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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LEONARD FENTON, Plaintiff and Respondent, v. LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP et al., Defendants and Appellants.	B196714 (Los Angeles County Super. Ct. No. BC354533)

APPEAL from an order of the Superior Court of Los Angeles County, George H. Wu, Judge. Affirmed.

Liner Yankelevitz Sunshine & Regenstreif LLP and Steven Wade Turnbull for Defendants and Appellants.

Ford & Serviss, William H. Ford III and Claudia Serviss; Edward J. Horowitz; Law Offices of Bruce Adelstein and Bruce Adelstein for Plaintiff and Respondent.

The trial court denied a special motion to strike under the anti-SLAPP statute, section 425.16 of the Code of Civil Procedure.[1] We affirm.

FACTS

A.

Leonard Fenton owns a house at --71 [address deleted], a 1.5 acre parcel in the hills above Hollywood. The only access to Fenton's property and the adjacent quarter-acre lot at --69 [address deleted] is by way of an easement across a third parcel (--93 H---------- [address deleted]).

In 1999, Fenton entered a contract to sell the --71 property to Jean and Lila Cazes and the Cazes, in anticipation of using the two properties together, purchased the adjacent --69 property. The --71 deal "fell through," and the Cazes asserted a claim against Fenton, insisting that he go forward with the sale of the --71 property (it isn't clear whether they actually filed a lawsuit, but there was clearly a dispute). Fenton retained Liner Yankelevitz Sunshine & Regenstreif LLP (LYSR) to represent him in that dispute, which was settled that year when Fenton agreed to purchase the --69 property from the Cazes.

B.

In 2004, Brian D'Angona and Richard Whobrey (collectively D'Angona) purchased the H---------- property burdened with the easement for access to Fenton's --71 and --69 [street deleted] properties. A dispute arose about Fenton's use of the easement, and in late 2004 he sued D'Angona for

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[1] All section references are to the Code of Civil Procedure.

declaratory relief to clarify his easement rights. In 2005, D'Angona retained LYSR to defend him in Fenton's action.

In August 2005, Fenton filed a motion to disqualify LYSR on the ground that the firm had previously represented him, but the motion was denied. In March 2006, Fenton renewed his disqualification motion but it was once again denied. A judgment was ultimately entered in favor of D'Angona, and Fenton appealed, but then (in June 2007) dismissed his appeal when he and D'Angona settled their dispute about the easement.

C.

Meanwhile, in June 2006, while Fenton's claims against D'Angona were still pending and LYSR was still representing D'Angona, Fenton filed this action for breach of fiduciary duty against LYSR, alleging that LYSR should not have represented D'Angona in the easement case because Fenton had provided confidential information to LYSR when the firm represented him in his 1999 dispute with the Cazes. The essence of Fenton's claim, as alleged in his subsequently filed first amended complaint, is that LYSR should not have represented D'Angona because of the conflict arising out of the firm's earlier representation of Fenton, and that LYSR acted wrongfully when it opposed Fenton's motion to have the firm disqualified in the easement action.

In October 2006, LYSR filed a special motion to strike Fenton's complaint under the anti-SLAPP statute, section 425.16, contending that Fenton's claim arose from oral and written statements made by LYSR in response to Fenton's disqualification motion in the easement case. Fenton opposed the motion, and the trial court denied it, finding that Fenton's claims against LYSR did not arise

from the firm's exercise of its petitioning or free speech rights and that its in-court statements were incidental to the dispute. LYSR appeals.

DISCUSSION

LYSR contends its in-court statements in the easement action are at the heart of Fenton's complaint, and that Fenton's action is based on LYSR's protected activity. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [when a cause of action alleges both protected and unprotected activity, the claim is subject to the anti-SLAPP statute "unless the protected conduct is 'merely incidental' to the unprotected conduct"].) It follows, according to LYSR, that its special motion to strike should have been granted. We disagree.

In ruling on a special motion to strike, the trial court must first determine whether the plaintiff's claims "arise from" the defendant's exercise of his right of free speech or petition. If the answer is "no," the motion should be denied without further inquiry; if the answer is "yes," the court must determine whether the plaintiff has established that it is probable he will prevail on his claim; if the answer is "yes," the motion must be denied, but if the answer to the second question is "no" the motion must be granted. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) On review, we apply the same two-step process. (*Ibid.*)

The question before us is whether the trial court correctly concluded that the gist of Fenton's claim did not arise out of "any written or oral statement or writing made before a . . . judicial proceeding," or "any written or oral statement

or writing made in connection with an issue under consideration or review by a . . . judicial body." (§ 425.16, subds. (e)(1), (e)(2); see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The trial court was plainly correct. Fenton's claim for breach of fiduciary duty arises out of LYSR's representation of D'Angona notwithstanding the fact that LYSR had previously represented Fenton in his dispute with the Cazes. It is the act of representing D'Angona that is the alleged wrong, and the allegations about LYSR's opposition to Fenton's motion to disqualify the firm are simply to show the continuing damage to Fenton. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

As the trial court put it, LYSR's statements in the easement case, both in and out of court, clearly were not the "gravamen" of Fenton's breach of fiduciary claim -- which is "based on [LYSR's] representation of [D'Angona] despite allegedly having confidential information about [Fenton] and on [the firm's] alleged sharing of that information with [its] new clients. . . . [Independent of the allegations about LYSR's opposition to the motion to disqualify it, the firm] arguably would have breached [its] fiduciary duties to [Fenton] whether or not [it] made those statements in or out of court . . . . The mere decision to represent [D'Angona] was problematic, if the allegations in the [first amended complaint] are to be believed. The manner or method of [LYSR's] opposition to [Fenton's] disqualification motion is therefore ultimately irrelevant to the question of whether [LYSR] breached the fiduciary duty [it] allegedly owed [Fenton] and is only 'incidental' to that cause of action." (And see *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189.)

In fact, *Benasra* is directly on point. There, the defendant law firm represented Benasra in the past, then represented another client (Guess, Inc.) in

an arbitration against Benasra. Benasra asked the arbitrators to disqualify the law firm, but the firm objected and the request was denied. Benasra then sued the firm for breach of fiduciary duty, and the firm responded with a special motion to strike under the anti-SLAPP statute. The trial court granted the motion, but Division Four of our court reversed, explaining the rule this way: "[T]he actual disclosure of confidences by a former attorney during litigation is not required to form the basis for the tort of breach of [the] duty of loyalty. The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client. . . . In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it. Evidence that confidential information was actually used against the former client in litigation would help support damages, but is not the basis for the claim." (*Benasra v. Mitchell Silberberg & Knupp LLP, supra,* 123 Cal.App.4th at p. 1189.)

Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra, 133 Cal.App.4th at pages 672-673, the case relied on by LYSR, reached the opposite result because there (unlike *Benasra* and our case), the allegations of protected activity were at the heart of the dispute, not merely incidental thereto -- in *Peregrine Funding* the allegations of loss resulted directly from the protected activity. (*Peregrine Funding* arose from a Ponzi scheme in which a corporation and its officers, all of whom had been represented by the law firm, defrauded investors; after the corporation declared bankruptcy, the trustee and a group of investors sued the law firm, alleging among other things that it had

aided and abetted a breach of fiduciary duty.) To the extent *Peregrine Funding* questions the wisdom of Division Four's analysis in *Benasra* (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra,* 133 Cal.App.4th at p. 674), we disagree with *Peregrine.*

The motion was properly denied on the ground that Fenton's action does not arise from LYSR's protected activities.

DISPOSITION

The January 19, 2007 order denying LYSR's special motion to strike is affirmed. Fenton is entitled to his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, Acting P.J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.