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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KEVIN DE LEON, Plaintiff and Respondent, v. SANTOS LEON et al., Defendants and Appellants.	B341428 (Los Angeles County Super. Ct. No. 23STCV24461)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen P. Pfahler, Judge. Affirmed.

Law Offices of Pflaster & Berman, Martin R. Berman; LA SuperLawyers and William W. Bloch for Defendant and Appellant Santos Leon.

McCoy Leavitt Laskey and Manuel S. Boxler for Defendant and Appellant Karla Vasquez.

Geragos & Geragos, Mark Geragos and Kimberly Casper for Plaintiff and Respondent.

Plaintiff Kevin de Leon brought this action against Santos Leon, Karla Vasquez, and a number of Doe Defendants (collectively, Defendants) for invasion of privacy and negligence after a recording was published online of an October 2021 meeting Plaintiff attended with other prominent Los Angeles political figures. Leon and Vasquez appeal the trial court's order denying their Code of Civil Procedure section 425.16[1] special motions to strike the complaint. We affirm.

FACTUAL BACKGROUND

We take our facts from Plaintiff's complaint and the declarations of Leon and Vasquez. Plaintiff was a Los Angeles City Councilmember when, in October 2021, he attended a meeting in a private conference room at the headquarters of the Los Angeles County Federation of Labor, AFL-CIO, with the President of the Federation, the Council President, and another Council member. An audio recording of the meeting was made without the knowledge of any of the four attendees. Plaintiff alleges Defendants surreptitiously recorded the meeting. Leon and Vasquez, a married couple employed at the Federation, deny doing so.

According to Plaintiff, the meeting attendees discussed how to redraw Los Angeles political boundaries after the 2020 census to represent the city's evolving demographics, including its Latino and African-American populations.

According to Vasquez and Leon, the meeting attendees "were trying to illegally rig the redistricting process" and "engag[ed] in racial stereotyping." Some of the attendees made

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1 Undesignated statutory references are to the Code of Civil Procedure.

"highly offensive" comments, including "racist attacks on other members of the City Council."

Plaintiff did not learn of the recording until a year later, when a Twitter account alerted reporters to its presence on Reddit, "a social news aggregator and discussion website where users can anonymously upload content for other users to comment on." According to Plaintiff, the publication of the recording in October 2022 was timed "to kneecap [his] political integrity and character and inflict maximum damage on his reputation."

The recording generated national news and became "a very significant issue of public interest." Plaintiff alleged Defendants uploaded the recording. Leon denied recording the meeting or uploading "the original recording." Vasquez denied recording the meeting and claimed she first learned of it when her boss told her to read the news about it. Her opening brief says she "emphatically denied all . . . accusations" that she recorded the meeting or publicly released it on Reddit. However, Leon and Vasquez both admitted having "many communications" about the recording after it became public.

The Los Angeles Police Department initiated a criminal investigation. (See Pen. Code, § 632, subd. (a).) Some employees of the Federation, including Defendant Leon, were required to turn over their employer-issued cell phones and laptops. Police executed a search warrant at the home of Leon and Vasquez and seized Vasquez's cell phone, laptop computer, and other electronic equipment. Police uncovered "some evidence that a computer at [Leon and Vasquez's] residence . . . may have had a record of posting a copy of the recording . . . in September 2022 and

October 2022." Leon and Vasquez were not charged with any crime.

Defendant Leon was fired by the Federation because there was a copy of the recording on his computer and he "discuss[ed] it with other people." Vasquez resigned.

PROCEDURAL HISTORY

Plaintiff filed this complaint in October 2023. He alleged Defendants surreptitiously recorded the October 2021 meeting in violation of Penal Code sections 632 and 637.2. He asserted three causes of action: invasion of privacy; negligence; and negligence per se.

In May 2024, Leon and Vasquez each moved to strike the complaint pursuant to section 425.16—widely known as an "anti-SLAPP motion." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) They argued the complaint arose from their "discussions and written communications" about the October 2021 meeting, which was activity protected by the anti-SLAPP statute. They also argued that while the complaint alleged Defendants engaged in "illegal activity in secretly recording" the October 2021 meeting, that allegation is "mixed in with allegations that [Defendants] engaged in clearly protected petitioning activity, participating in discussions and sharing of information on a matter of public interest." Finally, they argued Plaintiff could not show a probability of success on his claims because he had insufficient evidence either one of them had made the recording.

After hearing argument, the trial court denied both anti-SLAPP motions. The court first determined the complaint "categorically and undisputably arises from" unprotected activity–to wit, "the alleged illegal recording of the meeting between [Plaintiff] and the other[s]." While the court

acknowledged Leon and Vasquez denied any involvement in the recording, that "in no way alters the finding of . . . illegal conduct for purposes of considering the application of the special motion to strike." The court thus determined Leon and Vasquez failed to carry their burden at the first step of the anti-SLAPP test. In the alternative, even assuming Leon and Vasquez had succeeded in the first step of the test, the court further concluded Plaintiff had demonstrated a sufficient probability of success on the merits of his claims.

Leon and Vasquez timely appealed.[2] (See § 904.1, subd. (a)(13); Cal. Rules of Court, rule 8.104(a)(1)(B).)

DISCUSSION

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, italics omitted (*Baral*); see also § 425.16, subd. (b)(1).) A court's analysis of an anti-SLAPP motion proceeds in two steps. (*Baral*, at p. 384.) "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16." (*Ibid.*) "[T]he moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*); see also § 425.16, subd. (b)(1).)

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[2] Footnotes in Leon's and Vasquez's opening briefs ask us to judicially notice election records, copies of which have not been provided. Because the requests do not comply with the California Rules of Court, we deny them. (See *Kao v. Joy Holiday* (2020) 58 Cal.App.5th 199, 204, fn. 3 [denying request for judicial notice made in a brief]; see Cal. Rules of Court, rule 8.252(a).)

The first step of that test is dispositive of this appeal. As we explain, Leon and Vasquez did not meet their burden of showing Plaintiff's claims arose from their protected activity. Thus, we need not and do not consider the second step of the anti-SLAPP analysis. (See *Verceles v. Los Angeles Unified School Dist.* (2021) 63 Cal.App.5th 776, 792, fn. 8.)

I. General Principles and Standard of Review

The first step of the anti-SLAPP analysis requires the defendant to make "two related showings." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887 (*Wilson*).) First, "[c]omparing [the defendant's] statements and conduct against the [anti-SLAPP] statute, [the defendant] must demonstrate activity qualifying for protection." (*Ibid.*) The type of activity protected "include[s] a specified range of statements, writings, and conduct in connection with official proceedings and matters of public interest." (*Park*, *supra*, 2 Cal.5th at p. 1062; see also § 425.16, subd. (e).)

Second, "comparing that protected activity against the complaint, [the defendant] must also demonstrate that the activity supplies one or more elements of a plaintiff's claims." (*Wilson*, *supra*, 7 Cal.5th at p. 887; see also *Park*, *supra*, 2 Cal.5th at pp. 1060, 1063.)

Plaintiff's complaint defines the contours of the claims at the first step of the anti-SLAPP analysis. (See *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 888 (*Abir*).) Thus, a defendant's denial of engaging in protected activity does not make the activity unprotected under the anti-SLAPP law. (*Abir,* at p. 888.)

"We review de novo the grant or denial of an anti-SLAPP motion." (*Park*, *supra*, 2 Cal.5th at p. 1067.) "In addition to the

pleadings, we may consider affidavits concerning the facts upon which liability is based," but "[w]e do not . . . weigh the evidence." (*Ibid.*) Instead, we "accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Ibid.*)

II. Leon and Vasquez Failed to Meet Their Burden of Showing Plaintiff's Claims Arise From Protected Activity

Leon and Vasquez bear the burden at the first step of the anti-SLAPP analysis to demonstrate Plaintiff's claims "arise[] from activity protected by section 425.16." (*Baral*, *supra*, 1 Cal.5th at p. 384.) That requires a defendant "to identify what acts each challenged claim rests on and to show how those acts are protected under a statutorily defined category of protected activity." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009 (*Bonni*); see § 425.16, subd. (e)(1)–(4).)

In the trial court, as on appeal, Leon and Vasquez sought to strike the entire complaint on the ground it arose from their conduct in participating in discussions and written communications on matters of public interest protected by the First Amendment.

In *Bonni*, the court addressed the proper approach when a single cause of action rests on multiple factual bases, some of which may constitute protected activity and some of which may not, and the motion seeks to strike the entire cause of action: "[T]o the extent [the plaintiff] has alleged various acts as a basis for relief and not merely as background, each act or set of acts must be analyzed separately under the usual two-step anti-SLAPP framework. The [defendants] bear the burden of showing that each allegation supporting [the plaintiff's] claim of recovery is one that rests on protected activity. If the [defendants] carry

that burden, [the plaintiff] will then need to demonstrate some merit to his claim . . . ; if he cannot, those particular allegations will be stricken. Conversely, to the extent any acts are unprotected, the claims based on those acts will survive." (*Bonni*, *supra*, 11 Cal.5th at p. 1012.)

Here, Leon and Vasquez categorically deny making the recording and instead point to numerous communications that they had with colleagues and other members of the public after the recording was publicly released. Their sole argument on appeal as to protected activity is that their *discussions* of the recording are protected activity under section 425.16, subdivision (e)(3) and (4).

For purposes of this opinion, we will assume Leon's and Vasquez's comments about the recording after its public release would be protected activity.

Leon's and Vasquez's focus on their comments, however, "overlook[s] the actual allegations" of the complaint. (*Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (2022) 79 Cal.App.5th 982, 1005.) The complaint makes no allegations about Leon's and Vasquez's comments. The complaint instead alleges "a Twitter account alerted reporters and others to the existence and location of the recordings on Reddit," but does not allege Defendants were associated with that Twitter account or participated in discussions about the recording. Nor does the complaint allege that either Leon or Vasquez participated in discussions about the recording. Thus, the claims in the complaint cannot be said to arise out of those discussions, protected or not.

What the complaint does allege is "Defendants surreptitiously recorded" the October 2021 meeting and

"uploaded the audio recording[] to [Reddit]." Leon's and Vasquez's opening briefs never argue *that* conduct is protected under any of the categories of section 425.16, subdivision (e). They have thus essentially conceded it is not protected. (See *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 ["An appellate court 'will not develop the appellants' arguments for them . . . .' "].)

Because Leon and Vasquez have not argued the alleged surreptitious recording and its public release on Reddit is activity protected by the anti-SLAPP statute, we need not determine if it was illegal as a matter of law and thus per se ineligible for anti-SLAPP protection. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*).)

To the extent Leon or Vasquez may contend they did argue either the surreptitious recording or its public release was protected activity (separate and apart from any subsequent comments that were not actually alleged in the complaint), they did not come close to making the requisite showing. "[W]hile courts may strike less than the entirety of a complaint or pleaded cause of action, the trial court is not required to take on the burden of identifying the allegations susceptible to a special motion to strike. If a defendant wants the trial court to take a surgical approach, whether in the alternative or not, the defendant must propose where to make the incisions. This is done by identifying, in the initial motion, each numbered paragraph or sentence in the complaint that comprises a challenged claim and explaining 'the claim's elements, the actions alleged to establish those elements, and wh[y] those actions are protected.' " (*Park v. Nazari* (2023) 93 Cal.App.5th 1099, 1109, quoting *Bonni*, *supra*, 11 Cal.5th at p. 1015.) It is not the trial court's responsibility to

parse the complaint on behalf of the moving party. (*Park v. Nazari*, at p. 1109.)

Leon and Vasquez failed to do this. The only references they made in the trial court or this court regarding the surreptitious recording and its public release on Reddit are to their vehement denials of having done so.

But just as denial of engaging in an activity is not sufficient to show the activity is unprotected (*Abir, supra*, 40 Cal.App.5th at p. 888), neither does it show the activity is protected. Rather, whether Leon or Vasquez engaged in the surreptitious recording is a "factual dispute go[ing] to the merits of [Plaintiff's] claims and is not relevant to the first [step] of the anti-SLAPP inquiry." (*Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1047 (*Simmons*); see also *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 939 ["A defendant's declaration denying that he or she engaged in the conduct alleged in the complaint does not foreclose the possibility that a fact finder could later find that he or she did in fact engage in that conduct."].)

Defendant Leon's reply brief argues that even though the surreptitious recording "is potentially unprotected activity," it could be protected in some circumstances, such as when made in the course of gathering information for a news report. (See *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 161–162, 164; see also *Safari Club International v. Rudolph* (9th Cir. 2017) 862 F.3d 1113, 1121–1122 [gathering information for a YouTube post about a public issue].) That argument is forfeited since it was first raised in his reply brief. (See *Tukes v. Richard* (2022) 81 Cal.App.5th 1, 12, fn. 5.) Even considering it on the merits, Leon has pointed to no evidence suggesting he

made or publicly released the original recording as part of a newsgathering effort, particularly because he categorically denies doing either. (See *Simmons*, *supra*, 50 Cal.App.5th at pp. 1045–1046 [*Lieberman* was inapposite where the *Simmons* defendant "does not contend [the conduct] was lawful; rather[, the defendant] steadfastly denies knowing about . . . or participating in the alleged activity"].)

At oral argument, counsel for Defendant Leon conceded that absent the newsgathering exceptions in *Lieberman* and *Simmons*, the surreptitious recording at issue before us is illegal and unprotected activity. "Where a defendant moves to strike the entire complaint and fails to identify, with reasoned argument, specific claims for relief that are asserted to arise from protected activity, the defendant does not carry his or her first-step burden so long as the complaint presents at least one claim that does not arise from protected activity." (*Park v. Nazari, supra*, 93 Cal.App.5th at p. 1108.)

Leon and Vasquez thus have not met their burden to show Plaintiff's claims are premised upon any of their protected activity.

DISPOSITION

The order is affirmed. Plaintiff is entitled to costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1)–(2).)

RICHARDSON, J.

WE CONCUR:

CHAVEZ, Acting P. J. GOORVITCH, J.