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Court of Appeal, First District, Division 3, California.

Pauline **NICOLA**, Plaintiff and Appellant,

v.

Lillie L. **CALABRESE**, et al.,

Defendants and Respondents.

No. A104351. | (City and County of San Francisco Super. Ct. No. 402125). | Oct. 27, 2004.

Attorneys and Law Firms

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William Whitley Ashley, San Francisco, CA, for Defendant-Respondent.

Opinion

PARRILLI, J.

*1 Pauline **Nicola** appeals from an order denying her motion to strike under the SLAPP statute. (Code Civ. Proc., § 425.16.)¹ Respondents Lillie **Calabrese**, Clay **Calabrese**, and John **Calabrese** have filed no brief. We reverse in part.

BACKGROUND

Nicola sued her sister, Lillie **Calabrese**, to force the partition by sale of a duplex the sisters had inherited from their mother, Mary Navarra. **Nicola** claimed an undivided 50 percent interest in the property as a tenant in common, and alleged that **Calabrese**, who lived in the property, owed her compensation for the rental value of the property and reimbursement for half of all rents “collected, or deferred” by **Calabrese**.

Calabrese filed an answer and a cross-complaint. In the cross-complaint, she also sought partition by sale, and alleged **Nicola** had breached an oral tenancy-in-common agreement by failing to pay her 50 percent share of the expenses related to the property. Nine months later **Calabrese** retained new counsel, who decided to file an amended cross-complaint. The amended cross-complaint included causes of action for an accounting, breach of fiduciary duty, “wrongful endeavor to evict” under both the San Francisco rent control ordinance and the common law, breach of the covenant of quiet use and enjoyment, unfair business practices, breach of the covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, unjust enrichment, and injunctive and declaratory relief.

The amended filing included as cross-complainants **Calabrese's** husband and son, who also lived in the property. It did not mention any agreement to share expenses, but alleged **Nicola** had failed to meet her obligations as co-owner to contribute to the costs of maintaining the property, and had refused to rent out the empty unit of the duplex. It further claimed that **Nicola's** partition action was filed “ostensibly to force the sale of the Family Building for the purpose of generating substantial income,” and that she and her son David **Nicola** had “engaged in a pattern of bullying, harassment and aggressive demands and threats of eviction to force the **CALABRESES** family from their home.”

Nicola responded by moving to strike all causes of action in the amended cross-complaint under section 425.16, except for the first two relating to the administration of Mary Navarra's estate. **Nicola** contended the causes of action arose out of the filing of her partition action, a protected activity under section 425.16. She also argued the challenged causes of action were meritless.

The **Calabreses** opposed the motion by contending the references to the partition action in the cross-complaint were merely incidental. They emphasized their claims that the **Nicolas** had engaged in a pattern of threatening actions designed to drive the **Calabreses** from their home. The **Calabreses** argued there was a probability they would prevail on their claims under the rent control law. However, they conceded that two causes of action were “erroneously pled,” without identifying which ones.

*2 At the hearing on the motion, the **Calabreses'** counsel confined his arguments to the alleged rent control violations. The court denied the motion without comment.

DISCUSSION

We independently review the trial court's ruling. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

“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).) “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....” (*Id.*, subd. (e).)

“Section 425.16 posits ... a two-step process for determining whether an action is a SLAPP. 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 on the claim. (§ 425.16, subd. (b)(1); [citation].)” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

“The constitutional right of petition encompasses the basic act of filing litigation. [Citation.]” (*Id.* at p. 90, internal quotation marks omitted.) However, a cross-complaint does not “arise out of” the action filed by the plaintiff merely because it was filed in response to that action. A cross-complaint that properly “arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges” (§ 426.10, subd. (c)) does not necessarily arise from the earlier lawsuit itself. But if the cross-complaint is based on the plaintiff's filing of

a lawsuit, it falls within the scope of the SLAPP statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78.) We look to the principal thrust or gravamen of the cross-complainant's cause of action to determine whether the SLAPP statute applies. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

*3 With these guidelines in mind, we consider each of the causes of action in the **Calabreses** cross-complaint that were challenged by **Nicola's** SLAPP motion.

1. “Wrongful Endeavor to Evict”

The **Calabreses** allege that the **Nicolas** wrongfully attempted to force them from their home by oral and written threats, demands, cajoling, and the filing of the partition action. Absent the filing of the partition action, the verbal harassment described by the **Calabreses** hardly amounts to an attempted “eviction.” We conclude the gravamen of these causes of action is Pauline **Nicola's** filing of the partition action, which is protected activity under the SLAPP statute.

The **Calabreses** argued below that their claims under the San Francisco rent control ordinance and related regulations were “legally sufficient and supported by a prima facie showing of facts,” so as to establish a probability of prevailing under section 425.16, subdivision (b)(1). (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.) We disagree. The eviction provisions of the ordinance apply to a landlord's attempt to recover possession of a “rental unit.” (San Francisco Admin. Code, § 37.9(a).) Section 1.17 of the San Francisco Rent Board's rules and regulations defines “rental unit” as “a residential dwelling unit ... which is made available by agreement for residential occupancy by a tenant in consideration of the payment of rent.” No agreement obligated the **Calabreses** to pay rent to the **Nicolas**. Their cross-complaint alleges that “they were not required to continue to pay rent for their occupancy ... following Mrs. Navarra's passing....” Accordingly, the **Calabreses** could not state a claim under the rent control ordinance.

The cross-complaint also includes a claim for wrongful endeavor to evict under the common law. We note that co-tenants in common may seek partition as a matter of “unqualified right” under the common law. (4 *Witkin, Summary of Cal. Law* (9th ed. 1987) *Real Property*, § 294, p. 489.) In any event, the **Calabreses** have failed to provide any legal authority to support this cause of action. Thus, they have not carried their burden of establishing a probability

of prevailing. (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 999.)

2. Breach of the Covenant of Good Faith and Fair Dealing

This cause of action refers to “agreements” between the parties. No agreements are alleged in the cross-complaint, however. That omission, and the fact that this cause of action does not appear on the list included in the cross-complaint’s caption leads us to the conclusion that it was one of the “mistakenly pled” causes of action referred to in the **Calabreses**’ response to the SLAPP motion. In any event, it cannot be said that the cause of action for breach of the covenant of good faith and fair dealing arises out of the partition action. It is beyond the scope of the SLAPP statute.

3. Unfair Business Practices

*4 This appears to be the second “mistakenly pled” cause of action. It is also omitted from the caption, and refers to a “fraudulent business practice, designed to deprive RIVERA of wages, employment benefits, cash, and creditworthiness.” Groundless as this allegation obviously is, it is not based on the partition action, and is also beyond the scope of the SLAPP statute.

4. Breach of the Covenant of Quiet Use and Enjoyment

The cross-complaint accuses the **Nicolas** of breaching the covenant of quiet use and enjoyment that “exists in all residential tenancies,” resulting in diminution of the value of the **Calabreses**’ interest in the property and the infliction of mental and emotional distress. Mere threats and cajoling would amount to only a weak showing of such a breach; it is the partition action that substantially endangered the **Calabreses**’ enjoyment of their co-tenancy interest. (See 4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 573, pp. 747-748.) We conclude this cause of action is based on the filing of the partition action.

The **Calabreses** have made no arguments in support of this claim. Again, they fail to carry their burden of establishing a probability of prevailing.

5. Infliction of Emotional Distress

The cross-complaint alleges both intentional and negligent infliction of emotional distress. Though we are skeptical about the merits of these claims, we cannot say they arose

principally from the filing of the partition action. The gravamen of these causes of action appears to be the pattern of harassment alleged against the **Nicolas**, and the underlying dispute over the property. Accordingly, the infliction of emotional distress causes of action do not come within the scope of the SLAPP statute.

6. Unjust Enrichment

The cause of action for unjust enrichment alleges that the **Nicolas** held “converted funds” and asked that property in which they had invested these funds be held in constructive trust. These claims clearly pertain to the rent paid by the **Calabreses** in the years after Mary Navarra’s death, and do not arise from the partition action. The SLAPP statute does not apply to this cause of action.

7. Injunctive and Declaratory Relief

The cross-complaint includes an incomplete cause of action entitled “Injunctive and Declaratory Relief Preventing Eviction-Against All Cross-Defendants” and consisting entirely of the statement: “The **CALABRESES** reallege and incorporate by reference herein all of the preceding paragraphs as though fully set forth.” While it is difficult to tell exactly what the scope of this cause of action is—none of the papers filed in connection with the motion flesh out the claim—the reference to “preventing eviction” strongly suggests it arises from the filing of the partition action. The only “actual controversy” that might be the subject of declaratory relief in this case would be the dispute over whether partition was an available remedy or was barred under the rent control ordinance or the common law. (Compare *City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 79-80.) We conclude this cause of action is based on the filing of the partition complaint, and comes within the scope of the SLAPP statute.

*5 The **Calabreses** have offered no facts or arguments in support of their claim for injunctive and declaratory relief. Thus, once again they fail to carry their burden of establishing a probability of prevailing.

DISPOSITION

The order denying the SLAPP motion is reversed. The court is directed to enter an order granting the motion as to the causes of action for “wrongful endeavor to evict,” breach of the covenant of quiet use and enjoyment, and injunctive and

declaratory relief. **Nicola** shall recover her costs on appeal, and may seek attorney fees in the trial court under the SLAPP statute.

We concur: **McGUINNESS**, P.J., and **CORRIGAN**, J.

All Citations

Not Reported in Cal.Rptr.3d, 2004 WL 2397267

Footnotes

- 1 SLAPP is an acronym for Strategic Lawsuit Against Public Participation. Further statutory references are to the Code of Civil Procedure.