

**MARK DILBECK and TERESA DILBECK,**  
**Plaintiffs and Respondents,**

v.

**JEFFREY D. VAN SCHAICK and BARBARA VAN SCHAICK,**  
**Defendants and Appellants.**

**B195227**

**California Court of Appeal, Second District, Fourth Division**

**September 25, 2007**

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A. Plum, Judge, Los Angeles County Super. Ct. No. GC037198

Law Office of Dan Hogue and Dan Hogue for Defendants and Appellants.

The Law Offices of Randall S. Stamen and Randall S. Stamen for Plaintiffs and Respondents.

MANELLA, J.

Appellants Jeffrey and Barbara Van Schaick appeal the order denying their special motion to strike the complaint of respondents Mark and Teresa Dilbeck. They contend the trial court erred in ruling that the Dilbecks' action was not a strategic lawsuit against public participation (SLAPP). We conclude the Dilbecks' complaint does not arise from acts undertaken in furtherance of the Van Schaicks' rights of free speech or petition, and therefore, affirm.

## I

### Background Facts

The underlying facts are not in dispute. The Dilbecks own residential property in Altadena, next door to the Van Schaicks. The Dilbecks devised plans to remodel their home and add a second story. However, the branches of an oak tree located on the Van Schaicks' property have grown over the Dilbecks' home, rendering the Dilbecks' plans unworkable unless the tree is pruned.

Oak trees are protected by state law. (See Pub. Resources Code § 21083.4.) The County of Los Angeles (the County) has adopted regulations to preserve and protect oak trees, requiring a permit to cut down mature oak trees or to prune their larger branches.[1] (L.A. County Code § 22.56.2050, et seq.) The Dilbecks applied to the County for a permit. The County has thus far

refused to issue the requested permit.[2]

## II

### The Complaint

The Dilbecks brought suit against the Van Schaicks and the County. The complaint asserted claims for declaratory relief and trespass. The declaratory relief cause of action alleged that an oak tree growing on the Van Schaicks' property had encroached onto the Dilbecks' property and interfered with their ability to add a second story to their home. It described the Dilbecks' attempt to obtain a permit from the County to prune the oak tree, and the County's refusal to grant the permit allegedly because the Dilbecks were not the owners of the tree.[3] It stated that "an actual controversy has arisen and now exists between [the Dilbecks], the [Van Schaicks], [and the County] concerning their respective rights and duties." Specifically, the Dilbecks "are informed and believe and thereon allege that they may prune the [tree's] encroaching branches and that the owners of the [tree], the [Van Schaicks] are not required to execute the Request for [an oak tree permit]."

The trespass cause of action described the encroachment of the oak tree branches and alleged that "[the Dilbecks] have requested that the [Van Schaicks] prune the [tree's] encroaching branches or permit [the Dilbecks] to prune the [tree's] encroaching branches, pursuant to an [oak tree permit] to be issued by [the County]" and that the Van Schaicks "refused the requests and continue to maintain the trespass." The complaint prayed for an order stating that the County "may grant" an oak tree permit based on a request executed by the Dilbecks, and for an order permitting the Dilbecks or an independent contractor to prune the tree.[4]

## III

### The Special Motion to Strike

The Van Schaicks filed a special motion to strike pursuant to the anti-SLAPP statute, Code of Civil Procedure section 425.16 (section 425.16). They asserted that the complaint was based on their refusal to execute or "support" the Dilbecks' oak tree permit application and therefore attacked their right to free speech. They further argued that the trespass claim lacked merit because the law forbade the Van Schaicks to prune or cut the offending oak tree branches.

The Dilbecks opposed, contending that their action did not fit within the definition of a SLAPP suit and that, in any event, their complaint had prima facie merit. They submitted evidence showing they had hired a registered arborist, who expressed the opinion that the pruning required would not harm the health of the oak tree in

question. Counsel for the Dilbecks expressly denied that the complaint sought to compel the Van Schaicks to support or sign the oak tree permit.

The court denied the motion to strike. The minute order explained: "[The Van Schaicks] have not demonstrated that they are being sued for engaging in protected activity; the [Van Schaicks] are being sued for trespass, which is not protected activity. . . . Further, applying for an oak tree permit is not necessarily protected activity since doing so does not involve the right of petition or free speech concerning a public issue, namely the municipal codes that protect oak trees." The Van Schaicks appealed the court's denial of their motion to strike.[5]

## DISCUSSION

### I

#### **Application of Section 425.16 and Standard of Review**

The Legislature enacted section 425.16, the anti-SLAPP statute, in response to its perception "that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817, disapproved in part in *Equilon Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53.) Section 425.16 provides a procedure for the court "to dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) To this end, section 425.16 provides: "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).)

The courts are in agreement that "[s]ection 425.16, subdivision (b)(1), requires the trial court to engage in a two-step process when determining whether a defendant's section 425.16 motion to strike should be granted. First, the court decides whether the defendant[] has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. [Citation.] If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that 'there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1); [citation].) The

defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue." (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, supra, 29 Cal.4th 53; accord *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472; *Wilcox v. Superior Court*, supra, 27 Cal.App.4th at p. 815.)

On appeal, we review the record independently to determine whether the complaint against the defendant arose from an act in furtherance of the exercise of his or her right to petition or free speech and, if so, whether the plaintiff established a probability of prevailing on the complaint. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) "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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "[T]his court need not reach [the] second prong of the analysis if the 'arising from protected conduct' requirement is not met." (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 801, quoting *Equilon Enterprises v. Consumer Cause, Inc.*, supra, 29 Cal.4th at p. 67.)

### II

#### **Claims Arising From Acts Undertaken in Furtherance of Right of Free Speech Or Petition**

Here the parties primarily dispute whether the Dilbecks' complaint arises from acts undertaken in furtherance of the Van Schaicks' protected rights. Protected rights are defined by the anti-SLAPP statute in section 425.16, subdivision (e), which provides that an "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" includes "(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; (4) or 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).) As the Van Schaicks contend that the Dilbecks' complaint impinges on their right to *refrain* from speech, there is no "written or oral statement or writing" involved here within the meaning of subdivisions (e)(1) through (3). Thus, the issue is whether

the complaint arises from "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" under subdivision (e)(4). In deciding whether [the defendant] has met the 'arising from' requirement," the court considers ""the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.15, subd. (b).)" (*Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1579, quoting *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

First, the Van Schaicks contend the present suit seeks "to judicially compel the Van Schaicks to petition the County of Los Angeles for discretionary relief . . . from the oak tree statutes . . . ." They thus suggest the Dilbecks are affirmatively seeking an order compelling them to prepare and submit a permit application. There is merit to the argument that where a lawsuit's objective is to compel speech from someone who wishes to remain silent, the anti-SLAPP statute is implicated. In *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, this Court held that the reporting requirements of Civil Code section 2527 violated the free speech rights of prescription drug claims processors by requiring them to transmit cost studies to "each client for whom [they] perform[] claims processing services" (§ 2527, subd. (d)). We further held: "[The drug claims processors'] refusal to comply with the compelled speech requirements of the statute is an act in furtherance of [their] right of free speech in connection with an issue of public interest, within the meaning of [section 425.16]." (138 Cal.App.4th at pp. 1322-1323.) Here, however, the Van Schaicks' allegation concerning the objective of the Dilbecks' complaint is simply not true. The complaint seeks to compel *the County* to review the merits of the permit application submitted by *the Dilbecks*, and requests an order permitting *the Dilbecks* or their arborist to prune the tree. The complaint does not seek to compel the Van Schaicks to become personally involved in the permit application process in any fashion and, therefore, does not implicate the terms of section 425.16.[6]

The Van Schaicks alternatively contend that the complaint will indirectly force them to speak because "any judgment in favor of the Dilbecks on the trespass cause of action would necessarily require the Van Schaicks to petition the County of Los Angeles for discretionary relief from the Oak Tree Permit statute." The Van Schaicks' contention is based on the assumption that the only remedy available for trespass is injunctive relief. That assumption is incorrect. Damages are available as a remedy for trespass, as discussed in *Bonde v. Bishop* (1952) 112 Cal.App.2d 1, cited in the Van Schaicks' brief.[7] The court in *Bonde* quoted with approval authority for the proposition that the party over whose land overhanging branches extend may either cut them off *or* maintain an action for damages and

abatement, as long as he or she can prove the branches constitute a nuisance. (112 Cal.App.2d at p. 7.) The award of damages was reversed in *Bonde* not because damages were unavailable in trespass actions, but because there was no evidence to support them. (*Id.* at pp. 4-5.)

Moreover, the prospect that the Van Schaicks could eventually be faced with an order to abate the nuisance and could do so only by seeking a permit from the County does not transform the instant action into a SLAPP suit. "[S]ection 425.16 'does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding.'" (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677, quoting *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866.) "A cause of action 'arises from' protected activity where the act underlying the plaintiff's cause of action, or the act which forms the basis for it was itself an act in furtherance of the right of petition or free speech." (*Greka Integrated, Inc. v. Lowrey, supra*, 133 Cal.App.4th at p. 1579.) "[T]he 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. [Citations.]" (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78.)

The Dilbecks do not seek a remedy based on the Van Schaicks' refusal to cooperate with the permitting process. (Compare *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc., supra*, 138 Cal.App.4th 1307, 1313 [where plaintiff sought damages for defendant drug claims processors' failure to transmit cost studies to clients, action fell under section 425.16].) The trespass cause of action is based on the Van Schaicks' decision to maintain a tree whose branches invade another's air space -- not on their decision to refrain from seeking a permit.

The distinction between an action arising from a protected activity and one that merely indirectly impacts a protected activity is illustrated by the recent decision in *Wang v. Wal-Mart Real Estate Business Trust, supra*, 153 Cal.App.4th 790. There, the plaintiffs, sellers of property, filed a lawsuit after the buyer, Wal-Mart, obtained permits that allowed it to develop the property in a way that blocked access to the plaintiffs' remaining parcels. The complaint alleged, among other things, that Wal-Mart committed breach of contract and fraud and that the governmental authority involved in issuing the permits was liable for inverse condemnation. The defendants moved to strike pursuant to section 425.16, on the ground that "all allegations of the complaint arose from protected petitioning activity," contending that "if all references in the pleading to the development application and related permits were removed, no operative allegations would be left." (*Wang*, at p. 798.)

Emphasizing that "[t]here is no bright-line rule that all cases involving developments and application for

public permits always involve the type of petitioning conduct protected by the anti-SLAPP statutory scheme," the court of appeal reversed the trial court's order striking the complaint. (*Wang v. Wal-Mart Real Estate Business Trust*, *supra*, 153 Cal.App.4th at p. 804.) The court specifically addressed whether the connection between the permitting process and the actions that led to the complaint was sufficient to justify application of section 425.16; the issue turned on "whether [the complaint's] allegations are based essentially on protected activity, or alternatively refer to petitioning activity that is only incidental or collateral to the main thrust of the complaint . . ." (*Wang*, at p. 807.) The court found "[t]he overall thrust of the complaint challenges the manner in which the parties privately dealt with one another, on both contractual and tort theories, and does not principally challenge the collateral activity of pursuing governmental approvals." (*Id.* at p. 809.) Accordingly, the court concluded the claims raised "only collateral or incidental facts with respect to any conduct falling within the applicable definition in the anti-SLAPP statutory scheme." (*Ibid.*)

The court further held that as the permit applications were submitted in support of the development of private property for commercial purposes, Wal-Mart's actions were not undertaken in connection with "a matter of public interest." (*Wang v. Wal-Mart Real Estate Business Trust*, *supra*, 153 Cal.App.4th at p. 807, quoting § 425.16, subd. (e)(4).) Although the permit applications "were made according to certain requirements imposed by a public entity," they did not "principally concern an issue under official review that required a determination to be based upon the exercise of anyone's free speech or petition rights." (*Id.* at p. 808.) Even focusing on Wal-Mart's activities specifically geared toward closing the existing street that served the plaintiffs' parcels, "those are still predominantly private business-oriented activities that gave rise to the asserted contractual or tort liability." (*Id.* at p. 809.)

Similarly here, the thrust of the Dilbecks' complaint is the injury caused to their property by the encroaching tree, not the Van Schaicks' decision to refrain from involvement in the permitting process. The permit, although obtainable only by petitioning a governmental entity, principally concerns and affects the remodel of a private home by private individuals. By applying for a permit, the applicant is not expressing a point of view concerning the validity or importance of the oak tree regulations; he or she is merely seeking to prevent a potential injury or resolve a private dispute. Accordingly, the Dilbecks' complaint does not implicate section 425.16, and the motion to strike was properly denied.

### III

#### The Van Schaicks' Additional Contentions

The Van Schaicks raise a number of contentions concerning the validity of both the declaratory relief and the trespass causes of action. They assert, for example, that "the Dilbecks should have exhausted their administrative remedies and, if necessary, pursued mandamus relief pursuant to [the Code of Civil Procedure]," that "the present suit seeks the wrong relief, in the wrong forum," and that the statutes and regulations prohibit anyone from pruning the tree without permission, thereby providing a complete defense to the trespass cause of action. An appeal from an order denying a special motion to strike is not the proper place to contest the general validity of the complaint. Once the determination is made that the complaint is not a SLAPP action, the parties must rely on ordinary procedures to resolve litigation issues. We decline to provide an advisory opinion or to address issues not properly before us.

#### DISPOSITION

The order denying the special motion to strike is affirmed.

We concur: EPSTEIN, P. J., WILLHITE, J.

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Notes:

[1] The regulations exempt "tree maintenance," limited to the pruning of branches two inches or less in diameter. (L.A. County Code § 22.56.2070(D).)

[2] The August 1, 2006 notice from the County stated that it was unable to "complete [the] review" because the Dilbecks had not submitted "previously requested additional information." Apparently the "additional information" sought was evidence of acquiescence in the permit request by the Van Schaicks because the County takes the position that only the owner of the tree may obtain a pruning permit. (See L.A. County Code, § 22.56.2090(B) ["An application for an oak tree permit shall include . . . [e]vidence that the applicant . . . [i]s the owner of the premises involved, or . . . [h]as written permission of the owner or owners to make such application."].) It does not appear the County ever issued a formal or final denial.

[3] The Van Schaicks were originally named defendants in the declaratory relief cause of action, but were later dismissed as to that cause of action only.

[4] As the Dilbecks explain in their brief, the complaint "requested that the Trial Court determine whether the County could issue a permit to prune the oak tree based upon *the Dilbecks'* request for a County oak tree permit"; they "*do not* request that the Court order the County to issue the oak tree permit." (Emphasis original.)

[5] A grant or denial of a special motion to strike under

section 425.16 is an appealable order. (Civ. Proc. Code § 425.16, subd. (j); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

[6] The Van Schaicks also contend the present suit "followed" their refusal to assist the Dilbecks by executing a permit application. To the extent the Van Schaicks suggest the suit was filed in retaliation for their refusal to cooperate with their neighbors, "[a] cause of action does not 'arise from' protected activity [or allegedly protected activity] simply because it is filed after [the] activity took place." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669, quoting *City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 76-77.) Nor does the possibility that a lawsuit may have been "triggered by" allegedly protected activity or "filed in retaliation for the exercise of speech or petition rights" lead to the conclusion that it arises from such activity. (*Id.* at pp. 77-78.)

[7] See, e.g., *Crance v. Hems* (1936) 17 Cal.App.2d 450, 453 (order sustaining demurrer reversed where complaint alleged roots from defendant's trees "'killed, strangled, and completely destroyed' the plaintiffs' pecan trees and 'destroyed, curtailed and diminished' their farm crops and products"); *Stevens v. Moon* (1921) 54 Cal.App. 737, 742-743 (judgment for defendant reversed where evidence showed that roots from defendant's eucalyptus trees intruded onto plaintiff's land and caused plaintiff's walnut trees to grow stunted and to bear little fruit).

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