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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DEVONNE DALEY,

Plaintiff and Appellant,

v.

CK CONSTRUCTION AND
DEVELOPMENT CO. INC., et al.,

Defendants and Respondents.

B193115

(Los Angeles County
Super. Ct. No. SC088578)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline Connor, Judge. Affirmed.

De Castro & Morrow and Arthur D. Morrow for Plaintiff and Appellant Devonne Daley.

Law Offices of John A. Case, Jr., and John A Case Jr., for Defendants and Respondents CK Construction and Development Company, Inc., Chris P. Smith, Kaoruko Smith and 11924 Palms Boulevard.

Devonne Daley appeals from an order denying her special motion to strike under Code of Civil Procedure section 425.16¹ directed to the first and second causes of action for fraud and conspiracy to commit fraud asserted in the cross-complaint filed by CK Construction and Development Company, Inc. (CK Construction), Chris P. Smith, Kaoruko Smith and 11924 Palms Boulevard Limited Partnership (collectively, the CK defendants). We affirm.

FACTUAL AND PROCEDURAL HISTORY

1. The Parties

Daley is the owner of residential property located at 411 Carroll Canal in Los Angeles. Chris Smith and Kaoruko Smith are shareholders, officers and directors of CK Construction, which is a partner in 11924 Palms Boulevard Limited Partnership, an entity formed for the purpose of constructing and developing residential property located at 11924 Palms Boulevard in Los Angeles.

2. Daley's Complaint

In November 2003 Daley signed a construction contract with CK Construction to substantially remodel her home. In February 2006 Daley sued the CK defendants asserting claims for breach of contract, negligence, fraud and breach of fiduciary duty. According to the allegations in the complaint, CK Construction performed substandard work and sought and received payment for services that either had not been undertaken or were incomplete. She also alleged the CK defendants intentionally charged some of the material used for the 11924 Palms project to her remodeling project and tried to conceal the wrongful charge.

3. The CK Defendants' Cross-complaint

After filing an answer to Daley's complaint, in April 2006 the CK defendants filed a cross-complaint against Daley, Pamela Shatsky, the person who referred Daley to CK Construction, and CK Construction's former shareholders Charles E. Rutter and his wife Heidi Rutter, who is also Shatsky's niece. The cross-complaint asserted 12 causes of

¹ Statutory references are to the Code of Civil Procedure unless otherwise indicated.

action, including claims for fraud and deceit (first cause of action), conspiracy to defraud (second cause of action) and intentional interference with prospective economic advantage (12th cause of action).

a. *The first and second causes of action in the cross-complaint*

The first and second causes of action for fraud and conspiracy to defraud allege Daley made representations to CK Construction to induce the CK defendants to enter into a construction contract that she never had any intent to perform. From the time she entered into the agreement, Daley was conspiring with Shatsky and the Rutters to defraud the CK defendants. Shortly after signing the contract with CK Construction, Daley feigned dissatisfaction with CK Construction's performance and refused to pay the company for its work. In the meantime, the Rutters were involved in a shareholder dispute with CK Construction, demanding a share of the profits from projects the Smiths had invested in personally.

Daley and the Rutters retained the same attorney, G. Greg Aftergood, to represent them in their separate disputes with CK Construction. On October 13, 2004, prior to the initiation of litigation, the Rutters settled their dispute with the CK defendants, receiving \$40,000 in cash and property in exchange for relinquishment of their stockholder interest in CK Construction and agreement not to sue the CK defendants for any injury arising out of the subject of the settlement agreement. As part of the settlement, the Rutters acknowledged they were aware of Daley's on-going dispute with CK construction and represented that "neither of them ha[d] recommended or advocated that Daley prosecute any claim against [CK defendants] regarding the Daley Project, nor ha[d] either of them given any material advice to Daley regarding her prosecution of any such claim."

According to the CK defendants, the Rutters' representations in the settlement agreement that they had not assisted Daley in the prosecution of her claim against the CK defendants were false when made because, as evidenced by references in Daley's complaint to the 11924 Palms project, the Rutters had actually provided material information, advice and assistance to Daley prior to entering into the settlement agreement in furtherance of the conspiracy.

b. *The 12th cause of action*

In the 12th cause of action in the cross-complaint for interference with prospective economic advantage, the CK defendants alleged they had a prospective economic relationship with both International Business and Mercantile Reassurance Company, a surety company, and Lender's Choice Network, a property inspection company, and Daley acted with the intent to disrupt these relationships by naming each of them as defendants in her original complaint against CK Construction.

4. *Daley's Section 425.16 Special Motion to Strike*

On June 1, 2006 Daley filed a special motion to strike the first, second and twelfth causes of action in the CK defendants' cross-complaint under section 425.16, the anti-SLAPP statute,² alleging each of the causes of action arose from an act in furtherance of her right to petition the courts, a right protected by the United States and California Constitutions. On July 24, 2006, after Daley had dismissed International Business and Mercantile Reassurance Company and Lender's Choice Network from her lawsuit, the CK defendants voluntarily dismissed without prejudice their 12th cause of action for intentional interference with prospective economic advantage.

On July 31, 2006 the trial court denied the special motion to strike as to the first and second causes of action in the cross-complaint, concluding neither cause of action arose from protected activity. As to the 12th cause of action, the court ruled that, although the CK defendants' dismissal of their 12th cause of action rendered Daley's special motion to strike that cause of action moot, it did not preclude Daley from recovering attorney fees if her anti-SLAPP motion was meritorious as to that cause of action. (See, e.g., *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752-753; *Kyle v. Carmon*

² SLAPP is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

(1999) 71 Cal.App.4th 901, 917-919.) The court did not decide, however, whether Daley was the prevailing party with respect to that cause of action.³

CONTENTION

Daley contends the trial court erred in denying her special motion to strike the first and second causes of action for fraud and conspiracy to commit fraud because those claims directly arose from her exercise of her constitutional right to petition the court and the CK defendants did not demonstrate a reasonable probability of prevailing on those claims.

DISCUSSION

1. Section 425.16: The Anti-SLAPP Statute

Section 425.16 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 or 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).)⁴ In ruling on a motion under section 425.16, the trial court engages in a two-step

³ Although the court ruled the CK defendants’ 12th cause of action for intentional interference with prospective economic advantage arose from protected activity, it did not address whether the CK defendants had demonstrated a probability of prevailing on that claim and thus did not decide whether Daley was the prevailing party under the anti-SLAPP statute with respect to the 12th cause of action. Daley does not challenge on appeal the court’s ruling concerning the 12th cause of action.

⁴ Under the 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; (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; (4) or 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.” (§ 425.16, subd. (e).)

process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from 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).)⁵ If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).)⁶ “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the

⁵ In terms of the so-called threshold issue, the moving party’s burden is to show “the challenged cause of action arises from protected activity.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10.) “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that 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. [Citation.] 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. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)’” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

⁶ Once the defendant establishes the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a “probability” of prevailing on the claim. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.) “[T]he 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.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.)

second issue.’” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928 (*Kajima*).

We review the trial court’s rulings on an anti-SLAPP motion independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

2. *The First and Second Causes of Action for Fraud and Conspiracy To Defraud Do Not Arise from Protected Activity*

Although a cause of action that “arises from” a complainant’s litigation activity directly implicates the right to petition and thus is subject to a special motion to strike under section 425.16 (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-736), the “mere fact” that a cross-complaint is triggered by a complaint does not mean the allegations in the cross-complaint *arise from* protected petitioning activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77 (*Cotati*); *Navellier*, at p. 89.) “The anti-SLAPP statute cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.’” (*Cotati*, at p. 77.) To hold that all responsive cross-complaints fall under the purview of the anti-SLAPP statute would render all cross-actions “potential SLAPP’s,” an “absurd result” the Legislature plainly did not intend. (*Ibid.*; see also *Kajima*, *supra*, 95 Cal.App.4th at p. 929.) The critical issue in the instant case, therefore, is not whether the cross-complaint was prompted by Daley’s lawsuit, but whether Daley made the required threshold showing that the acts underlying the challenged fraud and conspiracy claims were undertaken in furtherance of her protected petitioning activity. (*Cotati*, at p.77; *Equilon Enterprises*, *supra*, 29 Cal.4th at p. 67.)

To support her argument the first and second causes of action arise from her protected petitioning activity, Daley likens the instant case to *Navellier*, *supra*, 29 Cal.4th 82. In *Navellier* the organizers of an investment company sued an independent fund trustee in federal court for breach of fiduciary duty. A partial settlement of the dispute

followed in which the trustee signed a general release of claims. The organizers subsequently filed an amended complaint in the federal action, and the trustee filed counterclaims for breach of contract and related claims. Ultimately, the organizers obtained summary judgment in the federal action based on the release. Later, the organizers filed a separate action in state court against the trustee for fraud, asserting the trustee had misrepresented his intention to be bound by the release, as demonstrated by his filing of the counterclaims in federal court. The trustee filed a special motion to strike the state court complaint under section 425.16, which the trial court denied. (*Navellier*, at p. 87.)

The Supreme Court in *Navellier* held the special motion to strike should have been granted. On the threshold issue whether the state court complaint “arose from” protected activity, the Court explained the organizer’s fraud action alleging the trustee had no intent to abide by the release was based solely and directly on the trustee’s filing of his counterclaims in the federal court action: “Sletten is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletten’s alleged actions taken in connection with that litigation, plaintiffs’ present claims would have no basis. This action therefore squarely falls within the ambit of the anti-SLAPP statute’s ‘arising under’ prong.” (*Navellier*, *supra*, 29 Cal.4th at p. 90.)

In *Navellier*, *supra*, 29 Cal.4th 90, unlike the instant case, “but for” the trustee’s filing of his cross-complaint, the organizers had no cause of action. (*Navellier*, at p. 90.) In those circumstances, when the petitioning activity itself serves as the basis for the subsequent complaint, the complaint directly “arises from” the protected petitioning activity. (*Ibid.*; see, e.g., *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 734-736 [malicious prosecution action directly arises from protected petitioning activity and thus falls within purview of anti-SLAPP statute]; *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1057 [abuse of process claim based on allegations one has used court’s process for improper purpose arises from protected petitioning activity].)

In contrast to the situation in *Navellier*, *supra*, 29 Cal.4th 90, the facts underlying the CK defendants’ causes of action for fraud and conspiracy to defraud are not premised

on Daley's litigation activities, but rather on misrepresentations allegedly made by Daley prior to entering into the contract with CK Construction and Daley's purported participation in a scheme with the Rutters "to defraud and to extort money from cross-complainants," a conspiracy that pre-dated Daley's filing of her complaint. Although the cross-complaint refers repeatedly to Daley's lawsuit,⁷ those references simply provide evidence of the purported conspiracy. (See *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399 [State Farm's argument the complaint was subject to special motion to strike "clearly confuses acts of alleged misconduct with the evidence needed to prove them"].) They do not transform the gravamen of the fraud and conspiracy claims, which does not involve protected speech or petitioning activity, into an action that is properly the subject of a section 425.16 special motion to strike. (See *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 "[w]e conclude it is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation] and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute"]; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [cause of action based on both

⁷ As Daley observes, the first and second causes of action in the CK defendants' cross-complaint make multiple references to Daley's complaint: "In her Complaint, plaintiff took what would otherwise be a garden variety construction dispute and concocted a far-fetched tale of corporate intrigue relying on information obtained directly from Aftergood, Charlie Rutter, Heidi Rutter, Shatsky and other cross-defendants. Among other things, the Complaint wrongfully accused cross-complainants of using draw-downs from Washington Mutual under the Daley Agreement to fund 11924 Palms and set forth various allegations of alter ego between CK Construction and its remaining shareholders [¶] . . . In her Complaint Daley concedes that she learned the facts and details of cross-complainant's dispute with Charlie Rutter in or about March 2004," long before the Rutters executed the settlement agreement with the CK defendants. "In a variety of allegations, including without limitation Paragraphs 3, 6, 34, 43, 44, 45, and 46, all of which constitute judicial admissions in this case, the Complaint pleads a plethora of allegations [concerning the 11924 Palms project], the source of which could only be Aftergood, Charlie Rutter, Heidi Rutter, Shatsky, and other cross-defendants."

protected and unprotected activity will be subject to section 425.16 except when protected conduct is “merely incidental to the unprotected conduct”]; see also *Kajima, supra*, 95 Cal.App.4th at p. 929 [although amended cross-complaint included allegations that Kajima threatened to file suit if claims were not paid, such references to protected petitioning activity were simply part of City’s allegations regarding Kajima’s pattern and practice of bidding and collecting on public construction work projects and “plainly [were] not the basis for liability asserted in any of the causes of action in the City’s amended cross-complaint”].)

Daley’s reliance on our opinion in *Kajima, supra*, 95 Cal.App.4th 921 to support her assertion the fraud and conspiracy claims arise from protected activity is misplaced. In *Kajima* an engineering and construction company (Kajima) sued the City of Los Angeles for breach of contract asserting the city owed it payment for work it had completed on a construction project. After the city filed an amended cross-complaint asserting 21 claims against Kajima, including breach of contract and various statutory violations, Kajima filed a special motion to strike the cross-complaint in its entirety, asserting the amended cross-complaint arose from, and was in “patent retaliation for,” Kajima’s exercise of its constitutional right to petition. The trial court denied the motion as to all but the 12th cause of action. We affirmed that order, holding the amended cross-complaint alleged causes of action arising from Kajima’s bidding and contracting practices, not from acts in furtherance of its right of petition or free speech (*Kajima*, at p. 929) -- a holding that is fully consistent with our decision today affirming the trial court’s order denying Daley’s special motion to strike.

Notwithstanding the holding and supporting analysis in *Kajima, supra*, 95 Cal.App.4th 921, Daley insists we also “upheld that portion of the trial court’s ruling [that] struck the one cause of action that specifically mentioned the cross-defendant’s act in filing the underlying complaint.” She argues that, just as we found the references to the underlying complaint significant in *Kajima* with respect to the 12th cause of action in that case, we should similarly find the references in the cross-complaint to the filing of Daley’s complaint conclusive as to the issue whether the fraud and conspiracy claims

arise from protected activity. Daley's characterization of this aspect of our decision in *Kajima*, consciously or not, overlooks footnote five of the opinion, which made clear "[t]he [c]ity d[id] not challenge the trial court's ruling striking the 12th cause of action" and thus we did not consider whether references in that cause of action to the filing of *Kajima's* underlying complaint composed the gravamen of the 12th cause of action. (See, e.g., *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 456, fn. 1 [appellate court's review limited to issues which have been adequately raised and supported in appellant's brief]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [not appellate court's function to address arguments not raised on appeal]; see also *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered"].)

Our conclusion the fraud and conspiracy claims in the cross-complaint do not arise from Daley's protected petitioning activity is consistent with the Fourth District's recent decision in *Booker v. Rountree* (2007) 155 Cal.App.4th 1366. In *Booker* two plaintiffs, Karl Rountree and David Gunther, each represented by the same attorney, Morse Mehrban, brought separate actions against restaurant owner Darryl Booker under the Unruh Civil Rights Act (Civ. Code, § 51) alleging the restaurant's failure to accommodate wheelchair-bound patrons with disabled parking spaces and sufficiently low counters violated their civil rights. The attorney filed both actions on the same date in September 2005 but served the restaurant owner only with Gunther's complaint on September 23, 2005 and did not disclose the other action, even during ensuing settlement negotiations. Booker settled with Gunther in November 2005 not knowing about Rountree's action. When he finally was served with Rountree's action in December 2005, Booker filed a cross-complaint for abuse of process, alleging Rountree had intentionally delayed serving his complaint in order to avoid a motion to consolidate the two actions and thereby obtain a collateral advantage over Booker. Rountree responded to the abuse of process complaint by filing a special motion to strike under the anti-SLAPP statute.

In addressing the threshold issue, the Fourth District Court of Appeal concluded Booker's abuse of process claim directly arose from the underlying litigation activity. The appellate court rejected Booker's argument the essence of the claim was fraud in concealing Rountree's action during settlement negotiations in the Gunther case. The court found, "The gravamen of the claim is misconduct *in* the underlying litigation. Indeed, that is the essence of the tort of abuse of process -- some misuse of process in a prior action -- and it is hard to image an abuse of process claim that would not fall under the protection of the statute." (*Booker v. Rountree, supra*, 155 Cal.App.4th at p. 1370; see also *Rusheen v. Cohen, supra*, 37 Cal.4th 1048 [abuse of process claim subject to anti-SLAPP statute].)

Here, in contrast, the gravamen of the fraud and conspiracy claims is not misuse of the courts or misconduct in the underlying litigation itself, but wrongdoing in the entering of the contract and the orchestration of a conspiracy that began long before the complaint was filed. Whatever merit, if any, the fraud or conspiracy claims may ultimately prove to have at a later stage of the proceeding, they are based on harm that allegedly occurred independently of the filing of Daley's action and thus do not arise from protected petitioning activity.

DISPOSITION

The order denying the section 425.16 special motion to strike is affirmed. The CK defendants are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.