

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CATLIN INSURANCE COMPANY, INC.,
Plaintiff,
v.
DANKO MEREDITH,
Defendant.

Case No. [20-cv-01345-HSG](#)

ORDER DENYING MOTION TO STRIKE AND GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 21

Pending before the Court is Defendant Danko Meredith’s motion to strike and motion to dismiss. Dkt. No. 21. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b). For the reasons detailed below, the Court **DENIES** the motion to strike and **GRANTS IN PART** and **DENIES IN PART** the motion to dismiss.

I. BACKGROUND

Plaintiff Catlin Insurance Company, Inc. filed this action on February 21, 2020, to recover a duplicative settlement payment. Dkt. No. 1. Plaintiff subsequently amended the complaint. See Dkt. No. 14 (“FAC”). Plaintiff alleges that it inadvertently made two settlement payments in connection with an underlying lawsuit in California state court.

Following a plane crash in July 2012, Defendants represented the heirs of one of the decedents in a wrongful death action against Able Air Corporation, an aircraft maintenance facility. See FAC at ¶ 4; see also Dkt. No. 21-1 (“Danko Decl.”) at ¶ 2. Plaintiff provided liability insurance coverage for Able Air to defend itself in the litigation. See Dkt. No. 24 (“Breitenbach Decl.”) at ¶ 3. In October 2017, Able Air settled with one of the heirs, LaVerne Boolen. See *id.* at ¶ 9. The settlement was memorialized in a written agreement, dated March 5, 2018. See *id.*; Dkt.

1 No. 25 (“Hanson Decl.”), Ex. A. In the agreement, Ms. Boolean agreed to release all claims against
2 Able Air and Plaintiff for \$180,000. *See* Hanson Decl., Ex. A. Plaintiff alleges that on April 30,
3 2018, it wired the settlement payment in the amount of \$180,000 to Defendant’s trust account, and
4 that two days later, on May 2, 2018, it accidentally sent Defendant a duplicative settlement check,
5 also in the amount of \$180,000. *See* FAC at ¶¶ 10–11. Plaintiff further alleges that Defendant
6 was aware of this duplicate payment, but said nothing. *See id.* at ¶¶ 12–14. Plaintiff only
7 discovered the duplicative payment over a year later, on July 5, 2019. *See id.* at ¶ 15. Plaintiff
8 alleges that Plaintiff informed Defendant of the mistake, and requested its assistance with
9 returning the overpayment. *See id.* at ¶¶ 16–17. However, Defendant refused to return the funds.
10 *See id.* at ¶¶ 18–19. Based on these facts, Plaintiff brings three causes of action against Defendant
11 based on this duplicative payment: (1) unjust enrichment; (2) conversion; and (3) breach of
12 fiduciary duty. *See* FAC at ¶¶ 22–34.

13 In response, Defendant contends that after Able Air settled with Ms. Boolean, the
14 underlying action proceeded to trial on behalf of the remaining heirs. *See* Danko Decl. at ¶ 7. The
15 jury returned a defense verdict, though the heirs indicated that they would appeal. *Id.* In February
16 2019, the parties entered into a global settlement agreement, including Ms. Boolean and the other
17 heirs, Able Air, and Plaintiff. *See* Danko Decl. at ¶ 8; *see also id.*, Ex. E (“Mutual Waiver
18 Agreement”). In the Mutual Waiver Agreement, the heirs agreed to waive their rights to appeal
19 the judgment and any post-trial litigation arising from the jury trial and plane crash. *See id.*, Ex. E
20 at 1–2. The parties also agreed that the agreement constituted “a full and final and complete
21 waiver and discharge of all claims of every sort and nature” resulting from matters litigated in the
22 jury trial and from the plane crash, and that the parties would be “responsible for their own past,
23 present and future attorney fees, costs and liens.” *Id.* at 2. Defendant urges that Plaintiff’s current
24 action to recover the duplicative settlement payment is not only barred by this Mutual Waiver
25 Agreement, but also that this action is predicated on protected activity and thus triggers
26 California’s anti-SLAPP statute, Cal. Civ. P. Code § 425.16. *See generally* Dkt. No. 21.
27 Defendant now moves to strike the amended complaint under California’s anti-SLAPP statute, or
28 in the alternative to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

1 **II. LEGAL STANDARD**

2 **A. Motion to Strike**

3 Under California’s anti-SLAPP statute, “[a] cause of action against a person arising from
4 any act of that person in furtherance of the person’s right of petition or free speech under the
5 United States or California Constitution in connection with a public issue shall be subject to a
6 special motion to strike, unless the court determines that the plaintiff has established that there is a
7 probability that the plaintiff will prevail on the claim.” Cal. Civ. P. Code § 425.16. The statute
8 was enacted to curtail “strategic lawsuits against public participation,” that were “brought
9 primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition
10 for redress of grievances.” *Id.* § 425.16(a). Because “it is in the public interest to encourage
11 continued participation in matters of public significance, and [because] this participation should
12 not be chilled through abuse of the judicial process,” the anti-SLAPP statute is to be construed
13 broadly. *Id.*

14 California courts apply a two-step process for analyzing an anti-SLAPP motion. *Hilton v.*
15 *Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010). Under the first prong, the moving party must
16 make “a threshold showing . . . that the act or acts of which the plaintiff complains were taken ‘in
17 furtherance of the right of petition or free speech under the United States or California
18 Constitution in connection with a public issue,’ as defined in the statute.” *Equilon Enters., LLC v.*
19 *Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002) (quoting Cal. Civ. P. Code § 425.16(b)(1)).
20 If the moving party meets its threshold showing, then the burden shifts to the non-moving party to
21 prove a probability of prevailing on the claim. *See id.* at 67.¹

22
23 ¹ Since 1999, the Ninth Circuit has determined that the motion to strike and attorneys’ fees
24 provisions of California’s anti-SLAPP statute, Cal. Civ. P. Code § 425.16(b)–(c), are available in
25 federal court because there is no “direct collision with the Federal Rules.” *See U.S. ex rel.*
26 *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (quotation
27 omitted). Yet a number of judges have questioned this holding. *See, e.g., Travelers Cas. Ins. Co.*
28 *of Am. v. Hirsh*, 831 F.3d 1179, 1182–86 (9th Cir. 2016) (Kozinski, J., concurring); *id.* at 1186
(Gould, J., concurring); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274–75 (9th Cir. 2013)
(Kozinski, J., concurring); *see also id.* at 275–76 (Paez, J., concurring); *cf. Abbas v. Foreign*
Policy Grp., LLC, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015) (rejecting application of District of
Columbia’s anti-SLAPP statute in federal court). The Court applies the statute in this case as
required by binding case law, but shares the concern that this interpretation of the statute “vastly
understates the disruption when federal courts apply the California anti-SLAPP statute,”

1 **B. Motion to Dismiss**

2 Under Federal Rule of Civil Procedure 12(b)(6), the Court must dismiss a complaint if it
3 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
4 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
5 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard
6 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
7 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court accepts as true a
8 plaintiff’s well-pleaded factual allegations and construes all factual inferences in the light most
9 favorable to the plaintiff. *Id.* However, a plaintiff must provide “more than labels and
10 conclusions.” *Twombly*, 550 U.S. at 555. The Court does not credit allegations that are
11 conclusory, unwarranted deductions of fact, or unreasonable inferences. *Kwan v. SanMedica Int’l*,
12 854 F.3d 1088, 1096 (9th Cir. 2017).

13 **III. DISCUSSION**

14 **A. Motion to Strike**

15 As noted above, to be subject to an anti-SLAPP motion, the cause of action must arise
16 from an act “in furtherance of the person’s right of petition or free speech under the United States
17 Constitution or the California Constitution in connection with a public issue.” Cal. Civ. P. Code
18 § 425.16(b). Subdivision (e) delineates the four types of acts that constitute a protected “act in
19 furtherance of a person’s right of petition or free speech.” Cal. Civ. P. Code § 425.16(e). These
20 include, as relevant here, “(2) any written or oral statement or writing made in connection with an
21 issue under consideration or review by a legislative, executive, or judicial body, or any other
22 official proceeding authorized by law” *Id.* The statute “shall be construed broadly” to
23 safeguard “the valid exercise of the constitutional rights of freedom of speech and petition for the
24 redress of grievances.” Cal. Civ. P. Code § 425.16(a). Here, Defendant contends that Plaintiff’s
25 allegations concern the underlying wrongful death action and the parties’ settlement discussions,
26 including the Mutual Waiver Agreement. *See* Dkt. No. 21 at 9–14. As such, Defendant argues

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28 particularly as it interacts with Rule 12 and its plausibility standard. *See Makaeff*, 715 F.3d at 274
(Kozinski, J., concurring).

1 that they arise from protected litigation-related activities.

2 Courts have found that “[a] settlement agreement executed in the context of active
3 litigation is made in connection with an issue under consideration or review by a . . . judicial
4 body.” *See O&C Creditors Grp., LLC v. Stephens & Stephens XII, LLC*, 42 Cal. App. 5th 546,
5 566 (Cal. Ct. App. 2019), *as modified* (Dec. 17, 2019) (quotation omitted). However, “[t]o
6 determine whether a claim meets the ‘arising from’ requirement of the anti-SLAPP statute,
7 [courts] consider the principal thrust or gravamen of a plaintiff’s cause of action.” *O&C*
8 *Creditors*, 42 Cal. App. 5th at 613–14. A defendant must “demonstrate that the *defendant’s*
9 *conduct by which plaintiff claims to have been injured* falls within one of the four categories
10 described in subdivision (e)” *Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th
11 1057, 1063 (Cal. 2017) (quotation omitted) (emphasis in original). “Allegations of protected
12 activity that merely provide context, without supporting a claim for recovery, cannot be stricken
13 under the anti-SLAPP statute.” *Baral v. Schnitt*, 1 Cal. 5th 376, 394 (Cal. 2016). As the
14 California Supreme Court has explained:

15 [A] claim is not subject to a motion to strike simply because it contests
16 an action or decision that was arrived at following speech or
17 petitioning activity, or that was thereafter communicated by means of
18 speech or petitioning activity. Rather, a claim may be struck only if
19 the speech or petitioning activity itself is the wrong complained of,
and not just evidence of liability or a step leading to some different
act for which liability is asserted.

20 *Park*, 2 Cal. 5th at 1060. “In short, in ruling on an anti-SLAPP motion, courts should consider the
21 elements of the challenged claim and what actions by the defendant supply those elements and
22 consequently form the basis for liability.” *Id.* at 1063.

23 The Court finds that this action does not arise from protected activity, with the
24 consequence that the motion to strike must be denied. Although Plaintiff’s complaint references
25 the underlying litigation and settlement agreements, those facts simply provide context for the
26 inadvertent \$180,000 payment, and explain Plaintiff’s theory as to why it is wrongful for
27 Defendant to retain double the agreed-upon settlement amount. The retention of a duplicate
28 payment sent by mistake is not protected activity. *Cf. Old Republic Constr. Program Grp. v. The*

1 *Boccardo Law Firm, Inc.*, 230 Cal. App. 4th 859, 870 (Cal. Ct. App. 2014) (“[M]erely citing a
2 settlement agreement as the basis for a duty allegedly breached by the defendant is not enough, by
3 itself, to bring a cause of action for the breach within the statute.”). “If the protected status of an
4 underlying agreement furnished sufficient ground to invoke the anti-SLAPP statute against a claim
5 for breach of that agreement, it would follow that every suit to enforce a settlement agreement
6 would be subject at the threshold to a SLAPP motion.” *Id.* It is also clear that Plaintiffs are not in
7 any way challenging the formation of the settlement agreement or the Mutual Waiver Agreement.
8 It would be an unjust distortion of the principles underlying the anti-SLAPP statute to read them
9 as Defendant urges, and the Court will not do so.

10 Because the Court finds that Defendant has failed to establish that Plaintiff’s causes of
11 action arise from protected activity, the Court need not address whether Plaintiff has established a
12 probability of prevailing on the merits.

13 **B. Motion to Dismiss**

14 Although Defendant does not proffer any distinct arguments, it states that it also moves to
15 dismiss Plaintiff’s claims under Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. No. 21 at 2.
16 Defendant contends that all three of Plaintiff’s causes of action are barred by California’s litigation
17 privilege, Cal. Civ. Code § 47(b), and that Plaintiff’s claims also fail because Defendant does not
18 owe Plaintiff a duty.

19 **i. Litigation Privilege**

20 “[T]he [litigation] privilege [in California] applies to any communication (1) made in
21 judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law;
22 (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to
23 the action.” *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (Cal. 1990). The litigation privilege also
24 applies to statements made by counsel during settlement negotiations. *See Downing v.*
25 *Zimmerman*, 85 Cal. App. 4th 1400, 1422 (Cal. Ct. App. 2001).

26 Defendant notes that the protections under the litigation privilege are co-extensive with the
27 anti-SLAPP statute, as both are intended to protect litigants’ rights to access the courts without
28 fear of reprisal. *See* Dkt. No. 21 at 15. But as already discussed, Plaintiff’s claims do not arise out

1 of any communications related to the underlying state court action. The litigation privilege is thus
2 inapplicable to Plaintiff’s causes of action in this case.

3 **ii. Fiduciary Duty**

4 Defendant urges that it had no duty to protect Plaintiff’s interests as an adverse party. *See*
5 Dkt. No. 21 at 16. Yet only Plaintiff’s breach of fiduciary duty claim requires the existence of a
6 duty between Plaintiff and Defendant. The elements of a cause of action for breach of fiduciary
7 duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by
8 that breach. *See Knox v. Dean*, 205 Cal. App. 4th 417, 432–33 (Cal. Ct. App. 2012). Plaintiff
9 alleges that Defendant “owed a fiduciary duty to Plaintiff because lawyers owe trust accounting
10 duties for all funds the lawyer or law firm receives or holds for the benefit of another.” *See* FAC
11 at ¶ 31.

12 In support of its contention that Defendant had a fiduciary relationship with Plaintiff when
13 Plaintiff sent it the settlement funds, Plaintiff cites several cases involving disciplinary
14 proceedings before the California State Bar. In *Johnstone v. State Bar*, for example, the California
15 Supreme Court explained that “[w]hen an attorney receives money on behalf of a third party who
16 is not his client, he nevertheless is a fiduciary as to such third party.” *Johnstone v. State Bar*, 64
17 Cal. 2d 153, 155 (Cal. 1966); *see also Crooks v. State Bar*, 3 Cal. 3d 346, 358 (Cal. 1970) (holding
18 that lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the
19 nonclient with regard to held funds). Critically, however, none of these cases involved adverse parties.
20 Plaintiff does not cite—and the Court is not aware—of any authorities that hold that a party has a
21 fiduciary relationship with an adverse party, or with an adverse party’s counsel, based solely on the
22 exchange of a settlement payment. The Court finds that Plaintiff has therefore failed to establish the
23 existence of a fiduciary relationship between Plaintiff and Defendant.

24 The Court accordingly **GRANTS** the motion to dismiss as to Plaintiff’s fiduciary duty claim,
25 but **DENIES** the motion as to Plaintiff’s remaining causes of action. Given the inarguable nature of
26 the relationship between Plaintiff and Defendant, the Court finds that Plaintiff could not cure the
27 defects in its fiduciary duty claim by alleging more facts. The Court therefore dismisses
28 Plaintiff’s fiduciary duty claim without leave to amend. *See Chaset v. Fleer/Skybox Int’l, LP*, 300

1 F.3d 1083, 1088 (9th Cir. 2002) (finding that because plaintiff cannot “cure the basic flaw” in the
2 pleading, “any amendment would be futile,” and “there is no need to prolong litigation by
3 permitting further amendment”).

4 **IV. CONCLUSION**

5 Accordingly, the Court **DENIES** the motion to strike; **GRANTS IN PART** the motion to
6 dismiss without leave to amend as to Plaintiff’s fiduciary duty claim; and otherwise **DENIES** the
7 motion to dismiss in its entirety. The Court notes that Defendant does not appear to dispute that it
8 received the inadvertent double-dip settlement payment, but advances a theory apparently
9 premised in significant part on the venerable legal principle of “finders, keepers.” The Court
10 urges the parties to consider whether they can resolve this matter between themselves without
11 further litigation.

12 The Court also **SETS** a telephonic case management conference on March 16, 2021, at
13 2:00 p.m. All parties, counsel, and members of the public and press may use the following dial-in
14 information below to access the conference line:

15 **Dial In:** 888-808-6929

16 **Access Code:** 6064255

17 The parties shall also file a joint case management stated by March 9, 2021, and be prepared to
18 discuss how to move this case forward efficiently.

19 **IT IS SO ORDERED.**

20 Dated: 2/26/2021

21 
22 HAYWOOD S. GILLIAM, JR.
23 United States District Judge
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