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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.	B154311 (Super. Ct. No. BC247941)

APPEAL from orders of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Reversed with directions.

Ronald C. Stock, in pro. per., for Defendant and Appellant.

Peggy J. Soukup, in pro. per.; Law Offices of Gary L. Tysch and Gary L. Tysch for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III(C)-(D).

I. INTRODUCTION

Defendant, Ronald C. Stock, appeals from an order denying his Code of Civil Procedure[1] section 425.16 special motion to strike. The present lawsuit is for abuse of process and malicious prosecution. An underlying lawsuit was dismissed pursuant to section 425.16. Defendant represented the plaintiffs in the underlying lawsuit. This lawsuit followed and defendant filed a special motion to strike. We conclude the special motion to strike in the present lawsuit should have been granted Accordingly, we reverse the order under review.

II. BACKGROUND

Defendant's special motion to strike was directed at the complaint filed by Peggy J. Soukup, plaintiff, alleging abuse of process and malicious prosecution. In an underlying action, Herbert Hafif, Cynthia D. Hafif, Greg K. Hafif (the Hafifs), and the Law Offices of Herbert Hafif (the Hafif firm) sued plaintiff. Defendant was one of the attorneys who represented the Hafifs and the Hafif firm in the underlying action against plaintiff. The underlying lawsuit involved allegations that plaintiff here, Ms. Soukup, a former employee of the Hafif firm, had disclosed to a third party confidential information obtained during her employment. The disclosure was purportedly made in furtherance of a conspiracy to defame the Hafif firm. The underlying lawsuit was dismissed in response to a section 425.16 special motion to strike.

Our colleagues in the Fourth Appellate District, Division Three, affirmed the order granting the special motion to strike. (*Law Offices of Herbert Hafif et al. v. Soukup et al.* (April 27, 2000, G020977) [nonpub. opn.].) In an unpublished opinion, the Court of Appeal held: the trial court erred in considering the plaintiffs' subjective motives for bringing the action, but the error was harmless; the allegedly actionable conduct

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1 All further statutory references are to the Code of Civil Procedure.

consisted of Ms. Soukup's complaints to the Department of Labor, which statements were within the protective purview of section 425.16; and the plaintiffs failed to meet their burden of establishing a probability of succeeding on their claims against Ms. Soukup. (*Ibid.)* The complaint in the present suit alleged that the underlying lawsuit was brought in order to "obtain collateral advantage" so that plaintiff would withdraw a complaint she had made to the United States Department of Labor and not pursue an "ERISA action." Further, it was alleged the underlying lawsuit was brought: to destroy plaintiff's credibility in other disputes; without probable cause; and maliciously.

In response to plaintiff's complaint, defendant filed a special motion to strike. The trial court denied the special motion to strike. The trial court concluded that the special motion to strike procedure did not apply to an attorney representing a party in another lawsuit.

III. DISCUSSION

A. Applicable Legal Principles And Standard of Review

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Enacted in 1992, section 425.16, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) The purpose of the statute was set forth in section 425.16, subdivision (a) as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ."

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 65; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.) Section 425.16, subdivision (e) provides: "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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." In order to protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-1176.)

When a special motion to strike is filed, the trial court must consider two components. First, the court must consider whether the moving defendant has sustained its burden of showing that the lawsuit falls within the purview of section 425.16**;** i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that plaintiff's cause of action arises out of actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on

another point in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1123, fn. 10.)

Second, once the defendant meets this burden, the obligation then shifts to the plaintiff to establish a probability that she or he will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 63; *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115.) The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at pp. 62-64.) Nor must a moving defendant show that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88-89; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) As to the second step of the special motion to strike decision-making process, the Supreme Court in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, described the trial judge's duties as follows: "[I]f a court ruling on [a special motion to strike] concludes the challenged cause of action arises from protected petitioning, it then 'determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' (*Equilon, supra,* 29 Cal.4th at p. 67 [].) To satisfy this prong, the plaintiff must 'state[ ] and substantiate [] a legally sufficient claim.' (*Rosenthal v. Great Western Fin. Securities*[(1996)] 14 Cal.4th [394,] 412 [].) 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [].)" (Fn. omitted.) We conduct independent review of the trial court's decision. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5 ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.)

B. The Order Denying The Special Motion To Strike Should Have Been Granted

Plaintiff argues the special motion to strike was correctly denied because the underlying lawsuit did not arise out of an act in furtherance of defendant's petition or free expression rights. (§ 425.16, subd. (b)(1).) We disagree. All of plaintiff's claims arise out of the underlying lawsuit which was dismissed pursuant to section 425.16. Plaintiff was counsel for the Hafifs and the Hafif firm in the underlying lawsuit. As we will explain, the present action arises out of defendant's exercise of free expression rights on behalf of clients, the Hafifs and the Hafif firm.

No doubt the present lawsuit against the Hafifs and the Hafif firm arises out of the exercise of their petition rights. (*Jarrow Formulas v. LaMarche, supra,* 31 Cal.4th at pp. 734-735; *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 95.) The issue as to defendant is slightly different. Rather, defendant was not a party in the underlying lawsuit, he is alleged to have been counsel for the Hafifs and the Hafif firm. In *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152, we discussed the situation where a plaintiff sues *both* the lawyer and client for litigation related conduct in an underlying lawsuit. We recognized that the application of a section 425.16 special motion to strike a complaint naming an attorney and a client may not be the same. We noted: "As to whether Mr. Kass and the Manning law firm, as the lawyers for Financial and Allstate, had standing to bring the special motion to strike, this issue is resolved by the language of section 425.16 subdivision (b)(1) which states in pertinent part: '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 . . . .' (Italics added.) As can be noted, the italicized language requires that the defendant . . . be the individual who is or was being sued for exercise of 'that person['s]' right of petition or free expression." (*Shekhter v. Financial Indemnity Co., supra,* 89 Cal.App.4th at p. 152.) In *Shekhter*, we held that the attorney and his law firm were entitled to specially move to strike pursuant to section 425.16. In *Shekhter*, in addition to representing several clients, insurance

companies, in another lawsuit, the attorney and his law firm exercised free expression rights independent of their representation in the underlying litigation. In *Shekhter*, we noted that the cross-complaint alleged tort claims based upon contact by the attorney and the law firm with broadcasting outlets and a "'nationally syndicated journalist.'" (*Id*. at p. 153.) In *Shekhter*, we concluded that the lawyer and his law firm were exercising their *own* free expression rights when communicating with journalists outside of the courtroom. But we did not resolve the question of whether an attorney could secure the benefit of section 425.16 while merely representing a client's interests *in litigation*.

The present case poses the issue we did not conclusively decide in *Shekhter*; whether an attorney may rely upon his or her exercise of free expression rights while providing legal representation in an underlying lawsuit as a basis for a special motion to strike in subsequent litigation. Under the facts of the present case, we conclude that defendant can secure the benefit of the special motion to strike remedy. As in *Shekhter*, our conclusion is premised upon the express language of section 425.16, subdivision (b)(1), which restricts the application of a special motion to strike to a "cause of action *against a person arising from any act of that person in furtherance of the person's* right of . . . *free speech* . . . ." (Italics added.) When defendant, acting as an advocate, filed papers and presented arguments in the underlying litigation, his advocacy activities arose out of the exercise of the right of free expression. The constitutional right of free expression arises in a variety of situations. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790 [music]; *Buckley v. Valeo* (1976) 424 U.S. 1, 14 [political contributions]; *Doran v. Salem Inn, Inc*. (1975) 422 U.S. 922, 932-933 [dancing]; *Spence v. State of Washington* (1974) 418 U.S. 405, 410-411 [placing an anti-war symbol on an American flag].) The Supreme Court has held that the right of free expression arising in the context of litigation "should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (*Pennekamp v. Florida* (1946) 328 U.S. 331, 347.) Further, other First Amendment rights including those of free press and assembly exist in the courtroom, albeit they are qualified. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 578 (lead opinion of Burger, C.J. ["Subject to the

traditional time, place, and manner restrictions, [citations] streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, [citation]; a trial courtroom also is a public place where the people generally--and representatives of the media--have a right to be present . . ."]; see *State v. Springer-Ertl* (S.D. 2000) 610 N.W.2d 768, 774 ["public and the press have fewer speech restrictions than lawyers participating in judicial proceedings"].) Finally, the First Amendment applies to lawyers' communications with clients in determining what challenges to raise inside the courtroom. (*Legal Services Corp. v. Velazquez* (2000) 531 U.S. 533, 544, 548 [congressional limitations on issues that may permissibly be raised by legal services lawyers constitutes a "serious and fundamental restriction on advocacy of attorneys" thereby violating the First Amendment].)

We need not decide whether the First Amendment applied to all of defendant's actions as an advocate on behalf of the Hafifs and the Hafif firm. Rather, the question is whether, in the words of section 425.16, subdivision (b)(1), plaintiff's advocacy actions can be categorized as "arising from any act of that person in furtherance of the person's right of . . . free speech . . . ." As noted in the immediately preceding paragraph, subject to restrictions not necessarily present elsewhere, the right of free expression applies to conduct by a lawyer. A lawyer advocates on behalf of a client and against an adversary. The lawyer advocates orally and in writing. All of the courtroom advocacy involves activities in a public place before a governmental body. As noted previously, section 425.16, subdivision (e) states in pertinent part that the term "'act in furtherance of a person's right of . . . free speech'" includes the following: "(1) any written or oral statement or writing made before a . . . judicial proceeding . . . ; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." The California Supreme Court has construed this language in

section 425.16, subdivision (e) as follows, "'[P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 734 citing *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1113.) Defendant's written and oral advocacy on behalf of the Hafifs and the Hafif firm arose from this form of conduct delineated in *Briggs*.

The foregoing language in *Briggs* is fully supported by the facts in that case. The defendant in *Briggs* was described by the Supreme Court thusly, "Defendant Eden Council for Hope and Opportunity . . . , a nonprofit corporation partly funded by city and county grants, counsels tenants and mediates landlord-tenant disputes." (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1109.) In *Briggs*, the Supreme Court recognize such when it held: "According to plaintiffs, section 425.16 protects only statements or writings that defend the speaker's or writer's own free speech or petition rights or that are otherwise 'vital to allow citizens to make informed decisions within a government office.' Plaintiffs insist tenant counseling activities like [defendant's] are not protected by section 425.16 because they neither promoted [defendant's] own constitutional right of free speech nor informed the public about possible wrongdoing. [¶] Even assuming, for purposes of argument, that plaintiffs accurately have characterized [defendant's] activities as constituting neither self-interested nor general political speech, we cannot conclude such activities thereby necessarily fall outside the protection of the anti-SLAPP statute. Contrary to plaintiffs' implied suggestion, *the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)*." (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1116, italics original and added.)

We acknowledge that the question directly before the Supreme Court in *Briggs* was whether for purposes of section 425.16 a statement made before or in connection with an issue under consideration in a legally authorized official proceeding must be one

of public significance. (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1109.) The issue here, the availability of the special motion to strike procedure to a lawyer sued for conduct in an underlying lawsuit, is different. But our colleague Presiding Justice Arthur Gilbert has explained the language in *Briggs* set forth in the immediately preceding paragraph requires that section 425.16 be available to a malicious prosecution defendant who acted as counsel in an underlying lawsuit. (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 221.) We are persuaded by Presiding Justice Gilbert's analysis. Further, as we noted in *Shekhter v. Financial Indemnity Co.*, *supra*, 89 Cal.App.4th at page 153, the special motion to strike was available to a lawyer and a law firm representing clients who exercised free speech rights while speaking to journalists. No sound justification exists for limiting the availability of a section 425.16 special motion to strike to a lawyer speaking only outside of the courtroom to a journalist. This is particularly true because the First Amendment, subject to restrictions not present elsewhere, applies to advocacy conduct in and out of a courtroom. Because defendant demonstrated that the claims against him *arose* out of the exercise of his own First Amendment free expression rights, his conduct as an advocate while speaking and writing on behalf of the Hafifs and the Hafif firm, he has sustained his initial burden pursuant to section 425.16, subdivision (b)(1) when the statute is broadly construed. Hence, the burden of proof shifted to plaintiff to show the probability she will prevail on her malicious prosecution and legal malpractice claims.

[Parts II.C-D are deleted from publication. See *post* at p. 12 where publication is to resume.]

C. The Probability of Prevailing

We agree with defendant that plaintiff's brief argumentative and conclusory three-page declaration and the voluminous attached documents filed in opposition to the special motion to strike did not constitute a sufficient prima facie showing of facts to

show any potential liability on his part. As to the first cause of action, the mere filing of a lawsuit, something there is no evidence defendant did, does not constitute the tort of abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; *Friedman v. Stadum* (1985) 171 Cal.App.3d 775, 779-780; *Drasin v. Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485; *Seidner v. 1551 Greenfield Owners Assn*. (1980) 108 Cal.App.3d 895, 904-905; *Christensen v. Younger* (1975) 47 Cal.App.3d 613, 617.) Further, there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra*, 42 Cal.3d at p. 1169; *Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 595.) As to the second cause of action, malicious prosecution, there is no evidence of: malice; an absence of probable cause at any time during the underlying lawsuit; or damage. Hence, there has been no prima facie showing of potential malicious prosecution liability on defendant's part. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.)

D. Attorney fees

Defendant is entitled to an attorney fee and cost award. (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215.) The attorney fee and cost motion should be pursued pursuant to rule 870.2(b) and (c) of the California Rules of Court. (*American Humane Ass'n v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1104.)

[The balance of the opinion is to be published.]

IV. DISPOSITION

The order denying defendant's special motion to strike under Code of Civil Procedure section 425.16 is reversed. Defendant, Ronald C. Stock, is to recover his costs and attorney fees incurred on appeal and in the trial court from plaintiff, Peggy J. Soukup.

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TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.