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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 FIVE

NOP MISSION LLC,

Cross-complainant and Appellant, **A126352**

v. **(City & County of San Francisco**

MURPHY'S DELI FRANCHISING et al., **Super. Ct. No. 473750)**

Cross-defendants and Respondents.

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This case arises out of a commercial landlord-tenant dispute. NOP 560 Mission, LLC (landlord) is the landlord of the J.P. Morgan Chase building (building) at 560 Mission Street in San Francisco. Murphy's Deli Franchising (MDF) is a franchisor of delis primarily located in office buildings. In January 2004, MDF leased a space in the building for a MDF deli. George and Jeanette Omran (collectively Omran) guaranteed the lease.

In March 2004, MDF subleased its space to Cal-Murphy, LLC (Cal-Murphy), a company that operates MDF delis. George Omran is part owner of Cal-Murphy. Thereafter, Cal-Murphy became "embroiled in a series of disputes" with landlord about the leased space, prompting Cal-Murphy, Omran, and others to sue landlord and others in March 2008 for, among other things, fraud, breach of the implied covenant of good faith and fair dealing, and nuisance. In January 2009, landlord filed a cross-complaint for

breach of contract, indemnity, and declaratory relief against MDF and Omran (collectively, cross-defendants).

In March 2009, cross-defendants filed separate special motions to strike landlord's cross-complaint. (Code Civ. Proc. § 425.16.)[1] The trial court granted the motions, concluding the cross-complaint arose out of protected activity and was designed to inhibit litigation. The court also determined landlord failed to demonstrate a probability of prevailing on the merits. The court awarded cross-defendants attorney fees as prevailing parties pursuant to section 425.16, subdivision (c).

Landlord appeals. It claims the court erred by granting the motions because the cross-complaint is not based on any act by cross-defendants in furtherance of protected activity, and because it demonstrated a probability of success on the merits. Landlord also challenges the court's award of attorney fees to cross-defendants as the prevailing parties. (§ 425.16, subd. (c).) Cross-defendants cross-appeal the award of attorney fees. They contend the court abused its discretion by awarding them only $45,545.75 in attorney fees and costs as prevailing parties. (§ 425.16, subd. (c).)

We reverse. We conclude the court erred by granting cross-defendants' anti-SLAPP motions because the cross-complaint does not arsie from free speech or petitioning activity. (§ 425.16, subd. (e)(4).) In light of our conclusion, cross-defendants are not prevailing parties pursuant to section 425.16, subdivision (c) and are not entitled to attorney fees and costs pursuant to that statute.

FACTUAL AND PROCEDURAL BACKGROUND

The Lease

In January 2004, MDF leased a space in the building for a deli. In the 10-year lease, MDF, the tenant, agreed to "indemnify, protect, defend and hold . . . Landlord . . . harmless of and from any and all claims, liability, losses, costs, damages, injury or

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[1] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure. "Section 425.16 is known as the anti-SLAPP statute." (*Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1509.) "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1 (*Jarrow*).)

expenses (including costs, expenses and attorneys' fees) arising out of or in any way related to or resulting directly or indirectly from the condition, use or occupancy of the Leased Premises, the activities of Tenant, . . . and any default or breach by Tenant in the performance of any obligation of Tenant under this Lease; provided, however, that the foregoing indemnity shall not be applicable to claims arising by reason of the gross negligence or willful misconduct of Landlord."[2]

Omran guaranteed the lease. The guaranty agreement provided Omran "unconditionally, absolutely and irrevocably guarantees to Landlord . . . the full and faithful performance and observance of any and all covenants . . . contained in the Lease to be performed by Tenant[.]" Pursuant to the agreement, Omran also agreed to "reimburse Landlord for any and all damages that may arise as a result of Tenant's non-payment or non-performance" of the tenant's duties and obligations under the lease.

A few months later, in March 2004, MDF subleased its space to Cal-Murphy, a company that operates MDF delis. George Omran is part owner of Cal-Murphy. MDF remained liable for its obligations under the lease even though it sublet the space to Cal-Murphy. Some time thereafter, Cal-Murphy became "embroiled in a series of disputes" with landlord about the leased space.

The Underlying Complaint

In March 2008, Cal-Murphy, Omran and others (collectively plaintiffs) sued landlord and others for, among other things, fraud, breach of the implied covenant of good faith and fair dealing, and nuisance. In the operative second amended complaint,[3]

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[2] The lease also contained an attorney-fee clause which provided, "If either party places the enforcement of this Lease, or any part thereof, or the collection of any Rent due, or to become due . . . or recovery of the possession of the Leased Premises in the hands of an attorney . . . or files suit upon the same, or seeks a judicial declaration of rights hereunder, the prevailing party shall recover its reasonable attorneys' fees, [and] court costs. . . ."

[3] The second amended complaint was the operative pleading when landlord filed its cross-complaint and when cross-defendants filed their respective anti-SLAPP motions. On March 25, 2009, the court sustained landlord's demurrer to the second amended complaint with leave to amend.

plaintiffs claimed landlord: (1) lied about the square footage of the space and the number of tenants in the building; (2) refused to permit Cal-Murphy to use a Texas contractor to perform tenant improvements; (3) declined to permit Cal-Murphy to install a grill; (4) withheld approval for the installation of a sign on the exterior of the leased space; (5) failed to wash Cal-Murphy's windows and replace broken lights; and (6) leased space in the building to Mixt Greens, a competitor which was permitted to have a grill and whose business emitted "offen[sive] odors" constituting a nuisance.

In January 2009, landlord cross-complained, alleging claims for breach of contract, indemnity, and declaratory relief. In its breach of contract cause of action against MDF, landlord alleged it tendered the underlying complaint to MDF "for defense and indemnification" pursuant to section 7.04 of the lease and that MDF breached the contract by "interfering with [landlord's] rights under the Lease and failing to defend and indemnify [landlord] from and against all claims, costs, liabilities or expenses arising out of or in connection with" the underlying complaint.

The cross-complaint also alleged claims for indemnity against both cross-defendants. Landlord alleged MDF "refused to take appropriate steps to prevent the [p]laintiffs, as subtenants, from interfering with [landlord's] rights under the Lease" and that it was entitled to "full and complete indemnity" from MDF and that it "demanded that [MDF] defend and indemnify [it] against Plaintiffs' claims. [MDF] . . . refused to provide such defense and indemnification." In its indemnity cause of action against Omran, landlord alleged Omran was "responsible for any actions taken by [p]laintiffs that are in violation of [landlord's] rights under the express terms of the Lease" and that Omran breached its guaranty obligations by "failing to prevent [p]laintiffs from interfering with [landlord's] rights under the Lease[.]" Finally the cross-complaint raised a cause of action for declaratory relief against both cross-defendants. Landlord alleged an actual controversy existed between landlord and cross-defendants because cross-defendants disputed landlord's claim that cross-defendants were required to defend and indemnify landlord.

The anti-SLAPP Motions

In late March 2009, cross-defendants filed separate anti-SLAPP motions. In its anti-SLAPP motion, MDF argued that it need not be a party to plaintiffs' underlying lawsuit to move to strike the cross-complaint pursuant to section 425.16. Next, MDF argued the cross-complaint was based on protected activity — that is, plaintiffs' right to petition. In essence, MDF claimed the cross-complaint was an attempt to "intimidate a franchisor into pressuring one of its franchisees to drop the principal action . . . or to settle it cheaply." MDF also noted that its failure to prevent plaintiffs from filing the underlying complaint was an exercise of its constitutionally protected right to refrain from speaking. MDF further argued landlord could not demonstrate a probability of prevailing on the merits because the cross-complaint did not allege facts sufficient to establish a breach of the indemnity provision or a breach of contract, and because landlord did not plead the declaratory relief cause of action with specificity. Finally, MDF contended the litigation privilege set forth in Civil Code section 47 barred landlord's claims. Omran filed its own anti-SLAPP motion raising similar arguments. Omran claimed the cross-complaint for "breach of the guaranty agreement" violated the anti-SLAPP statute because its failure to speak in opposition to plaintiffs' lawsuit was protected free speech. Omran also argued landlord could not demonstrate a probability of prevailing on the merits.

In opposition to MDF's motion, landlord argued the "cross-complaint [was] not based on any act by MDF in furtherance of MDF's protected activity." First, landlord contended that the private, commercial landlord-tenant dispute at issue was not a "'public issue'" and, as a result, the cross-complaint could not "be said to arise from MDF's exercise of its right of free speech in connection with a public issue." In addition, landlord argued the cross-complaint did not arise from an act by MDF in furtherance of MDF's right of petition because MDF "neither brought any action nor threatened to bring any action." In essence, landlord claimed the anti-SLAPP statute did not apply because MDF was a non-party to the underlying litigation and because "a refusal to get involved

in litigation is not [an act] 'in furtherance' of anyone's right of petition." Landlord opposed Omran's motion on similar grounds: landlord contended the cross-complaint was based on contractual rights, not on protected activity.

Next, landlord urged the trial court to deny both motions because it demonstrated a probability of prevailing on the merits. Landlord explained it had submitted evidence establishing there was a binding contract between it and MDF entitling landlord to indemnity and attorney fees if landlord successfully defended its rights under the lease against Cal-Murphy's claims. Landlord also argued the cross-complaint was not legally defective and that the litigation privilege did not apply. Finally, landlord argued it had alleged facts sufficient to state a cause of action for breach of contract, indemnity, and for declaratory relief. Landlord submitted multiple declarations denying the allegations in the second amended complaint.

The Court's Ruling

Following oral argument, the court granted both anti-SLAPP motions. With respect to MDF's motion, the court concluded the "[c]ross-complaint arises out of protected activity and is designed to inhibit litigation. An act in furtherance of a first amendment right comprises both a right to speak freely and also a right to refrain from doing so at all. *ARP Pharmacy Services, Inc. vs. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1314 [(*ARP Pharmacy Services*)]. Here, the gravamen of [the] cross-complaint is [cross-]defendants' failure to prevent the filing of the underlying complaint. [Landlord] fails to demonstrate the probability of prevailing on its claims. [Landlord] must demonstrate that the cross-complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment. *Feldman vs. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467 [(*Feldman*)]. There is no allegation of a particular breach of the lease by [MDF] that would give rise to a breach of contract cause of action or facts pled to trigger an indemnity provision. No facts alleged describing a controversy that would support a declaratory relief cause of action. The cross-complaint is barred by the litigation privilege [set forth in Civil Code section 47] in

that it is based on allegedly wrongful conduct by [cross-]defendants' failure to prevent a lawsuit and its purpose was designed to chill free access to the courts. . . ."

The court reached the same conclusion with respect to Omran's motion. It concluded the cross-complaint arose out of protected activity and was designed to inhibit litigation. The court also concluded landlord failed to demonstrate a probability of prevailing on the merits because the cross-complaint did not allege "a particular breach of the lease by Cal-Murphy that would trigger the Guaranty Agreement and establish a breach. No facts alleged giving rise to a controversy that would support a declaratory relief cause of action." Finally, the court concluded the litigation privilege set forth in Civil Code section 47 barred the cross-complaint.

The Attorney Fees Motion

Plaintiffs moved to recover $79,800.75 in attorney fees and costs as prevailing parties pursuant to section 425.16, subdivision (c). Landlord opposed the motion, contending the amount of fees plaintiffs sought was not "reasonable" within the meaning of section 425.16 because plaintiffs' counsel spent 180 hours, an "unreasonable amount of time to prepare two nearly identical motions."

Following argument, the court granted the motion in part. The court accepted counsel for plaintiffs' billing rate of $425 an hour but determined a "reasonable and necessary" amount of time to prosecute both motions was 100 hours. The court determined 180 hours was unreasonable "[i]n view of the duplicative nature of the pleadings and excessive time spent researching and preparing the pleadings. . . ." The court awarded plaintiffs $45,545.75 in attorney fees and costs pursuant to section 425.16, subdivision (c).

DISCUSSION

Section 425.16 provides a "procedural remedy to dispose" of strategic lawsuits against public participation — SLAPP lawsuits — that seek "'to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances.'" (*Feldman, supra,* 160 Cal.App.4th at p. 1477, quoting *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 (*Rusheen*); *Siam v. Kizilbash* (2005) 130 Cal.App.4th

1563, 1568.) Section 425.16, subdivision (b)(1), 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."

"We review the trial court's decision to grant or deny the anti-SLAPP motion de novo. [Citation.] In doing so, we consider '"'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)'"'" (*Feldman, supra,* 160 Cal.App.4th at p. 1478, internal citations omitted.) However, we do not weigh the credibility of the evidence. Instead, we accept as true evidence favorable to landlord and evaluate cross-defendants' evidence only to determine whether it has defeated landlord's evidence as a matter of law. (*Id.* at p. 1478.)

I.

The Cross-Complaint Does Not Arise From Protected Activity

"Section 425.16 articulates a 'two-step process for determining whether an action is a SLAPP.'" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456 (*American Taxpayers Alliance*), quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) First, we determine whether cross-defendants have made a threshold showing that their acts, about which landlord complains, were taken in furtherance of their constitutional rights of petition or free speech in connection with a public issue. (*American Taxpayers Alliance, supra,* at p. 456, citing *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928 (*Kajima*); *Rusheen, supra,* 37 Cal.4th at p. 1056.) If cross-defendants satisfy this burden, we determine whether landlord has demonstrated a probability it will prevail on the claims asserted in its cross-complaint. (*American Taxpayers Alliance, supra,* at p. 456.)

Accordingly, our first task is to determine whether cross-defendants have "made

the threshold showing" that the cross-complaint "arises from protected activity."[4] (*Rusheen,supra,* 37 Cal.4th at p. 1056.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the [cross-]defendant[s'] act underlying the [landlord's] cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the [landlord's] cause of action itself was *based on* an act in furtherance of the [cross-] defendant[s'] right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, original italics (*City of Cotati*).) Put another way, section 425.16's "definitional focus is not the form of the [landlord's] cause of action but, rather, the [cross-defendants'] *activity* that gives rise to [their] asserted liability — and whether that activity constitutes protected speech or petitioning. . . .'Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.' [Citation.]" (*Navellier, supra,* 29 Cal.4th at pp. 92-93, original italics.)

Cross-defendants meet their threshold burden "'by demonstrating that the act underlying the [cross-complaint] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati, supra,* 29 Cal.4th at p. 78, quoting *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) As relevant here, section 425.16, subdivision (e) defines an act "in furtherance of a person's right of petition or free speech . . . in connection with a public issue" as including "any . . . conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right

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[4] Cross-defendants contend the anti-SLAPP statute applies to MDF, even though MDF is not a party to the underlying litigation. Specifically, cross-defendants claim MDF has "indirect financial interests" in plaintiffs' claims and that there is a "substantial interrelationship" between MDF, Cal-Murphy, and the underlying litigation. In the trial court, landlord suggested section 425.16 did not apply because MDF was not a party to the underlying litigation, but landlord did not make that argument in its opening brief. "'Points raised for the first time in a reply brief will ordinarily not be considered. . . .'" (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 674, fn. 1, quoting *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

The language of the cross-complaint on which cross-defendants focus is the allegation that cross-defendants "fail[ed] to prevent [p]laintiffs from interfering with [landlord's] rights under the lease." Cross-defendants urge us to conclude — as the trial court did — that the cross-complaint is "based solely" on their "failure . . . to prevent the filing or the prosecution" of the underlying complaint. More specifically, cross-defendants characterize their purported "failure to prevent" the filing of the underlying complaint as a refusal to speak on the "propriety" of plaintiffs' lawsuit. In contrast, landlord contends the cross-complaint concerns cross-defendants' failure to perform their contractual duties and, as a result, does not implicate any free speech or petition rights.

We begin by examining the language of the cross-complaint. In its breach of contract cause of action, landlord alleged MDF breached its obligations under the lease by "failing to prevent [p]laintiffs from interfering with [landlord's] rights under the Lease and failing to defend and indemnify [landlord] from and against all claims, costs, liabilities or expenses arising out of or in connection with the [underlying complaint]." In its indemnity claim against MDF, landlord alleged MDF "refused to take appropriate steps to prevent the [p]laintiffs, as subtenants, from interfering with [landlord's] rights under the Lease." Landlord also alleged cross-defendants refused to defend and indemnify landlord in violation of the lease. In its indemnity cause of action against Omran, landlord alleged Omran breached the guaranty agreement "by failing to prevent [p]laintffs from interfering with [landlord's] rights under the Lease." Finally, in its claim for declaratory relief against both cross-defendants, landlord alleged "cross-defendants are obligated to defend and indemnify [landlord] from any and all losses resulting [from] the claims of [p]laintiffs that are in violation of and seek to interfere with [landlord's] rights under the express terms of the Lease . . . ."

We conclude that the language, "failing to prevent plaintiffs from interfering with [landlord's] rights under the Lease," means that cross-defendants failed to prevent

plaintiffs from suing landlord.[5] In other words, the term "interfering" is landlord's synonym for plaintiffs' act of filing the underlying complaint against landlord. Cross-defendants characterize their alleged conduct as a "failure to *speak out* against the [underlying] lawsuit" (italics added) and repeatedly contend they "could not be compelled to speak out against the [underlying lawsuit]" because they have "a constitutional right not to speak on the propriety of Cal-Murphy's lawsuit." Therefore, in cross-defendants' view, the cross-complaint alleges two failures: cross-defendants' failure to prevent plaintiffs from suing landlord by speaking out against the litigation *and* cross-defendants' failure to defend and indemnify landlord pursuant to the lease and the guaranty agreement.

Even if we accept cross-defendants' characterization of the challenged allegation, cross-defendants' failure to speak does not fall within section 425.16, subdivision (e)(1), which includes "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," nor within section 425.16, subdivision (e)(2), which encompasses "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[.]" Nor can cross-defendants' refusal to speak constitute a "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[.]" (§ 425.16, subd. (e)(3).)

Therefore, cross-defendants can establish the cross-complaint arises from protected activity within the meaning of section 425.16 *only* if they can establish their failure to speak on the propriety of the underlying lawsuit constitutes "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right

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[5] Landlord does not contend the allegations regarding cross-defendants' refusal to interfere with landlord's rights under the lease are incidental or collateral to the other allegations in the cross-complaint. (See, e.g., *Selzter v. Barnes* (2010) 182 Cal.App.4th 953, 962.)

of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) They cannot.

It is well-settled that "[f]iling a lawsuit is an exercise of one's constitutional right of petition, and statements made in connection with or in preparation of litigation are subject to section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 [unfair competition claim arose directly from acts or statements made in connection with environmental litigation]; *Jarrow, supra*, 31 Cal.4th at pp. 734-735 [filing malicious prosecution action]; *Navellier, supra,* 29 Cal.4th at pp. 85-86 [filing of counterclaims in alleged breach of settlement agreement]; *Feldman, supra,* 160 Cal.App.4th at pp. 1479-1480 [cross-complaint was based upon the filing of the unlawful detainer, service of the three-day notice, and alleged threats made in connection with the threatened unlawful detainer]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [litigation update describing the "parties' contentions and court rulings" and "directed to individuals who had some involvement in the parties' litigation"].) This case, however, does not concern cross-defendants' filing of litigation or statements they made in connection with litigation. It concerns something different: the *failure* to speak regarding the filing of litigation. We cannot conclude that cross-defendants' refusal to speak, in this context, is conduct protected by section 425.16. Cross-defendants would expand the conduct listed in section 425.16, subdivision (e)(4) — and recognized in a large body of case law — to include a potentially limitless array of non-actions: keeping silent about contemplated litigation.

Cross-defendants' reliance on *ARP Pharmacy Services, supra*, 138 Cal.App.4th at page 1314, is misplaced. That case concerned Civil Code section 2527 (Section 2527), a statute requiring prescription drug claims processors to provide prescription cost reports to various entities, including insurance companies. (*ARP Pharmacy Services, supra*, at pp. 1312-1313, 1317.) A licensed California pharmacy sued defendant drug claim processors, claiming the drug processors violated Section 2527 by failing to provide the cost reports. (*ARP Pharmacy Services, supra,* at p. 1313.) The trial court granted defendants' motion for judgment on the pleadings, concluding the reporting requirement

was compelled speech in violation of the federal and state Constitutions. (*Ibid*.) The trial court also granted defendants' anti-SLAPP motion. (*Ibid*.)

The Second District Court of Appeal affirmed, concluding the lawsuit arose from the drug claim processors' "refusal to provide pharmacy fee reports to insurers, as required under [S]ection 2527. . . . [T]he reporting requirement of [S]ection 2527 violates drug claims processors' free speech rights under the California Constitution. Their refusal to comply with the compelled speech requirement of the statute is an act in furtherance of [their] right of free speech in connection with an issue of public interest, within the meaning of . . . section 425.16." (*ARP Pharmacy, supra,* 138 Cal.App.4th at pp. 1322-1323.) The court explained that "'[b]ecause speech results from what a speaker chooses to say and what he chooses not to say, the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say.'" (*Id.* at p. 1314, quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491.)

ARP Pharmacy Services is distinguishable for several reasons. First, and in contrast to *ARP Pharmacy Services*, cross-defendants are not alleged to have refused to comply with a *statute* compelling speech. Second, and perhaps more importantly, cross-defendants are not alleged to have refused to speak "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) To be sure, the "constitutional right of free speech includes the right not to speak." (*Kronemyer v. Internet Movie DataBase, Inc.* (2007) 150 Cal.App.4th 941, 947 (*Kronemyer*).) But section 425.16 requires more than just an act in furtherance of a person's right of free speech: it requires speech in connection with a "public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) Even if we assume for the sake of argument that cross-defendants have a constitutional right to remain silent on the propriety of the underlying lawsuit, their anti-SLAPP motions fail because they have failed to demonstrate that the cross-complaint challenges what they characterize as a refusal on their part to speak or a refusal to speak on a public issue or on an issue of public interest. (§ 425.16, subd. (e)(4).)

"A statement or other conduct is made 'in connection with a public issue or an issue of public interest' [citation] 'if the statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic.' [Citation.]" (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677, (*Stewart*).) Other courts have stated the public issue or public interest requirement differently, explaining that "'in each case where it was determined that a public issue existed, "the subject statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation]." [Citation.]' [Citations.]" (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 65 (*City of Irwindale*).)

The issue raised in the cross-complaint — a commercial landlord tenant dispute — "concerns a private matter between [landlord and cross-defendants] that is not a public issue or of public interest." (*City of Irwindale, supra,* 184 Cal.App.4th at pp. 65-66.) We fail to see how the underlying complaint concerns a public issue or an issue of public interest under the guidelines set forth above. (*Stewart, supra,* 181 Cal.App.4th at p. 677.) Under the facts of this case, a dispute about a commercial lease is simply not an issue of public interest. It is "related to what in effect was a private matter." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1135; *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 807; *Kajima, supra,* 95 Cal.App.4th at p. 930; cf. *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 [former church member's action against Church of Scientology constituted a matter of public interest; the church was "a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and assets"].)

We are mindful that "[u]nder section 425.16, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs v. Eden Council*

for Hope & Opportunity (1999) 19 Cal.4th 1106, 1123, original italics, fn. omitted (*Briggs*).) Relying on *Briggs*, cross-defendants claim that their failure to speak out against the underlying lawsuit "need not concern an issue of public importance" because they refused to speak "in connection with civil litigation." (§ 425.16, subd. (e)(1), (2).) We are not persuaded.

In *Briggs*, a nonprofit provider of tenant counseling services, Eden Council for Hope and Opportunity (ECHO), helped several former tenants prosecute small claims actions against the owners of the apartment buildings where the former tenants lived. (*Briggs, supra*, 19 Cal.4th at pp. 1109-1110.) ECHO also helped one former tenant file a complaint against the owners with the Department of Housing and Urban Development (HUD). (*Id.* at p. 1110.) The building owners sued ECHO for defamation, and for intentional and negligent infliction of emotional distress, claiming ECHO helped the former tenants "'institute legal action'" and made allegedly defamatory statements about the owners to the former tenants and to a HUD investigator. (*Id.* at p. 1114.) According to the owners, ECHO employees allegedly referred to one of the owners as a "'racist,'" claimed he was "on a 'witchhunt,'" and called him a "'redneck'" who "'doesn't like women.'" (*Id.* at p. 1110.)

ECHO moved to strike pursuant to section 425.16, subdivisions (e)(1) and (2). (*Briggs, supra,* 19 Cal.4th at pp. 1109, 1111.) The California Supreme noted that the constitutional right to petition included the act of filing litigation or seeking administrative action; the court explained that the owners' claims against ECHO arose from "ECHO's statements or writings made in connection with issues under consideration or review by official bodies or proceedings — specifically, HUD or the civil courts." (*Id.* at p. 1115.) The *Briggs* court therefore held that "a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." (*Id.* at p. 1123, original italics, fn. omitted.)

Briggs does not alter our conclusion. Under *Briggs*, "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. [Citations.]" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) At issue in *Briggs* was section 425.16, subdivisions (e)(1) and (2), which protect statements and writings made "before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" and statements and writings "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. . . ." Here, cross-defendants did not allege — and have not established — their conduct falls within sections 425.16, subdivisions (e)(1) or (2). (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10 [motion to strike was not based on section 425.16, subdivision (e)(2); noting that a party "may not change his theory of the case for the first time on appeal"].) In any event, sections 425.16, subdivisions (e)(1) and (2) do not apply here because cross-defendants are not alleged to have made any written or oral statements before "any type of official proceeding authorized by law," or "in connection with an issue under consideration or review by . . . any [ ] official proceeding authorized by law." (*Ibid.*)

Cross-defendants sometimes characterize the acts giving rise to the cross-complaint as their failure to prevent the filing of the underlying litigation, apparently by refusing to "put pressure on Plaintiff Franchisee [MDF] to drop the suit or influence the outcome of the disputes between the parties." Even if this contention about cross-defendants' refusal to act is accurate and has support in the record, cross-defendants' refusal to pressure MDF or to "influence the outcome of the disputes between the parties" is not protected by section 425.16. The statute repeatedly refers to an "'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue.'" (§ 425.16, subd. (e).) As discussed above, these "acts" include written or oral statements

made in certain settings. (§ 425.16, subds. (e)(1)-(3).) We do not believe a refusal to take action, in this context, is protected under section 425.16, subdivision (e)(4).[6]

Differences between this case and *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17, are instructive. In *Ludwig*, the City of Barstow (City) sued developer Glen Ludwig for unfair competition and other similar claims. (*Id.* at p. 12.) The City alleged that Ludwig — who sought to build a shopping mall in competition with one planned in the City — had induced others to file meritless objections to the project in an attempt to delay or defeat the City's project. (*Id.* at p. 12, fn. 3.) The appellate court determined that Ludwig's actions were communicative conduct protected under section 425.16 because they were taken "'in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law. . . .'" (*Id.*, at p. 17, quoting § 425.16, subd. (e)(2).) Here, and in contrast to *Ludwig*, cross-defendants — by their own account — did not do anything. There was no conduct at all, let alone any communicative conduct. Therefore, we conclude what cross-defendants characterize as their failure to speak out against the filing of the underlying complaint or, alternatively, their refusal to prevent the filing of that complaint, is not protected conduct within the meaning of section 425.16.

Based on the foregoing, we conclude cross-defendants have failed to meet their threshold burden to show the acts alleged in the cross-complaint were in furtherance of their right of petition or free speech in connection with a public issue. (§ 425.16, subd. (e)(4).) Accordingly, we need not determine whether landlord has established a probability of prevailing on the merits.

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[6] It is not enough that the cross-complaint refers to the underlying lawsuit. (See *City of Cotati, supra,* 29 Cal.4th at pp. 77-79.) "To construe 'arising from' in section 425.16, subdivision (b)(1) as meaning 'in response to,' . . . would in effect render all cross-actions potential SLAPP's." (*City of Cotati, supra,* at p. 77; see also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 ["'[a]lthough a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute . . .'"].)

II.

The Award of Attorney Fees Pursuant to Section 425.16, subdivision (c) Must be Reversed

As noted above, the court awarded attorney fees pursuant to section 425.16, subdivision (c) which provides in relevant part that a prevailing party on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." In light of our conclusion that the trial court erred in granting cross-defendants' anti-SLAPP motions, cross-defendants are not prevailing parties under section 425.16, subdivision (c). As a result, cross-defendants are not entitled to attorney fees and costs pursuant to that statute. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137.)

DISPOSITION

The trial court's orders granting cross-defendants' anti-SLAPP motions are reversed. The matter is remanded with directions to vacate the orders and enter new orders denying the motions. The order awarding attorney fees and costs to cross-defendants as prevailing parties pursuant to section 425.16, subdivision (c) is also reversed. Landlord is awarded costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.