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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LYNCH PARTNERS, LLC,

Plaintiff and Respondent,

v.

ORACLE,

Defendant and Appellant.

D072525

(Super. Ct. No. 37-2016-00033559-
CU-CO-NC)

APPEAL from an order of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Galuppo & Blake, Louis A. Galuppo, Steven W. Blake, Andrew E. Hall, and Daniel T. Watts for Defendant and Appellant.

Marshall Law and Daniel E. Marshall for Plaintiff and Respondent.

Defendant Oracle¹ appeals from an order denying her special motion to strike under Code of Civil Procedure section 425.16.² Oracle contends the trial court erred in denying her motion on the ground that the first amended complaint for breach of contract (a residential lease agreement) filed by Lynch Partners, LLC (Lynch) did not arise out of protected activity. Oracle claims Lynch's action is based on a letter from her counsel demanding that Lynch return the security deposit she paid under the lease agreement, and sending a prelitigation demand letter threatening litigation is a protected exercise of the right of petition. We disagree that Lynch's breach of contract action is based on Oracle's demand for return of her security deposit and, accordingly, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 27, 2016, Oracle signed a residential lease agreement to rent a house in Rancho Santa Fe for \$9,000 per month. The term of the lease was from August 16, 2016 to August 31, 2017. Harold Lynch signed the lease on behalf of "Lynch Partners." On July 29, 2016, the parties signed an addendum to the lease that provided Oracle would pay \$15,000 to Lynch's agent Jennifer Barnes as a security deposit plus \$4,734.24 representing rent for the period of August 16 through August 31, 2016. The addendum further provided that rent in the amount of \$9,000 was due on or before September 1,

¹ Defendant is referred to in the record as Oracle or Ms. Oracle.

² All subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

A special motion to strike pursuant to section 425.16 is commonly referred to as an anti-SLAPP motion. "SLAPP is an acronym for "strategic lawsuit against public participation." ' ' " (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 305, fn. 1.)

2016 and on the first of every month until the lease terminated. Oracle transferred a security deposit to Lynch in the amount of \$20,645.12, which included an overpayment in the amount of \$910.88 that the parties agreed would apply to the rent due on September 1, 2016. On July 30, Oracle asked Barnes if she could bring some items to the property to store in the garage. Barnes viewed Oracle's request to move in personal property before her move in date as unorthodox, but she relayed the request to Harold Lynch and he granted it.

On August 10, 2016, Oracle and Barnes conducted a walk-through of the rental property. Oracle brought more items to store in the garage and a photographer to photograph defects in the property during the walk-through. On the evening of August 10, Oracle's agent Patti Phillips sent Barnes a letter requesting that certain defects in the property be remedied and indicating that Oracle would not be able to proceed with the rental if internet service could not be provided to the property.

On August 12, 2016, Phillips sent Barnes a letter stating that Oracle was cancelling the lease because the property was not habitable due to various defects, including "the bad condition of the flooring," filthiness, unpainted walls, and the lack of internet service.³ Phillips requested that Lynch immediately refund Oracle's \$20,645.12

³ Lynch filed a motion to augment the record to include the August 12, 2016 letter even though, as Lynch acknowledges in the motion, the letter is included in the clerk's transcript. Lynch also requests that we take judicial notice of the letter. Because the letter is part of the record, Lynch's motion to augment the record to include it is denied as unnecessary. (See *People v. Briggs* (1962) 58 Cal.2d 385, 407 [motion to augment record to include diary was properly denied where diary was already part of the record].) We also deny Lynch's request for judicial notice of the letter.

security deposit. On August 13, Barnes received a written notice of cancellation of the lease on a California Association of Realtors form that Oracle signed. The stated reason for cancellation was that the "[p]roperty was not as presented prior to signing lease agreement[.]" On September 2, 2016, Lynch served on Oracle a three-day notice to pay rent or quit and surrender possession of the premises for nonpayment of rent under section 1161.

On September 7, 2016, Oracle's counsel sent Lynch and Barnes a letter demanding the return of Oracle's security deposit (the September 7 letter). Oracle's counsel asserted that because Oracle had never taken possession of the property and had cancelled the lease on August 12, 2016, Lynch was obligated to return Oracle's security deposit no later than 21 days after August 12. Counsel further stated that Lynch's refusal to immediately return the deposit would constitute unlawful conversion of Oracle's money.

Oracle's counsel then recounted the events and circumstances leading to Oracle's cancellation of the lease under the heading "BACKGROUND." The letter stated: "It was clear to Phillips and Ms. Oracle that the house was uninhabitable, so on August 12, 2016, Phillips formally notified Lynch in writing that Ms. Oracle had canceled the lease agreement because of the poor conditions at the home, as well as Lynch's refusal to sign a separate commission agreement. . . . Ms. Oracle signed a cancellation form on the same day, using a standard California Association of Realtors template. Lynch's agent, Jennifer Barnes, responded and confirmed she had received the cancellation and put the property back on the market on August 13."

Lynch filed the original complaint in this action on September 26, 2016. In January 2017, Lynch filed the operative first amended complaint, which includes a single cause of action for breach of contract. A copy of the parties' written lease agreement is attached to the first amended complaint. The first amended complaint alleges the "parties orally agreed to allow [Oracle] to have early access and possession of the premises and through her own actions and those of her authorized agent she obtained and kept possession of the house[.] On September 7, 2016 she communicated she had relinquished legal possession to the house through her attorney for the first time."

The first amended complaint then alleges Oracle breached the lease agreement as follows: "[Oracle] clearly and positively indicat[ed] both by her words and conduct that she would not meet the contract requirements. [Oracle's] actions constitute 'early termination' as set forth in par. 30[] of the Exhibit A lease.[⁴] She clearly and positively by her words indicated she would not be honoring the terms of the contract. On 9/7/2016, . . . her attorney's letter first put [Lynch] on notice of the breaches[, i]ncluding repudiation of the contract and refusal to comply with the rental payments and term of the lease. [Oracle] clearly & positively indicated she would not meet the contract

⁴ Paragraph 30 of the lease agreement states: "BREACH OF CONTRACT; EARLY TERMINATION: In addition to any obligations established by paragraph 29, in the event of termination by Tenant prior to completion of the original term of the Agreement, Tenant shall also be responsible for lost rent, rental commissions, advertising expenses and painting costs necessary to ready Premises for re-rental. Landlord may withhold any such amounts from Tenant's security deposit." Paragraph 29 sets forth the tenant's obligations upon vacating the leased premises.

requirements in word and deed. [Oracle] had actual, physical and legal possession of the premises with full rights of access and egress."

On March 27, 2017, Oracle filed her special motion to strike the first amended complaint. The stated basis for the motion was that the only alleged act of breach in Lynch's breach of contract claim was "Oracle's attorneys sending a letter to Harold Lynch in September 2016 threatening to file a lawsuit against him if he did not return Oracle's security deposit." Oracle argued the letter was an exercise of Oracle's right to petition because it was reasonably relevant to the contemplated litigation and, "[a]s a prelitigation demand letter . . . it [was] 'absolutely privileged' under Civil Code [section] 47 and subject to strike under the anti-SLAPP statute."

In opposition to the motion, Lynch noted the first amended complaint alleges the September 7 letter put Lynch on notice of Oracle's breach of the lease; not that the letter was the basis for the lawsuit. As Lynch stated, "The letter was not the breach[;] it was notice of a prior breach." Lynch explained that the letter was referenced in the first amended complaint because it established the date Oracle "legally informed" Lynch she was relinquishing her possession of the property and "clearly communicated" to Lynch her intent to terminate the lease. Lynch argued the first amended complaint adequately pleads Oracle's anticipatory breach of the lease agreement on August 12, 2016, and that the breach of contract claim does not arise from the protected activity of sending the September 7 demand letter.

The trial court agreed with Lynch's construction of the first amended complaint and entered the following order denying Oracle's special motion to strike: "[Oracle's]

special motion to strike is denied. CCP § 42[5].16. The complaint does not arise out of [Oracle's] free speech or petition activity. [Oracle] argues that the first amended complaint is based on one alleged act of breach—[Oracle's] attorney sent a letter to Harold Lynch threatening to file a lawsuit against him if he did not return [Oracle's] security deposit. In retaliation for this letter, [Lynch] filed this lawsuit. [Oracle] argues that the letter was an exercise of [Oracle's] right of petition. This is not what was pled. The first amended complaint alleges that [Oracle] gave notice that she had relinquished possession of the premises and this constituted an early termination of the lease. The vehicle by which [Oracle] gave such notice—through her attorney, and any extraneous matters stated in the letter, do not convert the alleged anticipatory breach of contract into a violation of [Oracle's] right to petition."

Oracle timely appealed.⁵

DISCUSSION

Legal Principles Regarding Section 425.16 and Standard of Review

Section 425.16 provides that "[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

⁵ In this appeal, Oracle filed a motion to strike Lynch's respondent's brief on the ground it does not meet various requirements for appellate briefs set forth in California Rules of Court, rule 8.204, including requirements regarding font size, page numbering, margin width, and record citations. We deny Oracle's motion to strike Lynch's brief and exercise our discretion to disregard any noncompliance with rule 8.204. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

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 Legislature enacted section 425.16 to prevent and deter "lawsuits . . . 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 or her resources" [citation], the Legislature sought " ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." ' " [Citation.] 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.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278 (*Soukup*)).

Courts employ a two-step process for evaluating an anti-SLAPP motion. " 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity^[6] If the court finds

⁶ Categories of protected activity are set forth in section 425.16, subdivision (e), which provides: "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."

that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] '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.' " (*Soukup, supra*, 39 Cal.4th at pp. 278-279, italics omitted.)

In determining whether the "arising from" requirement is met, "the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*)). "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] . . . [I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies" (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1369.) "Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 (*Baral*)). Similarly, "[i]f the mention of protected activity is 'only incidental to a cause of action based essentially on nonprotected activity,' then the anti-SLAPP statute does not apply." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 272.)

"We review de novo the grant or denial of an anti-SLAPP motion. [Citations.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity." (*Park v. Bd. of Trustees*

of California State University (2017) 2 Cal.5th 1057, 1067 (*Park*.) If the defendant fails to show the lawsuit arises from protected activity, we may affirm the trial court's ruling without addressing the second prong (the probability of prevailing). (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 41.)

Analysis

Oracle contends the anti-SLAPP statute required the trial court to strike Lynch's lawsuit because the complaint was filed in retaliation for Oracle's protected activity of sending a prelitigation demand letter through her counsel. We disagree. As we discuss, the moving party in an anti-SLAPP proceeding must show the protected petitioning activity is the gravamen or principal thrust of the plaintiff's claims. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78 (*City of Cotati*.) It is not enough that the plaintiff's cause of action was filed after petitioning activity occurred or that the claims relate to petitioning activity; the petitioning activity itself must give rise to and be the basis for the asserted liability. (*Park, supra*, 2 Cal.5th at pp. 1062-1063.) Oracle has not met that burden here.

As an initial matter, we note Oracle is correct that prelitigation demand letters and communications sent or made in anticipation of litigation may constitute protected activity within the meaning of section 425.16. (See, e.g., *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 [letter to employer's customers accusing ex-employee of misappropriation of trade secrets and threatening to file litigation was protected conduct]; *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 887-888 [letter to film distributors asserting that film was not authorized and

threatening to sue was protected activity].) Nevertheless, "the 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, supra*, 29 Cal.4th at p. 89.)

Numerous cases illustrate that a cause of action may be "triggered by" or associated with a protected act, without necessarily meaning the cause of action *arises* from that act. (*Navellier, supra*, 29 Cal.4th at p. 89.) In deciding whether a cause of action arises from protected activity, "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." (*City of Cotati, supra*, 29 Cal.4th at p. 78.) There is a "distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park, supra*, 2 Cal.5th at p. 1064.) To be subject to the anti-SLAPP statute, "the prior protected activity [must] supply elements of the challenged claim." (*Ibid.*)

Here, the first amended complaint alleges that: the parties entered into a lease agreement; the parties agreed Oracle would have "early access and possession of the premises"; Oracle had "actual, physical and legal possession of the premises"; and Oracle breached and "repudiated" the lease agreement when she terminated the agreement early and refused to comply with the terms of the lease. Lynch further alleges that the letter from Oracle's attorney put Lynch on notice of the alleged breaches, and that Oracle "communicated she had relinquished legal possession to the house through her attorney." The elements of a breach of contract claim are (1) a contract, (2) plaintiff's performance

or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff. (*Abdelhamid v. Fire Ins. Exchange* (2010) 182 Cal.App.4th 990, 999.) "A plaintiff may sue for anticipatory breach when the other party ' "positively repudiates the contract by acts or statements indicating that [it] will not or cannot substantially perform essential terms thereof" ' [Citation.]" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 702.)⁷ Although inartfully drafted, Lynch's allegations make clear that its breach of contract claim arises not from counsel's letter, but from Oracle's own actions independent of the preparation of that letter. To be subject to the anti-SLAPP statute, the protected activity must "supply elements of the challenged claim." (*Park, supra*, 2 Cal.5th at p. 1064.) The September 7 letter does not perform that function.

We disagree with Oracle's claim that the "only allegation against Oracle is that her attorneys sent a demand letter asking for her security deposit," and that the letter is "the sole basis for [Lynch's] claims." As set forth *ante*, the first amended complaint is based on and arises from Oracle's underlying actions that are merely summarized in her counsel's letter. Oracle's demand that Lynch return her deposit is not even mentioned in the first amended complaint, and to the extent the complaint's reference to her counsel's September 7 letter can be viewed as an indirect reference to the demand, the reference is

⁷ Lynch's allegation that Oracle repudiated the contract appears to be based on an anticipatory breach. When we determine whether the plaintiff's claims arise from defendant's protected activity, we do not consider the legitimacy of the plaintiff's claims. (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371.)

merely a "collateral or incidental allusion[] to protected activity" that cannot support a special motion to strike under section 425.16. (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272.)

The first amended complaint references the security deposit only in the context of the alleged damages proximately caused by Oracle's alleged breach of the lease agreement. Lynch alleges damages in the form of future lease term rents in the amount of \$30,000 and additional amounts "according to proof as to other . . . [*sic*] actions and breaches and consequential damages caused by [Oracle] by breaching the agreement." The first amended complaint then alleges that "[Lynch] has credited the full amount of [the] security deposit to mitigate his damages pursuant to the terms of the contract . . . [.] [Lynch] has also credited [Oracle] for costs of rental commissions, [and] advertising expenses. These have been withheld from [the] security deposit" These references to Lynch's withholding Oracle's security deposit to mitigate damages merely provide context regarding the parties' underlying dispute—they do not reflect that Lynch's breach of contract claim arises from Oracle's demand for return of the deposit. (*Baral, supra*, 1 Cal.5th at p. 394 ["Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute."].)

Because the September 7 letter demanding a refund of Oracle's security deposit did not give rise to Oracle's alleged liability, it is immaterial that Lynch discussed the September 7 letter in more detail in its discovery responses. In no part of the first amended complaint does Lynch seek to hold Oracle liable for counsel's writing a

prelitigation demand letter; nor does counsel's writing of the letter supply the elements for Lynch's breach of contract claim. The fact that the September 7 letter put Lynch on further notice of Oracle's underlying breach does not transform that writing into the basis for Lynch's lawsuit within the meaning of section 425.16. (See *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1247 [reversing order granting motion to strike declaratory relief and breach of contract complaint, as the gravamen of the complaint was a dispute about rights and obligations under a lease, not the service of a three-day notice to quit and filing of an unlawful detainer action]; *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 176-177 [talent agents' claims against former employer for retaliation and wrongful termination were based on employer's course of conduct preventing the agents from performing their work, not a prelitigation letter written by employer's attorney that communicated the purported job modifications].)

In sum, the allegations of the first amended complaint do not reasonably support Oracle's contention that Lynch's claim arises from the protected activity of demanding the return of her deposit. Because Lynch's cause of action for breach of contract does not arise from Oracle's demand for the return of her security deposit and threat of litigation, or any other "act in furtherance of [her] right of petition or free speech under the United States or California Constitution in connection with a public issue" within the meaning of section 425.16, the trial court properly denied her special motion to strike. Because Oracle has not carried her burden of showing Lynch's claim arose from protected activity,

we need not and do not reach the secondary inquiry of whether plaintiff satisfied the burden of showing probable success on the merits.

DISPOSITION

The order denying Oracle's special motion to strike the first amended complaint under section 425.16 is affirmed. Lynch is awarded its costs on appeal.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

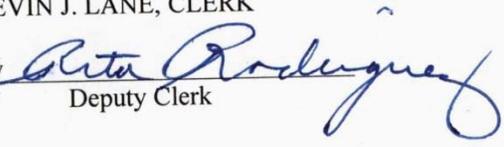
KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.



05/23/2018

KEVIN J. LANE, CLERK

By 
Deputy Clerk