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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

BAMKO, INC.,

Plaintiff and Appellant,

v.

BOOMBOTIX, INC.,

Defendant and Respondent.

B268715

(Los Angeles County
Super. Ct. No. BC575297)

COURT OF APPEAL - SECOND DIST

F I L E D

NOV 23 2016

JOSEPH A. LANE Clerk

Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Reversed and remanded.

Skiermont Derby, Paul B. Derby, Courtney E. Curtis, John J. O'Kane IV, and Mane Sandaryan for Plaintiff and Appellant.

Hartnett Smith & Paetkau, Tyler M. Paetkau and Jay Withee; Gielegghem Law Office and Neil Gielegghem for Defendant and Respondent.

Plaintiff and appellant Bamko, Inc. (Bamko) appeals from an order denying its special motion to strike, pursuant to Code of Civil Procedure section 425.16,¹ causes of action for fraud and unfair competition in a cross-complaint filed by defendant and respondent Boombotix, Inc. (Boombotix). The trial court concluded that the gravamen of the causes of action included both activity protected under section 425.16 and activity excepted from the ambit of the anti-SLAPP statute by section 425.17, subdivision (c). The trial court further concluded that Boombotix had proved the necessary elements for the section 425.17, subdivision (c) exception to apply. The trial court denied Bamko's anti-SLAPP motion on the ground that section 425.16 applies only to an entire cause of action, following the Court of Appeal's holding in *Baral v. Schnitt* (2015) 233 Cal.App.4th 1423, review granted, May 13, 2015, S225090, which was then pending before the California Supreme Court.

While this appeal was pending, the California Supreme Court issued its opinion in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 382 (*Baral*), reversing the Court of Appeal's decision and clarifying that "in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of *protected* activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." (*Id.* at p. 395, italics added.)

In light of the Supreme Court's holding in *Baral, supra*, 1 Cal.5th 376, we reverse the order denying the anti-SLAPP motion and remand the matter to the trial court for further proceedings consistent with the Supreme Court's direction in that case.

BACKGROUND

Bamko's breach of contract action and Boombotix's cross-complaint

Bamko is in the business of sourcing and manufacturing goods for its customers through its relationship with overseas manufacturers, primarily in China. Boombotix is a

¹ All further statutory references are to the Code of Civil Procedure. Section 425.16 is also known as the anti-SLAPP statute and motions brought pursuant to that statute are sometimes referred to as anti-SLAPP motions.

retailer of portable audio speakers. In June 2014, the parties were engaged in discussions regarding the design and manufacture of audio speakers and exchanged a series of text messages and emails regarding a purported sales order signed by Boombotix's CEO.

Bamko filed a breach of contract action against Boombotix in March 2015, alleging that Boombotix executed a sales order agreeing to purchase \$1,905,000 worth of speakers from Bamko. Boombotix cross-complained against Bamko for fraudulent inducement, unfair competition, and other claims not relevant to this appeal. In the operative first amended cross-complaint, Boombotix alleged that during the parties' discussions, it had made clear to Bamko that Boombotix was unwilling to make a contractual commitment to purchase any speakers until Bamko provided a satisfactory prototype that met Boombotix's expectations for design and functionality; that Bamko assured Boombotix that the purpose of the sales order was to obtain favorable pricing commitments from Bamko's manufacturers; and that there would be no binding contractual commitment between the parties until Bamko provided a satisfactory prototype. Boombotix further alleged that Bamko engaged in communications with Boombotix with the intent to use the purported contract and the threat of legal action to coerce Boombotix to pay a settlement in order to avoid costly and disruptive litigation.

Bamko's anti-SLAPP motion and the trial court's ruling

Bamko filed an anti-SLAPP motion to strike the fraudulent inducement and unfair competition causes of action in Boombotix's cross-complaint, arguing that those claims arose out of protected pre-litigation and litigation activity, and that Boombotix could not establish a likelihood of prevailing on the merits.

The trial court concluded that the fraudulent inducement and unfair competition causes of action "have two 'gravamens' that are asserted concurrently: 1) Bamko fraudulently induced Boombotix to sign the agreement in order to use the signed agreements as leverage with its manufacturers . . . and 2) Bamko fraudulently induced Boombotix to sign the agreement in order to pursue high cost litigation against Boombotix in order to secure a settlement" and that the second of these two "gravamens" was protected pre-litigation activity under the anti-SLAPP statute.

As to the first “gravamen” -- that Bamko fraudulently induced Boombotix to sign the sales order to use as leverage with Bamko’s manufacturers -- the trial court concluded that it came within the “commercial speech” exception codified at section 425.17, subdivision (c), and was therefore outside the ambit of the anti-SLAPP statute. The trial court further concluded that Boombotix had established the four necessary elements for that exception to apply: “1) the causes of action are against [Bamko], who is primarily engaged in the business of selling or leasing goods or services; 2) the causes of action arise from a statement or conduct by [Bamko], that consisted of representations of fact about [Bamko’s] business and their manufacturer’s business operations, goods, or services; 3) the statement or conduct was made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transaction in, the person’s goods or services; and 4) the intended audience for the statement or conduct meets the definition set for[th] in section 425.17(c)(2).”

The trial court noted that the Court of Appeal in *Baral* had held that an anti-SLAPP motion cannot be granted as to causes of action that contain allegations of both protected and unprotected activity, but that the California Supreme Court had granted review and the case was then pending before the Supreme Court. (*Baral, supra*, 233 Cal.App.5th 1423, review granted, May 13, 2015, S225090.) The trial court then applied the Court of Appeal’s holding in *Baral* as the basis for denying Bamko’s anti-SLAPP motion. This appeal followed.

DISCUSSION

Bamko contends it made the requisite threshold showing that Boombotix’s claims for fraudulent inducement and unfair competition arise from protected pre-litigation and litigation activity under section 425.16, and that the trial court erred by not determining whether Boombotix had demonstrated a probability of prevailing on those claims.²

² Bamko does not challenge the trial court’s determination that allegations regarding Bamko’s representations to Boombotix that the purpose of the sales order was to obtain favorable pricing commitments from Bamko’s manufacturers come within the commercial speech exception set forth in section 425.17, subdivision (c), but argues that

Boombotix argues that Bamko's allegedly protected litigation activity was incidental and unrelated to the principal thrust or gravamen of Boombotix's fraudulent inducement and unfair competition causes of action. Boombotix also moves to dismiss Bamko's appeal on the ground that the trial court denied Bamko's motion pursuant to the commercial speech exception in section 425.17, subdivision (c), and that an order denying an anti-SLAPP motion under section 425.17 is not appealable.

The Supreme Court's decision in *Baral, supra*, 1 Cal.5th 376 impacts this appeal and the motion to dismiss the appeal.

I. Section 425.16

Determining whether section 425.16 bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*)). First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action "aris[es] from any act . . . in furtherance of the [moving party's] right of petition or free speech." (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.) If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a "probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *Navellier*, at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. omitted.)

II. *Baral v. Schnitt*

Before the Supreme Court's decision in *Baral, supra*, 1 Cal.5th 376, courts of appeal were divided on the issue of whether an anti-SLAPP motion applies to a cause of action that alleges both protected and unprotected activity and whether the nonmoving

the commercial speech exception is irrelevant to the claims arising out of protected litigation activity.

party could defeat the motion by demonstrating a probability of prevailing on any part of the claim, including allegations of activity that is not protected by section 425.16. (*Baral*, at p. 386, and cases cited at pp. 386-387.) In *Baral*, the Court of Appeal sided with “those cases holding that, if the nonmoving party demonstrates a prima facie case of prevailing on *any* part of a mixed cause of action, the anti-SLAPP motion fails.” (*Id.* at p. 388.) The Supreme Court reversed, concluding that “[i]t is arbitrary to hold that the same claim, supported by allegations of protected and unprotected activity in a single cause of action, escapes review if the plaintiff shows a probability of prevailing on the allegations that are *not* covered by the anti-SLAPP statute.” (*Id.* at pp. 392-393.)

The Supreme Court then summarized the showings and findings required by section 425.16 as follows:

“At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.”

(*Baral, supra*, 1 Cal.5th at p. 396.)

III. Motion to dismiss

Boombotix contends Bamko’s appeal should be dismissed because the trial court’s order denying the anti-SLAPP motion was based on the commercial speech exception to

the anti-SLAPP statute set forth in section 425.17, subdivision (c),³ and such orders are non-appealable under section 425.17, subdivision (e).⁴

The order denying the anti-SLAPP motion makes clear that the trial court did not base its denial primarily on the commercial speech exception in section 425.17, subdivision (c), but on the Court of Appeal's holding in *Baral* that an anti-SLAPP motion can only be used to strike an entire cause of action. The trial court found that Bamko had made the requisite threshold showing that Boombotix's fraud and unfair competition causes of action arose out of protected pre-litigation activity. The trial court also found that the fraud and unfair competition claims contained allegations of unprotected activity that came within the commercial speech exception under section 425.17, subdivision (c), and that Boombotix had proved the elements necessary to establish that the exception applied. The trial court then ruled that because the fraud and unfair competition claims "included allegations of activity that are not protected under the anti-SLAPP statute[.]"

³ Section 425.17, subdivision (c) provides: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services . . . arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue."

⁴ Although an order denying or granting an anti-SLAPP motion is generally appealable under section 425.16, subdivision (i) and section 904.1, an order denying an anti-SLAPP motion pursuant to any of the exceptions set forth in section 425.17 is not. Subdivision (e) of section 425.17 provides: "If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action."

[u]nder the holding in *Baral*, [Bamko] has failed to meet its burden and it's special motion to strike is therefore DENIED.”

The trial court's denial of the anti-SLAPP motion was based on the Court of Appeal's holding in *Baral*, and not on the commercial speech exception accorded by section 425.17, subdivision (c). Boombotix's motion to dismiss the appeal is accordingly denied.

IV. Anti-SLAPP motion

At the time the trial court issued its order denying the anti-SLAPP motion, the California Supreme Court had not yet issued its opinion in *Baral, supra*, 1 Cal.5th 376. As discussed, the trial court based its order on the Court of Appeal's decision in *Baral*, which the Supreme Court subsequently reversed. The trial court accordingly did not undertake the analysis prescribed by the Supreme Court in that case. The trial court determined that Boombotix's fraud and unfair competition claims were based on allegations of both protected and unprotected activity and that the relief sought was based in part on Bamko's pre-litigation and litigation activity protected by the anti-SLAPP statute. At that point, the burden shifted to Boombotix to demonstrate that its claims based on Bamko's protected pre-litigation and litigation activity were legally sufficient and factually substantiated. The trial court was then required to undertake the second step of the anti-SLAPP analysis and determine whether Boombotix's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. (*Id.* at p. 396.) If it would, the anti-SLAPP motion should be denied. If not, then the motion should be granted and the claims stricken. (*Ibid.*)

The trial court did not apply the criteria prescribed by the Supreme Court in *Baral* or make the determinations required under the second step of the anti-SLAPP analysis. We therefore reverse the trial court's order and remand the matter to the trial court for further proceedings consistent with the Supreme Court's direction in *Baral*.

DISPOSITION

The order denying the anti-SLAPP motion is reversed. The matter is remanded to the trial court for further proceedings consistent with the Supreme Court's direction in *Baral, supra*, 1 Cal.5th 376. The parties will bear their respective costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT