IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

HELIX MEDIA LLC,

Plaintiff and Respondent,

v.

NATALIE CLARK et al.,

Defendants and Appellants.

B315990

(Los Angeles County
Super. Ct. No.
21GDCV00658)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph C. Hofer, Judge. Affirmed.

Robert James Winkler for Defendants and Appellants.

Orsus Gate, Denis Shmidt and Nabil Bisharat; Salvato Boufadel, Gregory M. Salvato and Joseph Boufadel for Plaintiff and Respondent.

INTRODUCTION

Natalie Clark (Clark) and Freya Holdings LLC (Freya)[1] appeal from an order denying their special motion to strike the operative complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[2] We conclude Clark did not meet her burden of demonstrating the conduct forming the basis of the underlying complaint involved protected activity within the meaning of section 425.16. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The First Amended Complaint's Allegations

The first amended complaint (FAC) alleges the following facts. Helix is a consulting company that helps individuals create passive income through the creation of e-commerce businesses (LLCs) that sell health supplements and skin care products. Once each LLC is established, Helix leverages its connections with manufacturers, payment processing companies, and its own expertise to run each e-commerce business itself. Through this model, each LLC owner earns several thousand dollars of passive income per year.

As part of its work for each LLC, Helix is given access to the LLCs' operating bank accounts. Each LLC sets up a reserve account held by various payment processing companies who

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1 We refer to Clark and Freya collectively as Clark unless otherwise indicated.

2 SLAPP is the acronym for strategic lawsuit against public participation. All further undesignated statutory references are to the Code of Civil Procedure.

administer the e-commerce financial transactions. The reserve accounts hold back a small percentage of income generated by the business as insurance for the processing company in the event the business has an inordinately high number of returns or chargebacks. Under the agreements entered into between Helix and each of the LLCs, Helix is entitled to 99 percent of the net profits, and each LLC owner is entitled to the remaining 1 percent.

This business model is based on policies enacted by payment processing companies, which only allow a limited number of payments to be processed by each LLC per year. By operating dozens of LLCs, Helix has managed to leverage economies of scale while still remaining within the processing companies' policies—a business model that the processing companies are fully aware of and encourage by working directly with Helix on behalf of all of its LLC clients.

In 2018, Helix engaged Clark to help identify and recruit individuals interested in the business model. As an independent contractor, Clark's role was that of an outside lead generator, salesperson, and recruiter. She was to identify interested individuals, explain the business model, and have them execute the necessary agreements. Between 2018 and 2021, Clark recruited over 20 individuals who created approximately 44 LLCs (the Merchant LLCs). Clark was compensated based on her success. Between August 2018 and January 2021, Helix paid Clark a total of $114,718.22.

The FAC further alleges that, because she was not satisfied with the money she earned, Clark decided to steal the entire business. In late January and early February 2021, Clark stole login credentials for each of the Merchant LLC's bank accounts;

unlawfully accessed those bank accounts and changed the passwords to the online accounts, eliminating Helix's access to the accounts; transferred approximately $460,000 from the Merchant LLC bank accounts into Freya's bank account—an entity Clark formed on January 27, 2021, which she owned, managed and controlled; and stole from Helix all the agreements executed by the LLCs since 2019 and/or failed to have the LLC owners sign the agreements in the first instance.

As part of her scheme, the FAC alleges that on January 28, 2021, Clark sent an email to the Merchant LLCs (the January 28 email). The email accused Helix of the following: that Helix materially breached its agreements with the LLCs by not paying each of the LLC owners his or her full 1 percent commission; that Helix was put on notice of these alleged breaches several months ago; and that Helix refused to remedy the breaches. The email went on to state that Clark transferred "the funds held in the merchant accounts into a trust account while the impeding [sic] litigation ensues." In the same email, Clark then offered to purchase each LLC and claimed that this purchase would allow each LLC owner to "be entirely and immediately absolved of the foregoing legal matter."

After receiving the January 28 email, a majority of the Merchant LLCs (41 total) refused to respond to Helix's inquires, refused to cooperate, and refused to instruct Clark to return the funds.

Based on these allegations, Helix sued Clark, Freya, and 41 of the Merchant LLCs for 25 causes of action sounding in both contract and tort. Helix subsequently filed the FAC on July 1, 2021.

B. The Special Motion to Strike

Clark moved to strike the following causes of action in the FAC under the anti-SLAPP statute: breach of oral contract (sixth cause of action); breach of the implied-in-fact contract (seventh cause of action); breach of the implied covenant of good faith and fair dealing (eighth cause of action); intentional interference with contractual relations (eleventh cause of action); libel per se (twelfth cause of action); trade libel (thirteenth cause of action); defamation (fourteenth cause of action); conversion (sixteenth cause of action); breach of fiduciary duty (twenty-second cause of action); and unfair competition under California Business and Professions Code section 17200 (twenty-third cause of action). She contended those causes of action should be stricken from the FAC because the January 28 email was a communication in "anticipation of [ ] litigation" and thus, she argued, it is protected under both the anti-SLAPP statute (specifically, section 425.16, subdivision (e)(2)) and the litigation privilege (Civ. Code, § 47, subd. (b).).[3]

In opposition, Helix argued the January 28 email was not written in anticipation of litigation because "no litigation was seriously contemplated at the time . . . Clark sent the January 28 . . . email." Alternatively, Helix claimed that even if the January 28 email constitutes protected activity, it was Clark's

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3 Clark also argued in the trial court that the January 28 email is protected activity under section 425.16, subdivision (e)(4), which protects "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 her opening brief on appeal, however, Clark notes she has abandoned this argument.

alleged actions (i.e., stealing passwords to the Merchant LLCs' bank accounts, removing Helix's access to those accounts, and transferring money out of those accounts into an account she controlled) that form the basis of Helix's claims against Clark, not the January 28 email. And, even if the January 28 email constituted protected activity, Helix argued it demonstrated a probability of prevailing on its claims.

After a hearing on the special motion to strike, the trial court denied the motion. The trial court held Clark "failed to meet [her] burden under the circumstances of establishing that there was at the time of the [January 28 email] any pending litigation or that at the time litigation was or could have been seriously contemplated. [Helix] did not yet know about any of the circumstances indicated in the [January 28 email] and [Clark] . . . failed to show that [she] intended at that point to pursue litigation [herself], or that such was or could have been contemplated in good faith. . . . [I]t is defendant's burden to establish those essential matters, and the motion fails to do so. The reply does not offer to provide further evidence on this issue." The trial court therefore denied the motion, concluding: "[T]he [m]otion is based on an argument that the [January 28 email] was a communication made in anticipation of litigation but has failed to sufficiently establish that there was at the time of the communication litigation which was seriously contemplated to be pursued or was contemplated in good faith."

Clark timely appeals.

DISCUSSION

A. The Anti-SLAPP Statute and Standard of Review

SLAPP suits are "generally meritless suits brought by large private interests to deter common citizens from exercising their

political or legal rights or to punish them for doing so." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68.) To combat these types of suits, the Legislature enacted section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits or individual causes of action that are brought to chill the valid exercise of a person's constitutional rights. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; see *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393; § 425.16, subd. (b)(1).)

The anti-SLAPP statute requires a two-step process: first, the moving party must establish that the lawsuit's claims are based on activity protected by the statute. (*Briganti v. Chow* (2019) 42 Cal.App.5th 504, 508 (*Briganti*).) If the defendant meets that burden, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. (*Ibid.*) "'[W]ithout resolving evidentiary conflicts,'" the court must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment; if not, the claim is stricken. (*Ibid.*) "In making these determinations the court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)" (*Ibid.*)

We review the trial court's decision to grant or deny an anti-SLAPP motion de novo. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.)

B. Clark Failed to Meet Her Burden of Demonstrating She Engaged in Protected Activity

Clark contends the statements in the January 28 email are protected under section 425.16, subdivision (e)(2) as written statements "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." She therefore contends the first prong of the anti-SLAPP statute is satisfied because, according to Clark, the January 28 email forms the basis of the causes of action she seeks to strike in the FAC. Helix counters the January 28 email does not fall within the scope of section 425.16, subdivision (e)(2) because no litigation or judicial proceeding was pending at the time Clark sent the email, and Clark failed to submit evidence demonstrating the January 28 email was in anticipation of litigation. We agree with Helix. As discussed below, Clark failed to meet her burden of demonstrating that at the time of the January 28 email, either she intended to sue Helix for its supposed breach of contracts it entered into with the Merchant LLCs, or that Helix was contemplating commencing legal proceedings against her.

Helix acknowledges, as it must, that statements made in anticipation of litigation (i.e., before an action is pending), may fall within the scope of section 425.16, subdivision (e)(2). "[O]ur Supreme Court has said, '"[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16."' [Citations.] This position reflects that 'courts have adopted 'a fairly expansive view of what constitutes litigation-related

activities within the scope of section 425.16." [Citation.]' [Citation.] Accordingly, although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration"' [citations] then the statement may be petitioning activity protected by section 425.16." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268 (*Neville*).) "[T]he mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future[, however,] is insufficient to invoke the litigation privilege." (*Edwards v. Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 36; see also *Eisenberg v. Alameda Newspapers, Inc*. (1999) 74 Cal.App.4th 1359, 1379 ["the 'mere possibility or subjective anticipation' of litigation is insufficient; it is necessary that there be proof of 'some *actual verbalization* of the danger that a given controversy may turn into a lawsuit . . . .'"].)

Clark contends the January 28 email, "[o]n its face . . . demonstrates that it was created in anticipation of litigation either to defend or to prosecute an action against Helix." Because the January 28 email is the sole focus of the special motion to strike, we quote it in its entirety:

> Dear [Merchant LLCs]:
>
> It has been such a pleasure working with you over the past couple of years, and it is with regret that I write to inform you that all sales to your companies ceased effective today. For the past several years I have taken the role as the agent for merchants, such as yourself, actively looking to

further their best interests when working with Helix Media LLC.

The management company, Helix Media LLC, has materially breached their contract with you during 2020. Your contract with them states a 1% commission and they have not been paying you that full amount. Please note that payouts have not been managed by me and were sent directly by Helix Media LLC. Helix Media LLC was put on notice of this material breach several months ago and refused to remedy the matter, as they are required to do under their contract. Because of this, their period of time allotted to cure the material breach of contract with merchants is officially over. As your de facto agent in the matter, I have a legal and ethical responsibility to you. I have taken steps to protect you by retaining legal counsel and have closed down sales.

In all good conscience, I cannot remove myself from this business arrangement and leave you exposed to any future consequences. I have gone through the necessary steps to transfer the funds held in the merchant accounts into a trust account while the impeding [sic] litigation ensues. Although I hope that the staff at Helix Media LLC handle the matter amicably, I have retained counsel from Diamondback Legal to handle all communications with them on behalf of yourself and all other merchants. Should you want to opt out of this arrangement, simply let me know and I'll forward the necessary documents to opt out. Further, should you not want to have the merchant funds

held in trust, instead having Helix Media managing the funds, simply let me know and I will arrange it.

I will be providing each merchant with an offer for the purchase of their LLC in the next day. This offer will allow you to be entirely and immediately absolved of the foregoing legal matter. I apologize for any concern or stress this may have caused you this morning. Just know, that we are taking this matter very seriously and taking all of the necessary steps to assure that you are made whole from Helix Media LLC's egregious and material breach of contract.

One further note, I would suggest simply not responding to any texts or calls from Helix, Kim or Jen. Simply forward me any communications from them and I will have counsel deal with it. I am truly looking forward to speaking to you about this in person, please bear with me as I reach out to all.

All my best,
Natalie [Clark]

Despite the email's reference to "impeding [sic] litigation," the evidence before the trial court did not establish a threat of impending litigation concerning Helix's alleged breaches of the contracts it entered into with the Merchant LLCs. In support of its opposition to the special motion to strike, Helix submitted a declaration from its CEO, Kim Ng, declaring the following: (1) before sending the January 28 email, Clark gave no indication

that she believed Helix was in breach of any agreements with the Merchant LLCs; (2) Clark never informed Helix she was preparing to bring litigation against it; (3) Clark never filed a lawsuit against Helix or a cross-complaint in the underlying action; (4) Helix was not in a position to consider filing a lawsuit against Clark at the time she sent the January 28 email because Helix only learned of the conduct alleged in the FAC *after* Clark sent the email; (5) Helix was not contacted by legal counsel representing Clark until after Helix confronted Clark about her transfer of assets out of the Merchant LLC bank accounts; and (6) Clark's counsel only began representing the Merchant LLCs after Clark purchased them, which occurred after she sent the January 28 email. Clark, on the other hand, submitted no evidence in support of her motion that she intended to sue Helix for its alleged breaches at the time she sent the January 28 email (and in fact, she never sued Helix). Nor did she submit evidence that Helix was contemplating commencing legal proceedings, seriously and in good faith, against Clark at the time she sent the email. As noted above, Clark's "subjective anticipation" of litigation is not enough to bring her statements within the scope of the litigation privilege or section 425.16, subdivision (e)(2). (See *Eisenberg v. Alameda Newspapers, Inc.*, *supra*, 74 Cal.App.4th at p. 1381 [declining to apply the litigation privilege where "[n]owhere in the record is there evidence respondents contemplated anything more than the mere possibility that [the person who was allegedly defamed] might be considering a lawsuit. Respondents cannot gain the protection of the privilege to protect their own communications merely by establishing that they anticipated a potential for litigation."].)

Clark's reliance on *Neville*, *supra*, 160 Cal.App.4th 1255 is misplaced. In *Neville*, an "employer fired one if its employees amid allegations that the employee had misappropriated customer lists and solicited his employer's customers to start a competing business." (*Id*. at p. 1259.) "Several months before litigation was commenced by the employer against its former employee, the employer's attorney drafted a letter to the employer's customers that accused the employee of breach of contract and misappropriation of trade secrets, and that 'suggest[ed]' to customers that, to avoid potential involvement in any ensuing litigation 'as a material witness, or otherwise,' the customers should not do business with the former employee." (*Ibid*.) The employee subsequently filed a cross-complaint against the former employer for defamation. (*Id.* at p. 1260.) The court held: "[I]n the circumstances of this case, the lawyer's letter to the customers was a 'writing made in connection with an issue under consideration or review by a . . . judicial body' (§ 425.16, subd. (e)(2)) and therefore covered by the anti-SLAPP statute because the letter directly related to the employer's claims against the employee, and the employer was seriously and in good faith contemplating litigation against the employee." (*Neville, supra*, 160 Cal.App.4th at p. 1259.)

In finding the evidence before the trial court established a threat of impending litigation, the *Neville* court relied on the following evidence: "The Letter's reference line reads, 'Maxsecurity v. Mark Neville, dba ABD Audio and Video.' It is written on the letterhead of Chudacoff's law office, and states that 'this office represents Maxsecurity in the above-matter [*sic*].' The Letter further states, 'We have notified Mr. Neville of his breach and shall be aggressively pursue [*sic*] all available

remedies.' Chudacoff declared that he "undertook to represent [the employer] in its efforts to enforce the employment agreement' with [the former employee], and prepared the Letter at his client's request. [The employer] filed suit approximately four months after the Letter was written, with Chudacoff acting as counsel of record." (*Neville, supra*, 160 Cal.App.4th at p. 1269.)

None of the same evidence of impending litigation is present here. First, the January 28 email was written by Clark, not legal counsel. In the January 28 email, Clark claims she retained counsel; as stated above, however, Helix was not contacted by legal counsel representing Clark until after Helix confronted Clark about her transfer of assets out of the Merchant LLC bank accounts. Second, unlike in *Neville*, the January 28 email contains no reference line indicating a pending or potential legal matter. Third, in *Neville*, the employer's attorney made specific claims and allegations in the letter that were then incorporated in the same attorney's complaint against the former employee. (*Neville, supra*, 160 Cal.App.4th at pp. 1267-1269.) In contrast to *Neville*, here, Clark never filed her own lawsuit against Helix or a cross-complaint in the underlying action. As the trial court noted, "the gist of the [January 28 email] . . . can be reasonably construed as being primarily to solicit the LLCs to be purchased by Clark." Accordingly, *Neville* does not assist Clark.

We conclude the evidence in the record does not establish Clark imminently intended to commence litigation against Helix for its alleged breach of contracts with the Merchant LLCs (she never did), or that Helix was seriously contemplating suing Clark at the time she sent the January 28 email. At most, the record established Clark anticipated a potential for litigation. Thus,

Clark failed to meet her threshold burden to show her conduct fell within the ambit of section 425.16, subdivision (e)(2). The trial court, therefore, properly denied Clark's special motion to strike.

DISPOSITION

The order is affirmed. Helix is awarded its costs on appeal.

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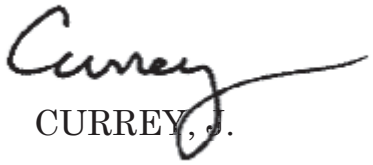
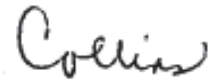


CURREY, J.

We concur:

MANELLA, P.J.



COLLINS, J.