Filed: 12/17/07

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MIRIAM CAESAR,

Plaintiff and Respondent,

v.

PRANA NINE PROPERTIES, LLC, et al.,

Defendants and Appellants.

A114178

(San Francisco County
Super. Ct. No. 444594)

Defendants Prana Nine Properties, LLC (Prana), Canyon Pacific Management Company, Inc. (Canyon Pacific), and Joby Tapia (Tapia) appeal the trial court's denial of their special motions to strike, pursuant to Code of Civil Procedure[1] section 425.16. Defendants argue that plaintiff's complaint arises primarily out of defendants' protected activities of serving a 60-day notice to vacate and pursuing a petition before the San Francisco Rent Arbitration and Stabilization Board (the Rent Board). Plaintiff Miriam Caesar contends none of her causes of action seek damages arising out of those actions. We reverse, in part.

I. FACTUAL BACKGROUND

Prana is the owner, and Canyon Pacific and its employee Joby Tapia are the managers, of a six-story, 33-unit apartment building at 3649 Market Street (the property). Plaintiff has resided at the property in apartment No. 204 (the premises) pursuant to a lease agreement since 1990. When Prana purchased the property in February 2004, it had

not been maintained for decades, so in September and November of 2004, Prana secured permits to conduct repair work on the property.

It was hoped that the work could be done unit by unit, beginning on the first floor and moving up, and that the tenants could be relocated to vacant units in the building "to minimize disruption." In November 2004, defendant Tapia spoke with plaintiff about this, but "she did not respond one way or the other." Tapia then sent her a letter, dated November 24, 2004, asking that she move from her apartment before December 6 so that her "sliding glass window" could be replaced. In the letter, Tapia also offered to "compensate [her] for [her] cooperation" by providing a rent credit in January for each day she was unable to occupy her unit in December.

Plaintiff informed defendants that she could not move out of her unit within the time frame specified in the request because her cat had just undergone cancer surgery and was recuperating. Plaintiff also said she "believe[d] the law required [she] receive more notice." In response, on December 1, Tapia posted a letter on plaintiff's door asking her to leave by January 9 and offering assistance in moving plaintiff's belongings. The letter stated: "This shall constitute 30 days notice of pending work to your unit. Please make every effort to cooperate fully with this revised schedule as this revision has caused delays that may affect other tenants."

In late December, plaintiff sent a letter to Tapia, together with her rent check for January, stating: "After having received your letter of December 1, 2004, I have educated myself on the laws concerning being required to vacate my home. It is my right to receive sixty (60) days notice of any eviction. . . . Therefore, I will not be vacating my home on January 8, 9, or 10th." Before receiving that letter, Tapia did not know that the San Francisco Residential Rent Stabilization and Arbitration Ordinance (the ordinance)

---

[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

set forth a procedure for temporary eviction and that plaintiff might be entitled to a 60-day notice.[2]

In January 2005, Tapia orally requested that plaintiff surrender the premises. When plaintiff explained "she could not do so on such notice," Tapia told her "they would enter the premises to perform construction work pursuant to California Civil Code section 1954[3] for each 24 hour period thereafter, and that Defendants would 'wrap her up in plastic' after each day's work"—meaning that they would wrap the premises in plastic at the end of each work day.[4] Plaintiff then reiterated that she would only vacate pursuant to a lawful 60-day notice. The following day (on January 5) defendants presented a letter withdrawing the December 1 request; on January 6, 2005, plaintiff was served with a 60-day notice of temporary termination of tenancy for purposes of repair work. The notice estimated the repair work would be completed within three months, and stated that if it could not, defendants would file a petition with the Rent Board

---

[2] The parties do not dispute the applicable law. In order to forcibly evict a tenant to effectuate repairs a 60-day notice must first be served. (§ 1946.1.) The landlord must have secured all necessary permits for the work prior to serving the notice; the landlord must inform the tenant where the permits can be viewed; the landlord must pay the tenant $1,000 in relocation costs within 10 days of the notice; and the landlord cannot evict the tenant for more than three months unless the time is extended by the Rent Board or its Administrative Law Judges. (S.F. Admin. Code, § 37.9, subd. (a)(11).)

[3] Civil Code section 1954 provides, in pertinent part, as follows: "(a) A landlord may enter the dwelling unit only in the following cases: [¶] . . . [¶] (2) To make necessary or agreed repairs, decorations, alterations or improvements, . . . or exhibit the dwelling unit to . . . workers[] or contractors . . . [¶] . . . [¶] (d)(1) . . . [T]he landlord shall give the tenant reasonable notice in writing of his or her intent to enter and enter only during normal business hours. The notice shall include the date, approximate time, and purpose of the entry. . . . Twenty-four hours shall be presumed to be reasonable notice in absence of evidence to the contrary. . . ."

[4] Tapia disputes this. He says that in response to plaintiff's statement that she "did not want to be disrupted" he told her "the work was *not* such that she could continue to live in the unit, with the landlord doing the work around her each day and enclosing the unit in plastic each night (as a large sliding glass door would have been missing, completely exposing the unit to the winter elements)." For purposes of the anti-SLAPP

requesting additional time. Pursuant to the notice, plaintiff vacated the premises by March 7, 2005.[5]

Access to the unit next to plaintiff's was also necessary to complete the repairs on plaintiff's unit, but due to a temporary changeover in personnel at the property, service of that notice was inadvertently delayed until February 8. That tenant (Ms. Erickson) vacated on April 11. Defendants first learned they would need to gain possession of four additional units in late April, when the contractor informed a Prana employee that the damage was more extensive than originally thought, and access to these units was necessary for proper completion of all the repairs. The tenants of these other units, although initially expressing a willingness to vacate voluntarily, ultimately demanded 60-day notices.

On May 4, 2005, defendants filed a petition with the Rent Board, pursuant to the ordinance, seeking approval of an extension of time in which to complete the repairs on plaintiff's and Erickson's units. Defendants explained that they required more than the three months allowed under the ordinance because they had only recently learned about the need for possession of the four additional units and these tenants had demanded formal 60-day notices.

Plaintiff submitted a written statement, signed by her attorney, objecting to the extension. She complained of the improper requests to vacate and stated it was defendants who had caused the unnecessary delay because the tenants in the other four units "were not served properly with 60-day notices in the first place." Plaintiff also asserted that defendants knew or should have known in November 2004—up to six weeks before she was served with the 60-day notice—about the need for access to the unit above hers to accomplish the repairs. Plaintiff requested that the petition be denied or that defendants be penalized for the extension.

(strategic lawsuit against public participation) motion, however, we accept plaintiff's version of this conversation.

[5] Defendants assert that plaintiff vacated the premises on March 20.

A noticed hearing on the petition was held on June 8. Neither plaintiff nor her attorney attended the hearing. After taking testimony, the Rent Board hearing officer issued a 12-page decision granting defendants' request for extension of time for completion of the repairs. The hearing officer rejected plaintiff's arguments and found that defendants "reasonably thought the work could proceed in stages, and that it chose to proceed in stages so that tenants could relocate within the same building, which would minimize the disruption to the tenants. [Prana] also established that it did not realize until work started in [plaintiff's and Erickson's] units that it had to vacate all units on the second and third floors at the same time, which was too late to provide statutory notice and complete the work within the initial 90-day period. The evidence therefore established that the [defendants'] time estimate of September 1, 2005 to complete the work is reasonable under [the regulations]. No determination is made as to the good faith of the landlord under Ordinance Section 37.9(a)(11) which is for the court and not the Rent Board to decide."[6]

On August 30, defendants confirmed that the premises would be available for plaintiff to move back in on September 1.[7]

II. PROCEDURAL BACKGROUND

A. The Complaint

On September 2, 2005, plaintiff sued defendants alleging eight causes of action. Her predicate factual allegations can be summarized as follows:

In November 2004, defendants "attempted to gain possession of the premises without just cause" in violation of the ordinance and "in bad faith" with a written request to vacate within 10 days. Plaintiff told defendants that she could not move out of her unit

---

[6] San Francisco Administrative Code section 37.9, subdivision (a)(11) permits a landlord to "seek[] in good faith to remove temporarily the unit from housing use in order to be able to carry out capital improvements or rehabilitation work. . . ."

[7] Upon plaintiff's retaking of possession, a dispute arose as to whether the unit was in a habitable condition. Ultimately, this was the subject of a petition filed by plaintiff with the Rent Board, which was settled in mediation.

in 10 days because her cat had just undergone cancer surgery and was recuperating. Plaintiff also "requested proper notice for possession pursuant to the ordinance."

In December 2004, defendants again attempted to gain possession of the premises "without just cause and in bad faith" with a second written request that also failed to comply with the requirements of the ordinance. The letter requested that plaintiff relocate to another unit in the building within 38 days. Plaintiff informed defendants again that she could not vacate in that time frame, and also "informed [d]efendants of the minimum requirements required by the ordinance."

In January 2005, defendants orally requested that plaintiff surrender the premises. When plaintiff explained she could not do so "on such notice," defendant Tapia told her "they would enter the premises to perform construction work pursuant to California Civil Code section 1954 for each 24 hour period thereafter, and that [d]efendants would 'wrap her up in plastic' after each day's work."

On January 5, defendants withdrew the December 1 request and on January 6, 2005, plaintiff was served with a 60-day notice of termination of tenancy, representing that the repair work would be complete by June 5. Pursuant to the notice, plaintiff vacated the premises on March 7, 2005.

On May 4, 2005, defendants filed a petition with the Rent Board for an extension pursuant to the ordinance, to allow them more time to complete the work. Defendants stated in the petition that they needed more time because other tenants had not been "served with notices to enable [d]efendants to gain possession pursuant to the Ordinance and the other tenants did not move out."

All of these allegations were incorporated by reference into each of the eight causes of action, and provide the factual predicates for each claim. Utilizing various theories of recovery, the complaint alleges, in essence, that defendants engaged in the enumerated acts wrongfully, in bad faith, in disregard of plaintiff's rights, in retaliation

for plaintiff's assertion of her rights, and with intent to and with the result of causing emotional distress, all resulting in damages.[8]

B. Motions to Strike

The three defendants each filed so-called anti-SLAPP motions to strike the complaint, pursuant to section 425.16.[9] They argued that all of plaintiff's claims were based, in part, upon defendants' exercise of their right to petition for approval of an extension of time for completion of the repair work and for the continued displacement of plaintiff from her unit. Defendants asserted that this was an "activity protected" under section 425.16, and therefore plaintiff was required to demonstrate a likelihood that her claims had minimal merit. Defendants argued that plaintiff could not do so and therefore the complaint should be dismissed.

After filing opposition to two of the three motions (Prana's motion was filed 15 days after those of Canyon Pacific and Tapia), plaintiff sought leave to amend the complaint prior to the hearings on the special motions to strike, in order to remove allegations that defendants' filing of the petition with the Rent Board was wrongful. Plaintiff argued that these allegations only "confused the issues" and were "not relevant to the complaint," and that she would be prejudiced if defendants were able to rely on them in their motions to strike. The court apparently denied the motion.

---

[8] Plaintiff's causes of action were for violation of rent control laws, retaliatory eviction, breach of implied duty of good faith and fair dealing, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of Business and Professions Code section 17200 et. seq., and wrongful eviction.

[9] On appeal plaintiff challenges the standing of defendants Canyon Pacific and Tapia to file a special motion to strike because the only name on the petition was that of the owner, Prana Nine. This issue was never raised below, and therefore it is waived. (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 351.) While the waiver rule does not apply to a pure question of law (*ibid.*), plaintiff's contention raises a mixed question of law and fact, viz., whether all defendants were involved in the petitioning activity, either directly or as parties in privity. In any event, plaintiff is judicially estopped from asserting lack of standing because her complaint specifically alleges that defendants—plural—were involved in the petitioning activity.

In opposition to the special motions to strike, plaintiff disavowed any claim for damages arising out of defendants' exercise of their right to petition the Rent Board to extend her displacement. Plaintiff argued, inter alia, that the allegations referring to defendants' act of petitioning for the extension of time were only incidental to her claims based on other, nonprotected activity, and therefore her "collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute," citing *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 686.

The trial court denied the defendants' motions, stating that "[p]laintiff's allegations referencing petitioning activity are incidental and tangential to the gravamen of the complaint." Defendants filed this timely appeal. (§ 425.16, subd. (i).)

C. Additional Issue on Appeal

After briefing was completed and shortly before oral argument, Division Three of the First District Court of Appeal issued its decision in *Birkner v. Lam* (2007) 156 Cal.App.4th 275 (*Birkner*). There, the court held that service of a formal notice to vacate a rental unit is protected activity under section 425.16 if the notice was a "legal prerequisite" to the filing of an unlawful detainer action. (*Birkner*, at p. 282.) We therefore invited the parties to submit postargument briefs on the applicability of *Birkner* to the facts of this case. Both sides submitted letter briefs on this issue.

III. DISCUSSION

A. Legal Principles and Standard of Review

The anti-SLAPP statute 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).) An "act in furtherance of a person's right of petition or free speech" 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; [or] (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 . . . ." (*Id.*, subd. (e).) The purpose of the statute is to deter lawsuits that could chill the exercise of the rights of freedom of speech and petition for the redress of grievances. (*Id.*, subd. (a)) Accordingly, it provides "an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims" arising from the valid exercise of those constitutional rights. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186 (*Martinez*).)

Determination of a special motion to strike involves a two-step process. "First, the court must decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, "[i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "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.) "The trial court's determination of each step [of the process] is subject to de novo review on appeal." (*Martinez, supra*, 113 Cal.App.4th at p. 186.)

B. Does the Complaint Arise from Protected Activity?

The parties agree that the act of petitioning the Rent Board was protected activity. The parties also do not seriously dispute that the 60-day notice was at least facially valid and therefore was also protected, because it was a "legal prerequisite" for bringing an unlawful detainer action had plaintiff refused to vacate her apartment. (*Birkner, supra*, 156 Cal.App.4th at p. 282.)[10] What is in dispute is whether the allegations in the

---

[10] Plaintiff concedes that the 60-day notice was facially valid, and that the 60-day notice warned that "legal proceedings will be instituted" against her if she did not comply with the notice. Despite this unequivocal statement in the notice, plaintiff argues that there is no evidence in the record that an unlawful detainer action would have been brought or was under serious contemplation based upon the notice. We reject this unfounded argument. Moreover, *Birkner* does not hold that a valid notice constitutes

complaint relating to those activities are central to plaintiff's claims or merely incidental and tangential to the gravamen of the complaint.

In cases where the wrongful acts alleged involve both protected and unprotected activity, " 'the cause of action will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct.' " (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 (*Peregrine*).) "As one court explained, 'if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion. . . .' [Citation.] But if the allegations concerning protected activity are more than 'merely incidental' or 'collateral,' the cause of action is subject to a motion to strike." (*Ibid.*) And while the court in *Martinez, supra*, 113 Cal.App.4th at pages 186-191, focused on "the *principal thrust or gravamen* of the plaintiff's cause of action" (*id.* at p. 188) in order to determine whether the allegations referring to protected activity were only incidental to the plaintiff's claims, this does not always answer the core question. Where, for example, the essence or gravamen of a plaintiff's claim is breach of duty of care or of loyalty, "this conclusion does not obviate the need to examine the specific acts of wrongdoing [the] plaintiffs allege regarding [the defendants'] conduct. . . ." (*Peregrine, supra*, 133 Cal.App.4th at p. 671.) "As the Supreme Court has explained, '[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] Because conduct that is alleged to be a breach of duty . . . may also fall within the class of constitutionally

---

protected activity only if an unlawful detainer action is under serious contemplation. Plaintiff also argues that "there is still the issue as to whether the [notice] was issued in good faith." But a mere allegation of bad faith or wrongfulness does not remove the notice from the category of protected activity. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910-911.) For purposes of a special motion to strike, only actions conclusively established to be illegal as a matter of law are deemed unprotected. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 321.)

protected speech or petitioning activity, a court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed. [Citations.]" (*Ibid.*) We note, finally, that courts can, and should, analyze each cause of action separately to determine whether it is subject to a section 425.16 special motion to strike. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.)

Applying these principles, it is clear that, except for the sixth cause of action, all of plaintiff's claims arise, in substantial part, out of defendants' service of the 60-day notice resulting in plaintiff's dispossession of the premises, and/or out of defendants' filing of the petition for an extension of time to complete the work before the Rent Board, resulting in plaintiff being dispossessed for an additional three months. Although plaintiff also makes allegations concerning verbal threats and invalid notices, the gravamen of the complaint is that defendants wrongfully evicted plaintiff from the premises and then wrongfully extended that eviction. Each cause of action is merely a variation on this theme.

Thus, for example, in the first cause of action plaintiff alleges she was evicted prematurely and "dispossessed of the premises in a wrongful manner." In the second cause of action she alleges that service of the notices to vacate, including the 60-day notice, were "in retaliation for Plaintiff asserting her legal rights" and "[as a] result of the[se] acts . . . Plaintiff was evicted from her residence prematurely." The other causes of action contain similar allegations.[11]

---

[11] The third cause of action alleges that defendants violated their duty of good faith and fair dealing by "requesting that Plaintiff vacate long before they needed her to do so . . . and by not timely completing the work." The fourth cause of action alleges that defendants were negligent in failing to ensure that "the disruption of Plaintiff's possession of the premises was as minimal as possible." The fifth cause of action alleges emotional distress due to the wrongful dispossession. The seventh cause of action incorporates by reference the general allegations describing defendants actions including service of the 60-day notice and filing of the petition for extension before the Rent Board (see, *ante*, pp. 5-6), and alleges that these acts are unlawful, unfair or fraudulent business practices. The eighth cause of action alleges that defendants "gained possession of the

Plaintiff's opposition to the petition before the Rent Board also reflected this core grievance. "[Plaintiff] has been paying up to three times the amount of her usual rent each month while she waits for the work to be completed. . . . [T]his delay is entirely unnecessary given that the landlord should have served proper notices [on the other tenants] in the first place." Unquestionably, a "principal thrust" of these causes of action was defendants' petitioning activity—which removed plaintiff from her apartment and kept her out for an additional three months.

Plaintiff nevertheless contends that her claims do not rest on the petitioning activity; rather, she seeks to limit the gravamen of her complaint to damages arising from the *invalid* notices. Plaintiff argues: Service of a request to vacate that does not provide the statutory notice period violates due process and "interferes with a tenant's possessory rights" whether or not the tenant vacates the premises. Further, a mere attempt by a landlord to gain possession in violation of the procedures enumerated in the ordinance is unlawful, and gives the tenant a right to sue for damages. Therefore, because plaintiff has an independent legal claim for damages for the invalid attempts to evict her, the causes of action do not depend on any acts related to her actual dispossession, including the 60-day notice and the petition.

We accept this argument with respect to the sixth cause of action. In it, plaintiff alleges damages arising out of defendants' "*attempt* to wrongfully gain possession of the premises contrary to the tenancy agreement and Ordinance." (Italics added.) Read most favorably to plaintiff, this can be interpreted as seeking damages flowing solely from the invalid notices served on plaintiff prior to the 60-day notice. Because the ordinance expressly confers upon a tenant the right to bring an action for damages if a landlord "wrongfully endeavors to recover possession of a rental unit in violation of [S.F. Admin. Code, §] 37.9 and/or 37.10," this cause of action does not arise out of defendants' petitioning activity because the defective notices do not qualify as a "legal prerequisite"

---

premises and petitioned for an extension of time with the Rent Board in retaliation for Plaintiff, and other tenants, exercising their legal rights."

for bringing an unlawful detainer action. (Cf. *Birkner, supra*, 156 Cal.App.4th at p. 282.)[12]

We must reject, however, plaintiff's claim that all other causes of action are also premised solely or primarily on the invalid notices. This contention simply does not track the actual allegations of the complaint. Just as a plaintiff cannot defeat a summary judgment motion based on a theory of recovery not yet pleaded (*Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1223), a plaintiff cannot defeat an anti-SLAPP motion based on a theory of recovery different than that pled in the complaint (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 475-476 ["On review of an anti-SLAPP motion to strike . . . the standard is akin to that for summary judgment or judgment on the pleadings. We must take the complaint as it is."]). As we have described, all of plaintiff's claims—save the sixth cause of action—are predicated in significant part upon defendants' service of the 60-day notice dispossessing plaintiff of the premises and upon defendants' petition to the Rent Board extending that dispossession for an additional three months.[13]

Plaintiff also argues she was not delayed in returning to her unit as a result of the petition that extended her dispossession, but was ousted prematurely because defendants failed to serve timely notices on the other tenants. Plaintiff cites to defendants' petition

---

[12] Defendants argue that even the defective notices are protected by the litigation privilege if they had a reasonable basis and were served in contemplation of legal action. But as defendants themselves point out, whether a defective notice is privileged is a question of fact. We look only to the pleadings to determine whether the alleged action constitutes "protected activity" as that is defined by section 425.16. Here, plaintiff alleged that she suffered emotional distress due to defendants' "attempt to wrongfully gain possession of the premises contrary to the tenancy agreement and Ordinance." At this stage of the proceedings, we do not look behind these allegations to determine disputed factual issues.

[13] We do not ignore the fact that plaintiff in her declaration attempts to disavow any challenge to the petition or the extension of time. But just as a complaint may not be amended after a special motion to strike has been filed in order to avoid its effects (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772-773), plaintiff may not rescind the allegations of her complaint by way of declaration to defeat an anti-SLAPP motion.

as showing that defendants asked the other tenants to move out instead of serving proper notices in the first instance. Plaintiff then concludes, "[i]f [defendants] adhered to the law as to surrounding tenants, then [plaintiff] would not have been deprived of a few more months at her residence."

This argument is simply another way of saying that defendants had no legal basis for pursuing the petition, because the delay was caused by their own failure to "adhere to the law." Indeed, this is exactly what she alleged in the complaint—that defendants had "no legal basis" for "petitioning for an extension of time to complete the repair work" and that the improper notices *and* the petition were undertaken to retaliate against plaintiff. No amount of creative briefing can change the meaning of these allegations. Additionally, this argument conveniently ignores the contrary adjudication of the hearing officer that the petition had merit and defendants' delay in serving the notices was entirely reasonable. As we explain below, plaintiff is bound by that determination. (See part II.C, *post*, at p. 17.)[14]

Plaintiff also attempts to reframe the legal construct, asserting "the real question" is whether defendants can "produce authority holding that the First Amendment in some manner protects [defendants] from liability for damages caused by [unprotected activity]." This is a complete mischaracterization of the applicable standard and, not surprisingly, plaintiff cites nothing in support of it.

Finally, plaintiff makes a last-ditch effort to redraw the scope of the complaint by arguing that she was deprived of her residence even after the effects of the petition had expired because when she was permitted to return on September 1, 2005, the premises were uninhabitable. She then interprets the complaint's allegations concerning the unreasonable delay in returning to her unit as "allegations . . . not made to claim the

---

[14] Plaintiff also makes the utterly specious argument that "[a]ny reference [in the complaint] to the petitioning activity cannot lead to damages since [plaintiff had] already moved out, and was already damaged by the service of the Notices." Plaintiff's complaint cannot rationally be read to exclude a claim for damages due to the *additional* time she was out of her rent-controlled apartment as a result of defendants' petition before the Rent Board.

petitioning activity gave rise to damages, but to show the bad faith issuance of the Notice, and the unwillingness of [defendants] to allow [plaintiff] to reoccupy her residence after September 1, 2005. . . ." We reject out of hand this fatuous attempt to rewrite the complaint to evade the anti-SLAPP statute. The allegations concerning uninhabitability were not pled in the complaint and—as plaintiff herself admitted—were the subject of a separate petition she brought before the Rent Board that was settled in mediation.

We conclude, for all these reasons, that plaintiff's first, second, third, fourth, fifth, seventh, and eighth causes of action are subject to section 425.16. This conclusion is congruent with the legislative purpose of the statute to deter lawsuits that have a chilling effect on the exercise of the constitutional right to petition for redress of grievances. (§ 425.16, subd. (a).) Landlords should not be subjected to retaliatory lawsuits for compliance with notice requirements and with the administrative hearing process. As stated in *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5, section 425.16 is "construed broadly, to protect the right of litigants to ' "the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions." ' " The right of parties freely to pursue administrative adjudicatory relief is equally protected. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.)

C. Do Plaintiff's Claims Have Minimal Merit?

Once it is determined that section 425.16 applies, to avoid dismissal of her claims a plaintiff is required to " 'make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor.' We do not weigh the evidence, 'but must decide only whether [defendants' evidence] defeat[s] plaintiffs' supporting evidence as a matter of law.' [Citation.] [¶] A plaintiff's complaint need only be shown to have 'minimal merit.' [Citations.] In considering this issue, we look at the ' "pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." ' " (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1299.)

Our efforts in deciding this aspect of the case were seriously hampered by plaintiff's failure to provide in her brief on appeal a single citation to the record in support of the assertion that plaintiff can establish a probability of prevailing on the merits. Nonetheless, we have conducted our own review of the record and conclude that plaintiff has not made out a prima facie case for any of the causes of action subject to section 425.16.

The seven causes of action allege injury arising, variously, from the service of two invalid notices to vacate and a verbal threat to invoke Civil Code section 1954, enter plaintiff's unit each day to work, and wrap plaintiff's premises in plastic each night; the service of a 60-day notice to gain possession of plaintiff's unit causing plaintiff's "premature" dispossession; and the initiation of proceedings before the Rent Board seeking an extension of time to complete the repair work, thus extending plaintiff's dispossession. Plaintiff alleges these acts were done in knowing and conscious (or wanton and reckless) disregard of her rights, in retaliation for plaintiff's asserting her rights, and in bad faith and with ulterior motives. Plaintiff seeks actual damages in excess of $25,000, treble damages, punitive damages, and attorney fees.

Plaintiff presented a single declaration to prove the merits of her claims. The declaration and its exhibits contain prima facie evidence that defendants' first two requests to vacate the premises did not comply with the statutory notice period or with the ordinance. Plaintiff also provides proof of Tapia's threat to gain access to her unit on 24 hours' notice and wrap it in plastic at night. Construing the evidence most favorably to plaintiff, it might even be inferred from this evidence that these actions were taken in knowing or reckless disregard of plaintiff's rights. But we find no evidence of any damages flowing from those events. And, while plaintiff states she felt "very threatened" by Tapia's statement, and that she was "upset" that she could not move back into her unit in June as provided in the notice, there is also no evidence that plaintiff suffered any actual injury. We are presented only with the *argument* that plaintiff "can assert damages over the statutory jurisdictional minimum."

There is, as well, no evidence supporting the claim that service of the 60-day notice by which defendants gained possession of plaintiff's unit was either wrongful, or without just cause, or in retaliation for plaintiff asserting her rights. Indeed all of the evidence indicates the 60-day notice satisfied all legal criteria and was served on plaintiff because she demanded proper notice, and because extensive repairs to plaintiff's unit and the building were necessary. Nor does plaintiff offer any competent evidence that defendants did not, in fact, require access to her unit from March through August. At best, in her unsworn opposition to defendants' petition before the Rent Board, she stated she had been told by a workman in November 2004—and therefore defendants should have known at the time she was served with the notice to quit—that there was "likely extensive water damage in [unit] 304 [as well as in her unit] 204." This is not competent evidence at all, and if it were, it is not prima facie evidence that defendants evicted plaintiff prematurely.

Finally, plaintiff is estopped from claiming that she was wrongfully or prematurely evicted due to defendants' improper delay in serving the notices on the other tenants, and from claiming that defendants' petition for extension of time was wrongful or without legal basis. Plaintiff cannot relitigate the issues decided by the Rent Board on the requested extension of time—including its factual findings that the landlord's delay in serving notices on the other tenants was reasonable and excusable. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1178 ["[t]he doctrine of collateral estoppel is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity"].)[15] Even apart from the Rent Board's decision, the evidence shows the delay resulting from the failed negotiations with the other four tenants was not a few months but more like a few days. Defendants learned of the need for access to the additional

---

[15] While plaintiff correctly contends the Rent Board decision is not collateral estoppel as to the alleged wrongfulness of the notices because the Rent Board specifically refused to rule on that question, plaintiff does not argue, and thus tacitly admits, that the Rent Board's decision does have collateral estoppel effect on the issues actually decided in that proceeding.

units in "late April" and the 60-day notices were served on April 27. Plaintiff offered no contradictory evidence.

In sum, plaintiff has not offered sufficient evidence to support a prima facie case for the causes of action subject to section 425.16, and the motions to strike therefore should have been granted as to those claims.

IV. DISPOSITION

The trial court's orders denying defendants' special motions to strike are vacated, and the case is remanded to the trial court with instructions to enter an order granting the motions as to the first, second, third, fourth, fifth, seventh, and eighth causes of action.

RIVERA, J.

We concur:

RUVOLO, P.J.

SEPULVEDA, J.

A114178

Curtis F. Dowling
Beckman Marquez
703 Market St., Ste. 1610
San Francisco, CA 94103

NOTICE

Please include both the appellate case number and the division number on any written communication or filing submitted to this court.

Our website address is
http://appellatecases.courtinfo.ca.gov

da

adda

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MIRIAM CAESAR,

Plaintiff and Respondent,

v.

PRANA NINE PROPERTIES, LLC, et al.,

Defendants and Appellants.

A114178

(San Francisco County
Super. Ct. No. 444594)

The opinion filed herein on December 17, 2007, is ordered modified as follows:

On page 4, the third and final full paragraph on the page should read:

Plaintiff submitted a written statement, signed by her attorney, objecting to the extension. She complained of the improper requests to vacate and stated it was defendants who had caused the unnecessary delay because the tenants in the other four units "were not served properly with 60-day notices in the first place." Plaintiff also asserted that defendants knew or should have known in November 2004—up to six months before the other tenants were served with the 60-day notice—about the need for access to the unit above hers to accomplish the repairs. Plaintiff requested that the petition be denied or that defendants be penalized for the extension.

No change in the judgment.

Dated: DEC 18 2007 Signed: RUVOLO, P.J.

A114178

Curtis F. Dowling
Beckman Marquez
703 Market St., Ste. 1610
San Francisco, CA 94103

NOTICE

Please include both the appellate case number and the division number on any written communication or filing submitted to this court.

Our website address is
http://appellatecases.courtinfo.ca.gov

da

adda