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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RAFFAELLA WILSON,

Plaintiff and Respondent,

v.

MARK ANTHONY AMBORT,

Defendant and Appellant.

A131543

(San Francisco City & County Super. Ct. No. CCH-10-571517)

Appellant Mark Anthony Ambort appeals the denial of his special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure section 425.16,[1] on grounds that respondent Raffaella Wilson was likely to prevail on the merits of her claim for a civil injunction to stop harassment pursuant to section 527.6. Reviewing the trial court's determination de novo as we must,[2] we concur that Wilson carried her burden of demonstrating a likelihood of prevailing on merits, notwithstanding that the lower court previously had denied, without prejudice, her petition for injunction. Accordingly, we affirm the denial of Ambort's motion to strike.

I. BACKGROUND

In November 2010, Wilson filed a request for orders to stop harassment seeking personal conduct and stay-away orders against Ambort. Therein Wilson averred that she

[1] SLAPP is the acronym for " 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) All further unspecified statutory references are to the Code of Civil Procedure.

[2] *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699 (*Overstock*).

was pursuing this remedy because Ambort harassed and stalked her, and she feared for her safety. She indicated that the harassment began in August 2009, when Ambort became enraged at what he perceived to be classroom "seat saving" by Wilson in the nursing program at City College of San Francisco (CCSF). Ambort verbally assaulted Wilson in the hallway, yelling, cursing and leaning into her, inches from her face. Wilson was frightened and shaken at the anger and verbal violence so out of proportion to the accusation, and because it was directed at her.

Wilson filed a complaint with Ted Alfaro, the director of student advocacy, and the CCSF dean, Rod Santos; two students familiar with Ambort's behavior wrote letters to the authorities about the incident.

Wilson and others had formed an online study group through Yahoo to discuss their coursework. Ambort posted a copy of her complaint on the Yahoo study group site.

As well, Ambort would stare and glare at Wilson in class, laugh under his breath "in a very creepy way" as she passed him, and lobbied for her ouster as class representative. Wilson filed a follow-up complaint with Alfaro in December 2009.

Returning for the spring semester in 2010, Wilson learned that Ambort was no longer in the nursing program. On October 27, 2010, Wilson received an e-mail from Ambort threatening to sue her in small claims court if she did not pay him $7,500 for conspiring to destroy his career.

Wilson asserted that she needed the temporary orders immediately based on the threat to sue and her belief that Ambort was emotionally unstable, paranoid, and blamed her for flunking out of the nursing program. She further explained that the e-mail, "Ambort's wild and unfounded accusations, and the threats of lawsuits" were causing her "massive amounts of worry, anxiety and fear for . . . personal safety and well-being." His threats were distracting Wilson from her studies. She learned that Ambort had instigated other small claims and civil harassment actions and feared his harassment would not end.

The trial court granted Wilson's application for a temporary restraining order on November 15, 2010.

The next month Ambort moved to strike the request for orders to stop harassment under the anti-SLAPP statute. He argued that Wilson's request was based on his purported demand letter, sent in anticipation of litigation, and as such her request arose from protected activity under the anti-SLAPP statute. As well, the litigation privilege fully protected the e-mail demand. In his supporting declaration, Ambort stated that he consulted multiple attorneys about filing a lawsuit against CCSF and Wilson, and was advised to file an action in small claims court to recover emotional distress damages. Further, he stated that he "fully intend[ed] to pursue litigation" regarding Wilson's attempt to remove or suspend him from the nursing program.

Opposing the motion, Wilson elaborated on her petition papers and also submitted declarations from nursing department chair Chien and the director of student advocacy, Alfaro. Wilson declared that after the initial verbal assault over seat-saving, Ambort would direct menacing gestures, stares and laughter at her, and mimicked and ridiculed her when she spoke in class. These on-campus incidents caused her severe emotional distress. Then in December 2009, during the final examination period, Ambort repeatedly posted her complaint to CCSF officials on the Yahoo study group site.[3] This action alarmed Wilson; she feared Ambort was stalking her, engaging in cyber-bullying, and she was frightened that he had accessed her confidential records and used the Yahoo study group to retaliate against and harass her.

In October 2010, Wilson received Ambort's e-mail. The accusations alarmed her and she feared Ambort was resuming his harassing activity and would never leave her alone. After the deadline to pay him $7,500 passed, Wilson concluded the e-mail was a threat intended to intimidate her in retaliation for complaining to CCSF officials about his conduct.

In December 2010, both parties appeared on Wilson's petition for an injunction prohibiting harassment. Denying the petition without prejudice, the court ruled that the

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[3] Wilson stated that the moderator of the discussion group removed the complaint several times, but Ambort managed to bypass the moderator. Alfaro attested that the posting violated CCSF's student privacy policy.

2009 classroom incident was not relevant because after that incident, other than the e-mail there had been no further contact between the parties for 10 months, and Ambort was no longer in the nursing program. Focusing solely on the e-mail, the court explained: "[T]he letter is basically a letter indicating that a lawsuit was going to be filed. That is not a threat of violence. . . . I . . . do not . . . have authority to issue a restraining order based on that letter. [¶] There's a litigation privilege. Mr. Ambort has a right to file a claim if he wishes to do so. He has not done that yet."

The anti-SLAPP motion was heard in January 2011, before a different judge. The court first indicated that the matter arose from protected conduct, and "for better or for worse, this kind of civil harassment petition can be the basis for a special motion to strike." Nonetheless it denied the motion, deciding that Wilson had brought forth prima facie evidence sufficient to "show at least minimal merit" and "justify the granting of relief." This appeal followed.

II. DISCUSSION

Ambort is adamant that Wilson did not demonstrate her prima facie case, urging this court to reverse the order denying his motion and remand for determination of his reasonable attorney fees. We conclude the court properly denied the motion.

A. *Legal Framework*

Section 425.16 applies to causes 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 . . . ." (§ 425.16, subd. (b)(1).) Such acts include written or oral statements or writings "made before" a judicial proceeding, and such statements or writings "made in connection with an issue under consideration or review by" a judicial body. (*Id.*, subd. (e)(1), (2).) Claims stemming from these acts are subject to a special motion to strike unless the trial court determines that the plaintiff has demonstrated a probability of prevailing on the merits. (*Id.*, subd. (b)(1).)

Resolving the merits of an anti-SLAPP motion thus invites a two-step analysis, concentrating first on whether the challenged cause of action arose from protected

activity within the meaning of the statute and, if so, proceeding next to whether the plaintiff can establish a probability of prevailing on the merits. (*Overstock, supra*, 151 Cal.App.4th at p. 699.) To establish a probability of prevailing on a claim, the plaintiff responding to an anti-SLAPP motion " '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.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded by statute on another point as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 545-550.) Thus, because the anti-SLAPP statute (1) allows early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech and petition concerns, and (2) limits the opportunity to engage in discovery, a plaintiff's burden of establishing a probability of prevailing is not high: We accept as true all evidence favoring the plaintiff, and consider the defendant's evidence only to ascertain whether it defeats the plaintiff's submission as a matter of law. (*Overstock, supra*, 151 Cal.App.4th at pp. 699-700; *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576.) Only a cause of action lacking "even minimal merit" constitutes a SLAPP. (*Naveillier v. Sletten* (2002) 29 Cal.4th 82, 89.)

B. *Analysis*

Assuming for the limited purposes of argument and resolving this appeal that Wilson's petition for permanent injunction "arose from" activity protected within the meaning of the anti-SLAPP statute because Ambort's October 26, 2009 e-mail was a legitimate, good faith demand letter in anticipation of litigation and not an extortionate

ultimatum,[4] we agree with the trial court that Wilson met her burden of demonstrating a probability of prevailing on the merits of her claim.

Section 527.6, subdivision (a) establishes a procedure for a person who has suffered harassment, as defined, to procure an injunction prohibiting that activity. The statute defines harassment as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (*Id.*, subd. (b).) " 'Course of conduct' " is further defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means . . . . Constitutionally protected activity is not included within the meaning of 'course of conduct.' " (*Id.*, subd. (b)(3).)

Here, the trial court granted Wilson's application for a temporary restraining order. This means that the court was *satisfied* that Wilson's affidavit showed "reasonable proof of harassment . . . , and that great or irreparable harm would result to the plaintiff." (§ 527.6, subd. (c).) However, the court denied the petition for permanent injunction, without prejudice.

Ambort contends that this ruling was fatal, citing *Thomas v. Quintero* (2005) 126 Cal.App.4th 635. There, the trial court had dismissed the plaintiff's petition for injunctive relief against civil harassment upon finding that the incidents did not rise to the level of necessitating a three-year civil harassment order. The reviewing court found this

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[4] Statements made in anticipation of a court action may merit protection under section 425.16. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 887.) A prelitigation statement comes within clause (1) or (2) of section 425.16, subdivision (e) "if the statement ' "concern[s] the subject of the dispute" and is made "in anticipation of litigation 'contemplated in good faith and under serious consideration' " [citation].' [Citations.]" (*Digerati Holdings, supra,* at p. 887.)

determination dispositive of the issue of whether there existed a probability that the plaintiff would prevail on his claim for purposes of defeating the defendant's anti-SLAPP motion. (*Id.* at p. 663.) However, the court also indicated it could conceive of a factual case in which the denial of a civil harassment injunction *would not* preclude a finding that petitioner had a probability of success on the merits, for example "where the petition presents an accurate facial case for injunctive relief, but additional or different evidence presented at the hearing leads the court to deny it . . . ." (*Id.* at pp. 664-665, fn. 21.)

Here, in their moving papers and at the hearing on whether to issue an injunction, the parties presented two very different narratives of the underlying events. Denying the petition for injunction without prejudice, the trial court looked only to the purported demand letter, deeming the earlier incidents irrelevant because there had been a 10-month hiatus of contact, and ruling that the litigation privilege protected the letter. On the other hand, denying the anti-SLAPP motion, the trial court took a different approach, explaining that the court hearing the civil harassment petition "takes all of the evidence, weighs it, makes a determination. I don't do any of that. [¶] Judge Robertson did not determine that it should be thrown out before even hearing the evidence. He did not determine that it in effect would have been sustained without leave to amend were there a demurrer proceeding. [¶] He heard the evidence that was presented to him and decided it wasn't enough to prevail, but that's not the standard now. [¶] . . . [¶] . . . They don't need to prove that they would prevail; they need only prove that they had enough that they in effect could have survived a motion for summary judgment if one had been brought."

The trial court cogently explained the two standards and laid out why denial of the petition for an injunction without prejudice did not foreclose its finding that Wilson was likely to prevail on the merits. The standard for prevailing is not high—only a cause of action lacking " 'even minimal merit' " constitutes a SLAPP. (*Overstock, supra*, 151 Cal.App.4th at p. 700.) Unlike the earlier ruling on the petition for injunction which ignored as irrelevant to the harassment determination everything except the October 26, 2010 e-mail, the court ruling on the anti-SLAPP motion considered the totality of

Wilson's showing on Ambort's actions, including her declaration opposing the anti-SLAPP motion, characterizing that showing as painting "a pretty rotten picture" of him.

This showing included the August 2009 verbal assault in which Ambort leaned within inches of Wilson's face, cursing and yelling; the repeated posting of Wilson's confidential complaint on the Yahoo online study site, in violation of college policy; and a course of directing menacing gestures and stares at her on campus and mimicking and ridiculing her in class. Ambort's verbal assault and subsequent behavior caused Wilson severe emotional distress. She feared Ambort was stalking her and engaging in cyber-bullying.

In October 2010, after Ambort had been removed from the nursing program, he sent Wilson a threatening e-mail, demanding that she pay him $7,500 by November 5, 2010, or suffer a small claims action, and accusing her of filing a false report and conspiring to force him out of the program and destroy his career. The accusations in the e-mail alarmed Wilson, causing her to fear that Ambort would resume his harassing conduct after the 10-month cessation. After Ambort's payment deadline passed, Wilson concluded the e-mail was a retaliatory act intended to intimidate her for complaining to CCSF officials, and thus filed the petition to stop harassment. Wilson's showing also included evidence that Ambort received a failing grade in a core course, thereby failing to maintain minimum academic qualifications which in turn, and pursuant to standards of the CCSF Department of Registered Nursing, disqualified him from the nursing program. According to the department chair, Ambort's failure to maintain minimum academic qualifications was the entire and sole reason for his disqualification. With this evidence, Wilson made a prima facie showing of facts which, if credited, could sustain a favorable judgment.

The trial court referred to the e-mail as the "trigger[]" for the request to stop harassment and intimated that, other than serving as a trigger, it was "protected activity." Yes, the e-mail was a trigger. But there is another way to look at this. The probability of prevailing inquiry entails assessment of the defendant's evidence to determine whether it defeats the plaintiff's submission as a matter of law. In this case, Ambort presented

evidence to bolster his claim that the e-mail constituted a valid prelitigation communication that was absolutely protected by the litigation privilege, Civil Code section 47, subdivision (b). In other words, he posited a substantive defense that Wilson would have to overcome to demonstrate a probability of prevailing. But a *prelitigation* communication attains privileged status "only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Acton Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) The lack of a good faith intention to bring a lawsuit does not advance the purpose of the litigation privilege because the communication in question does not bear a logical relation or connection to an action, and is not uttered to achieve the object of litigation. (*Ibid.*) It is a triable issue of fact whether a prelitigation communication relates to " 'imminent litigation . . . seriously proposed and actually contemplated in good faith as a means of resolving the dispute between [the parties].' " (*Ibid.*)

Similarly, a prelitigation statement is entitled to anti-SLAPP protection under section 425.16, subdivision (e)(1) or (2) where it " 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration" ' [citations]." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268.) On appeal Ambort has advanced the e-mail as shouldering his prong-one burden of demonstrating that Wilson's cause of action arose from protected activity, as well as the prong-two key to defeating her claim as a matter of law.

As to the prong-one effort, we note that the defendant does not have to establish *as a matter of law* that his or her actions have First Amendment protection. If this were the case, the probability of prevailing on the merits prong would be superfluous because by definition the plaintiff would lose on his or her claim. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314.) Rather, the defendant must only make a prima facie showing that the plaintiff's action arises from acts in furtherance of the defendant's rights of free speech or petition in connection with a public issue. (*Ibid.*) Thus, because the defendant does not have to *prove* the validity of his or her petitioning or speech activity, any asserted illegitimacy of those acts is for the plaintiff to raise and support in discharging

the plaintiff's burden of delivering a prima facie showing of the merits of his or her case. (*Id.* at p. 319.)

Here, Ambort met his prima facie prong-one burden because the e-mail arguably was a valid prelitigation communication. However, at the prong-two stage, the validity of the e-mail demand both as constitutionally protected petition activity and a candidate for the litigation privilege is subject to factual testing as to whether it was seriously proposed and actually contemplated in good faith, or instead was a hollow threat to extort money and harass Wilson. Ambort did not defeat, as a matter of law, Wilson's prima facie showing of harassment because there remained a triable issue of fact as to whether the e-mail was a valid prelitigation communication. First, Ambort had not filed an action after the deadline for payment had passed, nor had he filed one by the time of the hearing on the temporary restraining order. Second, proof of causation was lacking that Wilson's complaints were responsible for Ambort's failure to complete the nursing program. Moreover, any such claim by Ambort would be premised on Wilson's own protected conduct of complaining to CCSF officials. Thus, Ambort was bound to lose in small claims court. And, as certain loser of a small claims action against Wilson, Ambort would be responsible for paying her the costs of the action. (§ 116.610, subd. (g).) For all these reasons, we conclude there remained a triable issue as to whether " 'imminent litigation was seriously proposed and actually contemplated in good faith as a means of resolving the dispute . . . .' " (*Acton Apartment Assn., Inc. v. City of Santa Monica, supra*, 41 Cal.4th at p. 1251.) Therefore, Ambort did not defeat Wilson's prima facie showing as a matter of law, either by invoking the litigation privilege, or establishing the e-mail as constitutionally protected petition activity for purposes of the anti-SLAPP or the civil harassment statute.

Ambort counters that a section 527.6 injunction serves to prevent future injury and is only authorized when it appears likely that wrongful acts will recur. (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 402.) Citing *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332-333, he correctly points out that injunctive relief should not serve to punish past acts, and should not be granted in the absence of any evidence

demonstrating a reasonable probability that the acts will be repeated in the future. Nonetheless, we disagree with Ambort's assertion that Wilson made no showing of probability of future harm.

As we stated above, while the threatening e-mail may have constituted protected activity for purposes of prong-one analysis, undertaking the prong-two question of potential merit entails determining whether that same expression defeats Wilson's claim as a matter of law. In other words, does the threatening e-mail, as a matter of law (1) constitute constitutionally protected activity such that Wilson cannot establish a course of conduct within the meaning of subdivision (b)(3) of section 527.6, or (2) establish a complete defense to her action by virtue of the litigation privilege? We have concluded that it does not, and thus the content of the e-mail has a bearing on the question of future harm. The accusations and threats set forth in the e-mail portended a resumption of harassing conduct after the 10-month cessation, and therefore fulfilled Wilson's prima facie burden of showing a reasonable probability of future harm.

III. DISPOSITION

We affirm the judgment and deny Wilson's motion for sanctions.

Reardon, Acting P.J.

We concur:

Sepulveda, J.

Rivera, J.