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LUCINDA HAMPTON, Plaintiff and Appellant, v. EVELYN SCHIAPPACASSE, Defendant and Appellant.

A100633

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

2004 Cal. App. Unpub. LEXIS 10836

November 30, 2004, Filed

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PRIOR HISTORY: Superior Court of San Francisco County, Super. Ct. No. CGC01402622.

CORE TERMS: causes of action, garage, leave to amend, eviction, notice, Ellis Act, landlord, retaliatory, attorney fees, probability, covenants, parking space, breach of contract, emotional distress, prima facie, termination, lease, tenancy, tenant, flat, common law, demolition permit, summary judgment, residential, recoverable, inspection, prevailing, emotional, preempted, variance

JUDGES: Corrigan, J.; McGuiness, P.J., Pollak, J. concurred.

OPINION BY: Corrigan

OPINION

Both parties appeal from the trial court's ruling on landlord Evelyn Schiappacasse's anti-SLAPP motion to strike tenant Lucinda Hampton's complaint. We conclude the anti-SLAPP motion should have been granted without leave to amend as to all four causes of action, and remand with directions accordingly.

FACTUAL AND PROCEDURAL BACKGROUND [1]

1 Due to the procedural posture of the case, the historical facts are summarized from the pleadings and affidavits. (See Code Civ. Proc., § 425.16, subd. (b)(2).) Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

[*2] In July 1977, Hampton entered into a one-year lease of the lower flat in a two-unit residential San Francisco building from landlord Helen Schiappacasse. [2] Hampton agreed, inter alia, to care for the garden and to make no alterations to the premises without the landlord's prior written consent.

2 The parties agree that the tenancy became month-to-month by operation of law following expiration of the one-year lease.

Hampton later became a licensed family day care provider. Desiring to convert the garage area to additional space for day care, Hampton signed a written declaration promising (1) to indemnify her landlord for any liability or increased insurance premiums resulting from the day care operations, (2) to preserve parking space in the garage for the tenant of the upstairs flat, and (3) to conform any modifications to the applicable city building and fire codes.

In 1984, Hampton made structural modifications to the garage to accommodate her operations. In applying for a construction permit, Hampton's **[*3]** husband, Fred Leidecker, represented himself as the owner of the property. A certificate of final completion and occupancy was issued by the city in May 1984.

In November 1989, Helen Schiappacasse's son John inspected the property after the Loma Prieta earthquake. Thereafter, attorney Francis Kelly wrote to Hampton, expressing John's surprise that the conversion of the garage was "far greater than what was initially contemplated and represented back in 1980." Kelly also noted that "the entire back yard has been converted into a play area with play ground equipment," and "there is now room in the garage for only one automobile." Kelly asked for copies of the permits, noting that "no bath or toilet facilities in the area were discussed or contemplated." He also requested that Hampton provide updated licensing and liability insurance information.

In January 1990, Kelly again wrote to Hampton, charging that Leidecker had misrepresented himself as the owner of the property in undertaking the construction, and that no electrical or plumbing permits had been obtained. The letter directed Hampton to remove her car from the garage to provide space for a new upstairs tenant, and to remove **[*4]** the playground equipment from the backyard. In a response dated the following month, Hampton advised Kelly that her car had been removed from the garage, and that she regretted the errors made on the permits. She also stated her willingness "to be responsible should your client be cited for any violations that relate to the work done." Hampton indicated she would remove the play equipment when she vacated the premises, asserting that her own children and their friends used it on a regular basis.

In early 1993, a visit by a plumbing inspector resulted in the removal of the toilet and sinks installed without permits. After Helen Schiappacasse died in July 1993, her son John and his wife Evelyn became the owners of the property. According to Hampton's complaint, they engaged in a "campaign of harassment" designed to persuade Hampton to close her business. [3] In October 1998, John Schiappacasse allegedly reported four code violations to the city department of building inspection. [4] According to Hampton, three of the alleged violations involved minor repairs that she offered to complete, and the fourth violation stemmed from the elimination of an off-street parking space in the garage, **[*5]** which could have been cured by a variance opposed by the Schiappacasses. Following the October 1998 notice of violation from the city building department, the Schiappacasses' contractor, Edward Barbieri, obtained a permit allowing him to correct the notice of violation, remove the walls to provide parking spaces, and remove the day care facility.

3 The complaint alleged that the Schiappacasses refused to allow Hampton to install a toilet and sinks in the garage area, visited the premises without prior notice, delayed in repairing a leak, asked police to ticket parents delivering and collecting their children, sat at the garage entrance and annoyed parents arriving to pick up their children, falsely accused Hampton of licensing violations, and berated her in the presence of parents using her services.

4 At his April 2000 deposition, John Schiappacasse testified that his wife had obtained a copy of plans Leidecker submitted to the building department, representing that two parking spaces would remain in the garage after the construction. After John and Evelyn Schiappacasse notified the building inspection department that only one parking space remained, an inspector visited the property and filed a notice of violation.

[*6] In January 1999, Evelyn Schiappacasse and her daughter Lynn moved into the upstairs flat. Approximately one

week later, their attorney, Dennis Hyde, wrote to Hampton, asking her to vacate the garage. He included a 30-day notice of termination of tenancy based on commission of a nuisance, use of the premises for an illegal purpose, or the landlords' intention to demolish or remove the rental unit from housing use. [5] Hyde's letter mentioned that Barbieri had been employed to remedy the notice of violation, stating: "The corrective work will involve demolishing the walls you have constructed, re-establishing two parking spaces in the garage, and ending your commercial use of the garage space as a daycare facility."

5 Hampton alleged the Schiappicasses had told her she could continue to live at the premises if she closed her day care operations, but otherwise both she and her business would be evicted.

In February 1999, Hampton appealed the issuance of the demolition permit to the city board of appeals, claiming **[*7]** 1) the permit had been issued without notice to her; 2) the proposed demolition would destroy her business without due process, invading her rights under her lease; and 3) her own contractor could remedy the code violations with the landlord's cooperation. [6] The Schiappacasses opposed her request, noting that: "At present, no effort has been made to displace Ms. Hampton from her residence in the flat, only to secure her cooperation in correcting the code violations pursuant to the permit." Hyde also notified Hampton that the Schiappacasses would not allow her to alter the property, and the work would be performed by their contractor.

6 That administrative appeal was apparently not resolved before the Ellis Act eviction underlying the present lawsuit.

On September 23, 1999, the Schiappicasses' new law firm served Hampton with a 60-day notice of termination pursuant to the Ellis Act, Government Code section 7060 et seq. [7] Ruling on plaintiffs' motions in limine, the trial court found as **[*8]** a matter of law that plaintiffs had complied with all applicable requirements to withdraw the property from residential rental use under the Ellis Act. The trial court also ruled that the prohibition against retaliation provided in Civil Code section 1942.5, subdivision (c), could not be raised as a defense to an Ellis Act eviction. Judgment was entered in favor of the Schiappacasses on May 11, 2000. [8] On December 27, 2000, the sheriff served Hampton with a 7-day notice to vacate. She moved on December 31, 2000.

7 Later that month, their new attorney also advised the planning department that the Schiappacasses refused to authorize Hampton's application for a parking variance, and were in the process of terminating her tenancy, as the property was being removed from residential use.

8 Hampton's writ petitions were denied by this court, and her petition for review was denied by the Supreme Court. The judgment for the Schiappacasses in the unlawful detainer action was affirmed by the Appellate Department, which also denied Hampton's request for rehearing and petition for certification to this court. The Appellate Department issued its remittitur on December 18, 2000.

[*9] On December 19, 2001, Hampton filed a complaint for damages against John and Evelyn Shciappacasse alleging retaliatory eviction under Civil Code section 1942.5. In June 2002, the Schiappacasses moved for summary judgment. At oral argument, the court granted Hampton leave to amend to assert harassment occurring before and separate from the Ellis Act eviction, and denied the summary judgment motion without prejudice. In her August 2002 amended complaint, Hampton alleged causes of action for breach of the implied covenants of good faith and fair dealing and of quiet enjoyment (collectively, the covenants), along with common law and statutory retaliatory eviction. Hampton's alleged damages included loss of income and profits from her business, mental and emotional distress, moving costs, attorney fees, and increased rent and cost of living. Initially, she also claimed punitive damages, but later withdrew that

claim.

On August 9, 2002, Evelyn Schiappacasse filed a special motion to strike pursuant to section 425.16, known as the anti-SLAPP (strategic lawsuit against public participation) statute. [9] Following a bifurcated hearing in September 2002, the court granted **[*10]** the motion to strike as to the causes of action for breach of the covenants, on the ground that those causes of action "combined allegations of misconduct on which Plaintiff cannot prevail as a matter of law (such as petitioning the San Francisco Department of Building Inspection) with allegations [as to] which the Court finds Plaintiff has met her burden under CCP § 425.16." The court granted Hampton leave to amend to properly re-plead the allegations of those two causes of action. [10]

9 The anti-SLAPP motion was brought by Evelyn Schiappacasse alone. John Schiappacasse had died on August 3, 2002. On August 28, 2002, Hampton moved for an order substituting the trustees of the Schiappacasse Living Trust as John's successors in interest. The court's tentative ruling granting that motion became the order of the court on October 8, 2002, although it was not filed until November 15, 2002.

10 Before preparation of a written order granting leave to amend, Hampton filed a second amended complaint later found premature by the court. Hampton's third amended complaint was filed on September 23, 2002.

[*11] The court further granted the motion to strike as to the third cause of action, ruling that "the common law claim for wrongful eviction is preempted by the Ellis Act." The court denied the motion as to the fourth cause of action (for retaliatory eviction under Civil Code section 1942.5), ruling that plaintiff had met her burden, the cause of action was not preempted by the Ellis Act, and the claim was not barred by the statute of limitations. The court subsequently awarded Evelyn Schiappacasse $ 5,800 in attorney's fees. Schiappacasse timely appealed and Hampton cross-appealed.

DISCUSSION

The anti-SLAPP statute authorizes a motion to strike meritless lawsuits filed to chill the defendant's exercise of First Amendment rights. (§ 425.16.) Subdivision (b)(1) of the statute 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 **[*12]** plaintiff will prevail on the claim."

The statute requires the court to engage in a two-step process in ruling on 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. [. . .] 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." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

To establish a probability of prevailing, " 'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier I*).) In ruling on an anti-SLAPP motion, the court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see *Equilon, supra*, 29 Cal.4th at p. 67.) **[*13]** "Each cause of action that is the subject of a special motion to strike must be analyzed separately." (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866, fn. 24.) The application of section 425.16 is reviewed independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999; accord, *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 629; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186.)

Appellant contends the trial court erred in granting leave to amend after striking Hampton's first two causes of action. [11] Appellant relies on *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074 where the court explained: "The anti-SLAPP statute makes no provision for amending the complaint once the court finds the requisite connection

to First Amendment speech. And, for the following reasons, we reject the notion that such a right should be implied. [P] In enacting the anti-SLAPP statute, the Legislature set up a mechanism through which complaints that arise from the exercise of free speech rights 'can be evaluated at an early stage of the litigation **[*14]** process' and resolved expeditiously. . . . [P] Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. [P] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. [Citation.] Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. [Citation.] This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits. [Citation.] [P] **[*15]** . . . On the contrary, we believe that granting leave to amend the complaint after the court finds the defendant had established its prima facie case would be jamming a procedural square peg into a statutory round hole." [12] (See also *Thomas v. Los Angeles Times Communications, LLC* (C.D. Cal. 2002) 189 F. Supp. 2d 1005, 1017, fn. 11 [citing *Simmons, supra*, for the proposition that a plaintiff may not amend a complaint after it is stricken under § 425.16].)

11 "Published appellate court cases have concluded that where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct [citations], although this issue is currently under review by the California Supreme Court. [Citations.] Pending the Supreme Court's review of the issue, however, we will follow the existing appellate precedent that the anti-SLAPP statute applies to a mixed cause of action. [Citation.]" (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 (*Mann*).) Hampton does not challenge the trial court's determination under the first prong of the anti-SLAPP analysis that section 425.16 was applicable to her claims.

[*16]

12 In her reply brief, appellant also cites *Kids Against Pollution v. California Dental Association* (2003) 108 Cal.App.4th 1003, 1018, in which the Supreme Court subsequently granted review. (Review granted Sept. 17, 2003, S117156.)

Hampton contends *Simmons* is distinguishable because the trial court there denied leave to amend instead of granting it. Such a distinction is not persuasive, however, as it does not address the detailed reasoning or policy grounds underlying the *Simmons* decision. The trial court here properly concluded that it lacked authority under section 425.16 to strike particular allegations within a single cause of action. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) We conclude leave to amend should not have been granted, however, as it would frustrate the statutory purpose of providing "a quick and inexpensive method of unmasking and dismissing SLAPP suits." (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613 (*Roberts*) [plaintiff may not evade appellate **[*17]** review of SLAPP ruling by filing amended complaint].)

Nor has Hampton shown a probability of prevailing on the amended claim, as required by the second prong of the anti-SLAPP analysis. It was Hampton's burden to plead and prove a prima facie case as to each cause of action by reference to admissible evidence. (*Roberts, supra*, 105 Cal.App.4th at pp. 614, 616; see also *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1235-1239.) Her first two causes of action were for breach of the covenants. An essential element of such claims is damage proximately resulting from the alleged breach. (*Vu v. California Commerce Club, Inc.* (1977) 58 Cal.App.4th 229, 233; see also *Roberts*, *supra*, at p. 617, quoting *Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1123, fn. 6 [actual damage is an essential element of a cause of action for breach of contract].) Hampton's complaint alleged damages "in the form of loss of day care business and profits, attorney fees to respond to the January 25, 1999 Notice of Termination and to appeal the demolition permit and **[*18]** prosecute the variance application, and emotional distress."

In response to appellant's argument that she failed to put forward any evidence to support these damage allegations, Hampton does not claim to have adduced evidence of injury to her business, but refers only to her "quite modest" attorney fees in opposing the demolition permit and her claimed emotional distress. [13] She has not put forward competent evidence of such attorney fees, however, nor did she argue them below as an element of damages in response to the special motion to strike. [14] Evidence to support her claimed emotional distress damages was also lacking. [15] When a plaintiff presents no evidence showing it suffered any pecuniary loss as a result of defendant's actions, it may not rely on the unsupported allegations in its complaint to defeat a motion to strike under 425.16. (*Mann*, *supra*, 120 Cal.App.4th at pp. 109-110, citing *Roberts*, *supra*, 105 Cal.App.4th at pp. 613-614.) Neither may a plaintiff properly raise new damage theories for the first time on appeal. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 769 (*Navellier II*).)

13 To support her claim that such attorney fees are recoverable for breach of contract, Hampton cites Corbin on Contracts and an article in American Law Reports Third Series for the general proposition that the non-breaching party is entitled to recover the costs of third party litigation required by a breach of contract. Appellant contends, however, that the law of California does not support Hampton's argument here. We need not resolve this issue as we conclude Hampton has failed to support her damages claim with admissible evidence, as explained below.

[*19]

14 In her memorandum in opposition to the special motion to strike, for example, Hampton stated that "the gravamen [of her breach of contract claims] is injury to her business."

15 Hampton referred only to interrogatory answers predating her contract claims, and to her declaration in opposition to the earlier summary judgment motion, in which she stated she suffered emotional distress and aggravation of psoriasis "as the direct result of my moving out of 2334 Francisco." Thus she failed to establish that the alleged emotional distress was caused by the misconduct alleged in her first two causes of action ("the pre-eviction claims"). We also note Hampton's counsel's statement at the summary judgment hearing that "the real damage was sustained[] when the eviction occurred." In opposing the SLAPP motion, by contrast, counsel described the "serious damage" caused by the defendant's pre-eviction conduct as "loss of customers, [and] so forth."

Nor are emotional distress damages generally recoverable in a breach of contract action. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 558; **[*20]** *Navellier II*, *supra*, 106 Cal.App.4th at p. 777; *Roberts*, *supra*, 105 Cal.App.4th at p. 617, quoting *Frangipani v. Boecker* (1998) 64 Cal.App.4th 860, 865.) The case on which Hampton relies, *Westervelt v. McCullough* (1924) 68 Cal.App. 198 (*Westerveldt*), is distinguishable. In *Westerveldt*, the elderly owners of a residence agreed to provide room and board to defendant and her relatives, and "the parties for some time dwelt together in peace and amity and with mutual trust and confidence." (*Id*. at p. 201.) When the mortgage was foreclosed, defendant purchased the property and promised plaintiff she could remain in residence as long as she desired, in exchange for plaintiff's agreement not to redeem the property. (*Ibid*.) A few months after procuring the deed, however, defendant "ousted plaintiff and her husband from the common place of residence and they were compelled to seek shelter elsewhere." (*Id*. at p. 202.) The court found that plaintiff was unable to earn a living other than through her arrangement to provide room and board for defendant, that defendant's acts **[*21]** caused plaintiff to become sick for six months, that defendant never intended to keep her promises to plaintiff, and that defendant knew the right to remain in her long-time home was "of a special and peculiar value to plaintiff." (*Id*. at p. 203.)

In this factual setting, the *Westerveldt* court concluded that damages "expressly limited to physical suffering or illness" were recoverable when "the terms of a contract related to matters which concerned directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which [was] such as directly to affect or move the affection, self-esteem, or tender feelings of that party." (*Westerveldt*, *supra*, 68 Cal.App. at pp. 208-209.) The *Westerveldt* court derived its rule from cases involving such emotionally-laden issues as an undertaker's breach of an agreement to keep safe the body of a deceased person until burial, and a dressmaker's breach of an agreement to furnish dresses to a prospective bride. (*Id*. at pp. 207-208.)

The facts in *Westerveldt* differed significantly from those at issue here. [16] Under the highly unusual circumstances of

[*22] that case, the *Westerveldt* court concluded the impairment of respondent's health could "reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract [permitting plaintiff to remain in her home until death]." (*Westerveldt, supra*, 68 Cal.App. at p. 205.) Here, by contrast, the contract at issue was an ordinary lease, involving no such special relationship or purpose. "Emotional tranquility" was not "the contract's essence." (*Erlich v. Menezes, supra*, 21 Cal.4th at p. 560.) Hampton's assertion on appeal that her "self-esteem and sense of identity were closely tied to her business as a day care operator" is insufficient to bring her within the special circumstances of *Westerveldt*. Because Hampton failed to proffer evidence to support her claimed damages for breach of the covenants, she did not show a probability she would prevail on those claims, and they should have been stricken without leave to amend under section 425.16. (See *Navellier II, supra*, 106 Cal.App.4th at p. 775.) [17]

16 In affirming an award of damages for impairment of respondent's health, the *Westerveldt* court noted: "Respondent and her husband, well-advanced in life, had lived together in the residence for eight or ten years before appellant and her relatives appeared on the scene and respondent's right there to reside was of a peculiar value to her, a circumstance well known to appellant. After the original arrangement between respondent and appellant on behalf of the latter and her relatives all the parties resided together for some months practically as one family, thus naturally creating the feeling of trust and confidence which the trial court found that they reposed in each other. Notwithstanding this feeling, and in utter disregard of the warm-heartedness which should characterize the relations between those in a family circle, appellant entered into the arrangement which secured the home of respondent to her without intending to perform her own obligations under the arrangement. This was a detestable exhibition of wickedness and bad faith. Finally, it is to be observed that the arrangement was one the practical effect of which was to provide a home for respondent and her husband and to secure their maintenance through the remainder of their age and until death, whereas its breach thrust them into the street as outcasts and compelled them to resort to the charity of friends and relatives for subsistence and shelter." (*Westerveldt, supra*, 68 Cal.App. at pp. 204-205.)

[*23]

17 Because we conclude the motion to strike should have been granted for failure to show damages, we do not address the parties' additional arguments regarding appellant's personal liability, the applicable statute of limitations, and whether the covenants required the Schiappacasses to allow Hampton to remedy the Notice of Violation before seeking termination of her tenancy.

Hampton contends the trial court erred in ruling that her third cause of action, for common law retaliatory eviction, was pre-empted by the Ellis Act. Schiappacasse contends this issue was waived because it was not raised below, where Hampton focused only on her statutory retaliation claim. Hampton responds the issue presents a question of law and was therefore not subject to waiver. In any event, Hampton has failed to demonstrate error in this regard. Hampton attempts to bootstrap common law retaliatory eviction into Civil Code section 1942.5, which is listed among those statutes not superseded by the Ellis Act in Government Code section 7060.1, subdivision (d). Hampton **[*24]** has also conceded, however, that our Supreme Court's recent decision in *Drouet v. Superior Court* (2003) 31 Cal.4th 583 (*Drouet*), filed after the trial court's ruling here, "casts doubt on the availability of Civil Code 1942.5 as the basis for recovery of damages in the present case," as discussed below. [18]

18 We therefore need not consider Schiappacasse's argument that Hampton's claim is actually for a form of malicious prosecution, requiring her to establish that the unlawful detainer action lacked probable cause.

As to the fourth cause of action for statutory retaliatory eviction under Civil Code section 1942.5, the trial court denied the motion to strike, ruling that the cause of action was not preempted by the Ellis Act. In *Drouet*, however, the Supreme Court construed the two statutes together, concluding that a landlord in an unlawful detainer case was permitted "to go out of business and evict the tenants-even if the landlord **[*25]** has a retaliatory motive-so long as the landlord *also* has the bona fide intent to go out of business." (*Drouet, supra*, 31 Cal.4th at p. 597.) After *Drouet*, which Hampton concedes "casts doubt on the continued viability of [Civil Code section] 1942.5 in Ellis Act cases," Hampton "looks elsewhere for an alternative statutory basis for her fourth cause of action, statutory retaliatory eviction." She requests leave of this court to amend her complaint on appeal. Hampton cites no authority to support such an

unorthodox procedure, however, and we reject her request, noting Hampton's own concession that the Supreme Court had granted a hearing in *Drouet*, *supra*, before Hampton filed the complaint in this case. (See *Navellier II*, *supra*, 106 Cal.App.4th at pp. 772-773 [holding that "a plaintiff cannot use an eleventh-hour amendment to plead around a motion to strike under the anti-SLAPP statute," and noting that "nothing prevented plaintiff[] from timely alleging [the currently-proposed] claim."].) [19]

19 At argument, Hampton's counsel acknowledged that a landlord who properly complies with the Ellis Act has the right to evict a tenant despite a retaliatory motive. He went on to argue, however, that the landlord may nevertheless be subject to damages in connection with such an eviction. How a person may be liable in damages for conduct he has a right to perform was not made clear. Neither the logic nor the wisdom of this argument is immeditely apparent. We decline counsel's invitation to interpret the *Drouet* rule in this fashion.

[*26] Finally, Hampton contends attorney fees should not have been awarded to Schiappacasse because she was not the party who achieved her objectives in the litigation. We need not reach the merits of this argument in view of our disposition of the appeal. [20]

20 Hampton's request for judicial notice is also denied as to those documents not before the lower court on the SLAPP motion. (§ 425.16, subd. (b)(2).)

DISPOSITION

The order granting leave to amend as to the first two causes of action is reversed. The order striking the first, second, and third causes of action is affirmed. The order denying the motion to strike the fourth cause of action is reversed. The case is remanded to the trial court with directions to grant the special motion to strike as to all causes of action, without leave to amend. Costs to appellant.

Corrigan, J.

We concur:

McGuiness, P.J.

Pollak, J.