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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANIELLE GRIJALVA et al.,

Plaintiffs and Appellants,

v.

HELGA BRANDT et al.,

Defendants and Respondents.

D053856

(Super. Ct. No. 37-2008-00052285-
CU-DF-NC)

APPEAL from an order of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Reversed.

I.

INTRODUCTION

In March 2008, Grijalva and CSFES¹ filed this action against ASSE International, Inc. (ASSE), Helga Brandt, and Josef Motycka. According to plaintiffs' amended

¹ "CSFES" is the name plaintiffs used in their complaint to identify this party. Although CSFES appears to be an acronym, plaintiffs did not provide the full name of the entity in their complaint. In their complaint, plaintiffs alleged that both Brandt and Motycka were agents or employees of ASSE. Motycka is not a party to this appeal.

complaint, Grijalva founded CSFES, a Web site and agency that advocates for the safety and welfare of foreign exchange students visiting the United States. Plaintiffs alleged that ASSE is a student exchange agency that had failed to secured proper residential and education placements for students in its program. Plaintiffs further alleged that the defendants had made a series of false statements regarding Grijalva. Plaintiffs brought claims for defamation and unfair business practices against defendants.

ASSE and Brandt filed a joint special motion to strike plaintiffs' amended complaint pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16).² In order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the plaintiff's claims arise from "any act of [the defendant] in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue. . . ." (§ 425.16, subd. (b)(1).) The statute provides that any written or oral statement or writing made by the defendant in a judicial proceeding or made by the defendant in connection with an issue under consideration or review by a judicial body constitutes such an act. (§ 425.16, subd. (e)(1) and (2).)

In their anti-SLAPP motion, ASSE and Brandt claimed that plaintiffs' action was within the scope of the anti-SLAPP statute because it "appear[ed]" to relate to ASSE's participation in a separate judicial proceeding in North Carolina. After plaintiffs failed to file a timely opposition to the anti-SLAPP motion, the trial court granted the motion. In

² "SLAPP" stands for Strategic Lawsuit Against Public Participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

its order, the trial court concluded that ASSE and Brandt had demonstrated that "at least part of the first and second causes of action arise out of statements made by [ASSE] in the complaint-in-intervention in the North Carolina case."

On appeal, plaintiffs claim that the trial court erred in granting the anti-SLAPP motion. Plaintiffs contend that the trial court erred in concluding that ASSE and Brandt had satisfied their threshold burden of demonstrating that plaintiffs' claims arose from ASSE and Brandt's participation in the North Carolina proceeding.³ We agree, and reverse the trial court's order granting the anti-SLAPP motion.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2008, plaintiffs filed a complaint against ASSE, Brandt, and Motycka. In their complaint, plaintiffs alleged:

"Defendant [ASSE] has brought students to the United States without having secured proper placements for homes and schools for the students. As a result[,] problems have emerged and individuals have utilized the CSFES website in an effort to address the problems encountered by students experiencing extended stays in what were supposed to be temporary homes, problems with enrollment, problems resulting from improper hasty placements and problems . . . with improper placement homes."

Plaintiffs further alleged that "CSFES and . . . Grijalva seek to empower students, parents, and workers who are concerned about the students' welfare and who share the

³ Plaintiffs also claim that the trial court abused its discretion in refusing to allow them to file a late opposition to the anti-SLAPP motion. In light of our reversal of the order granting the anti-SLAPP motion, we need not consider this contention.

goal of having the agencies live up to their responsibilities regarding the safety and welfare of the students."

The only allegations in the complaint regarding specific wrongful actions allegedly taken by the defendants were the following:

"Defendant ASSE in response to the attention generated on [*s/c*] the problems it created, set out to malign CSFES and . . . Grijalva with an intentional and false campaign directed to the parents of the students and to citizens with concerns regarding the problems caused by . . . ASSE's misconduct.

"Defendants falsely accused [Grijalva] of the following:

"a. conducting her website and agency with a 'commercial purpose'

"b. 'manipulating facts'

"c. 'not portraying a clear picture'

"d. 'isn't interested in the welfare of the students'

"e. 'threatening' to send information on exchange agencies but 'if got [*s/c*] a contribution doesn't send anything,'

"f. 'represent[ing] herself as a federal agent,'

"g. 'performs background checks,'

"h. [b]eing a 'liar,'

"i. [m]aking 'false statements'[".]"

In a defamation cause of action, plaintiffs alleged, "Defendants made the foregoing statements with the intent to convey false and defamatory meanings of and concerning . . . Grijalva and CSFES." Plaintiffs also brought an unfair business practices claim against defendants in which they incorporated all of the other allegations of the

complaint and alleged that this "conduct of the defendants and each of them involve practices that were dishonest, deceptive, in disregard of the rights of the students and in disregard of the agency's obligations under the contract by which the students and their families entered the program."

On the same day that plaintiffs filed their complaint, they filed a notice of related case. In their notice, plaintiffs stated:

"Programmes Internationaux D'Exchanges [(PIE)] sued [Veronica Beddick and Grijalva] in North Carolina for defamation and interference for discussing problems related to foreign exchange students who were brought to the [United States] without proper placement in home and schools. [PIE] recruits students in France. ASSE is responsible for placements and supervision in the [United States]. Beddick was an employee of ASSE. Grijalva runs a website, CSFES, devoted to the welfare and safety of foreign exchange students. The enmity of ASSE against Grijalva, and the motivation behind the defendants['] effort to smear Grijalva can be traced back to her activities in helping bring ASSE caused problems to light."

On March 24, the plaintiffs filed an amended complaint that was identical in all material respects to their original complaint.⁴

On April 24, ASSE and Brandt filed an anti-SLAPP motion. In their motion, ASSE and Brandt claimed that plaintiffs' action arose from ASSE's participation in a separate judicial proceeding involving Grijalva. ASSE and Brandt explained that in September 2007, PIE sued Grijalva in North Carolina, alleging that she had wrongfully

⁴ The original complaint indicated that the case was a "Limited Jurisdiction" case, i.e. one in which the amount in controversy did not exceed \$25,000 (§ 85). The amended complaint prayed for a judgment within the "unlimited jurisdictional limit" of the trial court.

disseminated false and misleading information regarding PIE. In December 2007, PIE obtained a preliminary injunction in the North Carolina action enjoining Grijalva from having contact with students in PIE's programs and preventing Grijalva from disseminating false or misleading information regarding PIE.

ASSE and Brandt further stated that in February 2008, ASSE moved to intervene in the North Carolina action and sought a preliminary injunction against Grijalva to preclude her from contacting various persons sponsored by ASSE, and to prevent her from disseminating false or misleading information to those persons. ASSE and Brandt argued:

"A mere one month after ASSE moved to intervene, Plaintiffs filed this meritless suit seeking unsubstantiated damages and alleging that at some unspecified time, at an unspecified location and to unspecified persons, Defendants made 'statements' which Plaintiffs allege are defamatory and constitute unfair business practices. . . .

"This lawsuit is just a continuation of Plaintiffs' crusade to harass Defendants Plaintiffs seek to punish Defendants for ASSE's participation in the judicial proceedings in North Carolina and thereby chill Defendants' right of petition. The SLAPP character of Plaintiffs' action is not only clear from the obvious insufficiency of the causes of action, but also from the 'convenient' timing of plaintiffs' lawsuit

"Because plaintiffs have not sufficiently alleged Defendants' allegedly 'defamatory statements' in the instant action, the exact origin of and circumstances surrounding the alleged statements are currently unknown. However, the allegedly defamatory statements appear to directly relate to ASSE's participation in the North Carolina action. For example, Plaintiffs' First Amended Complaint alleges Defendants' defamatory publications included statements that Plaintiffs were 'making false statements.' [Citation.] This allegation appears to directly relate to ASSE's statements in the proposed Complaint ASSE submitted to the North Carolina court . . . that

Grijalva had disseminated 'false and misleading information.' [Citation.]" (Formatting omitted.)

ASSE and Brandt also argued that plaintiffs could not establish a probability of prevailing on either of their two causes of action.

ASSE and Brandt requested that the court take judicial notice of various documents from the North Carolina action, including PIE's complaint and motion for a preliminary injunction, the preliminary injunction entered in favor of PIE, ASSE's motion to intervene, ASSE's motion for a preliminary injunction, and the affidavits of two ASSE employees filed by ASSE in support of its motion for a preliminary injunction.

Also on or about April 24, ASSE and Brandt filed a demurrer to plaintiffs' amended complaint.⁵ In their demurrer, ASSE and Brandt claimed that plaintiffs' defamation and unfair business practices claims failed as matter of law because they were based on communications related to the North Carolina action. ASSE and Brandt also claimed that each of plaintiffs' claims failed to adequately state facts sufficient to state a cause of action and that the claims were vague and legally uncertain.

On July 16, ASSE and Brandt filed and served notices in which they stated that they had not received an opposition to either their anti-SLAPP motion or their demurrer.

On July 21, Grijalva's attorney filed an ex-parte application requesting that the trial court accept a late filed opposition to ASSE and Brandt's anti-SLAPP motion, or, in the alternative, that the court continue the hearing on defendants' anti-SLAPP motion. In

⁵ Several of the pleadings contained in the record, including the demurrer, do not bear a file stamp. We assume for sake of this decision that the pleadings that do not bear a file stamp were filed on the dates indicated in the documents.

the application, Grijalva's attorney also requested leave to file a second amended complaint in response to the pending demurrer. Grijalva's attorney filed the late opposition to defendants' anti-SLAPP motion and an accompanying declaration from Grijalva, as well as a second amended complaint, with the application. Grijalva's attorney also filed a declaration in which he stated that his failure to timely file the opposition "was due to personal difficulties I encountered and was not the fault of the client."

On July 22, ASSE and Brandt filed an opposition to the ex parte application. ASSE and Brandt noted that, while ordinarily an anti-SLAPP motion must be heard by the trial court within 30 days of the filing of the motion (§ 425.16, subd. (f)), in this case, plaintiffs had already had more than three months to file an opposition, due to the condition of the trial court's docket. ASSE and Brandt also argued that plaintiffs had not demonstrated sufficient grounds for relief from their failure to timely file an opposition. ASSE and Brandt supported their opposition with a declaration from one of their attorneys.

On July 24, the trial court denied Grijalva's application to file the late opposition to the anti-SLAPP motion. The court noted that the hearing on the anti-SLAPP motion was scheduled for the following day, and that to allow the filing of the opposition would be unfair to ASSE and Brandt since they would not have sufficient time to file a reply. The court also stated that it could not continue the hearing because the court was obligated to hear the motion within 30 days of the filing unless its docket would not

permit consideration of the motion within that time period.⁶ The trial court also denied Grijalva's attempt to file a second amended complaint, noting that such action could not properly be accomplished by way of an ex parte application, absent a stipulation.

The following day, the trial court confirmed its tentative ruling granting ASSE and Brandt's anti-SLAPP motion. The court concluded that ASSE and Brandt had demonstrated that the actionable conduct pled in the amended complaint arose out of "statement[s]. . . made before . . . [a] judicial proceeding," and "in connection with an issue under consideration or review by . . . [a] judicial body," quoting section 425.16, subdivision (e)(1) and (2). The court reasoned:

"Defendants have sufficiently shown that . . . at least part of the first and second causes of action arise out of statements made by Defendants in the complaint-in-intervention in the North Carolina case. The Court also concludes [that] the protected statements are not 'merely incident[al]' to the potentially unprotected statements alleged in the first amended complaint. Thus, Defendants have met their initial burden on this motion."

The trial court also noted that in light of ASSE and Brandt having met their burden to demonstrate that the plaintiffs' claims were within the scope of section 425.16, subdivision (e)(1) and (2), the plaintiffs were required to demonstrate a probability of prevailing on their claims. The court concluded that plaintiffs failed to carry this burden, since they had not submitted an opposition to the anti-SLAPP motion. The court granted the anti-SLAPP motion, and stated that ASSE and Brandt's demurrer was moot in light of the court's ruling on the anti-SLAPP motion.

⁶ Implicit in the court's comment is that the court's docket no longer precluded holding a hearing on the motion.

The trial court entered a formal order granting ASSE and Brandt's anti-SLAPP motion on August 8. Grijalva timely appeals from that order.⁷

III.

DISCUSSION

The trial court erred in granting ASSE and Brandt's anti-SLAPP motion

Plaintiffs claim that the trial court erred in granting ASSE and Brandt's anti-SLAPP motion. Specifically, plaintiffs claim that the trial court erred in determining that ASSE and Brandt had carried their burden of demonstrating that plaintiffs' claims arose from ASSE and Brandt's participation in the North Carolina proceeding and that the claims were therefore within the scope of section 425.16, subdivision (e)(1) and (2). We review de novo the trial court's determination that the plaintiffs' claims arose from ASSE and Brandt's protected activity. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604 (*Tutor Saliba Corp.*).

A. *Governing Law*

1. *General principles of law governing anti-SLAPP motions*

Section 425.16, provides in relevant part:

"(a) The Legislature finds and declares 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. The Legislature finds and declares that it is in the public interest to encourage continued

⁷ In her notice of appeal, Grijalva refers to the "*judgment* entered on August 8, 2008." (Italics added.) We construe the notice of appeal as referring to the August 8, 2008 *order* granting the anti-SLAPP motion. The order is appealable. (§ 904.1, subd. (13).)

participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

"(b)(1) 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.

"(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

"[¶] . . . [¶]

"(e) As used in this section, '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."⁸

In *Tutor-Saliba Corp., supra*, 136 Cal.App.4th at page 609, the court outlined the burdens of proof applicable to an anti-SLAPP motion:

⁸ ASSE and Brant did not argue in the trial court, and do not argue on appeal, that either of the plaintiffs' causes of action arose from statements or conduct defined in section 425.16, subdivision (e)(3) or (4). Accordingly, we restrict our analysis to section 425.16, subdivision (e)(1) and (2).

" Under the statute, the court makes a two-step determination:
"First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [Citation.] If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [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.] "

"[I]t 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." (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188; see also *Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319 [The " 'principal thrust or gravamen' " test serves the Legislative intent that section 425.16 be broadly interpreted].)

2. *The "arising from" requirement in section 425.16, subdivision (b)(1)*

In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*), the Supreme Court interpreted the requirement in section 425.16, subdivision (b)(1) that a defendant demonstrate that the plaintiff's action is one "arising from" protected activity. In *Cotati*, a group of mobile home park owners sued a municipality in federal court claiming that the municipality's rent stabilization ordinance was unconstitutional. (*Cotati, supra*, 29 Cal.4th at p. 72.) The municipality subsequently filed a declaratory relief action in state

court seeking a declaration that the ordinance was constitutional. (*Ibid.*) The owners filed an anti-SLAPP motion in the state court action (*ibid.*), arguing that the municipality's state action was within the scope of the anti-SLAPP statute because it arose from the owners' action in filing the federal lawsuit. (*Id.* at pp. 72-73.) The trial court granted the anti-SLAPP motion, reasoning that that the municipality had filed its action shortly after the owners filed the federal action, named only the owners as defendants, and involved " 'the exact contention' " made by the owners in the federal action. (*Id.* at p. 73.)

The *Cotati* court disagreed with the trial court's conclusion that the state court action had "aris[en] from" protected activity. (*Cotati, supra*, 29 Cal.4th at p. 76.) The court began by emphasizing that the timing of the City's filing did not demonstrate that the action arose from the owners' filing of the federal action. (*Id.* at pp. 76-77.) The court stated, "It is indisputably true, as the trial court observed, that City's action was filed shortly after Owners filed their claim in federal court. But the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Ibid.*) The *Cotati* court further explained that to interpret " 'arising from' " in section 425.16, subdivision (b)(1) as meaning 'in response to,' as Owners have urged, would in effect render all cross-actions potential SLAPP's. . . ." (*Id.* at p. 77.) The court rejected this interpretation as both leading to an "absurd result" and being inconsistent with the statutory scheme governing cross-complaints. (*Ibid.*)

The *Cotati* court further held that the "City's subjective intent [in filing the action] is not relevant under the anti-SLAPP statute." (*Cotati, supra*, 29 Cal.4th at p. 78.) "[A]

claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic." (*Ibid.*) A trial court may not focus on a plaintiffs' "litigation tactics," but rather, must determine, based "on the substance of [plaintiff's] lawsuit," whether the defendant has demonstrated that "an alleged SLAPP *arise[s] from* protected speech or petitioning." (*Id.* at p. 78.) The Supreme Court summarized its holding by stating, "[T]he 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." (*Ibid.*)

In applying this holding, the Supreme Court concluded that the municipality's action arose from the underlying dispute between the municipality and the owners that was at issue in both the federal and state actions, rather than from the owners' exercise of their constitutional right to file the federal action. (*Cotati, supra*, 29 Cal.4th at p. 80; see also *id.* at p. 77.) The court observed, "While City's complaint repeatedly refers to the underlying subject matter of Owners' federal action (i.e., the mobilehome park rent stabilization ordinance and arguments respecting its validity), it contains no reference to the action itself." (*Id.* at p. 77.) Thus, the municipality's action was not subject to the anti-SLAPP statute, since it was not an action "arising from" protected activity. (*Cotati, supra*, 29 Cal.4th at p. 80.)

3. *Statements made in a judicial proceeding or in connection with an issue in a judicial proceeding are subject to the anti-SLAPP statute*

Pursuant to section 425.16, subdivision (e)(1) and (2), "Statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest." (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35; accord *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 609 (*Gallanis-Politis*) [" "A cause of action 'arising from' defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike." . . . ' [Citation.]]".) Litigation activity subject to an anti-SLAPP motion includes "communicative conduct such as the filing, funding, and prosecution of a civil action." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

" "[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16." [Citations.]' [Citations.]" (*Gallanis-Politis, supra*, 152 Cal.App.4th at p. 109.) Thus, an action for defamation falls within the anti-SLAPP statute if the allegedly defamatory statement was made in connection with litigation. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.) However, "[t]he statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding." (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866.)

B. *Application*

The primary arguments that ASSE and Brandt advanced in their anti-SLAPP motion in the trial court in attempting to carry their threshold burden of demonstrating that plaintiffs' claims arose from protected activity are contrary to well established law. First, ASSE and Brandt claimed that the " 'convenient' " timing of the filing of this action, a "mere one month" after ASSE filed its complaint in intervention in the North Carolina action, demonstrated that plaintiffs' lawsuit arose from ASSE's participation in the North Carolina proceeding. However, as noted above, the Supreme Court has clearly held that the fact that a party files an action after protected activity has taken place does not demonstrate that the action arose from the protected activity. (*Cotati, supra*, 29 Cal.4th at p. 69 [fact that municipality's action was filed "shortly after" owners filed separate action did not mean that municipality's action arose from owner's action].)

Second, ASSE and Brandt claimed that plaintiffs' action was a "clearly-retaliatory lawsuit." Even assuming that plaintiffs filed this lawsuit in retaliation for ASSE's participation in the North Carolina action, any such retaliatory motive would be irrelevant in determining the merits of ASSE and Brandt's anti-SLAPP motion. (*Cotati, supra*, 29 Cal.4th at p. 77; see *Kajima Engineering and Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921 ["Kajima wrongly focuses on the City's filing of the amended cross-complaint as a supposed act of retaliation without demonstrating, as it must under the

anti-SLAPP statute, that the amended cross-complaint 'alleges acts in furtherance of [Kajima's] right of petition or free speech in connection with a public issue' ").⁹

ASSE and Brandt made the related argument in the trial court that, "The SLAPP character of Plaintiffs' action is . . . clear from the obvious insufficiency of the causes of action." We are not aware of any authority, and ASSE and Brandt have cited none, that indicates that the insufficiency of the allegations in a plaintiff's complaint may be used to demonstrate that the claims alleged therein arise from a defendant's protected activity.¹⁰ ASSE and Brandt apparently intend to suggest that that the alleged insufficiency of the plaintiffs' amended complaint demonstrates that plaintiffs' motive in filing the action was improper. (Cf. *In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 516 [" 'the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay" ' "]). However, as noted above, a plaintiff's motive in filing an action is irrelevant for purposes of determining the merits of an anti-SLAPP motion. (*Cotati, supra*, 29 Cal.4th at p. 77.)

Any alleged insufficiency in the plaintiffs' amended complaint regarding the context in which the purported defamatory statements were made would tend to negate, rather than support, the conclusion that ASSE and Brandt demonstrated that the

⁹ ASSE and Brandt reiterate these arguments on appeal, claiming that plaintiffs' filed this "retaliatory lawsuit" a "mere thirty-two days after ASSE intervened in the North Carolina action."

¹⁰ We express no view in this opinion on the merits of ASSE and Brandt's demurrer to the plaintiffs' amended complaint. As noted previously, the trial court concluded that the demurrer was moot, in light of its ruling granting the anti-SLAPP motion.

statements were made in a judicial proceeding or in connection with an issue before a judicial body. ASSE and Brandt implicitly acknowledged this in their anti-SLAPP motion when they stated, "Because plaintiffs have not sufficiently alleged Defendants' allegedly 'defamatory statements' in the instant action, the exact origin of and circumstances surrounding the alleged statements are currently unknown."

A defendant seeking to carry its burden of demonstrating that a plaintiff's action arises from the defendant's participation in a judicial proceeding does not carry this burden by demonstrating that the statements that form the basis of the action were made under "unknown" circumstances. Further, a defendant seeking to establish that the plaintiffs' cause of action arises from protected activity is not limited to the plaintiffs' pleadings. Rather, in seeking to carry this threshold burden, a defendant may submit declarations attesting to the context in which statements that form the basis of the plaintiff's claims were made. (See, e.g., *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1057 [defendant submitted declarations of its attorney and employee demonstrating that statements forming the basis of plaintiff's complaint arose in connection with judicial proceeding]; § 425.16, subd. (b)(2) [trial court shall consider "supporting and opposing affidavits stating the facts upon which the liability or defense is based," in ruling on anti-SLAPP motion].) In this case, ASSE and Brandt provided no such declarations. Their assertion in their anti-SLAPP motion that the statements forming the basis of plaintiffs' claims "*appear* to directly relate to ASSE's participation in the North Carolina action," does not establish that this is in fact so.

(Italics added, formatting omitted.)

While ASSE and Brandt did request that the trial court take judicial notice of various documents from the North Carolina proceeding, there is no reference in the plaintiffs' amended complaint to the North Carolina proceeding, and nothing in the complaint suggests that plaintiffs seek to hold ASSE and Brandt liable for statements they made in any pleading in the North Carolina action. On the contrary, rather than alleging that ASSE made the statements in a judicial proceeding, plaintiffs' amended complaint suggests that ASSE's statements were "directed to the *parents of the students and to citizens* with concerns regarding the problems caused by . . . ASSE's misconduct" (Italics added.)

Further, while plaintiffs' amended complaint alleges nine defamatory statements,¹¹ ASSE and Brandt's anti-SLAPP motion fails to address, in any fashion, eight of these statements. The only allegation from the plaintiffs' amended complaint that ASSE and Brandt mention in their anti-SLAPP motion is plaintiffs' allegation that the defendants had falsely accused Grijalva of "making 'false statements.' " ASSE and Brandt argued in their anti-SLAPP motion that this allegation arose from ASSE's allegation in its complaint in intervention in the North Carolina action that Grijalva had disseminated "false and misleading information."

Even assuming for the sake of argument that ASSE and Brandt demonstrated that this single allegation is premised on a statement made in the North Carolina pleading, or in connection with an issue under review in the North Carolina action, this would not

¹¹ The nine statements are quoted in full in part II, *ante*.

satisfy their burden to demonstrate that the gravamen of plaintiffs' claims arises from protected activity. (*Martinez v. Metabolife Intern., Inc.*, *supra*, 113 Cal.App.4th at p. 188.) "[C]ollateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*ibid.*)

In sum, ASSE and Brandt did not demonstrate that the defamatory statements alleged in plaintiffs' amended complaint were made in a judicial proceeding or in connection with an issue under consideration or review by a judicial body. (§ 425.16, subd. (e)(1) and (2).) Accordingly, the trial court erred in concluding that ASSE and Brandt carried their burden of demonstrating that plaintiffs' action arose from petitioning activity that is protected by the anti-SLAPP statute.¹²

¹² Although the trial court ruled that ASSE and Brandt demonstrated that plaintiffs' amended complaint arose from "statements made by *Defendants* in the complaint-in-intervention in the North Carolina case," *Brandt* did not make any statements in *ASSE's* complaint-in-intervention. (Italics added.) Further, ASSE and Brandt did not argue in their anti-SLAPP motion that Brandt had any involvement in the North Carolina proceeding. However, we need not resolve whether an employee of a entity may prevail on an anti-SLAPP motion based on its employer's alleged petitioning activity under these circumstances, in light of our conclusion that ASSE and Brandt failed to demonstrate that plaintiffs' amended complaint arose from ASSE's participation in the North Carolina proceeding.

IV.

DISPOSITION

The August 8, 2008 order is reversed. Grijalva is entitled to costs on appeal.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.