).) The trial court determined that defendant had shown all causes of action arose from protected activity and, consequently, the burden shifted to plaintiff to demonstrate a probability of success on his claims to avoid the granting of the motion. The court found that plaintiff did not present sufficient evidence to defeat the litigation privilege, Civil Code section 47, subdivision (b) (hereinafter Civil Code section 47(b)), and carry his burden.

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

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.' (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 57 . . . .)" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.)

On appeal, plaintiff raises multiple contentions. We find them meritless and affirm.

I

Procedural History and Background

Plaintiff Laue's first amended complaint (hereinafter complaint) alleges five causes of action: (1) libel; (2) slander; (3) intentional interference with economic advantage; (4) negligent interference with economic advantage; and (5) intentional infliction of emotional distress.

The complaint alleges the following facts. Plaintiff and defendant reside in adjoining properties in Gilroy, California. Plaintiff is a renter and his landlord is Cam Thy Nguyen. Defendant made a number of false accusations about him to police. Defendant defamed plaintiff's character by making false statements about him, both to police and in a letter she sent to plaintiff's landlord on or about May 17, 2013. On June 3, 2013, defendant filed a small claims law suit against plaintiff's landlord,[3] which omitted important facts and thereby "falsely accuse[d]" him of damaging metal posts by hanging fences without permission. On June 26, 2013, plaintiff wrote a letter to his landlord requesting that his lease be renewed for another year and, in response, the landlord indicated that plaintiff would need to resolve his issues with defendant. On July 31, 2013, in the South County courthouse lobby, defendant falsely stated that plaintiff "had verbally abused her worker so severely that he died." Defendant's allegedly false statements were the basis of all causes of action.

On September 5, 2013, defendant filed her anti-SLAPP motion. It stated that plaintiff "cannot show a probability he will prevail on any cause of action because the

[3] Plaintiff's declaration in support of opposition to defendant's anti-SLAPP motion states that defendant's small claims action was filed on July 3, 2013.

conduct complained of is subject to the litigation privilege. (Civ. Code § 47(b).)" The motion was accompanied by defendant's declaration.

In her declaration, defendant stated that, as a result of plaintiff's conduct, she had reported him to the police on several occasions and filed a small claims action against plaintiff's landlord. Defendant stated that she "never made any false police reports or any false allegations either in writing or the Small Claims action . . . ." She also explained: "Each time I talked to the police I did so for the purpose of obtaining police assistance to investigate and prosecute possible criminal activity. I reported only what I had perceived and honestly believed to be the truth. I have never stated anything false to the police concerning [plaintiff's] behavior." Defendant related several incidents in which the police had been called, either by plaintiff or her.

Defendant stated in her declaration that, on or about May 17, 2013, she sent a letter to plaintiff's landlords concerning the activities of their tenant, plaintiff, with regard to a fence and fence posts. According to defendant, in the letter she demanded the immediate removal of "patchwork metal" that plaintiff had installed on her fence post without her approval and payment of $300. She explained that she wrote the letter because she "was advised and believed" that she was required to make a written demand on the landlords before filing a small claims action.

Defendant stated in her declaration that she subsequently filed a small claims action "based upon the same occurrences and damages which were the subject matter of [her] May 17, 2013 letter." She indicated that she attended a mediation in the small claims action that occurred in the lobby of the South County courthouse in Morgan Hill. The mediator, the landlords (Cathy and Tony Nguyen), plaintiff and his wife, and defendant attended the mediation. She asserts that everything that she said about plaintiff "at the courthouse that day was in the context of the mediation proceeding and in the presence of the mediator." "The case settled at mediation and was dismissed that day."

Plaintiff's declaration detailed incidents between defendant and himself or his wife between January 2012 and June 2013. He accused defendant of making false claims about him to police, in her May 17, 2013 letter, and in her small claims complaint. He asserted that the letter was "not sent in anticipation of litigation" but rather to "harass [him] and interfere with [his] relationship with [his] landlord." In response to plaintiff's written request to renew his lease (set to expire August 31, 2013) for another year, the landlord wrote on July 15, 2013 that the landlord wanted to renew the lease but would like plaintiff to resolve the issue with defendant.

The trial court determined the causes of action arose primarily from defendant's allegedly false representations to police and her letter to plaintiff's landlord. It concluded that defendant had satisfied the requirement of making a threshold prima facie showing that those activities were protected under the anti-SLAPP statute. Consequently, the burden shifted to plaintiff to establish a probability of prevailing on the merits. It found that plaintiff had not presented sufficient evidence to defeat the litigation privilege and show a probability of prevailing on his claims. The trial court granted the anti-SLAPP motion. It denied defendant's request for attorney fees and costs without prejudice to a subsequent noticed motion.[4]

Discussion

A. *Court's Ruling under Section 425.16*

1. *Governing Law*

"The Legislature enacted section 425.16 to prevent and deter 'lawsuits [referred to as SLAPP's] 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).) Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his

[4] Plaintiff separately appeals from a later attorney fees and costs award in *Laue v. Ortiz* case No. H041044.

or her resources' [citation], the Legislature sought ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target" ' (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65 . . .). Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) An anti-SLAPP motion pursuant to section 425.16 "is a procedural device for screening out meritless claims [citation]." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737.)

Section 425.16, subdivision (b)(1), provides: "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." (Italics added.) "[S]ection 425.16 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. [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) "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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) Courts "review an order granting or denying a motion to strike under section 425.16 de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 . . . .)" (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.)

" 'A defendant meets [the initial] burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [Citation.]" (*Navellier*, *supra*, 29 Cal.4th at p. 88; see *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p.78.) Section 425.16, subdivision (e), states: "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, (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."

"[A] defendant need only make a prima facie showing that the underlying activity falls within the ambit of the [anti-SLAPP] statute . . . ." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*); see *Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) "There is no further requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 94-95.)" (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 286 (*Soukup*).) To defeat the anti-SLAPP motion once the burden has shifted to the plaintiff, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Wilson v. Parker, Covert* & *Chidester* (2002) 28 Cal.4th 811, 821.)

" '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 v. Hafif*, *supra*, 39 Cal.4th at p. 269, fn. 3.)" (*Flatley*, *supra*, 39 Cal.4th at pp. 325-326.)

2. *Applicability of Section 425.16 to Purely Private Defamation*

Plaintiff first asserts that, as a matter of law, section 425.16 does not apply to defamation cases involving private figures and matters of private concern. He claims that a cause of action is not subject to a special motion to strike unless the underlying speech was in connection with a public issue. This argument is meritless.

In deciding whether an activity is protected by section 425.16, the proper inquiry dictated by the statute is whether it falls "within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, '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.' [citation]" (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 66.) Although two of the categories set forth in subdivision (e) of section 425.16 require that the protected activity be "in connection" with an issue of public interest or a public issue (see § 425.16, subds. (e)(3) & (e)(4)), two of the statutory categories do not impose such requirement (see § 425.16, subds. (e)(1) & (e)(2)).

In *Briggs v. Eden Council for Hope* & *Opportunity* (1999) 19 Cal.4th 1106 (*Briggs*), the plaintiffs argued that "section 425.16 does not apply to events that transpire between private individuals." (*Id*. at p. 1116.) The Supreme Court rejected that argument, finding that the plain meaning of subdivisions (e)(1) and (e)(2) of

section 425.16 imposes no requirement that the statements concern an issue of public significance. (*Briggs*, *supra*, at pp. 1109, 1119, 1123.)

As previously indicated, for purposes of the anti-SLAPP statute, 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 [and] (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 . . . .' (§ 425.16, subd. (e), italics added.) Thus, plainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (*Briggs*, *supra*, 19 Cal.4th at p. 1113.) "A defendant moving to strike a cause of action under section 425.16, subdivision (e)(1) or (2) need not separately demonstrate the statement concerned an issue of public significance because those clauses protect any written or oral statement made in the applicable setting. (*Briggs v. Eden Council for Hope* & *Opportunity*, *supra*, 19 Cal.4th 1106, 1123.)" (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1467, fn. 4.)

Weinberg v. Feisel (2003) 110 Cal.App.4th 1122, which plaintiff quotes and upon which he relies, is apposite. That case concerned subdivision (e)(3) of section 425.16, which is not at issue in this case.

3. *Preliminary Issue Whether Activity was Illegal as a Matter of Law*

a. *Governing Law*

In *Flatley*, *supra*, 39 Cal.4th 299, the Supreme Court held that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is *illegal as a matter of law* and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Id*. at p. 317, italics added.) "[W]here a defendant brings a motion

to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but *either 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, italics added.)

Flatley's holding must be understood in lights of the facts before the court. In that case, a prelitigation demand letter was sent to Flatley's attorney by another attorney, who was representing an undisclosed female client who claimed that Flatley had committed a forcible sexual assault against her. (*Flatley*, *supra*, 39 Cal.4th at p. 308.) In subsequent telephone calls to Flatley's attorneys, the woman's attorney threatened to " 'go public' " if a sufficient settlement was not paid. (*Id*. at pp. 310-311.) The woman, represented by her counsel, sued Flatley for battery and intentional infliction of emotional distress based on the alleged rape. (*Id*. at pp. 305-306.) When the matter did not settle, the woman and her attorney then appeared on television, where the woman gave a detailed description of the alleged rape. (*Id*. at p. 306.) Flatley sued both the woman and her attorney. (*Ibid*.) Flatley's second amended complaint alleged five causes of action: civil extortion, intentional infliction of emotional distress, and wrongful interference with prospective economic advantage against both named defendants and defamation and fraud against only the woman. The woman's attorney filed an anti-SLAPP motion to strike Flatley's complaint. (*Ibid*.)

On review before the Supreme Court, Flatley argued that the letter from the woman's attorney and his subsequent telephone calls to Flatley's attorneys, constituted extortion as a matter of law and therefore the trial court correctly denied the anti-SLAPP motion. (*Flatley*, *supra*, 39 Cal.4th at p. 328.) The woman's attorney "maintain[ed] that his activity on behalf of [his client] amounted to no more than the kind of permissible settlement negotiations that are attendant upon any legal dispute or, at minimum, that a

question of fact exists regarding the legality of his conduct precluding a finding that it was illegal as a matter of law." (*Ibid*.)

The Supreme Court observed that "[a]t the core of [the defendant attorney's] letter [were] threats to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws unless he 'settled' by paying a sum of money to [his client] of which the [defendant attorney] would receive 40 percent." (*Flatley*, *supra*, 39 Cal.4th at p. 329.) It found that any doubt regarding the "extortionate character" of the letter was dispelled by the defendant attorney's subsequent telephone calls to Flatley's attorneys. (*Id*. at p. 332.) The court concluded that the "activity forming the basis of [the defendant attorney's] motion to strike Flatley's action was extortion as a matter of law" and, consequently, not within the protection of the anti-SLAPP statute. (*Id*. at p. 333.)

In *Mendoza v. ADP Screening and Selection Services, Inc*. (2010) 182 Cal.App.4th 1644, the Court of Appeal, Second Appellate District, Division Eight, concluded that "illegal as a matter of law" refers to only criminal acts. In that case, the plaintiff contended that the anti-SLAPP statute was inapplicable because the defendant "company engaged in statutorily prohibited conduct when it accessed the MLW ["Megan's Law" Web site], and sold information disclosed on the MLW to its clients." (*Id*. at p. 1653.) The appellate court rejected the claim. It explained: "Our reading of *Flatley* leads us to conclude that the Supreme Court's use of the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute. First, the court in *Flatley* discussed the attorney's underlying conduct in the context of the Penal Code's criminalization of extortion. Second, a reading of Flatley to push any statutory violation outside the reach of the anti-SLAPP statute would greatly weaken the constitutional interests which the statute is designed to protect. . . . [A] plaintiff's complaint *always* alleges a defendant engaged in illegal conduct in that it violated some common law standard of conduct or statutory prohibition, giving rise to liability, and we decline to give plaintiffs a tool for

avoiding the application of the anti-SLAPP statute merely by showing any statutory violation." (*Id*. at p. 1654; see *Price v. Operating Engineers Local Union No. 3* (3rd Dist. 2011) 195 Cal.App.4th 962, 971.)

Even if we assume the phrase "illegal as a matter of law" does not refer to only criminal acts (see Black's Law Dict. (9th ed. 2004), p. 815 ["illegal" means "[f]orbidden by law"]; cf. *Soukup, supra*, 39 Cal.4th at p. 283 & fn. 12 [discussing meaning of "illegal as a matter of law" as used in § 425.18, subd. (h)]), the illegality of the allegedly protected activity must be conceded by the defendant or conclusively established by the evidence presented in the motion to strike to satisfy *Flatley*. (See *Flatley*, *supra*, 39 Cal.4th at pp. 316-320; cf. *Soukup*, *supra*, at p. 287.) "[T]he question of whether the defendant's underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant's concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff's second prong showing of probability of prevailing." (*Flatley*, *supra*, at p. 320.) "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it . . . must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Id*. at p. 316.)

We now turn to whether the asserted protected activity was illegal as a matter of law.

b. *May 17, 2013, Letter Not Illegal as Matter of Law*

Plaintiff argues that section 425.16 was inapplicable to defendant's May 17, 2013 letter because it contained libel on its face under Civil Code section 45a and was illegal as a matter of law. Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on

its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."[5] (See *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386-387.)

Although defamatory language that is libelous on its face may be actionable without the proof of special damages, defamation as statutorily defined involves "a false and *unprivileged* publication." (Civ. Code, §§ 45, 46, italics added; see Civ. Code, § 44.) Even if we assume "illegal as a matter of law" also refers to uncontroverted tortious conduct, defendant did not concede and the evidence did not conclusively establish that the allegedly false statements were not privileged.[6] This is not one of those "rare cases where the defendant's assertedly protected speech or petitioning activity is conclusively demonstrated to have been illegal as a matter of law." (*Flatley*, *supra*, 39 Cal.4th at p. 320.) Accordingly, the usual rules apply and "any claimed illegitimacy of the defendant's conduct must be resolved as part of a plaintiff's secondary burden to show the action has 'minimal merit[]' [citation]." (*Id*. at pp. 319-320.)

c. *Police Reports Not Illegal as Matter of Law*

Plaintiff asserts that section 425.16 did not apply to the police reports because knowingly making a false report to police is illegal as a matter of law pursuant to Penal Code section 148.5, subdivision (a). That provision states in pertinent part: "Every person who reports to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33 . . . that a felony or misdemeanor has been committed,

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[5] " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." (Civ. Code, § 48a, subd. 4(b).)

[6] We fully discuss the applicability of the Civil Code section 47(b) privilege to defendant's allegedly false statements in connection with the issue whether the plaintiff has demonstrated a probability of prevailing on his claims.

knowing the report to be false, is guilty of a misdemeanor." (Italics added.) "Filing a false criminal complaint is an illegal activity, not a constitutionally protected exercise of the right of petition or free speech . . . ." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 706.)

In *Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th 696, the defendant wife did not "contest that she submitted an illegal, false criminal report." (*Id*. at p. 705.) In this case, however, defendant never conceded making false police reports and the evidence did not conclusively show that she knowingly made false reports. "Thus, this case is controlled by the case law holding that when allegations of making false reports are controverted, they are insufficient to render that alleged conduct unlawful as a matter of law and outside the protection of section 425.16. (See *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 712 . . . ['mere allegation that [the defendant] engaged in unlawful . . . activities is insufficient to render [the defendant's] alleged actions unlawful as a matter of law and outside the protection of . . . section 425.16']; *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512 . . . [the defendant's allegedly false report to police that the plaintiff inappropriately touched her was deemed protected activity because there was no uncontroverted evidence showing the report to be false]; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569-1570 . . . [defendant's allegedly false report to school official was protected activity, notwithstanding plaintiff's allegation of falsity, because no uncontroverted evidence showed that it was false].)" (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 967.)

Plaintiff points out that, if his action had gone to trial, defendant would have been required to prove that the allegedly defamatory statements were true to establish an affirmative defense of truth (see CACI No. 1720). That evidentiary burden is not relevant to our application of the *Flatley* standard in an anti-SLAPP motion. We reiterate that "[a]n activity may be deemed unlawful as a matter of law when the defendant does not dispute that the activity was unlawful, or uncontroverted evidence conclusively shows

the activity was unlawful. [Citations.]" (*Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at p. 712.) That is not the case here.

4. *The First Prong*: *Protected Activity*

"The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).)" (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) In deciding whether this threshold requirement is satisfied, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see *Navellier*, *supra*, 29 Cal.4th at p. 89.)

As we have indicated, section 425.16, subdivision (e)(2), protects "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." " '[A] statement is "in connection with" litigation under section 425.16, subdivision (e)(2), if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.' (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 . . . , fn. omitted; see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 . . . [courts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16'].)" (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962.)

On appeal, plaintiff argues that the trial court incorrectly invoked Civil Code section 47(b) to determine the scope of section 425.16.[7] He cites *Flatley*, *supra*, 39

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[7] Plaintiff is not arguing on appeal that the allegations of defendant's claim in small claims court or her statements made in the context of mediation of that claim were not protected by section 425.16. They were clearly "made *in connection with* an issue under (continued)

Cal.4th 299, in which the California Supreme Court stated: "Civil Code section 47 does not operate as a limitation on the scope of the anti-SLAPP statute." (*Id*. at p. 325.) The court also stated, however, that "[t]here is, of course, a relationship between the litigation privilege and the anti-SLAPP statute." (*Id*. at p. 322.) Courts look "to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2)." (*Id*. at pp. 322-323.)

"By analogy to cases extending the litigation privilege to statements made outside the courtroom, many cases have held that the official proceeding privilege applies to a communication intended to prompt an administrative agency charged with enforcing the law to investigate or remedy a wrongdoing." (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 362 (*Hagberg*).) Civil Code section 47(b)'s privilege extends to statements made in any "official proceeding authorized by law." "[T]he privilege established by [Civil Code] section 47(b) applies to a communication ' "concerning possible wrongdoing, made to an official governmental agency such as a local police department, . . . [if the] communication is designed to prompt action by that entity . . . ." ' (*Hagberg v. California Federal Bank*, *supra*, 32 Cal.4th at p. 364 . . . .)" (*Mulder v. Pilot Air Freight* (2004) 32 Cal.4th 384, 387.) "[T]he broad application of the privilege serves the important public interest of securing open channels of communication between citizens and law enforcement personnel and other public officials charged with investigating and remedying wrongdoing." (*Hagberg*, *supra*, at p. 372.)

The foregoing reasoning also brings defendant's communications to police within the protection and purview of section 425.16, subdivision (e)(2). We conclude that case

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consideration or review by . . . judicial body." (Civ. Code, § 425.16, subd. (e)(2), italics added.)

law correctly indicates that, unless speech is outside the protection of section 425.16 under *Flatley*, a report or statement concerning another's possible wrongdoing made to police, that is designed to prompt law enforcement action, constitutes activity protected by section 425.16. (See *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941-942; *Chabak v. Monroy*, *supra*, 154 Cal.App.4th at p. 1512.)

Generally, " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding' " are protected by section 425.16. (*Brigg*, *supra*, 19 Cal.4th at p. 1115; see *Flatley*, *supra*, 39 Cal.4th at p. 322, fn. 11.) "Ordinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16. [Citation.]" (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293; see *Blanchard v. DIRECTV, Inc*. (2004) 123 Cal.App.4th 903, 918 (*Blanchard*) [where entire lawsuit was premised on prelitigation demand letter, plaintiffs conceded their lawsuit arose from activity protected by section 425.16].) Plaintiff presented evidence showing that her May 17, 2013 letter had a connection or logical relation to her small claims action. Her declaration explained that the demand letter was sent to plaintiff's landlord preparatory to, or in anticipation of, filing a small claims action against the landlord, which was settled in mediation.

Here, defendant made a sufficient threshold showing that the challenged causes of action arose from activity protected by section 425.16. Accordingly, the burden shifted to plaintiff to show a probability of prevailing on the merits. (§ 425.16, subd. (b)(1).)

5. *The Second Prong*: *Probability of Prevailing*

"[S]ection 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b))." (*Equilon Enterprises v. Consumer Cause, Inc*., *supra*, 29 Cal.4th at p. 63.)

As indicated, "[t]o establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Soukup, supra*, 39 Cal.4th at p. 291.) "For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)) . . . .' " (*Ibid*.)

Insofar as we can discern, plaintiff is arguing that it cannot be concluded that the Civil Code section 47(b) privilege bars his causes of action because there are many issues of fact. As the California Supreme Court has recognized, however, the privilege is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. (See, e.g., *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927 . . . [where the plaintiff's defamation action was barred by Civil Code section 47, subdivision (b), the plaintiff cannot demonstrate a probability of prevailing under the anti-SLAPP statute]; *Dove Audio, Inc. v. Rosenfeld, Meyer* & *Susman* (1996) 47 Cal.App.4th 777, 783-785 . . . [the defendant's prelitigation communication was privileged and trial court therefore did not err in granting motion to strike under the anti-SLAPP statute].)" (*Flatley*, *supra*, 39 Cal.4th at p. 323.)

The privilege established by Civil Code section 47(b) "bars a civil action for damages for communications made '[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [statutes governing writs of mandate],' with certain statutory exceptions that do not apply to the present case." (*Hagberg, supra*, 32 Cal.4th at p. 360.) "The privilege established by this subdivision often is referred to as an 'absolute' privilege, and it bars all tort causes of

action except a claim for malicious prosecution. [Citations.]"[8] (*Ibid*.; see *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232.)

The privilege "applies regardless of malice. [Citations.]" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956; see *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1063.) Thus, if the privilege is otherwise applicable, plaintiff's assertions that defendant acted maliciously are unavailing.

" '[C]ommunications with "some relation" to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193 . . . .) [The litigation privilege] is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.]" (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1057.) Courts have found statements in prelitigation demand letters to be protected by the litigation privilege. (See e.g. *Blanchard, supra*, 123 Cal.App.4th 903; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577-578.)

"A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. [Citations.]" (*Action Apartment Assn., Inc. v. City of Santa Monica, supra*, 41 Cal.4th at p. 1251; see Rest.2d Torts, § 587 & com. e.) If the allegedly defamatory statement is "made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement is sufficiently connected to litigation and will be protected by the litigation privilege. [Citation.] If it applies, the privilege is absolute. [Citation.]" (*Blanchard*,

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[8] "[Civil Code] [s]ection 47(b), of course, does not bar a criminal prosecution that is based on a statement or communication, when the speaker's utterance encompasses the elements of a criminal offense. (See, e.g., Pen.Code, §§ 118 [perjury], 148.5 [false report of criminal offense].)" (*Hagberg, supra*, 32 Cal.4th at p. 361.) Obviously, the plaintiff's lawsuit is not a criminal prosecution.

supra, 123 Cal.App.4th at p. 919, see *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 266-267.)

While it is true that "[w]hether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact" (*Action Apartment Assn., Inc. v. City of Santa Monica*, *supra*, 41 Cal.4th at p. 1251), "[t]he question of fact is *not* whether [a communication] was malicious or done with a bad intent or whether it was done based upon facts the [alleged defamer] has no reasonable cause to believe to be true." (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1487, italics added; see Rest.2d Torts, § 587, com. a [The privilege "protects a party to a private litigation . . . for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity."].) "Instead, it focuses on whether the litigation was genuinely contemplated. (*Feldman v. 1100 Park Lane Associates*, *supra*, 160 Cal.App.4th at p. 1487.) The requirement guarantees that hollow threats of litigation are not protected. (*Ibid*.)" (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 824.)

Plaintiff disputes that defendant's May 17, 2013 letter was written preparatory to, or in anticipation of, litigation.[9] He maintains that the May 17, 2013 "letter does not qualify as privileged because it makes no mention of a lawsuit or threat of a lawsuit" and he was not a party to the small claims action. He attacks defendant's May 17, 2013 letter on the ground that it is "full of contradictions" and omits facts. He also asserts defendant made unnecessary defamatory statements about him and that letter would have

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[9] On appeal, plaintiff Laue asks this court to take judicial notice of defendant's small claims action against the landlord. We deny the request. "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

constituted a sufficient demand for payment without them, and, therefore, defendant's intent in sending the letter "remains suspect." Plaintiff further argues that "[t]he fact that the parties settled for $150, in lieu of the $300 demanded by [defendant], does not make the lawsuit legitimate." None of these arguments takes the defendant's May 17, 2013 letter outside the scope of the absolute litigation privilege.

Plaintiff failed to make a prima facie showing that defendant was not genuinely contemplating litigation when she sent the letter to plaintiff's landlords. The letter, dated May 17, 2013, demanded $300 from them based on plaintiff's conduct related to the fencing between the properties. Her small claims action against the landlords was filed within about a month and a half of the letter.

Plaintiff also insists that defendant cannot raise the Civil Code section 47(b) privilege as a defense to the allegedly false police reports. He relies upon language quoted from *Lefebvre v. Lefebvre*, *supra*, 199 Cal.App.4th at p. 705, which is taken out of context from a discussion whether defendant wife's report to a sheriff deputy concerning her husband was illegal as a matter of law and, therefore, outside the scope of the anti-SLAPP statute. In that case, defendant wife did not "contest that she submitted an illegal, false criminal report . . . ." (*Ibid*.) Here, in contrast, defendant has not conceded, and the evidence presented does not conclusively establish, that defendant's statements to police were illegal as a matter of law. (See *Flatley*, *supra*, 39 Cal.4th at p. 320.) As our earlier discussion indicates, reports of suspected wrongdoing to police are generally privileged under Civil Code section 47(b). (See *Hagberg*, *supra*, 32 Cal.4th at p. 364.) "[Civil Code] section 47(b) operates to bar civil liability for any tort claim based upon a privileged communication, with the exception of malicious prosecution . . . . [Citations.]" (*Id*. at p. 375.) Plaintiff has not presented sufficient evidence to show that he has a probability of prevailing on the merits of his tort claims with respect to the allegedly false police reports.

Plaintiff further contends that defendant's subjective intent in making statements to police, writing the May 17, 2013 letter, and bringing the small claims lawsuit could not be properly determined on the anti-SLAPP motion because section 425.16, subdivision (g), barred the discovery process. This assertion we deal with more extensively below and reject it.

Plaintiff failed to demonstrate a reasonable probability of prevailing on any of his causes of action.

6. *Stay of Discovery Proceedings under Section 425.16, Subdivision* (*g*)

Plaintiff complains that he could not present sufficient evidence to show a probability of prevailing on his claims because the discovery process was barred by subdivision (g) of section 425.16. As to defendant's May 17, 2013 letter, he asserts that the claim of privilege "could be overcome with evidence obtained in discovery." Plaintiff now claims that he "can prove that the small claims lawsuit [defendant] filed against his landlord was based entirely on false pretenses" and he has evidence to prove that defendant knowingly made one or more false reports to the police.

Plaintiff argues that section 425.16 improperly shifted the burden to him to establish a probability of prevailing on the claims given that discovery was barred. He also baldly asserts that the secondary burden placed on plaintiffs under section 425.16 "only applies for public officials and public figures in matters of public concern under the *New York Times* standard and does not apply in defamation lawsuits involving private figures in matters of private concern." This latter assertion contradicts the plain language of the statute (§ 425.16, subd. (b)) and finds no support in the case law interpreting section 425.16. "[O]ur anti-SLAPP jurisprudence has attempted to effectuate the central purpose of the statute by carefully examining the actual words of the statute and giving them their plain meaning." (*Flatley*, *supra*, 39 Cal.4th at pp. 312-313.)

Section 425.16, subdivision (g), provides: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section.

The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." This court has concluded that "the stay on all 'discovery proceedings' as provided in the anti-SLAPP statute applies to discovery motions, including those already pending at the time the special motion to strike is filed . . . ." (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1128.) "[C]ase law has interpreted good cause in this context to require a showing that the specified discovery is necessary for the plaintiff to oppose the motion and is tailored to that end. [Citations.]" (*Id*. at p. 1125.)

First, as we have already stated, in ruling on a motion to strike under the anti-SLAPP statute, "[t]he plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citations.]" (*Soukup*, *supra*, 39 Cal.4th at p. 291, fn. omitted.) Second, section 425.16, subdivision (g), does not erect an absolute barrier to further discovery. Plaintiff is not in the position to argue that he was improperly denied the discovery necessary to establish a probability of prevailing since he failed to seek permission to conduct further discovery as statutorily allowed. (See *Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264 [forfeiture rule generally applies in civil proceedings; it requires the timely assertion of a right in the trial court]; cf. *Robbins v. Regents of University of California* (2005) 127 Cal.App.4th 653, 659-660 [party opposing summary judgment forfeited due process claim by failing to move for a continuance for the purpose of conducting further discovery].)

Third, plaintiff has failed to demonstrate that *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [84 S.Ct. 710] (*New York Times*) or *Herbert v. Lando* (1979) 441 U.S. 153 [99 S.Ct. 1635], both of which he cites, supports his argument. In *New York Times*, the United States Supreme Court determined that the federal constitution requires a rule prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual

malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times*, *supra*, 376 U.S. at pp. 279-280 [84 S.Ct. 710, 726].) The court later extended this constitutional malice standard to defamation actions brought by public figures.[10] (See *Masson v. New Yorker Magazine, Inc*. (1991) 501 U.S. 496, 510 [111 S.Ct. 2419]; *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 659, 666 [109 S.Ct. 2678].) *Herbert v. Lando*, *supra*, 441 U.S. at p. 153 determined that no absolute First Amendment privilege barred inquiry into the editorial process of a media defendant in a libel case. (*Herbert v. Lando*, *supra*, at p. 169.) The California Supreme Court has observed: "It has become apparent in the years since *New York Times*, *supra*, 376 U.S. 254 . . . was decided that a malice standard of fault carries significant burdens as well as benefits for the news media. Under that standard, liability requires proof of knowing falsehood or a subjective awareness of probable falsity. A plaintiff is therefore allowed wide ranging access to discovery regarding the editorial process. (*Herbert v. Lando* (1979) 441 U.S. 153 [60 L.Ed.2d 115, 99 S.Ct. 1635].)" (*Brown v. Kelly Broadcasting Co*., *supra*, 48 Cal.3d at p. 753.)

Plaintiff has failed to establish that the First Amendment to the United States Constitution has anything to say about his civil discovery rights once the anti-SLAPP

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[10] "Even as to private-figure plaintiffs, there are now significant constitutional restrictions on the right to recover damages. A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages. ([*Gertz v. Robert Welch, Inc*. (1974) 418 U.S. 323, 347 and 349 . . .]; *Dun* & *Bradstreet, Inc. v. Greenmoss Builders* [(1985) 472 U.S. 749,] 756 . . . .) This malice must be established by 'clear and convincing proof.' (*Gertz*, *supra*, 418 U.S. at p. 342 . . . .) . . . When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation. (*Philadelphia Newspapers, Inc. v. Hepps* [(1986)] 475 U.S. 767, 777 . . . .) Contrary to the normal rule of appellate review, a reviewing court must independently review all the evidence on the issue of malice. (*Bose Corp. v. Consumers Union of U.S., Inc*. (1984) 466 U.S. 485, 510-511 . . . ; *McCoy v. Hearst Corp*. [(1986)] 42 Cal.3d 835, 845.)" (*Brown v. Kelly Broadcasting Co*. (1989) 48 Cal.3d 711, 747.)

motion was filed. Plaintiff is a private person allegedly defamed on issues of no public concern. As a general rule, civil discovery rules adopted by a state legislature are a matter of legislative grace. (See *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 32 [104 S.Ct. 2199].)

Plaintiff has failed to demonstrate that, because discovery is statutorily stayed upon the filing of an anti-SLAPP motion absent the granting of a noticed motion based on good cause, section 425.16 improperly shifted the burden to him to establish a probability of prevailing on the merits.

B. *Constitutional Challenges*

1. *Constitutional Right to Trial by Jury*

Plaintiff asserts that he has constitutional and statutory rights to a jury trial in this case (see U.S. Const., 7th Amend.; Cal. Const., art. I, § 16; § 631, subd. (a)) and application of section 425.16 to his claims violated his right to have a jury decide their merits. In ruling on an anti-SLAPP motion, "[t]he court may not weigh the evidence or make credibility determinations; doing either would violate plaintiff's right to a jury trial. [Citation.]" (*Colt v. Freedom Communications, Inc*. (2003) 109 Cal.App.4th 1551, 1557.) "Section 425.16 does not impair the right to a trial by jury because the trial court does not weigh the evidence in ruling on the motion, but merely determines whether a prima facie showing has been made which would warrant the claim going forward. [Citation.]" (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 193; see *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 740, fn. 8; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 37 Cal.App.4th 855, 865-867.)

Insofar as plaintiff is claiming that the trial court misapplied section 425.16 and that error resulted in a violation of his right to jury trial, we reject it. We have concluded that defendant's anti-SLAPP motion was properly granted.

2. *Constitutional Rights to Due Process and Equal Protection*

Plaintiff argues that, by granting defendant's anti-SLAPP motion, the trial court violated his rights to due process and equal protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

Plaintiff contends that the due process clause of the Fourteenth Amendment mandates fair procedures. He points to Civil Code section 43, which provides in pertinent part: "[E]very person has, *subject to the qualifications and restrictions provided by law*, the right of protection . . . from defamation . . . ." (Italics added.) He asserts that "[a] plaintiff has been deprived of due process of law when that plaintiff is deprived of a remedy for unlawful damage to their reputation."

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332.) "Once it is determined that due process applies, the question remains what process is due." (*Morrissey v. Brewer* (1972*)* 408 U.S. 471, 481 [92 S.Ct. 2593].) " '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.]" (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 334.) "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Id*. at p. 333.) Beyond this safeguard, "the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative

burdens that the additional or substitute procedural requirement would entail. [Citation.]"[11] (*Id*. at p. 335.)

Plaintiff was afforded the opportunity to make a prima facie showing that the allegedly defamatory communications were not privileged and his claims had minimal merit necessary to go forward. "[T]he Legislature's detailed anti-SLAPP scheme 'ensur[es] that claims with the requisite minimal merit may proceed.' (*Navellier*, *supra*, 29 Cal.4th at p. 94 . . . .)" (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 740-741, fn. omitted.) Defendant utterly fails to show that the procedures provided by section 425.16 were constitutionally inadequate and their application resulted in a deprivation of due process.

Plaintiff also claims that he "has the same right to the protections of Civil Code [sections] 45, 45a, and 46 as similarly situated private plaintiffs, against private defendants, in matters of private concern." He asserts that the trial court "arbitrarily granted [defendant Ortiz] the right to make defamatory statements, while the same right is denied to others a matter of law."

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 . . . .) Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." ' (*Ibid*.) 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law

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[11] Under the California Constitution, courts "may also consider a fourth factor, ' "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." ' [Citations.]" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ*. (2013) 57 Cal.4th 197, 213.)

challenged." ' (*Ibid*.)" (*People v. Brown* (2012) 54 Cal.4th 314, 328.) Plaintiff did not make this threshold showing. He is not similarly situated with plaintiffs whose claims are outside the ambit of section 425.16 or who are able to make the minimal showing required to defeat an anti-SLAPP motion.

C. *Costs and Attorney Fees Under Subdivision* (*c*)(*1*) *of Section 425.16*

Plaintiff asserts that this court should award him reasonable costs and attorney fees for defending against defendant's anti-SLAPP motion, claiming that the motion was frivolous and solely intended to cause unnecessary delay. Section 425.16, subdivision (c)(1), provides in pertinent part: "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 on the motion, pursuant to Section 128.5." As used in section 128.5, " '[f]rivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) Since defendant's anti-SLAPP motion was properly granted, the motion cannot be deemed frivolous.

DISPOSITION

The order granting the special motion to strike the first amended complaint is affirmed. Plaintiff Dale Laue shall bear costs on appeal.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.