1 of 1 DOCUMENT

SHANNON SCHNEBLE, Cross-Complainant and Respondent, v. DANIEL SIKER et al., Cross-Defendants and Appellants.

A104266

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

2004 Cal. App. Unpub. LEXIS 7210

August 2, 2004, Filed

PRIOR HISTORY: San Francisco City & County Super. Ct. No. CGC 03419831.

DISPOSITION: The judgment is affirmed. Respondent is awarded costs.

CORE TERMS: tenant, cross-complaint, cause of action, Ellis Act, protected activity, privileged, lawsuit, declaratory relief, declaration, notice, declaratory relief, furtherance, probability, withdrawal, tenancy, attorney fees, sentences, right of petition, conduct underlying, general allegations, habitability, actual eviction, notice of termination, free speech, harassment, prevailing, opposing, rental, heat, moot

JUDGES: Lambden, J.; Kline, P.J., Ruvolo, J. concurred.

OPINION BY: Lambden

OPINION

Daniel and Linda Siker (the Sikers) [1] own real property located in San Francisco (the property). Shannon Schneble (tenant or respondent) leased the property. The Sikers notified respondent that they were withdrawing their property from rental use pursuant to the Ellis Act (Gov. Code, § 7060 et seq.); subsequently, they filed a lawsuit against tenant for declaratory relief. Tenant filed a cross-complaint against the Sikers and Evelyn Schneckenberger [2] (collectively, owners or appellants) for, among other claims, constructive and actual eviction. Appellants filed a motion to strike the cross-complaint pursuant to Code of Civil Procedure section 425.16 **[*2]** , [3] known as the anti-SLAPP (strategic lawsuit against public participation) statute. The court denied the motion and on the court's own motion it struck two sentences in the cross-complaint. Owners appeal, arguing that the court erred in denying its motion to strike and in striking two sentences from the cross-complaint. We uphold the lower court's ruling.

1 They are husband and wife.

2 It appears from the record that Schneckenberger is the manager of the property while the Sikers, who live in Wisconsin, own the property.

3 All further unspecified code sections refer to the Code of Civil Procedure.

BACKGROUND

Tenant has leased the property owned by the Sikers, who live in Wisconsin, since 1984. At various times, tenant complained to appellants about the condition of the property. In October 2002, tenant sent appellants a detailed report regarding the alleged substandard and hazardous conditions. In November 2002, tenant filed administrative proceedings against owners before the Residential **[*3]** Rent Stabilization and Arbitration Board.

On January 17, 2003, owners entered into a mediated agreement in the administrative proceeding to correct the conditions. At the end of that same month, owners sent tenant a notice of termination of the tenancy pursuant to the Ellis Act. On April 27, 2003, owners filed a complaint in court against tenant, seeking a declaration of compliance with the Ellis Act.

On June 4, 2003, tenant filed a cross-complaint against appellants for constructive eviction, actual eviction, breach of implied warranty of habitability, negligence, harassment, retaliation, unfair competition, negligent infliction of emotional distress, and intentional infliction of emotional distress. She alleged that the property had the following defective conditions: "deteriorated exterior stairways, damaged and dilapidated fixtures in the premises, improperly installed and capped gas lines, electrical and plumbing work performed without permit, exposed wiring, water damaged walls and ceilings, water leaks, inadequate and non-existent hot water and heat, gas leaks, mold and mildew." She asserted that prior to the filing of her cross-complaint, "the premises were cited for violations **[*4]** by the Department of Building Inspection, City and County of San Francisco, and ordered to abate the nuisances."

Tenant claimed that in January 2003, appellants served her with a notice to terminate her tenancy pursuant to the Ellis Act and that she invoked the disability protections, which extended her tenancy an additional eight months. She also alleged that, on April 28, 2003, owners "filed an action for declaratory relief against [tenant], which action purports to adjudicate the rights between the parties. As a result of said lawsuit, [tenant] has been forced to retain legal counsel to defend her and has incurred attorney fees." In addition, she alleged that PG&E shut off gas service to the property on May 3, 2003, because of the "defective and dangerous conditions of the gas lines." Further, she asserted that "on several occasions, [appellants] initiated work without valid permits, and on one occasion, the Department of Building Inspection issued a 'stop work' order for non-compliance."

In her cross-complaint, tenant alleged that work continued on the property until June 2, 2003. She asserted: "At all times mentioned herein, workmen performed the tasks in such fashion **[*5]** as to render the premises uninhabitable and to expose [tenant] to unhealthy and irritating conditions, including without limitation, dirt, dust, building materials, debris, and other particulates. As a result of said exposure, [tenant] experienced difficulty breathing and suffered from a respiratory reaction. On or about May 24, 2003, [tenant] sought medical treatment for the conditions suffered."

Tenant further asserted that she had no usable kitchen or cooking facilities from May 21, 2003 to June 2, 2003. She alleged: "Workmen employed by [owners] relocated equipment and fixtures in the kitchen so as to render them inaccessible and unusable. Further, the presence of dust and harmful particulate caused [tenant] to vacate the premises temporarily and sleep in an alternate location. [Tenant] has had no hot water, heat, or gas service for the premises . . . . Workmen employed by [owners] have left the premises in a dirty, degraded condition, further making the premises uninhabitable . . . ."

On July 10, 2003, appellants filed a notice of special motion and special motion to strike pursuant to section 425.16 of the anti-SLAPP statute. They challenged each cause of action **[*6]** in the cross-complaint except the third, warranty of habitability.

On August 14, 2003, the court denied the special motion to strike. The court on its own motion struck the following two sentences from tenant's cross-complaint: "On or about April 28, 2004, [owners] filed an action for declaratory relief against [tenant], which action purports to adjudicate the rights between the parties. As a result of said lawsuit, [tenant] has been forced to retain legal counsel to defend her and has incurred attorney fees."

On October 9, 2003, owners filed their notice of appeal. Subsequently, on February 18, 2004, they dismissed without prejudice their complaint against respondent for declaratory relief. Appellants requested judicial notice of respondent's second amended answer in unlawful detainer action and we grant that request; that document is part of the record on appeal. Appellants also requested to take additional evidence of a facsimile from respondent's counsel and respondent's answers to interrogatories. We also consider those documents as part of the record on appeal.

DISCUSSION

I. *Claim that Appeal is Moot*

Respondent asserts that this appeal is moot because **[*7]** owners dismissed their pleading for declaratory relief. She argues that by dismissing the pleading, appellants eliminated the alleged protected activity prompting the anti-SLAPP motion. According to respondent, no justiciable issue remains. Appellants reply that the dismissal does not make this appeal moot because tenant is suing them for having filed the declaratory relief action and for their withdrawal of the property pursuant to the Ellis Act.

We agree that owners' dismissal of their complaint for declaratory relief does not render their motion to strike tenant's pleading pursuant to the anti-SLAPP statute moot. The question remains whether the conduct underlying tenant's cross-complaint arises from protected activity. Acts pursuant to the Ellis Act constitute privileged conduct under section 425.16. In San Francisco, where the property is located, the owner of real property must engage in various procedures with the rent board under Chapter 37 of San Francisco's Administrative Code and privileged conduct includes seeking administrative action. (See, e.g., *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.) Moreover, the statutory right **[*8]** to withdraw property from residential rental use must actually be invoked by way of notices and applications to designated municipal agencies, which are protected actions. Accordingly, since tenant has not dismissed the cross-complaint, the question whether the claims in the cross-complaint arise from the privileged conduct of withdrawing the property pursuant to the Ellis Act or filing a lawsuit for declaratory relief remains.

II. *The Application of the Anti-SLAPP Statute to Tenant's Claims*

A. *The Anti-SLAPP Statute*

Section 425.16, commonly referred to as the anti-SLAPP law, provides in relevant part: "(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly. [P] (b)(1) A cause of action against a person **[*9]** 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. [P] (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. [P] (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination. [P] . . . [P] (e) 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, **[*10]** 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."

Under the statute, the court makes a two-step determination: "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).) 'A defendant meets this 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]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing **[*11]** on the claim. (§ 425.16, subd. (b)(1) . . . .)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; see also *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) To establish the probability of prevailing, the plaintiff "need only have ' "stated and substantiated a legally sufficient claim.' " [Citation.] 'Put another way, 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." ' [Citation.]" (*Navellier, supra,* at pp. 88-89.) "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." (*Id.* at p. 89.) We review the ruling whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing de novo. (See, e.g., *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1123, fn. 10.) **[*12]** "The process the court uses in determining the merits of the motion is similar to the process used in approaching summary judgment motions. The evidence presented must be admissible [citation] and the trial court does not weigh the evidence. [Citation.] Rather, a probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff. [Citation.]" (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188.)

B. *Conduct Underlying the Cross-Complaint*

We consider under the first prong of the test whether the claims in the cross-complaint arise from privileged conduct. Appellants have the burden of showing that the "challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; see also § 425.16, subd. (b)(1).) If a particular claim does not arise out of privileged conduct, then the motion to strike is properly denied. If the answer to the first question is in the affirmative, we then must move to the second **[*13]** prong of the test, probability of success.

As already noted, withdrawing property pursuant to the Ellis Act is protected activity. Similarly, any notice of termination served on tenant pursuant to the Ellis Act is covered by the anti-SLAPP statute. All communications with "some relation" to an anticipated lawsuit are privileged. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194.)

Appellants contend that each claim--other than breach of the warranty of habitability--arose from privileged conduct. Appellants' argument as to each challenged cause of action--constructive and actual eviction, negligence, harassment, retaliation, unfair competition, negligent infliction of emotional distress, and intentional infliction of emotional distress--is essentially identical. The principal contention of appellants is that tenant alleged protected activity in the general allegations of her cross-complaint. In each of her causes of action tenant incorporated the general allegations, which included the allegation referring to the protected activity; appellants assert that therefore the conduct underlying these causes of action is protected. In addition, the allegations regarding tenant's **[*14]** claims of harassment and retaliation were limited to acts committed by appellants after June 6, 2002. Since the complained of acts after this date include the Ellis Act withdrawal and owners' lawsuit for declaratory relief, appellants assert that these claims must have arisen from privileged activity. [4] Moreover, appellants point out that tenant mentioned privileged conduct twice more in her declaration opposing the special motion [5] and in her third affirmative defense to the complaint for declaratory relief.

4 Owners' lawsuit and withdrawal of the property pursuant to the Ellis Act did not occur until 2003. Presumably, owners are arguing that the cross-complaint did not allege any actions by them between June 6, 2002 and their withdrawal of the property and therefore these allegations must refer to this privileged activity. As we explain below, the factual allegations giving rise to the claims in the cross-complaint do not arise out of any protected activity and simply because the acts occurred after the privileged conduct took place does not mean these acts were privileged.

5 In her declaration, tenant stated that owners withdrew the property "from residential rental use under the Ellis Act" and served a "new termination notice" on her. She stated that she received a one-year extension of termination of her tenancy on the basis of disability. In addition, she stated that the owners filed a complaint against her for declaratory relief as to the propriety and sufficiency of their Ellis Act withdrawal.

[*15]

6 Tenant answered owners' complaint on July 24, 2003. In her third affirmative defense, tenant stated in relevant part: "[Owners have] retaliated unlawfully against [tenant] by seeking to recover possession of the rental unit by terminating tenancy in violation of Civil Code Section 1942.5 and in violation of common law and by bringing this action for declaratory relief."

In considering whether the action "arises from" actions in furtherance of the right to petition, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see also *Navellier v. Sletten, supra,* 29 Cal.4th at p. 89.) The plaintiff, however, cannot "frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.' " (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) The "mere fact that an action was filed after protected activity **[*16]** took place does not mean that it arose from that activity." (*City of Cotati v. Cashman, supra,* 29 Cal.4th at pp. 76-77.) 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. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' " (*Id.* at p. 78; see also *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1318.)

Although appellants argue to the contrary, it is clear that a complete reading of the cross-complaint establishes that each cause of action was based on conduct that was not related to the withdrawal of the property pursuant to the Ellis Act or to owners' lawsuit for declaratory relief. Each cause of action primarily relied on the general allegations and, as already **[*17]** noted, the general allegations do mention the protected activity. Tenant alleged in her cross-complaint that she incurred attorney fees as a result of owners' declaratory action (and she referred to her receiving notice of termination pursuant to the Ellis Act in her declaration), but just because petitioning activity is alleged in the complaint, does not mean that it becomes part of the act underlying the cause of action. (See, e.g., *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001.) Here, the protected activity is not the principal conduct underlying each cause of action. With regard to tenant's claims of wrongful and actual eviction, negligence, and harassment, these claims arose principally from the acts of repair on the property by owners' contractors. Tenant complained that the repair by the contractors forced her to vacate temporarily because of the dust; prevented her from using her kitchen for over one week; and deprived her of hot water, heat, or gas service.

When we consider whether the action "arises from" actions in furtherance of the right to petition, we consider "the pleadings, and supporting and opposing affidavits stating the facts **[*18]** upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see also *Navellier v. Sletten, supra,* 29 Cal.4th at p. 89.) Here, tenant stated in her declaration that she had complained about an obsolete and "life-hazardous" electrical system and the lack of heat in her dwelling. [7] Moreover, the department of building inspection issued a notice of violation on May 16, 2003. It noted, among other things, extensive wood deterioration throughout the rear exterior stairway; gas lines not properly capped; electrical work

without permits; peeling paint; mildew; and no hot water. The report by expert witness, Claudio Bluer, stated that he observed several violations on the property that constituted "immediate life threatening hazards, directly affecting health and safety (habitability)." He opined: "Failure to bring this structure in compliance with all applicable construction codes should result in vacation of living unit. [P] Due to the several life threatening conditions, the inordinate number of habitability violations, the lack of maintenance, and their compounded effect, this building constitutes a threat to the health and safety of the occupants. . . **[*19]** ."

7 Appellants make various arguments regarding the admissibility or the weight this declaration should be given. We need not consider these arguments as the declaration and reports are only being considered as they relate to clarifying the conduct alleged in the cross-complaint.

Further, tenant alleged a wrongful termination of her tenancy that is not related to the withdrawal pursuant to the Ellis Act. In her cross-complaint, tenant alleged that appellants told her to leave the premises in June through August 2002 because their daughter was going to live there. [8] She asserted that this attempt to terminate her tenancy was in response to her request for repairs.

8 The owners withdrew the written notices of termination by a letter from their counsel dated August 26, 2002.

A complete reading of the cross-complaint establishes that, **[*20]** although two sentences in the general allegations refer to protected activity and the costs of attorney fees associated with challenging this protected activity, the gravamen of the cross-complaint arises from non-protected activity. "We analyze the gravamen of the actionable conduct to determine whether" the alleged conduct arises from "protected conduct within the meaning of the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 189-190.) Not one cause of action arises principally from owners' invocation of the Ellis Act. As discussed *ante*, the fact that the pleading incorporates privileged activity or that claims are based on conduct occurring after privileged activity has occurred, does not necessarily mean that the claims arise from privileged conduct. It is true that the anti-SLAPP statute will apply even when the claims do not arise *solely* from protected activity, but in this case the claims do not arise primarily from protected activity. Indeed, the protected activity--other than giving rise to attorney costs--appears to have little relevance to the claims in the cross-complaint. Here, tenant's declaration, the **[*21]** documents attached to her declaration, and her pleading establish that the causes of action in her cross-complaint are predicated upon conduct separate and apart from the filing of the notice of intent to withdraw the property pursuant to the Ellis Act or to owners' filing of their lawsuit for declaratory relief and therefore owners' conduct was not privileged under section 425.16. Accordingly, the trial court properly denied the motion to strike the cross-complaint.

III. *Trial Court's Striking Portions of the Cross-Complaint*

The trial court, on its own motion pursuant to section 436, subdivision (a), [9] struck the following paragraph from tenant's cross-complaint: "On or about April 28, 2003, [owners] filed an action for declaratory relief against [tenant], which action purports to adjudicate the rights between the parties. As a result of said lawsuit, [tenant] has been forced to retain legal counsel to defend her and has incurred attorney fees."

9 The court order mistakenly refers to section 426, subdivision (a).

[*22] Section 436, subdivision (a) provides: "The court may . . . at any time in its discretion, and upon terms it deems

proper: [P] (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." Appellants complain that the court should not have stricken the sentences in the cross-complaint pertaining to the filing of the complaint for declaratory relief because the facts deleted were not irrelevant, false, or improper, as required by the statute.

We review the trial court's decision to strike a portion of the cross-complaint pursuant to section 436, subdivision (a) for abuse of discretion. (See, e.g., *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) We have already held that the conduct underlying each cause of action in the cross-complaint did not primarily arise out of the lawsuit for declaratory relief. (See section II., *ante*.) Indeed, other than the referral to attorney fees, this allegation had no relationship to any alleged injury. Accordingly, we agree with the trial court that these two sentences were irrelevant and therefore it properly deleted them.

Appellants also challenge the lower court's ruling on **[*23]** the basis that the court erred in applying section 436, a general statute, because they maintain that this general statute cannot be applied to cases involving section 425.16, the specific anti-SLAPP statute. (See section II.A., *ante*, for our detailed discussion of section 425.16.) To support their assertion, appellants cite the rules of statutory construction that a more specific statute controls over a more general one (e.g., *Lake v. Reed* (1997) 16 Cal.4th 448, 464), and the more specific statute controls when provisions in a statute cannot be harmonized (e.g., *American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 925). However, "it is only where apparently conflicting provisions cannot be harmonized that the provision which is found later in the statute or which is more specific controls the earlier or more general provision." (*Ibid.*)

Appellants claim the two statutes cannot be harmonized "because they cannot both be directed simultaneously to the same allegations." They cite no authority to support this statement because, clearly, many statutes apply to the same allegations. Indeed, under appellants' reasoning, a court could not consider **[*24]** a defendant's demurrer or motion to strike pursuant to section 436 simultaneously with considering a special motion to strike. Appellants argue further that allowing the trial court "to sua sponte strike allegations that trigger the SLAPP statute would eliminate the viability of the statute. The Legislature did not enact and amend the SLAPP statute simply to unnecessarily duplicate Code of Civil Procedure § 436(a). . . ." Section 425.16 and section 436, subdivision (a) are not in conflict, nor are they duplicative. Section 425.16 requires separate consideration of each action, but the special motion to strike may not parse any finer and the court has no authority under this provision to strike particular allegations. (*Fox Searchlight Pictures, Inc. v. Paladino, supra*, 89 Cal.App.4th at p. 308; cf. *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 627-628.) Thus, irrelevant or improper allegations *can only be deleted* through a motion pursuant to section 436. It would be absurd to require ambiguous or otherwise inartful allegations to remain simply because the anti-SLAPP statute applies to a cause of action. No authority **[*25]** supports appellants' argument and we reject it.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs.

Lambden, J.

We concur:

Kline, P.J.

Ruvolo, J.