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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JIM BROUSTIS et al.,
Plaintiffs and Respondents,
v.
JOEL DROUET,
Defendant and Appellant.

A104802

(San Francisco County
Super. Ct. No. 314166)

Drouet v. Superior Court (2003) 31 Cal.4th 583 (*Drouet*), held that a landlord may overcome the defense of retaliatory eviction (Civ. Code, § 1942.5) “by demonstrating a bona fide intent to withdraw the property from the [rental] market” pursuant to the Ellis Act (Gov. Code, § 7060 et seq.). (*Drouet, supra*, at p. 600.)

This sequel involves a lawsuit by the same tenants against their landlord, alleging causes of action arising from the landlord’s invocation of the Ellis Act and the subsequent eviction. The landlord, appellant Joel Drouet, moved to strike three of the tenants’ causes of action under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The trial court denied the motion to strike, ruling the causes of action did not arise from activity protected by the anti-SLAPP statute. We disagree. The targeted causes of action arise from both protected and unprotected conduct. For reasons set forth below, we reverse and remand for further proceedings.

I. FACTS

The detailed factual history of the dispute between the parties is set forth in *Drouet, supra*, 31 Cal.4th at pp. 588-589, and need not be restated in detail here. The tenants, plaintiffs Jim Broustis and Ivy McClelland, had ongoing conflicts with the landlord and accused him of lease violations, improper charges and failure to make repairs to the property. (*Id.* at p. 588.)

Instead of making the requested repairs, the landlord commenced Ellis Act proceedings in August 1999 to remove the property from the rental market.¹ When the tenants did not quit the premises, the landlord filed an unlawful detainer action under the Act in October 1999. (*Drouet, supra*, 31 Cal.4th at pp. 588-589.) The tenants raised the defense of retaliatory eviction. The issue of whether they could raise that defense in an Ellis Act unlawful detainer proceeding wound its way to the appellate division of the superior court, then to this court, then to the Supreme Court—culminating in the *Drouet* decision. (*Id.* at p. 589.)

During the pendency of this appellate journey, the tenants filed the instant lawsuit against the landlord. The tenants allege 10 causes of action for various torts and breaches of contract, including the breach of the warranty of habitability, all arising from the landlord-tenant dispute, the numerous conflicts between the parties, and the landlord's alleged mistreatment of the tenants.

The landlord filed an anti-SLAPP motion to strike three causes of action: the fifth, for tortious breach of the covenant of quiet enjoyment; the sixth, for retaliatory acts including retaliatory eviction; and the eighth, for intentional infliction of emotional distress arising from not only the retaliatory eviction, but the failure to make necessary repairs to keep the property safe. The landlord argued that “a significant part of the gravamen of the three causes of action is the Ellis Act withdrawal and eviction,” which involved both litigation and the landlord's taking administrative action to invoke his

¹We refer sometimes to the Ellis Act as “the Act.” Subsequent statutory citations are to the Code of Civil Procedure unless otherwise indicated.

rights under the Act. As such, the landlord claimed, “there is no question” each cause of action arises from conduct protected under the anti-SLAPP statute.

The trial court disagreed: “[T]he Court finds that [the landlord’s] conduct underlying [the tenants’] causes of action was not in furtherance of [the landlord’s] rights to petition and of free speech. The Court further finds that [the tenants’] causes of action were triggered by, but do not arise from, protected activity within the meaning of [section] 425.16 [subdivision] (b)(1) Therefore [the landlord as] moving party has not met his initial burden of showing that this suit is based on protected activity. [Citation.]”

The trial court denied the landlord’s motion to strike the three causes of action.

II. DISCUSSION

The landlord contends that the three causes of action arise from conduct protected by the anti-SLAPP statute. He argues his commencement of proceedings under the Ellis Act, as well as his eviction of the tenants, is conduct in furtherance of his right to petition for the redress of grievances. We agree. We reverse and remand so the trial court may conduct further proceedings.

The anti-SLAPP statute 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 or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

(§ 425.16, subd. (b)(1); see *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043 (*Braun*); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 858-859 (*Lafayette Morehouse*).)²

Acts in furtherance of the right of petition or free speech include: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding,

² “SLAPP” stands for “Strategic Lawsuit Against Public Participation.” (*Lafayette Morehouse, supra*, 37 Cal.App.4th at p. 858.)

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; [or] (4) . . . 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.” (§ 425.16, subd. (e); see *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 102 (*Mann*).

The anti-SLAPP statute “posits . . . a two-step process for determining whether an action is a SLAPP.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).

“First, the court decides whether the defendant has made a threshold showing that the challenged cause of action [arises] from protected activity. [Citation.]” (*Navellier, supra*, 29 Cal.4th at p. 88; see *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).

“A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)” (*Braun, supra*, 52 Cal.App.4th at p. 1043.) And whether a cause of action “aris[es] from” protected activity, within the scope of section 425.16, subdivision (b)(1), “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.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; see *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001.)

Where a cause of action “alleges both protected and unprotected activity,” the anti-SLAPP statute nevertheless applies “unless the protected conduct is ‘merely incidental’ to the unprotected conduct” (*Mann, supra*, 120 Cal.App.4th at p. 103, quoting *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419.) In other

words, the anti-SLAPP statute “applies to a mixed cause of action. [Citation.]” (*Mann, supra*, 120 Cal.App.4th at p. 103.)³

If the trial court finds that the defendant has satisfied the first step, and shown the cause of action arises from protected activity, the court turns to the second step. The court “must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]” (*Navellier, supra*, 29 Cal.4th at p. 88; see *Equilon, supra*, 29 Cal.4th at p. 67.)

Here the trial court erred by determining that the three causes of action did not arise from protected activity. Both the commencement of litigation and of administrative proceedings such as those under the Ellis Act involve the right to petition the government for the redress of grievances. The constitutional right to petition includes the act of filing litigation. (*Navellier, supra*, 29 Cal.4th at p. 90; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*.) The right also includes the filing of administrative proceedings. (*Briggs, supra*, at p. 1115; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.)

Moreover, the anti-SLAPP statute protects conduct which is also protected by the litigation privilege of Civil Code section 47, subdivision (b). (*Equilon, supra*, 29 Cal.4th at pp. 64-65; *Briggs, supra*, 19 Cal.4th at p. 1115.) The litigation privilege applies to communications having some logical relation to the action. (*Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 146-147.) Expression in the course of litigation is a form of the constitutional right of petition and privileged under Civil Code section 47, subdivision (b)(2).

In light of the foregoing authorities, we readily conclude that the commencement of the Ellis Act administrative proceedings, and the unlawful detainer action which led to the eviction, arise from the landlord’s right to petition and thus qualify as conduct

³ As *Mann, supra*, 120 Cal.App.4th at p. 103 noted, the issue of the statute’s application to mixed causes of action is pending before the Supreme Court. (*Kids Against Pollution v. California Dental Association* (2003) 108 Cal.App.4th 1003, review granted Sept. 17, 2003, S117156.)

protected by the anti-SLAPP statute. Although the plaintiffs' complaint does not reference the prior Ellis Act proceedings, at the request of counsel, the trial court in reaching its decision considered argument about the effect of the prior case. Drouet petitioned the Rent Board regarding his intention to withdraw his building as a rental. He served a notice of termination of tenancy on plaintiffs and then attempted to evict them when they would not vacate the premises. Plaintiffs' complaint in this case was triggered by and directly related to Drouet's Ellis Act actions.⁴ The causes of action for retaliatory actions, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress as alleged in the complaint are intertwined with the conduct of Drouet's exercising his Ellis Act rights.⁵

In the three causes of action, the tenants have intermingled this protected conduct with unprotected conduct, such as the landlord's alleged failure to make repairs to the rental property. The protected conduct is not merely incidental to the unprotected conduct within the meaning of *Mann*. The plaintiffs allege that defendant Drouet served the eviction notice on them and thereafter sued them for the purpose of retaliation. When a landlord with a bona fide intent has complied with the Ellis Act and attempts to evict, the tenants' defense will fail (*Drouet, supra*, 31 Cal.4th at pp. 599-600). Plaintiffs here assert what normally is a defense to a landlord's action as the cornerstone of their causes of action. Thus the landlord satisfied the first step of the two-step process, by showing the causes of action arise from conduct protected by the anti-SLAPP statute. The trial court now must proceed to the second step, and determine whether the tenants have

⁴ See, e.g., plaintiffs' allegations in paragraph 37 of their complaint.

⁵ The tenants rely on *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308. That case is distinguishable. It involved a lawsuit arising from unlawful rent practices—not the filing of litigation or administrative proceedings. (*Id.* at p. 1318.)

The tenants also rely on a recent statute, section 425.17, which limits the applicability of the anti-SLAPP statute in certain types of cases. But the tenants do not appear to have relied on section 425.17 below—and in any event the statute does not apply here.

demonstrated a probability of prevailing. We therefore remand the matter to the trial court for that determination. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568-569.)

III. DISPOSITION

The order denying the anti-SLAPP motion to strike is reversed. The case is remanded to the trial court for a determination on the second step of the two-step anti-SLAPP process, as discussed in this opinion.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.