NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NILI N. ALAI et al., Cross-complainants and Respondents, v. LAW OFFICES OF MARK B. PLUMMER, Cross-defendant and Appellant.	G057721 (Super. Ct. No. 30-2018-01002061) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed.

Law Offices of Mark B. Plummer and Mark B. Plummer for Cross-defendant and Appellant.

Nili N. Alai, in pro. per., for Cross-complainant and Respondent.

Siamak Nabili, in pro. per., for Cross-complainant and Respondent.

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INTRODUCTION

Cross-defendant Law Offices of Mark B. Plummer (Plummer) appeals from the order denying its special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure section 425.16.[1] (All statutory references are to the Code of Civil Procedure unless otherwise specified.) Cross-complainants Nili N. Alai and Siamak Nabili filed a cross-complaint against Plummer in which they asserted several claims stemming from Plummer's representation of them. Plummer argues the cross-complaint arose out of protected conduct because Alai and Nabili filed the cross-complaint in retaliation for Plummer filing a complaint against them seeking the recovery of unpaid legal fees.

We affirm. Plummer failed to identify any allegations underlying the claims of the cross-complaint that arise from protected activity. Plummer's argument that Alai and Nabili pursued their cross-claims against Plummer, in whole or in part, in retaliation for its filing the underlying complaint against them does not, in and of itself, render the claims of the cross-complaint subject to being struck under the statute.

BACKGROUND

In June 2018, Plummer filed a complaint against Alai and Nabili which was placed under seal by the trial court. In November 2018, Alai and Nabili filed a cross-complaint against Plummer, attorney Mark B. Plummer, and Jocelyn B. Plummer which contained claims for breach of contract, breach of fiduciary duty, fraud and fraudulent concealment, conversion, defamation and slander, accounting and unconscionable fees (Bus. & Prof. Code, § 6000, Cal. Rules of Prof. Conduct, rule 4-200), and unfair business practices (Bus. & Prof. Code, § 17200).

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[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) We refer to Plummer's special motion to strike as "the anti-SLAPP motion."

In the cross-complaint's factual summary, Alai and Nabili alleged that in the course of their legal representation, the cross-defendants "willfully, oppressively, and with malice aforethought" engaged in the following conduct: (1) "[e]xecuted a blatantly false and unlawful contract for healthcare representation"; (2) "[d]emanded and collected unjust and exorbitant enrichment in a scheme of 'fixed flat fee' stacked on statutory MICRA contingency fees"; (3) "[a]bandoned [Alai and Nabili] without cause and without notice less than two weeks before trial"; (4) "[p]rejudiced [Alai and Nabili]'s case by placing a baseless case lien after client abandonment, and without authorization or contractual agreement"; (5) "[e]xtracted from case representation through a surreptitious 'notice of disassociation' without leave of court and less than [two] weeks before trial"; (6) "[c]onverted and unjustly retained $960 from hourly clients of a court awarded sanctions in favor of client"; (7) "[r]efused to return clients' $2500 deposit, or place funds in a client trust account"; (8) "[f]reely communicated without authorization to third parties and breached client's confidences and privacy during and after dissociating from case"; (9) "[h]abitually concealed and suppressed documents and relevant evidence from clients"; (10) "[d]efamed and slandered clients to third parties, resorting to name calling 'liars', 'fraudsters', 'psychopath', and the like to [its] own clients during course of professional legal representation"; and (11) "[e]xtorted unjust enrichment from clients through schemes and artifices threatening to damage and ruin their case through deliberate and false allegations of 'fraud', testify against them in their base case, sue clients for an unconscionable sum of '$331,000' instead of the correct contingency fees if clients terminated CDS from representation in the lucrative hourly insurance case."

Plummer[2] filed the anti-SLAPP motion seeking an order striking the cross-complaint "and each cause of action contained therein" on the sole ground Alai and

[2] Jocelyn Plummer was also a moving party but withdrew as such before the hearing on the motion. She is not a party on appeal, and we do not refer to her further. Mark B. Plummer was not a moving party.

Nabili "filed a frivolous Cross-Complaint . . . in retaliation for [Plummer] filing a lawsuit seeking payment for services rendered at the behest of [Alai and Nabili]."

The trial court denied the anti-SLAPP motion after finding that Plummer did not carry its burden of demonstrating that the allegations underlying the claims in the cross-complaint arise from protected activity. Plummer appealed.

DISCUSSION

I.

SECTION 425.16 AND THE APPLICABLE STANDARD OF REVIEW

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)[3]

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[3] In *Baral, supra*, 1 Cal.5th at page 395, the California Supreme Court held the Legislature's choice of the term "motion to strike" reflected the understanding that "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Id.* at p. 393.) Thus, an anti-SLAPP motion may be used to attack specific allegations constituting a claim within a pleaded count. If the targeted claim

"We review an order granting or denying an anti-SLAPP motion under the de novo standard and, in so doing, conduct the same two-step process to determine whether as a matter of law the defendant met its burden of showing the challenged claim arose out of protected activity and, if so, whether the plaintiff met its burden of showing probability of success." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42.)

II.

PLUMMER FAILED TO SHOW THE CROSS-COMPLAINT AROSE FROM PROTECTED ACTIVITY.

In the anti-SLAPP motion, Plummer argued the cross-complaint arises from protected activity because Alai and Nabili "specifically stated that they would sue Cross-Defendants . . . if the subject Complaint was not dismissed." Plummer did not cite any allegations of the cross-complaint in support of its argument. Instead, it cited to an exhibit attached to the anti-SLAPP motion which consists of an e-mail from Alai to Plummer offering to abandon filing the cross-complaint in exchange for Plummer's agreement to dismiss the complaint.

In its appellate opening brief, Plummer reiterates, again without reference to any claim, element, or allegation of the cross-complaint, that its conduct was protected because "the filing of the Complaint in this action was clearly a 'protected activity' covered by Code of Civil Procedure section 425.16." It is well-established, however, that the mere filing of a cross-complaint, even if filed in response to or in retaliation for the filing of a complaint, does not, in and of itself, establish that the cross-complaint arises from protected activity within the meaning of section 425.16.

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*), the California Supreme Court reiterated its prior precedent: "A

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amounts to a cause of action "in the sense that it is alleged to justify a remedy," it is subject to an anti-SLAPP motion. (*Id.* at p. 395.) In the anti-SLAPP motion, Plummer did not identify and challenge any specific allegations as constituting a claim within a cause of action in the cross-complaint.

claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' (*Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89; see *City of Cotati v. Cashman* [(2002) 29 Cal.4th 69,] 78 [suit may be in 'response to, or in retaliation for,' protected activity without necessarily arising from it].) Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ['arising from'] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability."

The *Park* court elaborated: "Thus, for example, in *City of Cotati v. Cashman, supra,* 29 Cal.4th 69, the plaintiff city filed a state suit seeking a declaratory judgment that its rent control ordinance was constitutional. The suit followed in time the defendant owners' federal suit seeking declaratory relief invalidating the same ordinance. In the state action, the defendants filed an anti-SLAPP motion alleging the suit arose from their protected activity of filing the federal suit. The motion, we explained, should have been denied because the federal suit formed no part of the basis for the state claim. The city's potential entitlement to a declaratory judgment instead arose from the parties' underlying dispute over whether the ordinance was constitutional, a dispute that existed prior to and independent of any declaratory relief action by the owners. [Citation.]

"In contrast, in *Navellier v. Sletten, supra,* 29 Cal.4th 82, another case in which the defendant's protected activity was the prior filing of court claims, the prior claims were an essential part of the activity allegedly giving rise to liability. The *Navellier* plaintiffs sued for breach of contract and fraud, alleging the defendant had signed a release of claims without any intent to be bound by it and then violated the release by filing counterclaims in a pending action in contravention of the release's terms. Unlike in *City of Cotati*, the defendant was 'being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's "arising from" prong.' [Citation.]

"While in both cases it could be said that the claim challenged as a SLAPP was filed *because* of protected activity, in that perhaps the *City of Cotati* plaintiff would not have filed suit had the defendant not done so first, in only *Navellier* did the prior protected activity supply elements of the challenged claim. The *City of Cotati* plaintiff could demonstrate the existence of a bona fide controversy between the parties supporting a claim for declaratory relief without the prior suit, although certainly the prior suit might supply evidence of the parties' disagreement. In contrast, specific elements of the *Navellier* plaintiffs' claims depended upon the defendant's protected activity. The defendant's filing of counterclaims constituted the alleged breach of contract. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 87.) Likewise, the defendant's misrepresentation of his intent not to file counterclaims, a statement we explained was protected activity made in connection with a pending judicial matter (see § 425.16, subd. (e)(1), (2)), supplied an essential element of the fraud claim (*Navellier*, at pp. 89-90). Together, these cases reflect what we have described elsewhere, in a non-SLAPP context, as 'a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an

underlying course of conduct evidenced by the communication.'" (*Park, supra,* 2 Cal.5th at pp. 1063-1064.)

Here, Plummer does not argue that any protected activity alleged in the cross-complaint supplies an element for any claim. Instead, its argument is limited to the contention the cross-complaint arises from protected activity simply because it followed the filing of the underlying complaint which, as discussed *ante*, is a contention that has been directly rejected in *Park* and its progeny. (See, e.g., *Third Laguna Hills Mutual v. Joslin* (2020) 49 Cal.App.5th 366, 372 ["a cross-complaint will ordinarily not be considered a SLAPP suit because a cross[-]complaint usually arises from the underlying dispute alleged in the complaint, and not out of the litigation process itself; a defendant's oppressive litigation tactics alone will not trigger a dismissal under the anti-SLAPP statute"].)

In its minute order, the trial court ruled Plummer did not carry its burden of demonstrating the claims in the cross-complaint arose from protected activity because the thrust of the cross-complaint sought redress for Plummer's malpractice and "section 425.16 does not protect legal malpractice." (See *Wittenberg v. Bornstein* (2020) 50 Cal.App.5th 303, 312 ["a client's action against his or her attorney, whether it is pleaded as a claim for malpractice, breach of fiduciary duty, or any other theory of recovery, is not subject to the anti-SLAPP statute 'merely because some of the allegations refer to the attorney's actions in court'"].) We do not need to evaluate the trial court's reasoning in denying the anti-SLAPP motion because, in our de novo review, we conclude here the anti-SLAPP motion failed to show that the cross-complaint arises from any protected conduct, regardless of whether such conduct may be properly characterized as malpractice.

As the anti-SLAPP motion did not identify allegations of the cross-complaint that constituted protected activity within the meaning of section 425.16, we do not reach the second prong of the anti-SLAPP analysis.

DISPOSITION

The order is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.