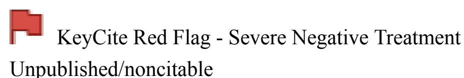

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Court of Appeal, First District, Division 2, California.

Steven MANN et al.,
Plaintiffs and Respondents,
v.
AJLOUN ENTERPRISES, LLC
et al., Defendants and Appellants.

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|
Filed 10/30/2018

(San Francisco City and County Super. Ct. No. CGC16552088)

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Opinion

Richman, J.

***1** This is another appeal by defendants, a landlord and its principal, who lost an anti-SLAPP special motion to strike portions of the pleadings of respondents, their tenants. The landlord had brought three unlawful detainer actions, all of which were unsuccessful, two dismissed and the third decided on the merits for tenants. And two petitions with the rent board were also decided favorably to the tenants, including with many findings that the landlord had breached its habitability obligation. The tenants then sued defendants, alleging three causes of action, for: (1) malicious prosecution, (2) infliction of emotional distress, and (3) breach of contract. Defendants filed an anti-SLAPP motion to strike the first and third causes of action. As to the first cause of action, the trial court denied the motion as to the landlord but granted it as to the principal. As to the third cause of action, the trial court denied it, with the exception of striking two clauses. Defendants appeal. We affirm.

BACKGROUND

The Parties and the General Setting

Plaintiffs and respondents are Steven Mann and Glen Leis (sometimes referred to collectively as respondents), the occupants of unit A, one of four units in a property located at 890 47th Avenue, San Francisco (the property). Leis had occupied the unit since 2010, Mann since 2012, under an agreement with Esther Kirk, the owner of the property, and also their upstairs neighbor. They had no written lease, and their rent was $1,200 a month, payable on the 15th. According to respondents, they consistently paid their rent on time, usually before its due date. And as particularly pertinent here, they paid the October 2013 rent early that month.

Defendants and appellants are Ajloun Enterprises, LLC (Ajloun) and Muath, also known as Matthew, Zghoul (Zghoul), owner of Ajloun (sometimes referred to collectively as appellants). Ajloun owns some 35 rental units in San Francisco.

Sometime in late 2013, Ajloun acquired the property, though the actual date of its acquisition is not clear in the record, its papers below asserting it took ownership on various dates, including October 14 and October 21, 2013. Ajloun also claimed in various proceedings to have acquired the property from Kirk's estate prior to her death, from her alleged legal guardian prior to her death, and from her daughter the day after she died.

On November 27, shortly after its acquisition, Ajloun filed a petition with the San Francisco Rent Board (Rent Board) to determine the lawful amount of rent due. Respondents filed their own petition to the Rent Board complaining of lack of heat and electricity; and at a subsequent hearing, they also asserted their right to a garage.

Following a March hearing, on May 1, 2014, the Rent Board issued its decision on appellant's petition, which determined that the legal rent was $1,200 a month, payable on the 15th, that the anniversary date of the agreement was October 15, 2010, and that as part of their housing services, respondents were entitled to half the garage.

***2** Following a June hearing, on August 1, 2014, the Rent Board issued its decision on respondents' petition. The decision found numerous habitability problems, including shut-offs of heat, water, gas, and electricity, and also illegal entries and demands for entry in violation of Civil Code section 1954, as well as demands for all day entry for repairs that were never accomplished. There was also evidence of many notices of violations from the Department of Building Inspection.

Meanwhile, as the Rent Board proceeding was underway, Ajloun also set in motion other activity that would come to underlie the issues here, beginning with Ajloun's "change of ownership" notice of November 1, advising that as of October 14, it was the new owner of the property and demanded rent for November 2013. This notice said rent was to be paid to Ajloun and mailed to 1298 Valencia Street, San Francisco, "Attn: Ihsan Hamdi."

Respondents testified they timely tendered the November rent to Zghoul when he inspected the property in early November, and that Zghoul refused to accept it, telling them to deliver the payment to their lawyer, Andrew Catterall, at his office on Montgomery Street. They further asserted that they tendered payment to Catterall, who refused it, telling them not to pay rent until the Rent Board determined the amount due. Then, and apparently despite his earlier advice, in early February 2014, Catterall demanded rent for five months, including rent already paid in October and rent not yet due until February 15. And on February 28, respondents paid what they said was owed up to that time, and in the first week of March and in early April 2014, delivered two rent checks, each for $1,200, to Catterall's offices.

Ajloun's version of events during this period does not deny there were rent-related issues, saying "a great deal of chaos surrounded the collection of rent in late 2013 and early 2014." But it attempts to explain this on the basis that its employee, and later the company it hired to collect rents, performed poorly and/or was confused and/or had bad records. For example, appellants' brief describes the situation this way:

"A great deal of chaos surrounded the collection of rent in late 2013 and early 2014. Upon acquiring the property, Ajloun began the process of sorting out the rental amounts and due dates of rent payment from the various tenants at its properties. [Citation.] Ajloun's employee who was responsible for collecting, scanning, and depositing rent checks from the tenants retired around May or June, 2014. [Citation.] In the period shortly before her retirement, her performance suffered and she did not properly track payments. [Citation.] For a period of time, Zghoul was receiving rent checks being made to Ajloun's attorneys, although Ajloun had requested that payment be made directly to it. [Citation.]

"Plaintiffs made rent payments for the months of November 2013 through February 2014 by cashier's checks provided to Ajloun's attorney, Andrew [Catterall], in February 2014. [Citation.] Zghoul did not immediately cash those checks as he was attempting to ascertain how much tenants had been paying and owed, and collecting rent checks as they dribbled in from tenants. [Citation.] Furthermore, in December 2013, as new owners, Ajloun stopped accepting rent from plaintiffs pending the San Francisco Rent Board's decision on Ajloun's petition to determine plaintiffs' lawful amount of rent. [Citation.] The Rent Board decided the petition on August 1, 2014."

***3** In short, appellants' position was that at the beginning it was Ajloun's own employee who performed badly and kept poor records. It did not get better when Ajloun hired external help.

In May 2014, Ajloun hired a property management company, 49 Square Realty, owned by Gary Sayed, to collect rent on its properties. At some point in 2014, Zghoul gave Sayed respondents' uncashed rent checks for November through February, but not the checks for March or April. And, it would develop, Sayed refused to accept rent payments for May through August. This brought about more confusion—and more issues.

Once again, appellants admit the confusion, the incompetence, the bad record-keeping. Again, we quote from appellants' brief:

"Prior to May 2014, 49 Square Realty did not know how much plaintiffs had paid or when. [Citation.]

"Zghoul did not give 49 Square Realty plaintiffs' March and April 2014 rent checks. [Citation.] Zghoul did not recall depositing those checks either. [Citation.] 49 Square Realty's ledger reflected rent for April 2014 was unpaid and 49 Square Realty had no reason to think otherwise. [Citation.]

"Although Ajloun's attorney, Andrew Catterall, confirmed receipt of the March 2014 payment, neither Ajloun's books nor Sayed's books reflected payment for April 2014. [Citation.] Although Catterall's office apparently received the April 2014 rent check, no one in his office knows what happened to it. [Citation.] In 2014, Ajloun's bank did not show individual checks that were included in a bundled deposit, only the lump sum deposit amount. [Citation.] Thus, Zghoul could not obtain an itemization of those bundled deposits. [Citation.]

"Zghoul did not recall receiving or cashing the March or April rent checks. [Citation.] ... It was later discovered that plaintiffs had paid the March rent by cashier's check and the April rent by a regular check, not a cashier's check."

In light of that record—perhaps more accurately, despite it—Ajloun began efforts to evict Mann and Leis.

On December 22, 2014, Ajloun served a three-day notice to pay rent or quit, demanding, however inappropriately, rent owed for March through December. Then, on December 31, represented by attorney Edward Singer of Zacks & Freedman, PC, Ajloun filed its complaint for unlawful detainer.[1]

Two days after the unlawful detainer action was filed, Nancy Conway, attorney for respondents, advised Singer that the three-day notice was wrong, as rent had been paid for March and April 2014. The advice fell on deaf ears, and Singer continued with the action, to the point of filing a motion for summary judgment in May. Respondents' opposition to the motion included proof of payment of the rent, following which Ajloun dismissed the unlawful detainer action.

On August 26, 2015, represented by Singer, Zghoul filed another unlawful detainer action—an action, we are constrained to point out, not even mentioned in Zghoul's opening brief. The action was based on a claimed failure to comply with a three-day notice to pay rent or quit for past due rent for the 12-month period between August 17, 2014, and August 17, 2015. This unlawful detainer proceeded to a court trial that began on October 8, and proceeded over five days, during which the court heard the testimony of Zghoul, Sayed, and Catterall, and both respondents. The court admitted numerous exhibits, and took judicial notice of various pleadings, court records, and statutes.

***4** On November 13, 2015, the trial court filed a 24-page statement of decision which, after an exhaustive analysis of law and exposition of facts, concluded as follows: "For all the foregoing reasons, the Court finds in favor of Defendants Glen Leis and Steven Mann on the basis that Plaintiff's August 17, 2015 Three-day Notice to Pay Rent or Quit did not comply with the requirements set forth under San Francisco Administrative Code Chapter 37.9, Cal. Code of Civil Procedure § 1161(2), or the unequivocal case law, requiring that a Three-Day Notice to Pay Rent or Quit not demand an amount in excess of what Defendants owe. (*Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc.* (1983) 139 Cal.App.3d 355, 359 ['A notice that seeks rent in excess of the amount due is invalid and will not support an unlawful detainer action.'].)"

The Proceedings Below

In May 2016, respondents filed a complaint against Ajloun and Zghoul, alleging three causes of action against both defendants: (1) malicious prosecution, (2) intentional infliction of emotional distress, and (3) breach of contract. Generally, the malicious prosecution claim alleged Ajloun "maliciously initiated and wrongfully pursued [the] unlawful detainer action" that had been dismissed. And the breach of contract cause of action alleged various breaches, as follows:

"BC [Breach of Contract (BC)]-1: [¶] On or about November 2013, defendants interfered with plaintiffs['] quiet enjoyment of the premises by inter[ ]alia multiple illegal entries, initiation and maintenance of meritless unlawful detainers. Refusing to accept rent payments and demanding rent payment prior to actual ownership of the premises."

"BC-2: [¶] Failure to deliver habitable premises. Interfering with utilities. Cutting of heat, water, electric. Abusing right to enter premises by giving notices to enter for overly long periods of time, giving notices to enter and not doing promised repairs. Doing substantial construction to premises without compensation including ripping out walls, windows, plumbing, refusing to provide alternate housing."

Appellants filed an anti-SLAPP motion seeking to strike the first and third causes of action. The essence of their argument was that both causes of action were based on claimed protected activity, the filing of the unlawful detainer action.

And, the motion argued, respondents could not prevail on either claim—not on the malicious prosecution claim because they could not meet two of the three requisite elements of that tort, and not on the breach of contract claim because it was barred by the litigation privilege.

Respondents filed opposition, acknowledging that the malicious prosecution claim was based on protected activity.

Following appellants' reply, the motion came on for hearing on November 8, prior to which the trial court had issued a tentative ruling. At the conclusion of the hearing, the court took the matter under submission. And on November 18, the court entered its order, which for the most part denied the anti-SLAPP motion. Specifically:

As against Ajloun, the court ruled against it on both causes of action. As to the first, for malicious prosecution, the court held that respondents met their burden under step two of the anti-SLAPP analysis. And as to the third, for breach of contract, the trial court concluded that the cause of action did not arise from protected activity.[2]

As against Zghoul, the trial court granted the motion as to the first cause of action, because plaintiffs could not show that Zghoul was not protected from liability based on Ajloun's LLC status.

***5** Appellants appealed.

DISCUSSION

Anti-SLAPP Law and the Standard of Review

Code of Civil Procedure section 425.16, subdivision (b)(1)[3] provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue 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." Subdivision (e) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP.

A two-step process is used 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, that is, by demonstrating that the acts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).)

As to how we deal with step two, we set forth the governing law in *Grewal v. Jammu* (2011) 191 Cal.App.4th 977 (*Grewal*):

"We decide the second step of the anti-SLAPP analysis on consideration of 'the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).) Looking at those affidavits, '[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.' (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700.)

"That is the setting in which we determine whether plaintiff has met the required showing, a showing that is 'not high.' (*Overstock.com, Inc. v. Gradient Analytics, Inc., supra,* 151 Cal.App.4th at p. 699.) In the words of the Supreme Court, plaintiff needs to show only a 'minimum level of legal sufficiency and triability.' (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5.) In the words of other courts, plaintiff needs to show only a case of 'minimal merit.' (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675, quoting *Navellier*[, *supra*,] 29 Cal.4th [at p.] 95, fn. 11.)

"... As the Supreme Court early on noted, the anti-SLAPP statute operates like a 'motion for summary judgment in "reverse." ' (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) Or, as that court would later put it, 'Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.]' (*Varian Medical Systems, Inc. v. Delfino* [(2005)] 35 Cal.4th [180,] 192; accord, *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)" (*Grewal, supra,* 191 Cal.App.4th at pp. 989-990.)

Respondents Met Their Burden on the Malicious Prosecution Claim

***6** Appellants' motion sought to strike the malicious prosecution claim on the basis that respondents could not

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meet their burden to demonstrate a probability of prevailing under step two of the anti-SLAPP analysis. Though granting the motion as to the individual Zghoul (based on LLC law), the trial court denied it as to Ajloun, concluding that respondents met their burden. We reach the same conclusion.

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) Ajloun contends that respondents failed to meet their burden as to the second and third elements.

The second element of a malicious prosecution claim is lack of probable cause. If there is " 'no dispute as to the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute that action is purely legal.' [Citation.] 'The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted.' [Citation.]" (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 222.) So, it is often said that "the existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury .... [¶] ... [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ...." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 (*Sheldon Appel*).)

On the other hand, when there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, there becomes a fact question that must be resolved before the court can determine the legal question of probable cause. (See *Sheldon Appel, supra,* 47 Cal.3d at p. 881 ["the jury must determine what facts the defendant knew"].) As indicated above, there is necessarily a "dispute" as to the state of appellants' knowledge before they filed the unlawful detainer action.

Unlawful detainer law is set forth in chapter 4 of the Code of Civil Procedure, at sections 1159 through 1174.3. That law contains strict rules, both substantive and procedural. As Witkin describes it, "[b]ecause of its summary nature and its effect of forfeiting the tenant's right of possession, strict compliance with the statutory requirements is required." (12 Witkin, Summary Cal. Law (11th ed. 2017) Real Property, § 734, p. 832.)

Section 1161, subdivision (2) provides that a tenancy may be terminated for non-payment of rent on three days' notice, but the rent demanded must not exceed the amount of rent due, and a three-day notice that overstates the rent due will not support an unlawful detainer action. (*Levitz Furniture Co. v. Wingtip Communications* (2001) 86 Cal.App.4th 1035, 1038, 1040.) Put otherwise, an overstated three-day notice is fatally defective. (*Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 462; *Nourafchan v. Miner* (1985) 169 Cal.App.3d 746, 753 [finding a $5.96 overstatement in $1,078 rent due rendered three-day notice invalid].)

***7** Here, there is no question that the three-day notice overstated the amount of rent due, ignoring the rent payments for March and April 2014. Indeed, appellants' own explanation quoted above demonstrated that they had to know this—or at least should have known this—as they had cashed the rent checks. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.)

Appellants, of course, cannot refute the fact that their demand for rent was overstated. And so what do appellants say? Nothing helpful. As their opening brief puts it, however dismissively, they filed the unlawful detainer case in the face of their "knowledge that its business records were not in good order." Their reply brief goes into more detail, attempting to explain it this way: "Zghoul described the circumstances leading up to the filing of the unlawful detainer action, including that plaintiffs had not paid rent for a substantial period of time (May through August); it was difficult to keep track of rent paid because plaintiffs sent the rent to Ajloun's attorneys instead of directly to Ajloun (despite being asked to send it directly to Ajloun), which added another layer of difficulty in tracking rent; the newly hired company to collect rents did not show all of plaintiffs' rent payments when they took over because Zghoul somehow kept the March and April rent checks; rent checks trickled into Zghoul from Ajloun's 35 units at various times during the month and he lost track of the various rent checks. [Citation.] Further, Ajloun's bank only recorded lump sum deposits and did not show individual checks within a bundled deposit for Zghoul 'had no easy way to determine whether [he] had cashed [plaintiffs'] check.' "

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So, what is it? That respondents paid their rent to "Ajloun's attorneys" (which, we note, respondents testified they were told to do)? Or, that 49 Square Realty, the "newly hired company," did not show all the payments because "Zghoul somehow kept the March and April rent checks"? Or, was it because the rent checks from Ajloun's "35 units" "trickled in" so that Zghoul "lost track" of the rent checks? Or, was it the bank's fault? Whatever it was, it was all on appellants' end. And it was all of no matter to appellants, who filed the unlawful detainer action regardless.

Finally, lack of probable cause is evidenced under the principle enunciated in *Zamos v. Stroud* (2004) 32 Cal.4th 958, which held that an action will lie for continuing to pursue a claim after learning it is not based on probable cause. (*Id.* at p. 973.) Here, within days after the unlawful detainer was filed, respondents' attorney advised appellants' attorney Singer that the rent was overstated. Singer ignored this information, apparently never attempting to verify it, and instead pushed on, to the point of filing a summary judgment motion, forcing respondents to incur the expense of opposing it—which opposition demonstrated that the rent demanded was excessive.

Respondents met their burden as to the second element of their malicious prosecution claim.[4] Likewise on the third, malice.

***8** Malice in connection with malicious prosecution " 'relates to the *subjective intent or purpose* with which the defendant acted ....' " (*Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 292.) Malice " 'may range anywhere from open hostility to indifference' "; it is not limited to " 'ill will toward plaintiff but exists when the proceedings are [prosecuted] primarily for an improper purpose.' " (*Ibid.*; accord, *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1157 (*Sierra Club*).) As an element of malicious prosecution, malice "reflects the core function of the tort, which is to secure compensation for harm inflicted by misusing the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement." (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 451–452, italics omitted.)

As *Sierra Club* elaborated: "Suits with the hallmark of an improper purpose are those in which: ' "... (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' [Citation.]" (*Sierra Club, supra,* 72 Cal.App.4th at p. 1157.)

Since malice concerns actual mental state, it necessarily presents a question of fact. (*Sheldon Appel, supra,* 47 Cal.3d at p. 874.) Particularly apt here, an anti-SLAPP case with its reverse summary judgment analysis, is this observation by the dissenting justice in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 696 (dis. opn. of Arabian, J.): "malice is such a highly factual issue that it often precludes summary disposition." Indeed it does, especially here, where the record contains abundant evidence to support respondents on the issue of malice.

While attorney Singer filed a short declaration testifying as to whom he spoke, there is no evidence he did anything to research the applicable facts before filing the unlawful detainer action. This indicates a degree of indifference from which one could infer malice. (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1409; see *Sheldon Appel, supra,* 47 Cal.3d at p. 883 ["if the trial court determines that the prior action was not objectively tenable, the extent of a defendant attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice"].) Beyond that, there was, inferentially at least, bad blood between the parties.

Appellants themselves describe the setting as one that got off to a "rough start," describing it as a "rocky relationship" and acknowledging that "the parties may not have gotten along." As their counsel put it at the argument below, there was "a lot of dislike here." Again, appellants would have it that such did not matter. We see it otherwise.

The record contains abundant evidence that appellants were hostile to respondents, manifested in many ways. Thus, for example, appellants demanded rent be paid to their attorney (at his Montgomery Street office, no less) who first accepted it, then rejected it. Appellants locked respondents out of their garage. And perhaps worst of all, appellants refused them habitability obligations in numerous particulars, including with interruptions to heat, water, and electricity. Were all that not enough, appellants refused to dismiss the

unlawful detainer case despite learning that the three-day notice overstated the rent owed.

The Breach of Contract Cause of Action Is Not Based on Protected Activity

***9** As we have put it, "In order for a complaint to be within the anti-SLAPP statute, the 'critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' (*Navellier*[, *supra*,] 29 Cal.4th [at p.] 89.) To make that determination, we look to the 'principal thrust or gravamen of the plaintiff's cause of action.' (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188, italics omitted; see *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.)" (*Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 133–134.)

The Supreme Court has recently put it this way: "A claim arises from protected activity when that activity underlies or forms the basis for the claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon Enterprises v. Consumer Cause, Inc.* [(2002)] 29 Cal.4th [53,] 66; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114.) Critically, '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.' [Citations.] ... Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) ....' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062–1063.)

Respondents' third cause of action was set forth in paragraphs BC-1 and BC-2 of their complaint, quoted above, that appellants breached the agreement in various ways by various acts: failure to deliver habitable premises; interfering with utilities; cutting off heat, water, electricity; giving notices to enter but not doing promised repairs; and other actions.

Appellants moved to strike this cause of action. The trial court denied it, with the exception of striking two clauses, neither of which was in the charging allegations: one in BC-1, "maintenance of meritless unlawful detainer," and one in BC-4, "bringing meritless lawsuit." That denial was right.

It is enough to quote from appellants' own opening brief, which admits that the "allegation that [appellants] failed to deliver habitable premises, interfered with utilities, abused the right to enter the premises, and did substantial construction to premises without compensation are not protected under section 425.16." That, of course, is the gravamen, the thrust, of respondents' breach of contract claim. That ends the inquiry.

Baral v. Schnitt (2016) 1 Cal.5th 376, which appellants discuss at length, does not avail them. There are several reasons why, but one will suffice: the Supreme Court's holding that "[a]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Id.* at p. 394.) That describes two clauses stricken here, which could be said to be at the most incidental to the breach of contract claim. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187–188; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, supra,* 133 Cal.App.4th at pp. 672–673.)[5]

DISPOSITION

***10** The order is affirmed. Respondents Mann and Leis shall recover their costs on appeal.

We concur:

Kline, P.J.

Miller, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 5617148

Footnotes

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1 This was actually the second unlawful detainer action Ajloun had filed. The first was in April 2014, based on nuisance, on the allegation that Leis had assaulted a neighbor at the property and had been charged with felony battery. The unlawful detainer named both Leis and Mann. The district attorney dropped the criminal charge, and in August Ajloun dismissed the action.

2 The court did strike two clauses: "initiation and maintenance of meritless unlawful detainers" and "[b]ringing meritless lawsuit." Neither of those clauses was in the charging allegations in BC-1 or BC-2 in the complaint.

3 All undesignated statutory references are to the Code of Civil Procedure.

4 Appellants' reply brief asserts that respondents' "evidence does not show Ajloun lacked probable cause in bringing the unlawful detainer action for unpaid rent." This, of course, is not the requirement, not under the reverse summary judgment standard employed by the cases.

5 Scattered throughout respondents' brief are assertions and arguments that (1) the trial court should have denied the anti-SLAPP motion attacking the breach of contract claim in its entirety; and (2) it was error to grant the motion as to defendant Zghoul. And apparently respondents ask us to rectify these errors. Respondents did not file any cross-appeal from these aspects of the trial court's rulings, and thus have no standing to make the arguments here.

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