CLARENDON AMERICA INSURANCE COMPANY v. BISHOP, BARRY, HOWE, HANEY & RYDER

CLARENDON AMERICA INSURANCE COMPANY, Cross-complainant and Respondent,

v.

BISHOP, BARRY, HOWE, HANEY & RYDER et al., Cross-defendants and Appellants.

No. A126398.

Court of Appeals of California, First District, Division One.

Filed August 23, 2011.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

DONDERO, J.

In this appeal cross-defendants, Bishop, Barry, Howe, Haney & Ryder, and Peter A. Schmid, seek reversal of a order that denied their anti-SLAPP motion (Code Civ. Proc., § 425.16) to dismiss a cross-complaint for professional negligence, indemnity, apportionment and contribution.[1] We conclude that the cross-complaint does not arise from constitutionally protected free speech and petitioning activity within the meaning of section 425.16, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2003, Wareham Development Corporation and related business entities (Wareham) constructed and sold condominium units in a complex called the Terraces at Emerystation (the Terraces) in Emeryville. Cross-complainant Clarendon America Insurance Company (Clarendon) issued a commercial general liability insurance policy to Wareham that covered the Terraces development.

By the early part of 2004, some of the condominium units in the Terraces experienced water intrusion and damages. The Terraces homeowners association (the Association) asserted claims for faulty construction against Wareham on behalf of the owners of the units, some of whom were forced to move out of their residences in mid-2004 due to water damage. Pursuant to a preexisting Claims Administration Agreement, Clarendon retained Risk Enterprise Management Limited (REM) as the third party claims administrator to defend and indemnify against the claims brought by the Terraces homeowners. REM, in turn, retained the law firm of Bishop, Barry, Howe, Haney & Ryder, and attorney Peter A. Schmid to defend Wareham against claims related to defective construction of the Terraces condominium units.[2]

The Association served a written statutory notice of construction defects (Civ. Code, §§ 910, 914) on Wareham in February 2005. A subsequent lawsuit filed against Wareham on March 21, 2006, alleged construction defects and resulting damages to the condominium owners.[3] A settlement of the lawsuit in

late 2007 resulted in payment of damages to the Association for repair of the defects and damages. Thereafter, the condominium owners moved back into their units by early 2008.

A second action was filed by the individual condominium owners at the Terraces as plaintiffs against Wareham in April of 2008, based on the same construction defects, but which alleged separate and additional individual damages, including those incurred after the settlement of the prior action. In the fraud, conspiracy and promissory estoppel causes of action of the second amended complaint, several misrepresentations pertinent to this appeal were alleged: first, on August 31, 2004, defendants' agent represented that cross-defendants were retained to represent *plaintiffs,* whereas cross-defendants were actually retained to represent defendants; second, during the course of the Clarendon proceeding defendant Schmid indicated to plaintiffs and other condominium owners, who were then displaced from their units, that if they instituted a lawsuit against Wareham for their individual claims they would no longer receive reimbursement for their alternative housing expenses; finally, Schmid indicated to the displaced condominium owners that repairs to their units would be "completed by approximately mid to late 2005," but the repairs were not completed even by the date the second amended complaint was filed. The pleading further alleged that plaintiffs relied on the misrepresentations to their detriment by refraining from rescinding the purchases of their condominium units, and by executing agreements to accept the specified temporary substitute housing or continued payments for residential expenses by the insurer of Wareham in exchange for a waiver of any further claims for reimbursement of housing costs, and to credit as a "direct set-off" any payments made "towards damages" in the event a lawsuit was filed against Wareham.[4]

By an amendment to the second amended complaint filed on October 17, 2008, plaintiffs added Clarendon as a defendant to the causes of action for fraud and promissory estoppel. The amendment alleged specifically that Clarendon hired Schmid and ordered him to make the representations upon which the fraud and promissory estoppel causes of action are based.

The pleading at issue here is the cross-complaint of Clarendon filed against cross-defendants and REM on February 20, 2009, for professional negligence, indemnity, apportionment and contribution. The cross-complaint explicitly states that it "necessarily arises" from the second amended complaint and the "alleged conduct and representations" of cross-defendants made "during the course of administering and defending against the homeowners' and homeowners association's claims against Wareham" in the "so-called Clarendon proceeding" and the related "formal lawsuit filed on March 21, 2006."[5] The cross-complaint alleges that cross-defendants negligently defended Wareham in the Clarendon proceeding, which proximately resulted in damages incurred by plaintiffs as alleged in the second amended complaint. The cross-complaint seeks indemnification from cross-defendants for any sums paid by settlement or awarded as damages to plaintiffs in the underlying action.

Cross-defendants filed a special motion to strike the cross-complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16. This appeal followed the trial court's denial of the motion.

DISCUSSION

Cross-defendants argue that the trial court erred by finding that the cross-complaint does not fall within the scope of section 425.16. Cross-defendants claim that the cross-complaint alleges conduct that "necessarily arises from constitutionally protected free speech and petitioning activity," in the nature of "`communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding,'" as specified in section 425.16, subdivision (e)(1) and (2). Their position is that legal malpractice claims "are not categorically exempted from the scope of the anti-SLAPP statute's protection," and the bases of liability alleged in the cross-complaint are misrepresentations and other communications made by attorneys in the course of the Clarendon proceeding, which are protected by the anti-SLAPP statute. Cross-defendants also maintain that cross-complainant failed to demonstrate a probability of prevailing on the merits of the causes of action stated in the cross-complaint due to operation of the litigation privilege (Civ. Code, § 47).

I. The Anti-SLAPP Standards.

"Subdivision (b)(1) of section 425.16 provides 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, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' In order to encourage participation in matters of public significance, section 425.16 specifies in subdivision (a) that the statute `shall be construed broadly.'" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

"The anti-SLAPP statute requires the court to engage in a two-step process when deciding the special motion to strike. [Citation.] First, the court must determine whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity within the meaning of the anti-SLAPP statute. [Citation.] If the court finds that the defendant has made such a showing, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) "`"The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]" [Citation.]' [Citations.] `Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Governor Gray Davis Com. v. American Taxpayers Alliance, supra,* 102 Cal.App.4th 449, 456.)

"`Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."' [Citation.]" (*Tuchscher Development Enterprises, Inc. v. San Diego*

Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1231-1232 (*Tuchscher*).) "On appeal we review independently whether the complaint against the appellant arises from appellant's exercise of a valid right to free speech and petition and if so, whether the respondent established a probability of prevailing on the complaint." (*Governor Gray Davis Com. v. American Taxpayers Alliance, supra,* 102 Cal.App.4th 449, 456.)

II. The Cross-complaint as an Action Arising from Protected Activity Under the Anti-SLAPP Statute.

We turn our attention to the first prong of the anti-SLAPP statute. "The phrase `arising from' in section 425.16, subdivision (b)(1), has been interpreted to refer to `the act underlying the plaintiff's cause' or `the act which forms the basis for the plaintiff's cause of action' and that such act must have been one done in furtherance of the right of petition or free speech. `In short, 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. [Citation.]' [Citation, italics in original.]" (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1397-1398; see also *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002)95 Cal.App.4th 921, 928-929; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089-1090.)

Subdivision (e) of section 425.16 defines "`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'" to include: "(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, 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." "To satisfy the `arising from' test, it need only be `demonstrate[d] that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in [section 425.16,] subdivision (e).'" (*Yu v. Signet Bank/Virginia* (2002)103 Cal.App.4th 298, 316, quoting from *Equilon Enterprises v. Consumer Cause, Inc.*(2002) 29 Cal.4th 53, 66.)

The only potential category of protected acts encompassed by the cross-complaint is for statements made "*in connection with* an issue under consideration or review" by a judicial body as provided in section 425.16, subdivision (e)(2). (Italics added.) "For the second clause, all that is needed is that the statement or writing be 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.'" (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) "A cause of action arising from litigation

activity may appropriately be the subject of a section 425.16 motion." (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.) "`[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* (2003) 31 Cal.4th 728, 734.)

"Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Braun v. Chronicle Publishing Co., supra,* 52 Cal.App.4th 1036, 1047.) "The statute's definitional focus is not on the form of the plaintiff's cause of action but rather the defendants' activity giving rise to his or her asserted liability and whether that activity" itself was "based on" acts undertaken in connection with an issue under consideration in the litigation. (*Tuchscher, supra,* 106 Cal.App.4th 1219, 1232; see also *Navellier v. Sletten*(2002) 29 Cal.4th 82, 89-90, 92.)

We agree with cross-defendants that a claim cannot fall outside the scope of the anti-SLAPP statute merely by virtue of its label as a professional malpractice action. (See*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670-672 (*Peregrine Funding*).) "[A] plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity. [Citation.] Accordingly, we disregard the labeling of the claim [citation] and instead `examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' and whether the trial court correctly ruled on the anti-SLAPP motion. [Citation.] We assess the principal thrust by identifying `[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272 (*Hylton*).) Thus, we proceed to an examination of the predominant nature of the cross-complaint to determine if it arises from protected acts in furtherance of free speech.

Cross-defendants did not make any statement or writing either "before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," to qualify as protected acts pursuant to clause (1) of the statute, or "in connection with an issue under consideration or review" by a "judicial body" as provided in section 425.16, subdivision (e)(2). None of the alleged acts and statements were made to judicial officials, or occurred within the confines of an appearance in a judicial proceeding. (Cf.*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009.) Cross-defendants were retained primarily in connection with relocation of the homeowners during the construction defects dispute in an effort to avoid litigation. The conduct of cross-defendants that forms the basis of the cross-complaint for professional malpractice and

indemnification may have occurred after the dispute arose and the plaintiff condominium owners served a written statutory notice of construction defects on Wareham in February 2005, but no lawsuit had been filed, nor was actual litigation ongoing or pending.

We recognize that communications made in preparation for or preliminary to the institution of a judicial or official proceeding may come within the litigation privilege of Civil Code section 47, subdivision (b), and concomitantly within the scope of Code of Civil Procedure section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115;*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908-909; *Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 242; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-784.) "Case law establishes that communications that are intimately intertwined with, and preparatory to, the filing of judicial proceedings qualify as petitioning activity for the purpose of the anti-SLAPP statute." (*Cabral v. Martins*(2009) 177 Cal.App.4th 471, 482; see also *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194; *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 169-170.) "`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'" [citation] then the statement may be petitioning activity protected by section 425.16.' [Citations.]" (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789-790.)

However, "[t]he litigation privilege does not retroactively protect any and all communication preceding the litigation; the privilege applies from the point the contemplated litigation is seriously proposed in good faith for purposes of resolving the dispute." (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1473.) Also, "the contemplated litigation must be *imminent.*" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 35.)

The statutory procedure for notice of construction defects is not a legislative, executive, or judicial proceeding, nor was litigation imminent here. Rather than an official, governmental proceeding or action, Civil Code section 895 et seq. establishes nonjudicial "procedures and requirements with respect to construction defect cases involving homes and homeowners. . . . Section 910 sets out `prelitigation procedures' to be followed by plaintiffs before suit can be filed, procedures that can be summarized as `notice and opportunity to repair.' Section 912 in turn sets out certain requirements for builders with respect to documentation and information to be provided to homeowners. As a sanction, or incentive to comply, section 912 also provides, in subdivision (i), that a `builder who fails to comply with any of these requirements . . . is not entitled to the protection of this chapter, and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action . . . .'" (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 830-831, fns. omitted.)[6]

In *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1512-1514 (*Garretson*), the plaintiff sued the defendant for wrongful foreclosure, breach of agreements related to plaintiff's purchase of defendant's two properties, and to compel

defendant to arbitrate the disputes related to the two properties. Defendant responded with an anti-SLAPP motion to strike plaintiff's sixth cause of action for wrongful foreclosure. The court found that plaintiff's wrongful foreclosure claim, based on defendant's giving statutory notice of nonjudicial foreclosure against plaintiff's property, resulting in plaintiff incurring expenses in stopping the foreclosure, did "not concern an issue under official review that required a determination to be based upon the exercise of defendant's free speech or petition rights. Rather, defendant and plaintiff engaged in business dealings or transactions of a contractual nature, leading to defendant initiating private nonjudicial foreclosure proceedings, which plaintiff claims were unjustified." (*Id.* at pp. 1520-1521.) The present case is similarly not closely linked to any governmental, administrative, or judicial proceedings or regulations, but instead was part of a nonjudicial, private alternative to litigation that was not yet imminent.

The action before us is thus distinguishable from *Peregrine Funding, supra,* 133 Cal.App.4th 658, 668, where the plaintiffs asserted causes of action against the defendant law firm for legal malpractice and aiding and abetting a breach of fiduciary duty. The claims in that case were based on the law firm's transactional legal advice given in legal opinion letters, its efforts on behalf of clients to block a formal Securities and Exchange Commission investigation into alleged violations of federal securities laws which delayed provisional relief, and the firm's conflicted, joint representation of adverse clients. On appeal the court in *Peregrine Funding* determined that the "allegations of loss resulting from protected activity distinguish[ed] [the] case from other cases finding certain claims against lawyers were not subject to a motion to strike under section 425.16." (*Id.* at p. 673.) The legal opinion letters written by the law firm, which were not issued in connection to any litigation, were "not writings made before a judicial proceeding, or in connection with an issue under review by a court. (§ 425.16, subd. (e)(1), (2).)" (*Id.* at p. 670.) Also, the firm's failure "to disclose potential conflicts of interest or obtain informed consent from all clients to its joint representation," did not involve "speech or petitioning activit[ies]." (*Id.* at p. 671.) In fact, the opinion described these particular acts as "garden variety transactional malpractice, which typically does not trigger the protections of section 425.16." (*Id.* at p. 670.)

But the court found that the firm's opposition to "the SEC's efforts to obtain restraining orders and to appoint a receiver" in a lawsuit necessarily involved written or oral statements made before a judicial proceeding (§ 425.16, subd. (e)(1)), and the litigation tactics, which included non-communicative conduct such as curtailing deposition testimony and withholding documents, "constitute[d] `conduct in furtherance of the exercise of the constitutional right of petition' (§ 425.16, subd. (e)(4))." (*Peregrine Funding, supra,* 133 Cal.App.4th 658, 671, 672.)[7] *Peregrine Funding* is inapposite, as here the construction defects dispute was not part of a judicial proceeding, or before a judicial body, when the claimed protected activity by counsel transpired.

Even if we were to find that some form of judicial or official proceeding — in the nature of a legal dispute that thereafter ripened into litigation — between the

parties had commenced, the alleged wrongful conduct on the part of the cross-defendants does not fall within the scope of the threshold definition of protected acts. The "arising from" requirement is not satisfied by showing that the challenged suit merely followed in time, or even that it was in response to or motivated by, the conduct which the suit challenges. A finding of protected activity is not "as simple as identifying statements made in the course of litigation." (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 575 (*Robles*).) The "`statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with "an issue under consideration or review" in the proceeding.' [Citation.] In other words, `it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' [Citations.]" (*Ibid.*)

An examination of the substance of the cross-complaint confirms to us that no protected activity within the meaning of section 425.16 has been alleged. Although the allegedly actionable conduct may have occurred during an incipient legal dispute that preceded litigation, the requisite connection of the statements to petitioning activity is missing. The second amended complaint and the related cross-complaint are based on professional negligence and associated wrongful acts during the course of cross-defendants' previous representation of Calderon, that may result in liability of the insurer to the plaintiffs in the present action. The mere fact that the cross-complaint asserts claims related to the prior litigation activities in the Clarendon proceeding is "not enough. `Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute.'" (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 (*Freeman*), quoting from *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537-1538 (*Kolar*); see also *Hylton, supra,* 177 Cal.App.4th 1264, 1274.)

The fundamental thrust of the cross-complaint is not protected litigation-related speech and petitioning activity undertaken on another's behalf in a judicial proceeding. Plaintiff's action and the cross-complaint may have been prompted by the cross-defendants' conduct in the prelitigation construction defect dispute, but the fact "`[t]hat a cause of action arguably may have been "triggered" by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]' [Citation.]" (*Garretson, supra,* 156 Cal.App.4th 1508, 1522.) The cross-complaint is not based on petitioning activities in the Clarendon proceeding, but rather on alleged misrepresentations, professional malpractice, and breach of fiduciary duties by cross-defendants that may cause the cross-

complainant to incur damages in the present action. (*Id.* at pp. 1552-1523.) The distinction is critical.

For instance, in *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 909-910, a written communication of an offer to settle a pending lawsuit directed from one attorney on behalf of a client to opposing counsel that purportedly precipitated a conflict of interest was found to constitute a matter connected with issues under consideration or review by a judicial body that directly implicated the right to petition.[8]Here, in contrast, the allegations of cross-defendants' negligence in failing to protect the Clarendon proceeding plaintiffs' interests, conflict of interest or breach of fiduciary duties, and false advice, statements or suppression of information that compromised the representation those plaintiffs were afforded, are all acts that did not have a functional relationship to anticipated, imminent litigation. Cross-defendants' acts, to the extent they were litigation related, were at most incidental to the allegations of breach of contract, negligence, and breach of fiduciary duty arising from cross-defendants' representation of clients with opposing interests in the prior proceeding. (See *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226-1228 (*PrediWave Corp.*); *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1627-1628 (*United States Fire Ins.*); *Garretson, supra,* 156 Cal.App.4th 1508, 1523;*Freeman, supra,* 154 Cal.App.4th 719, 732-733; *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809-811.) "The anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the purpose of the transaction or occurrence underlying the complaint." (*California Back Specialists Medical Group v. Rand*(2008) 160 Cal.App.4th 1032, 1037.)

Cases presented with the same essential argument made by cross-defendants here have decisively rejected the assertion that former clients' actions against attorneys based on allegedly wrongful written or oral statements made during the course of prior litigation, whether pleaded as professional malpractice, breach of fiduciary duties, or any other theory of recovery, are subject to the anti-SLAPP statute. (*Robles, supra,* 181 Cal.App.4th 566, 581-582; *PrediWave Corp., supra,* 179 Cal.App.4th 1204, 1227-1228; *Hylton, supra,* 177 Cal.App.4th 1264, 1274; *United States Fire Ins., supra,* 171 Cal.App.4th 1617, 1629;*Freeman, supra,* 154 Cal.App.4th 719, 732; *Kolar, supra,* 145 Cal.App.4th 1532, 1539-1540;*Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630.) Attorney malpractice and breach of fiduciary duty are not protected rights. (*Kolar, supra,* at p. 1539; see also *Robles, supra,*at p. 577.)

Not only did the timing of the conduct precede any pending or imminent litigation, but the nature of the alleged breach of duty focused on the act of entering into an attorney-client relationship, and its legal ramifications, not any protected speech or petitioning activity performed in the course of such a relationship. (*United States Fire Ins., supra,* 171 Cal.App.4th 1617, 1629.) "A malpractice claim focusing on an attorney's incompetent handling of a previous lawsuit does not have the chilling effect on advocacy found in malicious

prosecution, libel, and other claims typically covered by the anti-SLAPP statute. In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously. This is vastly different from a third party suing an attorney for petitioning activity, which clearly could have a chilling effect." (*Kolar, supra,* 145 Cal.App.4th 1532, 1540; see also *Robles, supra,* 181 Cal.App.4th 566, 577-578.) The "statute should not be used to insulate" a statement made in the course of judicial proceeding "from recourse by the very client on whose behalf the statement was made." (*Robles, supra,* at p. 576.)

We conclude that the cross-complaint neither arose from nor is based on cross-defendants' constitutionally protected speech or petitioning activity within the meaning of section 425.16. Therefore, cross-defendants have failed to make the necessary prima facie showing of activity protected by the anti-SLAPP statute. Having so concluded, it is unnecessary for us to determine if cross-complainant established the probable validity of its claim. (*Garretson, supra,* 156 Cal.App.4th 1508, 1524-1525.)

Accordingly, the judgment is affirmed. Costs on appeal are awarded to cross-complainants.

Marchiano, P. J. and Margulies, J., concurs.

Footnotes

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

2. In this appeal we will refer to the law firm of Bishop, Barry, Howe, Haney & Ryder, and attorney Peter A. Schmid, collectively as cross-defendants.

3. The parties have referred to this lawsuit as the "Clarendon proceeding," and we will do the same.

4. The agreements were also cancelled without further reimbursement payments if a lawsuit was filed against Wareham.

5. We will also use the term "Clarendon proceeding" to refer to the first lawsuit filed on March 21, 2006, against Wareham and defended by Clarendon as liability insurer and REM as its claims administrator.

6. Civil Code section 910 provides that "[p]rior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 . . . the claimant shall initiate the following prelitigation procedures: [¶] (a) The claimant . . . shall provide written notice . . . to the builder, . . . of the claimant's claim . . . . That notice shall . . . describe the claim . . . ." Civil Code section 916 then gives the builder the election to inspect the property and section 917 authorizes the builder to avoid litigation by making a written offer to repair the problems. The homeowner "shall authorize the builder" to perform the repair if offered. (Civ. Code, § 918.) "If the claimant does not conform with the requirements of this chapter, the builder may bring a motion to stay any subsequent court action or other proceeding until the requirements of this chapter have been

satisfied. The court, in its discretion, may award the prevailing party on such a motion, his or her attorney's fees and costs in bringing or opposing the motion." (Civ. Code, § 930, subd. (b).)

7. The court concluded that the plaintiffs' claims were "based in significant part" on the law firm's "protected petitioning activity in the SEC litigation" and the allegations of petitioning activity were not merely incidental. (*Peregrine Funding, supra,* 133 Cal.App.4th 658, 675, 673.)

8. See also *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489, where one attorney's communications with another attorney's clients about pending litigation, and subsequent conduct by the attorney in enforcing a settlement agreement on the client's behalf, were classified as communications "`made in connection with an issue under consideration or review by a . . . judicial body . . . .' (§ 425.16, subd. (e)(2).)"