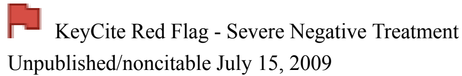
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Court of Appeal, First District, Division 4, California.

Christopher B. DOLAN et al., Cross-complainants and Appellants,
v.
Jacqueline PIERI et al., Cross-defendants and Appellants.

No. A121087.
|
(San Francisco County Super. Ct. No. CUD 05-613150).
|
July 15, 2009.

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Opinion

SEPULVEDA, J.

***1** A landlord sued residential tenants for unlawful detainer and unpaid rent, and the tenants cross-complained alleging numerous causes of action, including breach of the rental contract by failing to provide habitable premises. The landlord filed a motion to strike the cross-complaint as a Strategic Lawsuit Against Public Participation (SLAPP) arising from her petitioning activity in seeking to oust the tenants. (Code Civ. Proc., § 425.16.) The tenants opposed the motion and requested sanctions. The trial court denied the landlord's anti-SLAPP motion to strike, and denied the tenants' request for sanctions. Both parties appeal. We affirm the order denying the landlord's anti-SLAPP motion upon concluding, as did the trial court, that the cross-complaint does not arise from protected speech or petitioning activity. We dismiss the tenants' cross-appeal of the denial of sanctions because the sanctions ruling is not appealable.

I. FACTS[1]

Jacqueline Pieri is the owner of a two-unit residential building on Buchanan Street in San Francisco. Rock Plichcik is Pieri's son, and resides in one of the units. Christopher Dolan rented the other unit from Pieri in July 1994, and Lent Howard became a subleasing cotenant with Dolan around 1999.

In December 2003, Pieri and Dolan became embroiled in a dispute. Pieri threatened to evict Dolan, and Dolan accused Pieri of unlawful eviction efforts and of maintaining the premises in a dangerous condition. In March 2004, Pieri gave tenants Dolan and Howard notice of her intent to withdraw her building from the San Francisco rental market, pursuant to the Ellis Act. (Gov.Code, § 7060 et seq.) The initial notice to vacate was improperly served, and Pieri served another notice in August 2004. Tenants Dolan and Howard did not vacate and, in February 2005, Pieri filed an unlawful detainer action.[2]

Dolan and Howard later vacated the premises during the course of the litigation: Dolan in September 2005 and Howard in January or February 2007. As possession of the premises was no longer at issue, landlord Pieri's complaint for unlawful detainer was reclassified in February 2007 as an ordinary civil damages action for unpaid rent. (Civ.Code, § 1952.3.)

In October 2007, tenants Dolan and Howard filed a cross-complaint against landlord Pieri and her son, which is the subject of this appeal. The cross-complaint is 37 pages in length, and avers 12 causes of action ranging from breach of the rental contract to intentional infliction of emotional distress. Landlord Pieri and her son, Rock Plichcik, demurred and, critical to this appeal, moved to strike the cross-complaint as a SLAPP suit. (Code Civ. Proc., §§ 425.16, 430.30.)[3] Pieri and Plichcik argued that all of the causes of action arose from protected conduct, in whole or in part, including the landlord's petitioning under the Ellis Act and filing an unlawful detainer complaint. Tenants Dolan and Howard opposed the anti-SLAPP motion by arguing that their causes of action are based on conduct unrelated to any petitioning activity, such as maintaining substandard housing. Dolan and Howard argued that the anti-SLAPP motion was frivolous, and asked for sanctions.

***2** In March 2008, the court denied the anti-SLAPP motion upon concluding that the gravamen of the causes of action was habitability of the premises, not protected petitioning activity. The court did not impose sanctions upon landlord Pieri and her son for bringing the anti-SLAPP motion. Separately, the court sustained the demurrer to the cross-complaint with leave to amend to plead certain causes of action with greater particularity. Landlord Pieri and her son appealed denial of their anti-SLAPP motion, and tenants Dolan and Howard cross-appealed denial of their request for sanctions. However, a denial of sanctions to a prevailing plaintiff on an anti-SLAPP motion is not an appealable order, and therefore the cross-appeal must be dismissed. (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 145-150, 51 Cal.Rptr.3d 403.) We address only the appeal by Pieri and Plichcik challenging denial of their anti-SLAPP motion.

II. DISCUSSION

We conclude that the trial court was correct: the causes of action stated in the cross-complaint do not arise from protected speech or petitioning activity. (§ 425.16, subd. (b)(1).) We reach that conclusion through consideration of well-established principles, to which we now turn.

General principles

The anti-SLAPP 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 plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An "act in furtherance of a person's right of petition or free speech" includes "any written or oral statement or writing" made in an official proceeding or "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.,* subds.(e)(1), (e)(2).)

The anti-SLAPP statute was enacted to prevent and to deter lawsuits that "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," and provides "an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims" arising from the exercise of those constitutional rights. (§ 425.16, subd. (a); *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186, 6 Cal.Rptr.3d 494; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312, 46 Cal.Rptr.3d 606, 139 P.3d 2.) An anti-SLAPP motion requires the trial "court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685.) Second, "[i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703.) "The trial court's determination of each step [of the process] is subject to de novo review on appeal." (*Martinez, supra,* at p. 186, 6 Cal.Rptr.3d 494.)

The challenged cause of action must "arise from" protected activity

***3** Only those causes of action "arising from" the defendant's protected speech or petitioning activity are subject to a special motion to strike. (§ 425.16, subd. (b)(1).) "[T]he 'arising from' requirement is not always easily met. [Citations.]" (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 66, 124 Cal.Rptr.2d 507, 52 P.3d 685.) It is not enough that an action was filed after protected activity, or in response to protected activity, or even in retaliation for protected activity. (*Ibid.; City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) Instead, "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." (*City of Cotati, supra,* at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) "[T]he 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." (*Ibid.*)

Several cases illustrate the point. In *City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 72, 124 Cal.Rptr.2d 519, 52 P.3d 695, a city sued mobile home park owners for declaratory relief concerning a contested rent control ordinance. The trial court dismissed the state court action as a SLAPP because it was in response to the owners' pending federal action challenging the ordinance, and was filed to gain a more favorable forum to litigate the constitutionality of the ordinance. (*Id.* at pp. 72-73,

124 Cal.Rptr.2d 519, 52 P.3d 695.) The California Supreme Court reinstated the city's declaratory relief cause of action because the action did not arise from the owners' federal suit but from a preexisting controversy over the ordinance. (*Id.* at pp. 79-80, 124 Cal.Rptr.2d 519, 52 P.3d 695.) The court observed that the proper question in ruling on an anti-SLAPP motion is "[w]hat activity or facts underlie" the cause of action. (*Id* . at p. 79, 124 Cal.Rptr.2d 519, 52 P.3d 695.) The basis for declaratory relief is the existence of an actual, present controversy. (*Ibid.*) While the owners' federal suit informed the city of the existence of the controversy, the federal suit did not constitute the controversy. (*Ibid.*)

In *Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th at pp. 186-191, 6 Cal.Rptr.3d 494, the court held that a consumer's claims for product liability, fraud and other claims against a diet supplement manufacturer did not arise from the manufacturer's statements on the labels and instructions accompanying the product. "[I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Id.* at p. 188, 6 Cal.Rptr.3d 494.) While some of the consumer's causes of action, like fraud, required proof of the manufacturer's statements concerning the product, the "wrongful, injury-producing conduct ... on which these claims are based focuses on and arises from the nature of the [p]roduct" and resulting physical injury: the manufacturer allegedly knew the product did not satisfy product warranties and was unsafe. (*Id.* at pp. 190-191, 6 Cal.Rptr.3d 494.) The "core conduct" underlying the causes of action was thus "outside the boundaries of conduct to which the anti-SLAPP statute applies." (*Id.* at p. 191, 6 Cal.Rptr.3d 494.) The court concluded that "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." (*Id.* at p. 188, 6 Cal.Rptr.3d 494.)

***4** In a case presenting similar facts to those presented here, landlords filed notice under the Ellis Act of their intention to permanently remove units from the rental market. (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 157, 64 Cal.Rptr.3d 488.) Tenants sued, challenging landlord's right to invoke the Ellis Act and the landlord responded with an anti-SLAPP motion, arguing that the tenants' declaratory relief action arose from the landlord's filing of the Ellis Act notice. (*Id.* at pp. 156-158, 64 Cal.Rptr.3d 488.) The appellate court concluded that the tenants' action did not *arise* from protected activity (the Ellis Act filing) but from the landlord's allegedly unlawful termination of tenancy. (*Id.* at pp. 160-162, 64 Cal.Rptr.3d 488.) "[T]he [tenants'] suit is not based on [the landlord] defendants' filing and serving of a notice required under the Ellis Act, it is based on the [plaintiff tenants'] contention [that] 'defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home.' " (*Id.* at pp. 161-162, 64 Cal.Rptr.3d 488.) In the landlord-tenant context, the question is whether the prior legal action by the landlord "merely 'preceded' or 'triggered' the tenant's lawsuit, or whether it was instead the 'basis' or 'cause' of that suit." (*Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1289, 89 Cal.Rptr.3d 24; accord *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1481-1484, 74 Cal.Rptr.3d 1.)

The causes of action here do not arise from protected activity
Landlord Pieri and her son fail to meet their threshold burden of demonstrating that the tenants' cross-complaint is one arising from the landlord's protected speech or petitioning, rather than simply being preceded or triggered by the protected activity. In evaluating whether an action is a SLAPP, we must focus upon the "substance" or "gravamen" of the action. (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695; *Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th at p. 188, 6 Cal.Rptr.3d 494.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 92, 124 Cal.Rptr.2d 530, 52 P.3d 703.)

The substance of most of the causes of action is habitability, specifically Pieri's alleged failure to provide a safe and habitable apartment. This is true of the first (breach of contract), second (breach of the implied covenant of good faith and fair dealing), third (breach of the implied covenant of quiet enjoyment), fourth (breach of warranty of habitability), fifth (tortious breach of the implied warranty of habitability), sixth (negligence), seventh (nuisance), and ninth (intentional infliction of emotional distress) causes of action. It is true that some of these causes of action include allegations referring to protected activity. For example, tenants Dolan and Howard allege that landlord Pieri breached the implied covenant of quiet enjoyment by, among other things, the "filing of

meritless Unlawful Detainer Actions without proper service, and seeking to evict DOLAN and HOWARD without a good faith basis in law or fact." But "it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th at p. 188, 6 Cal.Rptr.3d 494; see *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319, 86 Cal.Rptr.3d 288, 196 P.3d 1094 [approving "principal thrust or gravamen" test to determine whether action alleging both protected and unprotected activity is given SLAPP protection].) Such is the case here, where the quiet enjoyment cause of action is based essentially on unprotected activity pertaining to habitability issues, including "vermin infestation, sewage encroachment and flooding, [and] failure to provide venting to the hot water heater and the stove...."

***5** The tenth cause of action (trespass) does not arise out of protected petitioning or speech activity, but the alleged conduct of the landlord and her son in entering the tenants' apartment without permission. The substance of the three remaining causes of action is unlawful invocation of the Ellis Act by purportedly removing the building from the rental market but continuing to rent a unit to the landlord's son. This is the primary basis for the eighth (fraud), eleventh (wrongful eviction) and twelfth (breach of rent control ordinance) causes of action. As the court concluded in *Marlin v. Aimco Venezia, LLC, supra,* 154 Cal.App.4th at pp. 160-162, 64 Cal.Rptr.3d 488, a tenant's action for wrongful invocation of the Ellis Act does not arise from protected petitioning activity but from termination of tenancy. "[T]he [tenants'] suit is not based on [the landlord] defendants' filing and serving of a notice required under the Ellis Act, it is based on the [plaintiff tenants'] contention [that] 'defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home.' " (*Id.* at pp. 161-162, 64 Cal.Rptr.3d 488.) The "principal acts or omissions" constituting the alleged breach of obligation here are not the landlord's filing of notices under the Ellis Act. (*Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th at p. 188, 6 Cal.Rptr.3d 494.) Any injury suffered by the tenants is not founded on the fact that landlord Pieri *petitioned* to remove her building from the rental market, but upon her alleged *conduct* in terminating the tenancy of Dolan and Howard while continuing to rent the premises to her son.

As our Supreme Court has instructed, "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." (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) Protected speech or petitioning activity must be the activity that "gives rise to [defendant's] asserted liability." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 92, 124 Cal.Rptr.2d 530, 52 P.3d 703.) Here, liability is not premised upon "any written or oral statement or writing" made in an official proceeding or made in connection with an issue being considered in an official proceeding. (§ 425.16, subds.(e)(1), (e)(2).) Landlord Pieri's acts underlying the tenants' causes of action are not her filing Ellis Act notices or an unlawful detainer action, but the allegedly deficient performance of her obligation to maintain the apartment and her allegedly unlawful termination of the tenancy. Landlord's liability (if any) arises from her property management, not her exercise of her constitutional rights of free speech and petition for the redress of grievances.

While we agree that the anti-SLAPP motion was properly denied, we reject the argument that the motion and this appeal are frivolous. In what is, or should be, a simple landlord-tenant dispute, tenants Dolan and Howard filed a shotgun-style pleading with a dozen causes of action, many of which include collateral allegations concerning protected activity. We cannot say that the filing of an anti-SLAPP motion in response to such a pleading is frivolous. We deny the request by tenants Dolan and Howard for imposition of sanctions on appeal. (Cal. Rules of Court, rule 8.276.)

III. DISPOSITION

***6** The order denying cross-defendants' anti-SLAPP motion is affirmed. The cross-appeal from the order denying sanctions on the anti-SLAPP motion is dismissed. Cross-complainants' request for sanctions on appeal is denied. The parties shall bear their own costs incurred on the appeal and cross-appeal.

We concur: REARDON, Acting P.J., and RIVERA, J.

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All Citations

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Footnotes

1 Our statement of the facts is based on the pleadings, declarations submitted with the motion, and judicially noticed declarations in the case file. (Code Civ. Proc., § 425.16, subd. (b)(2); Evid.Code, § 452, subd. (d)(1).)

2 In a separate action, Pieri filed a petition for a writ of mandate against the City and County of San Francisco (City) that challenged a City ordinance requiring tenant relocation assistance when removing property from the rental market. We rejected Pieri's claim that the ordinance violates the Ellis Act. (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 40 Cal.Rptr.3d 629.)

3 All further statutory references are to the California Code of Civil Procedure unless otherwise noted.

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