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5 IN THE UNITED STATES DISTRICT COURT
6
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8

9 T.T., by and through his guardian ad litem
10 SUSAN T.,

No. C 12-02349 WHA

11 Plaintiff,

12 v.

13 COUNTY OF MARIN,

14 Defendant.

**ORDER GRANTING IN PART
AND DENYING IN PART ANTI-
SLAPP MOTION TO STRIKE
AND AWARDING ATTORNEY'S
FEES**

15 COUNTY OF MARIN,

16 Counterclaimant,

17 v.

18 T.T., by and through his
19 guardian ad litem SUSAN T.; SUSAN
20 TIMMEL; JESSICA WELCH;
21 COLLEEN A. SNYDER; CHRISTIAN
M. KNOX; F. RICHARD
RUDERMAN; PAULA SOLOMON
and RUDERMAN & KNOX, LLP,

22 Counterclaim Defendants.
23

24 **INTRODUCTION**

25 In this action to enforce an administrative judgment in favor of a special-needs student,
26 plaintiff moves to strike defendant's counterclaims for fraud, false claims, and breach of
27 contract. For the reasons explained below, the motion is **GRANTED IN PART** and **DENIED IN**
28 **PART.**

STATEMENT

Plaintiff T.T. is a special-needs student who filed a Individuals with Disabilities Education Act “due process” complaint against the Novato Unified School District and defendant County of Marin before the Office of Administrative Hearings for the State of California in August of 2011. The due process complaint alleged that Novato and the County had failed to provide T.T. an appropriate education given his disability. Plaintiff settled the complaint with Novato, but not the County, in November of 2011.

The settlement agreement between plaintiff and Novato provided that Novato would reimburse plaintiff \$82,000 for educational costs for the 2011-2012 and 2012-2013 school years. The settlement agreement defined the parties as “Jessica Welch . . . individually and on behalf of her son” T.T., and Novato; the County is not explicitly named in the settlement agreement. The settlement agreement also released “all claims” related to the dispute between the parties, including Novato’s “past and present officials, employees, trustees, successors, predecessors, assigns, agents, attorneys, consultants, affiliates and representatives” (Dkt. No. 60-1 at 3–4). Following settlement, Novato was dismissed from the due process action.

Plaintiff subsequently pursued his due process claim against the County before the OAH. The due process complaint before the OAH sought, *inter alia*, declaratory and compensatory relief for the County’s alleged failure to provide appropriate education for the 2009–2010 through 2010–2011 school years (Dkt. No. 73-2 at 10).

Outside of the OAH proceedings, the County contended that OAH did not have subject-matter jurisdiction in the matter due to a line-item veto by the governor of the relevant statute in October 2010, a state court decision in March 2011 (not involving plaintiff), and a July 2011 memorandum of understanding with Novato. The County also contended that OAH did not have personal jurisdiction over the county because it had not been properly served with the complaint. The County did not, however, assert these contentions in front of OAH. The County refused to participate in the OAH proceeding in any way, refusing, for example, to make a special appearance to contest jurisdiction. OAH was apparently apprised of the County’s arguments by plaintiff, who submitted letters from defendant’s counsel to the ALJ. During the OAH hearing,

1 the ALJ arranged for the County to be contacted via telephone; the County confirmed during that
2 phone call that it did not intend to appear at the hearing.

3 OAH held that it had subject-matter and personal jurisdiction over the absent defendant
4 and awarded plaintiff \$41,000 as compensation for, *inter alia*, the County's failure to provide
5 appropriate education *prior to its responsibilities being extinguished by the line-item veto*. OAH
6 also held that there was no risk of a double recovery because the OAH judgment and the
7 settlement with Novato covered different educational expenses. The County did not appeal the
8 OAH judgment.

9 In February 2012, plaintiff's counsel sent the County a demand letter seeking to enforce
10 the judgment and requesting prevailing party attorney's fees. Following expiration of the
11 County's window to appeal the OAH decision, plaintiff filed suit in this district to enforce the
12 OAH judgment under 20 U.S.C. 1415(i)(3) . In September (as amended in November), the
13 County filed counterclaims for fraud, for filing a false claim under the California False Claims
14 Act, and for breach of contract.

15 With respect to the latter, the County contends that it was an intended third-party
16 beneficiary of the settlement with Novato, and that the OAH suit therefore breached the claims
17 release. The County asserts this breach-of-contract claim against plaintiff, plaintiff's mother,
18 and plaintiff's grandmother.

19 The County also contends that the counterclaim defendants made false statements during
20 the OAH hearing, and that these statements constitute fraud. The County asserts this claim for
21 fraud against plaintiff, plaintiff's mother and grandmother, plaintiff's counsel and their law firm,
22 and plaintiff's expert witness in the OAH proceeding.

23 The County further contends that because of the allegedly false statements during the
24 OAH proceeding, the letter demanding reimbursement based on the OAH judgment "was based
25 upon false information" (Amd. Counterclaim ¶ 40) and therefore constitutes a false claim under
26 the CFCA. There is no contention that plaintiff's counsel misrepresented the OAH judgment
27 itself or the amount of attorney's fees due in the demand letter. The County asserts the CFCA
28 claim against plaintiff, the mother and grandmother, and plaintiff's counsel and their law firm.

1 The County further contends that the instant action is part of plaintiff’s “continued
2 attempt to defraud the County of Marin with . . . false claims” (*id.* ¶ 41). This allegation is
3 incorporated by reference into the County’s counterclaim for fraud, but is not incorporated into
4 the CFCA claim. (*id.* ¶¶ 41, 43, 58).

5 Plaintiff moves to dismiss the counterclaims and moves to strike the counterclaims under
6 California’s Anti-SLAPP statute, and requests attorney’s fees and costs. Following full briefing
7 and oral argument, plaintiff’s motion as to the counterclaim for breach of contract is **DENIED**,
8 and plaintiff’s motions as to the fraud and CFCA counterclaims is **GRANTED**. Plaintiff’s request
9 for attorney’s fees and costs with respect to the fraud and CFCA counterclaims is **GRANTED**.

10 At oral argument, the County reiterated that the OAH proceeding did not have
11 jurisdiction over the County. The County does not, however, request any relief on this basis at
12 present and the parties have not briefed the issue. This dispute remains to be addressed, if at all,
13 another day.

14 ANALYSIS

15 A “strategic lawsuit against public participation” — otherwise known as a “SLAPP suit”
16 — is a “meritless suit filed primarily to chill the defendant’s exercise of First Amendment
17 rights.” *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 783 (1996).
18 California Code of Civil Procedure Section 425.16(b)(1) — the “anti-SLAPP” statute — allows
19 defendants to strike any cause of action “arising from any act of that person in furtherance of the
20 person’s right of petition or free speech under the United States Constitution or the California
21 Constitution in connection with a public issue.” Section 425.16(e)(1) defines “act in furtherance
22 of a person’s right to petition or free speech” as “any written or oral statement made before a
23 legislative, executive, or judicial proceeding, or any other official proceeding authorized by
24 law.”

25 The analysis under the anti-SLAPP statute is two-pronged. *First*, the party moving to
26 strike must make a threshold showing that the challenged claim was one arising from “protected
27 activity.” *Second*, if the moving party is able to do so, the burden shifts to opposing party to
28

1 make a prima facie showing of facts that would support a judgment in their favor if proved at
2 trial. *Vargas v. City of Salinas*, 46 Cal. 4th 1, 14 (2009).

3 “Special procedural rules apply where an anti-SLAPP motion is brought in federal
4 court.” *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*, 448 F. Supp. 2d 1172, 1180
5 (C.D. Cal. 2006) (Judge Cormac Carney). This is because the anti-SLAPP burden-shifting
6 analysis must comply with the Federal Rules:

7 § 425.16 applies in federal court. However, it cannot be used in a manner
8 that conflicts with the Federal Rules. This results in the following
9 outcome: If a defendant makes a special motion to strike based on alleged
10 deficiencies in the plaintiff’s complaint, the motion must be treated in the
11 same manner as a motion under Rule 12(b)(6) except that the attorney’s
fee provision of § 425.16(c) applies. If a defendant makes a special
motion to strike based on the plaintiff’s alleged failure of proof, the
motion must be treated in the same manner as a motion under Rule 56
except that again the attorney’s fees provision of § 425.16(c) applies.

12 *Carr v. Asset Acceptance, LLC*, No. 11-890, 2011 WL 3568338 *3 (E.D. Cal. Aug.12, 2011)
13 (Judge Lawrence O’Neill) (quoting *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973,
14 983 (C.D. Cal. 1999) (Judge Dean Pregerson). “If a defendant makes an anti-SLAPP motion
15 based on the plaintiff’s failure to submit evidence to substantiate its claims, the motion is treated
16 as a motion for summary judgment, and discovery must be developed sufficiently to permit
17 summary judgment under Rule 56. *Bautista v. Hunt & Henriques*, No. 11-4010, 2012 WL
18 160252, at *3–4 (N.D. Cal. Jan. 17, 2012) (Magistrate Judge Joseph Spero) (citing *Bulletin*
19 *Displays*, 448 F. Supp. 2d at 1180, and *In re Bah*, 321 B.R. 41, 45 n.6 (9th Cir. 2005)).

20 Although the parties have submitted evidentiary materials their opposition and reply
21 papers, plaintiff’s motion to strike focuses on the sufficiency of the pleadings. Thus, this order
22 construes plaintiff’s motion to strike as a motion under Rule 12(b)(6). This order now turns to
23 the two prongs of analysis.

24 **1. THE CHALLENGED CLAIMS ARISE FROM PROTECTED ACTIVITY**

25 Plaintiff first has the burden of showing that the County’s counterclaims for relief arise
26 out of activity protected by Section 425.16. In the anti-SLAPP context, the critical point is
27 whether the County’s counterclaims for relief are based on an act in furtherance of plaintiff’s
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1 right of free speech. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002). Acts in furtherance
2 of a person's right of petition or free speech include:

3 (1) any written or oral statement or writing made before a
4 legislative, executive, or judicial proceeding, or any other official
proceeding authorized by law;

5 (2) any written or oral statement or writing made in connection
6 with an issue under consideration or review by a legislative,
executive, or judicial body, or any other official proceeding
7 authorized by law;

8 Cal. Civ. Proc. Code § 425.16(e). A claim for relief arising from a party's litigation activity may
9 appropriately be the subject of a Section 425.16 motion to strike. *Church of Scientology v.*
10 *Wollersheim*, 42 Cal. App. 4th 628, 648 (1996). Acts in furtherance of free speech or the right of
11 petition further include "communicative conduct such as the filing, funding, and prosecution of a
12 civil action." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2005) (holding that a creditor's actions
13 taken in collecting a judgment constituted communicative conduct in furtherance of the right of
14 petition).

15 This order holds that all three of the County's counterclaims are based on acts in
16 furtherance of plaintiff's right of free speech. The breach-of-contact counterclaim arises out of
17 plaintiff's act of prosecuting his due process complaint against the County (Amd. Counterclaim ¶
18 56). The fraud counterclaim arises out of plaintiff's representations during the OAH action (*id.*
19 ¶¶ 60–61). The CFCA counterclaim arises out of plaintiff's demand letter requesting
20 reimbursement under the OAH judgment and prevailing party attorney's fees (*id.* ¶ 45). These
21 acts are indisputably part of plaintiff's litigation activity.

22 The County contends that plaintiff's actions are not protected because the counterclaims
23 are based on illegal activity. This contention is devoid of merit. The County does not point to
24 any allegedly illegal activity other than plaintiff's actions in connection with prosecuting its
25 claim. Instead, the County makes a circular and conclusory allegation that its "claims for fraud,
26 false claims act violations and breach of contract, are based on [plaintiff's] illegal fraudulent
27 conduct to obtain monies from the County" (Opp. 9).
28

1 The County's contentions that that the due process complaint was pursued despite an
2 alleged lack of subject-matter jurisdiction and despite the release in the settlement agreement are
3 irrelevant to defining the underlying activity.

4 **2. THE COUNTY'S ABILITY TO PREVAIL ON ITS CLAIMS**

5 On the second prong of the anti-SLAPP analysis,

6 [o]nce it is determined that an act in furtherance of protected
7 expression is being challenged, the plaintiff must show a
8 reasonable probability of prevailing in its claims for those claims
9 to survive dismissal. To do this, the plaintiff must demonstrate
10 that the complaint is legally sufficient and supported by a *prima*
11 *facie* showing of facts to sustain a favorable judgment if the
12 evidence submitted by the plaintiff is credited. This burden is
much like that used in determining a motion for nonsuit or directed
verdict, which mandates dismissal when no reasonable jury could
find for the plaintiff. Thus, a defendant's anti-SLAPP motion
should be granted when a plaintiff presents an insufficient legal
basis for the claims or when no evidence of sufficient
substantiality exists to support a judgment for the plaintiff.

13 *Metabolife Intern., Inc. v. Wornick*, 264 F. 3d 832, 840 (9th Cir. 2001) (quotation marks
14 omitted). This rule will now be applied to the record on this motion.

15 **A. The County's Counterclaims Are Not Precluded**

16 Plaintiff contends that the County cannot prevail on any of its three counterclaims
17 because these claims are precluded. Plaintiff asserts that defendant's counterclaims are
18 precluded because County has waived them or is estopped from asserting them because it failed
19 to appear at the OAH proceeding or appeal that decision. "California . . . accords collateral
20 estoppel effect to default judgments, at least where the judgment contains an express finding on
21 the allegations." *Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 924 (9th Cir. 2008). One of the
22 threshold requirements for collateral estoppel under California law, however, is that "the issue
23 sought to be precluded from relitigation must be identical to that decided in a former
24 proceeding." *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990).

25 This order therefore finds that the County is not precluded from asserting its three
26 counterclaims in this action, at least on this record. Plaintiff asserts in conclusory fashion that
27 "[e]ach of the County's three claims require the Court to unseat the findings by the OAH" (Dkt.
28 No. 72 at 7). Plaintiff does not establish — on a claim by claim basis — that the issues sought to

1 be precluded are identical to issues decided at the OAH proceeding. For example, plaintiff does
2 not establish that the OAH proceeding resolved the questions of whether the County is a third-
3 party beneficiary to the settlement agreement, nor whether plaintiff made representations to the
4 OAH in furtherance of an organized fraud. Moreover, the County's counterclaim under the
5 CFCA for submission of the post-judgment demand letter is necessarily outside the scope of the
6 issues decided at the OAH proceeding, and thus cannot be precluded.

7 **B. The County's Breach-of-Contract Counterclaim**

8 Turning to the proceedings in this action, Plaintiff contends that County was neither a
9 third-party beneficiary of the settlement agreement with Novato, nor was intended to be a third-
10 party beneficiary by the parties. This contention goes to the merits of the County's breach-of-
11 contract claim. Being outside the pleadings, this contention would more properly be raised on a
12 motion for summary judgment and this order declines to rule on the issue at the Rule 12(b)(6)
13 stage.

14 Plaintiff asserts that the County's breach-of-contract counterclaim is barred by the
15 litigation privilege. This order disagrees. Determining the scope of the litigation privilege is
16 similar to the anti-SLAPP analysis above regarding whether the target of a claim arises out of a
17 protected activity. California Civil Code § 47(b), provides that:

18 A privileged publication or broadcast is one made in any (1)
19 legislative proceeding, (2) judicial proceeding, (3) in any other
20 official proceeding authorized by law, or (4) in the initiation or
course of any other proceeding authorized by law.

21 Regarding a claim for breach of contract:

22 [W]hether the litigation privilege applies . . . turns on whether its
23 application furthers the policies underlying the privilege. . . .
24 [T]he purpose of the litigation privilege is to ensure free access to
the courts, promote complete and truthful testimony, encourage
zealous advocacy, give finality to judgments, and avoid unending
litigation.

25 *Wentland v. Wass*, 126 Cal. App. 4th 1484, 1492 (2005). Where the communication at issue is a
26 separate promise independent of the litigation, however, the litigation privilege may not apply.
27 *See id.* at 1495.

1 The County seeks to enforce a separate promise independent of the litigation: a release
2 provision. After weighing the public policy interests, this order concludes that the litigation
3 privilege should not apply here because otherwise any effort to enforce an otherwise valid
4 litigation release could be hamstrung by invocation of the litigation privilege.

5 Based on the pleadings, this order also holds that the County has pled a barely-plausible
6 counterclaim for breach of contract. The elements of a breach of contract claim are: (1)
7 existence of the contract, (2) performance by the plaintiff or excuse for nonperformance, (3)
8 breach by the defendant, and (4) damages. *Tom Trading, Inc. v. Better Blue, Inc.*, 26 Fed. Appx.
9 733, 735 (9th Cir. 2002). The counterclaim alleges the existence of a contract between plaintiff
10 and Novato to which the County is allegedly a third-party beneficiary (Amd. Counterclaim. ¶
11 52). This allegation is supported by other facts alleged in the complaint: the settlement
12 agreement released claims against Novato's agents, representatives, and consultants, and by
13 virtue of a memorandum of understanding with Novato, County was such an agent,
14 representative, and consultant for these purposes (*id.* ¶¶ 26–27). The counterclaim asserts that
15 plaintiff breached by continuing its suit against the County following the agreement (*id.* ¶ 56).
16 The counterclaim also alleges damages from the claim for reimbursement (*id.* ¶ 67).

17 These allegations are sufficient at the pleading stage. Accordingly, the County has
18 established an ability to prevail on its counterclaim for the purposes of Rule 12(b)(6) and
19 plaintiff's anti-SLAPP motion is **DENIED** as to this claim. This should not, however, be taken as
20 a ruling that the County's counterclaim is likely to survive a motion for summary judgment.

21 C. The County's Fraud Counterclaim

22 The County's counterclaim for fraud is a different story. This counterclaim does not
23 follow the more common path of seeking to set aside a prior judgment on the grounds that it was
24 procured by fraud. Rather, the County seeks to recover money in tort from the speakers
25 themselves based entirely on representations made during the OAH proceedings (Amd.
26 Counterclaim ¶¶ 60–61). These representations fall squarely within the realm of
27 communications protected by the litigation privilege. Accordingly, this order holds that the
28 County cannot establish a probability that it will prevail on this counterclaim.

1 To the extent that the fraud counterclaim could be interpreted to apply to statements
2 made to enforce the OAH judgment, the California Supreme Court has explicitly held that the
3 litigation privilege applies to actions taken in collecting a judgment. *Rusheen v. Cohen*, 37 Cal.
4 4th 1048, 1058 (2005). Extending the litigation privilege to post-judgment activities is
5 consistent with the litigation privilege’s policy of giving litigants and witnesses free access to the
6 courts and promoting finality in judgments. *Id.* at 1063.

7 The County attempts at length to substantiate the elements of its fraud claim but does not
8 address the application of the litigation privilege. Moreover, even if the County had attempted to
9 salvage this counterclaim, the counterclaim complaint plainly fails to plead the fraud
10 counterclaim with particularity under Federal Rule 9(b). For example, although the County lists
11 a series of sixteen allegedly fraudulent misrepresentations (the vast majority of which are
12 actually legal contentions), the County fails to identify which of the eight fraud counterclaim
13 defendants made which representation.

14 The motion to strike the fraud counterclaim is **GRANTED**.

15 **D. The County’s CFCA Counterclaim**

16 The parties dispute whether the litigation privilege applies to the County’s CFCA
17 counterclaim given the factual circumstances of this dispute. It is not necessary to resolve this
18 issue because there is a more fundamental problem with this counterclaim.

19 Under Section 12651(a)(1) of the CFCA, liability falls on any person who “knowingly
20 presents or causes to be presented a false or fraudulent claim for payment or approval.” Here,
21 plaintiff’s attorneys clearly submitted a “claim” to the County in the form of the demand letter
22 requesting payment under the OAH judgment and attorney’s fees. The problem is that there is
23 no contention that the claim itself was “false.” The County does not allege that the demand letter
24 misstated the OAH judgment or the amount of attorney’s fees due. Construing the awkwardly-
25 written pleading favorably to the County, the counterclaim alleges that the demand letter was
26 based on a “false record.” In other words, the County is asserting that plaintiff made false
27 statements at the OAH proceeding, and that the OAH judgment that plaintiff seeks to enforce is
28 “based on” false information.

1 The County does not cite any authority that interprets the CFCA to apply to an *accurate*
2 claim to enforce a judgment where the recipient disagrees with an underlying factual finding.
3 Indeed, it would be bizarre if the government could collaterally attack any attempt to enforce a
4 judgment — with the threat of treble damages — because it alleged that the prevailing party
5 made a false factual statement at the earlier proceeding. This is especially true where, as here,
6 the County defaulted on the earlier proceeding by failing to appear.

7 The County has failed to plead a plausible claim under the CFCA. Plaintiff's motion to
8 strike is **GRANTED**.

9 **CONCLUSION**

10 Plaintiff's anti-SLAPP motion to strike as to the County's counterclaims under the CFCA
11 and for fraud is **GRANTED**. Plaintiff's motion to strike as to the County's counterclaim for
12 breach of contract is **DENIED**. Plaintiff is awarded attorney's fees pursuant to California Civil
13 Procedure Code Section 427.16(c). Plaintiff may only recover for attorney's fees and costs
14 incurred in defending against the County's CFCA and fraud counterclaims. The parties must
15 follow the procedure set out in the accompanying order.

16 Because it was unnecessary to rely on the lodged materials to reach the conclusions
17 above, plaintiff's request for judicial notice **DENIED AS MOOT**

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19
20 **IT IS SO ORDERED.**

21
22 Dated: January 25, 2013.

23 
24 _____
25 WILLIAM ALSUP
26 UNITED STATES DISTRICT JUDGE
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