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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GARY L. EFFRON, Plaintiff and Respondent, v. AMERICAN INTERNATIONAL GROUP, INC., et al., Defendants and Appellants.	B198461 (Los Angeles County Super. Ct. No. BC358352)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Alan R. Zuckerman, Barry Zoller, and Jeffrey S. Ranen for Defendants and Appellants.

Schonbrun DeSimone Seplow Harris & Hoffman, Michael D. Seplow, and Rebecca Hamburg for Plaintiff and Respondent.

Plaintiff and respondent Gary L. Effron (Effron) brought this wrongful termination action against his former employer, Lewis Brisbois Bisgaard & Smith (LBBS), and two of its clients, American International Group, Inc., and AIG Technical Services, Inc. (collectively AIG). He claims that comments made by AIG to LBBS led to LBBS's decision to terminate Effron from the law firm.

AIG filed a special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16,[1] California's anti-SLAPP[2] statute. The trial court denied AIG's motion, finding that Effron's allegations did not fall within the scope of the anti-SLAPP statute. AIG appeals.

We agree with the trial court that Effron's allegations do not fall within the purview of section 425.16. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

On June 1, 1985, Effron began working as an associate for LBBS. In 1988, he and LBBS entered into an employment contract, pursuant to which his title was changed to "non-equity partner."

While employed by LBBS, Effron's practice consisted of insurance defense work, and he worked on matters for one of LBBS's largest clients, AIG.

In 2004, Effron was handling the case of *Saakyan v. Vallone Realty* (the *Saakyan* case). In that case, LBBS represented two parties (the insureds) who were insured by AIG. At some point in 2004, Arlene Preddie (Preddie), a claims adjustor with AIG, began overseeing the defense of the *Saakyan* case. During the course of Preddie's

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

management of the litigation, she purportedly "provided instructions for [Effron] regarding [his] preparation of the case for trial."

Specifically, on September 10, 2004, Scott Lichtig (Lichtig), an LBBS equity partner, notified Effron that, per AIG's instructions, the only thing he was to do in the *Saakyan* case was to try to settle it; he was not supposed to prepare for trial, even though the trial date was only 10 days away.

On September 13, 2004, a settlement was reached in the *Saakyan* case, however, the following day, opposing counsel informed Effron that his client had changed his mind and decided not to accept the settlement. Effron immediately advised Preddie of this development, with copies to AIG's insureds, the parties in the *Saakyan* case.

On September 15, 2004, Effron discussed the *Saakyan* case with the principal of the insureds in the *Saakyan* case. During that conversation, Effron informed the insured of AIG's instruction not to prepare for trial.

That same day, Effron spoke with Preddie at least twice. During one of those conversations, she informed Effron that she had spoken with the insured and the insured was upset as a result of his conversation with Effron. Also on that date, Preddie called Lichtig to complain about the fact that Effron had informed the insured about AIG's instructions on the *Saakyan* case.

On September 23, 2004, Effron was removed from working on the files being handled by Preddie at AIG; approximately seven AIG cases were transferred away from Effron to other LBBS attorneys.

Believing that LBBS and AIG disapproved of Effron's conduct in keeping AIG's insureds informed of litigation strategy and feeling pressure from AIG and LBBS to conduct himself in an allegedly unethical manner, Effron determined that he could not continue to work on the *Saakyan* case. Accordingly, on October 22, 2004, he turned the case file over to another LBBS equity partner.

Because Effron was unable to meet LBBS's minimum billing requirements, LBBS terminated its nonequity partner relationship with him on July 13, 2006.

Procedural Background

Effron initiated this lawsuit against LBBS and AIG on September 12, 2006. As against AIG, Effron alleged negligent and intentional interference with contractual and economic relations and negligent and intentional infliction of emotional distress.

On November 27, 2006, AIG filed the instant anti-SLAPP motion. The parties participated in discovery, and AIG filed an amended anti-SLAPP motion on March 5, 2007. AIG argued that Effron's claims should be dismissed pursuant to the anti-SLAPP statute because all of the allegedly wrongful conduct was protected by the litigation privilege (Civ. Code, § 47, subd. (b)).

Effron opposed AIG's motion, claiming that his causes of action did not arise out of protected activity; "the mere fact that AIG's acts in question in this case were somehow associated with a litigated matter in which AIG was the carrier and [Effron] was the attorney for the insured does not mean that [Effron's] action arises out of AIG's protected activities. Indeed, AIG has failed to show that the acts of which [Effron] complains were done in furtherance of its petitioning activities." As for the litigation privilege, Effron pointed out that "the California Supreme Court has made it clear that although there may be areas of overlap, the two statutes [§ 425.16 and Civ. Code, § 47, subd. (b)] are inherently different and are **not** co-extensive."

On March 27, 2007, after entertaining oral argument, the trial court denied AIG's anti-SLAPP motion. It found that Effron's claim against AIG did not fall within the scope of the anti-SLAPP statute. In so ruling, the trial court focused upon "four statements [alleged in the complaint] involving AIG that led to [Effron's] termination. First, AIG's statement to [Effron] telling him not to prepare for trial and focus on settling. . . . Second, [Effron's] statement to the insureds telling them of AIG's instruction. . . . Third, the insureds' statement to AIG complaining of the instruction. . . . Fourth, AIG's statement to LBBS that lead to [Effron] no longer handling AIG cases. . . . None of these statements were both (a) the fact from which [Effron's] cause of action arose and (b) in furtherance of AIG's right to petition the government."

AIG's timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review. [Citation.]" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

II. *The Anti-SLAPP Statute*

Section 425.16, subdivision (b)(1) 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." The statute "posits . . . a two-step process for determining whether an action is a SLAPP." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the defendant bringing the special motion to strike must make a prima facie showing that the anti-SLAPP statute applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at p. 819.) Once a moving defendant has met its burden, the motion will be granted (and the claims stricken) unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567–568.)

III. *The Trial Court Properly Denied AIG's Anti-SLAPP Motion*

At issue here is whether AIG's statements and conduct fall within the purview of the anti-SLAPP statute. We conclude that they do not.

Effron's claim against AIG is based upon AIG's alleged complaint to LBBS about Effron and its subsequent instruction to remove Effron from any and all AIG matters. AIG's comments did not arise from any protected speech or petitioning activity. As such, they do not fall within the scope of section 425.16.

In urging us to reverse, AIG argues that its statements to LBBS criticizing Effron's performance fall within the scope of the anti-SLAPP statute because they were made

during the course of underlying litigation, namely the *Saakyan* case. The cases cited by AIG are readily distinguishable. In *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420, "[t]he complaint and the evidence submitted by [the defendant] established that all four of the tort causes of action alleged against her in [the] complaint arose from her acts of negotiating a stipulated settlement of a pending unlawful detainer action." (*Ibid*.) Similarly, in *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784, the court held that "communications preparatory to or in anticipation of the bringing of an action or other official proceeding [were] . . . entitled to the benefits of section 425.16." (See also *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1115.)

Likewise, in *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 604, "[a] Los Angeles County (County) employee sued the County and a County official [for discrimination.] In her third amended complaint, the employee also asserted a retaliation claim, and sued two other County supervisory employees . . . , alleg[ing that they] obstructed her efforts to obtain bilingual bonus pay by conducting a pretextual investigation and preparing a report [that] falsely [concluded that] she was not entitled to bilingual pay." The two supervisors brought an anti-SLAPP motion, contending "that the retaliation claim against them arose from protected First Amendment activity, as the investigation was conduct and the report was prepared in response to a request from counsel for the County in connection with the employee's discovery requests in the ongoing lawsuit." (*Ibid*.) The Court of Appeal determined that because the investigation and memorandum upon which the plaintiff's retaliation claim was based were acts undertaken during the defense of the pending litigation, namely while counsel was preparing responses to the plaintiff's discovery requests, the plaintiff's claim arose from acts in furtherance of the defendants' free speech or petition rights. (*Id*. at p. 612.)

Taken together, these cases reaffirm the principle that "the statutory phrase 'cause of action . . . arising from' means simply that 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. [Citation.] In the anti-SLAPP context, the 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. [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; see also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669–670.)

Effron's claims do not arise out of any acts taken in furtherance of the right to petition. While AIG may have insisted that LBBS remove one of its attorneys from AIG matters, that direction is not *itself* an act in furtherance of the right of petition. In other words, Effron's claims are not based upon "communications [that] AIG had with . . . LBBS . . . to control and direct pending litigation against AIG's insureds," as AIG argues.

In so holding, we reject AIG's contention that AIG's right to select counsel falls within the scope of the anti-SLAPP statute.[3] We agree with AIG that it has the right to select its attorney and may terminate an attorney's employment at any time. That being said, we do not agree that these rights amount to an act in furtherance of the right of petition. The fact that AIG's exercise of its right to change attorneys occurred during the course of petitioning activity or may have been triggered by petitioning activity does not mean that Effron's claim arose from that activity itself. (See, e.g., *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1535; *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1037 ["Not all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16"]; *Navellier v. Sletten, supra,* 29 Cal.4th at p. 89 ["that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such"].)

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3 It follows that we are not persuaded by AIG's assertion in its reply brief that "Effron's claim against [it] will have a 'chilling effect' on [its] right to select and terminate counsel." While section 425.16 was designed to dispose of lawsuits that are brought to "chill the valid exercise of . . . constitutional rights," there is no indication that it was enacted to cloak the hiring and firing of a lawyer in First Amendment protection. (§ 425.16, subd. (a).)

As the trial court found, acts, as envisioned by section 425.16, constitute steps taken to advance the constitutional right of petition. For this reason, "'[i]t is beyond dispute the filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16.' [Citation.]" (*Kolar v. Donahue, McIntosh & Hammerton*, *supra,* 145 Cal.App.4th at p. 1537.) Moreover, "[t]he anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation. [Citation.]" (*Ibid*.; see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1267–1269 [anti-SLAPP statute covers prelitigation communications such as demand letters or other statements to adverse parties, potential adverse parties, and sometimes nonparties].) "Acts in furtherance of free speech or petition rights include 'communicative conduct such as the filing, funding, and prosecution of a civil action.' [Citation.]" (*Gallanis-Politis v. Medina, supra,* 152 Cal.App.4th at p. 609; see also *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1285 [filing a notice of lis pendens and a notice of rescission falls within the purview of section 425.16]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17 [an entity's act of directing litigation, even though it was not a party to the underlying lawsuit, fell within the scope of the anti-SLAPP statute].) AIG's alleged instruction that Effron be removed from all of its matters does not advance its petitioning activities.

The situation would be different if, as the trial court correctly found, Effron's claims were based upon AIG's instruction about how to handle the *Saakyan* case, namely not to prepare for trial but to settle the case. Effron's causes of action, however, are not based upon this direction. Rather, his claims arise out of the alleged retaliation that occurred afterwards, when he discussed AIG's instruction with AIG's insureds and those insureds complained to AIG, who in turn complained to LBBS.

We are not convinced by AIG's theory that *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 (*Taheri*) compels reversal. In *Taheri*, Taheri Law Group brought an action for interference against another attorney, Neil C. Evans (Evans), alleging that Evans improperly solicited its client, Alexander Sorokurs (Sorokurs), during pending

litigation. (*Id*. at p. 485.) Specifically, Taheri Law Group had alleged that after successfully representing Sorokurs for 18 months, Sorokurs discharged its counsel, and on the same day, received a letter from Evans, notifying it that he was Sorokurs's new counsel in connection with the pending matters. (*Ibid*.)

In response to the complaint, Evans filed an anti-SLAPP motion, arguing that "his actions were protected by the anti-SLAPP statute, as those actions 'all took place in connection with pending litigation in which [Taheri Law Group's] interests were allegedly interfered with by [Evans] by [Evans's] filings, letters, and other communicative actions in pending litigation.'" (*Taheri, supra*, 160 Cal.App.4th at p. 486.) The trial court granted Evans's motion to strike (*id.* at p. 487), and the Court of Appeal affirmed, concluding that Taheri Law Group's lawsuit arose from protected activity (*id*. at pp. 488–489).

In so holding, the Court of Appeal relied upon the allegations of Taheri Law Group's complaint and rejected Taheri Law Group's contention that "its lawsuit arose from Evans's conduct soliciting a client, 'not what [Evans] did when he got into the case.'" (*Taheri, supra*, 160 Cal.App.4th at p. 489.) "Its complaint plainly shows it arose from Evans's communications with Sorokurs about pending litigation, and from Evans's conduct in enforcing the settlement agreement on Sorokurs's behalf." (*Ibid*.)

While we are a bit puzzled by the analysis in *Taheri*, we are able to reach the following conclusions. If the *Taheri* court found that the plaintiff's claims fell within the scope of the anti-SLAPP statute because they were based upon "conduct in enforcing the settlement agreement" (*Taheri*, *supra*, 160 Cal.App.4th at p. 489), then *Taheri* does not mandate reversal of the trial court's order here. The conduct in that case included a motion filed by Evans on Sorokurs's behalf to enforce the settlement agreement. (*Id*. at p. 486.) Certainly such conduct constitutes an act in furtherance of the right of petition. In contrast, as previously mentioned, AIG's comments criticizing Effron and asking that he be replaced with a different LBBS attorney is not an act in furtherance of the right of petition.

On the other hand, if *Taheri* is to be read broadly, as holding that an attorney's solicitation of a client during pending litigation constitutes an act in furtherance of the client's right of petition, we respectfully disagree. The attorney's act of solicitation arises out of the attorney's interest in obtaining business; it does not advance the client's right of petition. Thus, the anti-SLAPP statute would not apply.

AIG spends time discussing whether statements not made by AIG fall within the scope of the anti-SLAPP statute. This analysis is irrelevant. If AIG did not make these statements, then AIG must utilize a different procedural vehicle to dispose of allegations against it that arise out of someone else's statements or conduct.

Because AIG did not meet its "threshold burden of showing" that Effron's suit is "based on protected activity," we need not consider whether Effron "is likely to succeed on the merits." (*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1288.) AIG, "of course, remains free to challenge the lawsuit on other grounds and through other procedural means." (*Ibid*.)

DISPOSITION

The order of the trial court is affirmed. Effron is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD