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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KRIZEL GALLANO, Plaintiff and Respondent, v. BURLINGTON COAT FACTORY OF CALIFORNIA LLC, Defendant and Appellant.	A146335 (San Mateo County Super. Ct. No. CIV532414)

Defendant Burlington Coat Factory of California appeals from the trial court's order denying its special motion to strike under Code of Civil Procedure section 425.16 (section 425.16) as to the putative class action complaint filed by plaintiff Krizel Gallano. The complaint alleges that defendant illegally used California's shoplifting statute (Pen. Code, § 490.5) to improperly shift to its employees business losses caused by common on-the-job mistakes. The trial court determined that the conduct alleged by plaintiff was not activity protected by section 425.16 because it constituted extortion as a matter of law. We disagree, and remand the matter for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Background

Plaintiff worked as a cashier and a customer service representative for defendant at its Daly City store beginning in May 2013. On March 15, 2014, she was told to go to a room at the back of the store where she was confronted by loss prevention personnel

about mistakes she had made in the course of performing her job. While there, she was allegedly coerced into signing a statement confessing to numerous mistakes, including processing a return of perfume that allegedly resulted in a loss of $400 to the store. The complaint also asserts that she was accused of ringing up items for customers that had been mismarked by other employees with the wrong price tag. She alleged that at no point was she accused of benefitting from her mistakes, changing prices of merchandise, or committing any other acts of dishonesty.

After plaintiff signed the statement, she was directed to sign a promissory note establishing a debt in the amount of $880. She was told that if she paid the amount and resigned, there would be no criminal charges. She signed a letter of resignation and was told she would be receiving a letter from a third party with further instructions on how to make payments on her debt. Later, she received a civil demand letter from a law firm seeking $350 for " 'shoplifting, theft, or fraud' " pursuant to Penal Code section 490.5. The letter further stated: "This civil claim is separate from, and in addition to, any criminal proceedings that may have arisen from the incident and **is not an attempt to collect a debt**." (Boldface in original.)

II. The Complaint

On February 5, 2015, plaintiff filed a class action complaint against defendant, alleging violations of California labor laws and Business and Professions Code section 17200. She declared that the purpose of her complaint was to stop defendant's "unlawful practice of intimidating its employees into indemnifying the company for [its] ordinary business losses." She alleged that defendant has a practice of mischaracterizing as theft routine retail mistakes, such as processing fraudulent returns or selling mistagged items. It then misuses the civil shoplifting provision contained in Penal Code section 490.5 to intimidate employees into signing promissory notes that force them to shoulder the debt for the company's financial losses. She asserted this conduct violates Labor Code section 2802, subdivision (a), which states that "[a]n employer shall indemnify his or her

employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."[1]

Motion to Strike

On March 16, 2015, defendant filed a special motion to strike the complaint under section 425.16. Defendant argued that the complaint's allegations demonstrated that plaintiff's claims arise from protected activity within the meaning of section 425.16, as the challenged conduct was undertaken in anticipation of litigation. Specifically, it asserted that each of her claims is premised upon defendant's demands for payment that are authorized under Penal Code section 490.5.

Plaintiff opposed the motion, arguing that her lawsuit was exempt under Code of Civil Procedure section 425.17 as a public interest lawsuit.[2] She also asserted that her claims were not based on protected conduct, but instead were based on defendant's alleged Labor Code violations. She further argued that the law firm's demand letters were outside the scope of her complaint, and claimed defendant admitted through discovery that it has never filed any action against any resident of California under Penal Code section 490.5. She also relied on *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*) for the proposition that defendant's conduct is not protected because the acts are

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[1] The complaint also asserts a claim for violation of California Code of Regulations, title 8, section 11070, subdivision (8), which provides that "[n]o employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." The cause of action under Business and Professions Code section 17200 is based on the labor-related violations asserted in the complaint.

[2] The trial court found the complaint did not fall within Code of Civil Procedure section 425.17, and that section is not at issue in this appeal.

prohibited by the Labor Code. As evidence, she submitted her own written declaration, which defendant asserts contains inadmissible hearsay.

On August 12, 2015, the trial court filed its order denying defendant's SLAPP motion. The court concluded defendant had failed to make a prima facie showing that plaintiff's claims arise from protected activity. The trial court first observed defendant had not introduced any evidence in support of its motion, instead relying on the allegations of the complaint for its contention that all of the claims are based on protected speech. The court concluded that, as a matter of law, defendant's conduct amounted to criminal extortion. This appeal followed.

DISCUSSION

I. Overview of Applicable Law

Section 425.16, subdivision (b)(1) provides that a cause of action arising from a constitutionally protected right of petition or free speech may be stricken unless the plaintiff establishes the probability she will prevail on the claim. The court must engage in a two-step analysis under this section. First, it must determine whether the defendant has met its burden to show " 'that the challenged cause of action is one arising from protected activity.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) Second, it must consider whether the plaintiff has met her burden to show the likelihood of prevailing on the claim. (*Ibid*.) We review an order granting an anti-SLAPP motion de novo. (*Flatley*, *supra*, 39 Cal.4th at pp. 325–326.)

Under section 425.16, subdivision (e), 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 . . . judicial proceeding . . ., [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." " 'A cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' " (*Rusheen v. Cohen* (2006) 37 Cal.4th

1048, 1056.) 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), and such statements are equally entitled to the benefits of section 425.16. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268.)

II. Defendant's Conduct Is Protected Activity

Defendant asserts its conduct undertaken pursuant to Penal Code section 490.5 is in furtherance of its right to petition its government and determine whether criminal or civil action for theft is warranted. Plaintiff asserts the court correctly found that her causes of action do not arise from protected activity because the gravamen of her complaint, which she calls "criminal extortion of [p]laintiff that resulted in an unlawful promissory note," concerns violations of labor laws that prohibit employers from passing business losses onto employees. However, the complaint contains numerous references to Penal Code section 490.5.

Plaintiff's complaint alleges repeatedly that defendant's conduct was undertaken "in an effort to profit from California's 'Civil Shoplifting Law,' " complaining that the "demands for civil penalties under Penal Code section 490.5 are unfair, unlawful, and fraudulent . . . ." For example, the complaint states that defendant "has devised a scheme to avoid the prohibitions of Labor Code section 2802 by creating improper debts and recouping its business losses *through collections made under Penal Code section 490.5*." (Italics added.) The complaint also alleges that defendant's counsel made follow-up phone calls to plaintiff "*demanding payment pursuant to Penal Code section 490.5*." (Italics added.) We conclude the complaint arises out of constitutionally protected activity, namely, the right to petition for remedies that are statutorily authorized under the Penal Code.

The anti-SLAPP statute protects the right to petition before courts and administrative bodies (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [" ' "[t]he constitutional right to petition . . . includes the basic act of filing

litigation or otherwise seeking administrative action" ' "]), and this protection extends to predispute demands (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 54 ["an attorney's settlement demand letter on a client's behalf generally is protected as a petition activity"]; *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1299 (*Malin*) [demand letter threatening court litigation was protected activity]; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 36–37 ["the specter of litigation loomed over all communications between the parties at that time"; therefore, communications were protected activity].)

A fair reading of the complaint is that plaintiff alleges defendant has a practice of using Penal Code section 490.5 to obtain compensation to which it is not entitled. Penal Code section 490.5 states that a "merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person detained . . . has unlawfully taken merchandise from the merchant's premises." (Pen. Code, § 490.5, subd. (f)(1).) The statute provides an affirmative defense to merchants in any civil action brought by any person resulting from a detention or arrest by a merchant, stating that "it shall be a defense to such action that the merchant detaining or arresting such person had probable cause to believe that the person had stolen or attempted to steal merchandise and that the merchant acted reasonably under all the circumstances." (*Id.*, subd. (f)(7).)

Plaintiff argues defendant failed to assert an investigation privilege because it failed to raise the issue in its motion. However, the trial court noted defendant's counsel raised the issue at oral argument. We decline to deem the argument waived for failure to raise it below. Here, plaintiff admits she engaged in the conduct that caused defendant's losses, though she defends her actions by claiming she did not have any unlawful intent. However, she does not claim defendant violated any aspect of Penal Code section 490.5. For example, plaintiff does not allege that she was detained for an unreasonable amount

of time.[3] She also does not claim that defendant is demanding more money than is authorized under the statute. Instead, plaintiff relies on the trial court's conclusion that defendant's conduct amounted to a crime. As we will discuss further below, we find that conclusion to be flawed.

Defendant's conduct is consistent with remedies that are permitted under the statute. Penal Code section 490.5, subdivision (c) provides, in relevant part: "When an adult . . . has unlawfully taken merchandise from a merchant's premises, . . . the adult . . . shall be liable to the merchant . . . for damages of not less than fifty dollars ($50) nor more than five hundred dollars ($500), plus costs. In addition to the foregoing damages, the adult . . . shall be liable to the merchant for the retail value of the merchandise if it is not recovered in merchantable condition . . . . An action for recovery of damages, pursuant to this subdivision, may be brought in small claims court if the total damages do not exceed the jurisdictional limit of such court, or in any other appropriate court. The provisions of this subdivision are in addition to other civil remedies and do not limit merchants or other persons to elect to pursue other civil remedies."

We conclude the allegations in plaintiff's complaint fall squarely within Penal Code section 490.5. Each of plaintiff's causes of action allege that defendant's actions under the statute amounted to an improper attempt to shift liability for "ordinary business losses" to its employees. Accordingly, defendant has made a prima facie showing that plaintiff's complaint is based on protected conduct. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)[4]

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[3] "[A]ll reasonable attempts to investigate employee theft, including employee interrogation, are a normal part of the employment relationship. It is also true that all such reasonable interrogation or voluntary confinement cannot be regarded as false imprisonment and is not actionable." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 717.)

[4] The portion of the complaint regarding the settlement and demand letter sent by defendant's attorney is also protected by the anti-SLAPP statute. Whether defendant filed any lawsuit is not determinative. (See *Blanchard v. DIRECTV, Inc.* (2004)

III. Defendant's Conduct Was Not Criminal

The trial court found defendant had acted illegally because "[i]t is uncontested in this motion that Defendant engaged in activities designed to illegally shift ordinary business losses to employees."[5] The court also found plaintiff's factual allegations fell within matters covered by laws prohibiting extortion because defendant's representatives had indicated that it might bring criminal charges if she did not sign the promissory note. The court found the demand letter also "made false accusations of criminal conduct" against plaintiff by referencing the possibility of criminal charges as follows: "This civil claim is separate from, and **in addition to, any criminal proceedings that may have arisen from the incident**." (Boldface in original.) Defendant asserts that the court's findings are invalid as they were based on plaintiff's "self-serving, hearsay-riddled" declaration and her complaint. We agree the allegations and supporting evidence do not conclusively establish that defendant's conduct was illegal.

"Extortion is not a constitutionally protected form of speech." (*Flatley, supra*, 39 Cal.4th at p. 328.) In *Flatley*, an attorney was sued by an entertainer for civil extortion and other claims. (*Id.* at p. 305.) The lawsuit was based on a letter and telephone calls made by the attorney which demanded money to settle claims that the entertainer had raped the attorney's client. (*Id.* at pp. 307–311.) The threats were not limited to filing a lawsuit but also contained threats of disseminating the information to

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123 Cal.App.4th 903, 920 [upholding the litigation privilege and rejecting the plaintiff's argument that the defendant was not acting in serious contemplation of litigation].) Even if the litigation privilege does not apply, plaintiff alleges in the complaint that defendant's attorneys sent her a "civil demand letter" pursuant to Penal Code section 490.5, which stated that she could " 'satisfy this civil claim by paying the amount of $350.00 . . . .' " Since plaintiff's entire action is based on the conduct falling under Penal Code section 490.5, the first prong of the anti-SLAPP analysis is satisfied.

[5] In so concluding, it appears the trial court conflated the two prongs of the section 425.16 analysis by determining the merits of plaintiff's claims and using that determination to conclude defendant's conduct did not constitute protected activity.

the media. (*Ibid*.) The attorney threatened to have the entertainer criminally prosecuted and to publish the information if a seven-figure payment was not made. (*Id.* at p. 311.)

The Supreme Court concluded the attorney's conduct was extortion as a matter of law. (*Flatley, supra*, 39 Cal.4th at p. 330.) However, *Flatley* noted that this conclusion was "based on the specific and extreme circumstances of this case." (*Id.* at p. 332, fn. 16.) *Flatley* stated that the "opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion." (*Ibid*.)[6]

Flatley "is a very narrow exception. It applies only 'where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence.' " (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210.) Thus, if "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley, supra*, 39 Cal.4th at p. 316.)[7]

In Malin, supra, 217 Cal.App.4th 1283, the appellate court addressed conduct more extreme than that alleged in this case, yet the court found no extortion. In *Malin*, an

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[6] Similarly, extreme circumstances were present in *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799. The defendant sent the plaintiff a demand letter requesting $75,000 or the defendant would report the plaintiff to a number of state and local prosecutorial agencies and the IRS, as well as to disclosed alleged wrongdoing to vendors and customers. (*Id.* at p. 806.) The *Mendoza* court concluded that the conduct constituted criminal extortion as a matter of law, which was not a protected activity. (*Ibid*.)

[7] We agree with defendant that it was not required to put forth evidence as to whether the allegations in the complaint arise from protected conduct. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 ["Defendants had the initial burden to show only that the complaint was based on protected conduct. They did not have to make a preemptive factual showing to negate what [the plaintiff] might present to satisfy her burden."].)

extortion claim was based on a demand letter that sought to force a settlement by threatening to embarrass the plaintiff with allegations of embezzlement and disclosure of sexual secrets of a third party. (*Id.* at pp. 1298–1299.) *Malin* concluded that the letter did not fall within the narrow exception of "a letter so extreme in its demands that it constituted criminal extortion as a matter of law." (*Id.* at p. 1299.) *Malin* explained that the absence of overt threats to report plaintiff to state or federal authorities distinguished the letter from those in *Flatley* and *Mendoza*. (*Malin,* at p. 1299.)

In this case, defendant does not concede that it engaged in any unlawful acts. And while defendant's actions were assertive, there are no allegations that its conduct, in and of itself, exceeded the scope of that which is statutorily authorized by Penal Code section 490.5. For example, there are no allegations that defendant's accusations were fabricated. The demand letters also do not threaten to expose plaintiff to criminal liability unless payment is made.[8] Rather, the complaint alleges that defendant is using the shoplifting procedures to achieve an unlawful result, namely, to coerce employees into paying for ordinary losses. The conduct as alleged in the complaint does not on its face arise to the "extreme" levels in *Flatley* and *Mendoza* such that the conduct is illegal as a matter of law.[9]

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[8] The only reference in the first demand letter to plaintiff dated April 9, 2014 states: "This civil claim is separate from, and in addition to, any criminal proceedings that may have arisen from the incident and **is not an attempt to collect a debt**." (Boldface in original.) The second letter, dated May 1, 2014, does not contain any reference to criminal proceedings.

[9] Defendant asserts the trial court abused its discretion in overruling its objections to plaintiff's declaration. Because we conclude the case must be remanded for consideration of the second prong of the section 425.16 analysis, we need not consider this assertion.

IV. The Trial Court Must Determine Whether Plaintiff Has Made a Prima Facie Showing of Her Right to Prevail

Because defendant has "met [its] threshold burden of demonstrating that plaintiff's action is one arising from the type of . . . petitioning activity that is protected by the anti-SLAPP statute" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 95), whether its conduct was wrongful is an issue plaintiff "must raise *and* support in the context of the discharge of [her secondary] burden to provide a prima facie showing of the merits of [her causes of action]." (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) This burden can be met by showing defendant's purported " 'defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.' " (*Paul for Council v. Hanyecz*, at p. 1367; see *Flatley*, *supra*, 39 Cal.4th at p. 323 ["The litigation privilege is . . . relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing."].)

Because the trial court concluded that defendant had not met its burden under the first prong of the section 425.16 analysis, it did not address the second prong. Although the parties have extensively briefed the issues pertaining to the probability of plaintiff's prevailing on their causes of action and the validity of defendant's defenses, we believe it more appropriate that the trial court address these issues in the first instance.

DISPOSITION

The order denying defendant's motion to strike is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. Defendant shall recover its costs on appeal.

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Dondero, J.

We concur:

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Humes, P. J.

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Banke, J.