GUEST COLUMN

Anti-SLAPP Statute in the Real Estate Litigation Mix

BY MATTHEW HENDERSON

As anyone who has been sued can tell you, litigation is, at best, an annoyance, and at worst, and much more typically, scary, stressful, time-consuming and expensive. Given that the longstanding rule of American jurisprudence is that each party to a lawsuit pays its own attorneys' fees (absent a contractual or statutory provision to the contrary), defendants can find themselves at the mercy of aggressive plaintiffs who are able to inflict not insignificant financial harm by the simple act of filing a complaint. And while strategic and tactical considerations have always rightly been part of a lawyer's calculus in determining when, where and whom to sue, at times the brute force of a lawsuit becomes its own reason for being.


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These concerns have especial significance in the field of public advocacy, in which people of ordinary means can find themselves up against well-heeled interests with substantial experience with and resources for using the judicial system. The mere act of suing a person or group of people for their conduct in the public arena — lobbying a local board or commission, for instance, or circulating a petition — can have a significant chilling effect on their actions.

This was the problem the California Legislature confronted in 1992 when it added section 425.16 to the Code of Civil Procedure. Commonly known as the "anti-SLAPP" statute ("SLAPP" standing for "strategic lawsuit against public participation"), section 425.16 provides a method by which lawsuits brought for strategic purposes to bully or muzzle a defendant for his or her speech or petition activities can swiftly and economically be resolved.

Such lawsuits represent a real threat to grassroots or other small-scale advocacy and free speech activities. "The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans." (*Wilcox v. Superior Court*, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*) Such lawsuits typically involve allegations of torts such as defamation, interference with prospective economic advantage, nuisance or infliction of emotional distress. (Id.; *Wilbanks v. Wolk.*)

Of course, creative lawyers pushing the envelope of legal theory and practice quickly put section 425.16 to use in all manner and types of cases outside the prototypical SLAPP

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situation. Thus, in the 16 years since section 425.16 was first passed, the scope and sweep of the statute have expanded into fields beyond what the original authors could have foreseen — including recent forays into the realm of real estate litigation.

Mechanism of the Anti-SLAPP Statute

The mechanics of section 425.16 are relatively straightforward. Where a defendant or cross-defendant is confronted by a cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue," which the statute subsequently further defines, he or she is permitted to file a "special" motion to strike directed against the offending causes of action. The motion must be filed within 60 days of service of the complaint or cross-complaint, and discovery is stayed until the court issues a ruling on the motion. Thus, section 425.16 puts the brakes on a lawsuit, allowing a defendant the chance to have it thrown out at a very early point in the proceedings.

The moving defendant has the initial burden to establish that the causes of action to which the motion is directed arise from the exercise of petition or free speech rights. If the defendant satisfies this requirement, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits of the challenged claims. If the plaintiff satisfies this burden, the motion to strike is denied; if not, the motion to strike is granted, and the defendant is entitled to a recovery of attorneys' fees. A plaintiff who defeats a motion to strike is entitled to an award of fees only if the motion was frivolous or solely intended to cause unnecessary delay.

While the procedure for a motion under section 425.16 is uncomplicated, and its application to the prototypical SLAPP case is obvious — defamation, malicious prosecution, interference with prospective business advantage, etc. — its extension into the realm of real estate litigation can prove instructive and cautionary for client and practitioner alike.

Anti-SLAPP Motions in Real Estate Litigation

Disputes between landlords and their tenants are hardly uncommon; however, an unlawful detainer action seems an odd setting for the use of an anti-SLAPP motion. Nevertheless, the First District Court of Appeal handed down a case earlier this year that applied section 425.16 in just this context.

1100 Park Lane Associates v. Feldman involved a dispute between a landlord and subtenants. The landlord filed an unlawful detainer action, and the subtenants cross-complained for retaliatory eviction, negligence, negligent misrepresentation, breach of the covenant of quiet enjoyment, wrongful eviction, breach of contract, and unfair business practices. The landlord responded with an anti-SLAPP motion to strike, which the trial court granted only as to the retaliatory eviction claim.

On appeal, the First District held that the trial court hadn't gone far enough in sustaining the motion to strike. It ruled that all of the subtenants' causes of action except for negligent misrepresentation were subject to the anti-SLAPP lawsuit. The case hinged on the fact that the landlord's filing of the unlawful detainer action and acts taken in conjunction with that activity were the basis for the subtenants' claims. The filing of litigation is a classic expression of the right of free petition and is thus well within the scope of section 425.16's protection, irrespective of any "public interest" in the subject matter of the lawsuit. Thus, something as mundane as an unlawful detainer action can bring section 425.16 and its protections and punishments into play — a fact the subtenants and their counsel probably did not foresee at the time they filed their cross-complaint!

As with landlord-tenant disputes, litigation involving real estate purchases would appear to be an unlikely place for an anti-SLAPP motion to be made, but recent cases show that this is not so. In fact, there have been multiple published decisions in this field within the past year. Take, for instance, the case of *Garretson v. Post*, which involved a dispute between the buyer of a piece of real estate and the seller who had taken back a note and deed of trust to finance the purchase. The buyer purportedly defaulted on the note, and the seller initiated nonjudicial foreclosure under the deed of trust. The buyer cured the alleged default under protest, and then filed suit against the seller for wrongful foreclosure, among other causes of action. The seller responded with an anti-SLAPP motion, contending that the steps she took to foreclose the deed of trust constituted protected petition or free speech activity.

The court disagreed, holding that a private nonjudicial foreclosure is not within the scope of section 425.16's protections. While the motion to strike was not availing in this case, it reveals the creative and expansive ways in which counsel have tried to use the anti-SLAPP statute to aggressively protect and promote their clients' interests. Other recent cases involving anti-SLAPP motions in the context of disputes between purchasers and sellers of real property include *Lien v. Lucky United Properties Inv., Inc.*, *Midland Pacific Bldg. Corp. v. King* and *Wang v. Wal-Mart Real Estate Business Trust.*

In the current real estate climate, litigation over property in foreclosure is increasingly common. The use of foreclosure "consultants" or equity purchasers has led to a raft of lawsuits where owners of homes in default claim to have been duped out of title to and/or equity in their property. Again, this would seem an unlikely place for section 425.16 to rear its head, but as *Salma v. Capon.*

Salma involved allegations by a homeowner that he and his estranged wife had been duped out of their home by an equity purchaser. The homeowner sued to recover title to the property, and the record title holder filed a cross-complaint including causes of action for conversion and interference with prospective economic advantage. As you may have guessed, the homeowner responded with an anti-SLAPP motion, which the trial court granted as to the conversion claim. Noting that the challenged claims in the cross-complaint derived from the homeowner's recourse to local authorities and the courts in trying to recover title to his home, the court of appeal ruled that the motion should have been granted as to the interference claim as well. Thus, an ordinary-looking title dispute was found to implicate the petition and speech concerns of section 425.16.

In a similar vein, backyard disputes between neighboring homeowners can also provide the stage for a section 425.16 motion. In *Castillo v. Pacheco*, the plaintiff homeowners sued their neighbors, claiming that backyard sweat lodge rituals constituted a nuisance by emitting smoke, ash and odors. The defendants filed a 425.16 motion, claiming that the complaint arose out of protected religious practices. While the court of appeal disagreed, noting that the anti-SLAPP statute covers petition and free speech activities, it is far from a stretch to see that a successful motion to strike under section 425.16 could be made in the context of a neighbor dispute.

As this thumbnail overview of recent real estate cases demonstrates, the anti-SLAPP statute can pop up in unexpected places in unpredictable ways. Thus, section 425.16 represents a potential trap for unwary litigants and a nifty (if somewhat focused) arrow in the savvy attorney's quiver. ▲

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