NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

KATHLEEN LEONARD, Cross-complainant and Appellant, v. RETAILER'S CREDIT ASSOCIATION OF GRASS VALLEY, INC., Cross-defendant and Respondent.	C079880 (Super. Ct. No. CU12-78288)

Cross-complainant Kathleen Leonard appeals from a judgment entered in favor of cross-defendant Retailer's Credit Association (RCA) after the trial court granted RCA's special motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute (strategic lawsuits against public participation).[1] On appeal, Leonard contends the trial court erred in granting the motion, because it was not filed within 60

[1] Undesignated statutory references are to the Code of Civil Procedure.

days of the filing of the operative first amended cross-complaint (FACC). Leonard also argues the motion should not have been granted because RCA cannot establish that her causes of action arise from protected activity, and Leonard can show a probability of success on the merits. Finally, Leonard argues that the trial court erred in denying her request for attorney's fees and costs. Finding no error, we affirm.

I. BACKGROUND

This case, which originated as an attempt to collect a debt in the amount of $2,340, comes before the court for the third time, following a successful petition for review to the California Supreme Court and an unsuccessful petition for writ of certiorari to the U.S. Supreme Court. (*Leonard v. Superior Court* (2015) 237 Cal.App.4th 34, 41 (*Leonard I*); *Leonard v. Retailer's Credit Ass'n of Grass Valley, Inc.* (2014) __ U.S. __ [135 S.Ct. 85].) Much of the procedural history of the case is set forth in this court's earlier opinion in *Leonard I,* from which we liberally borrow.

A. The Underlying Collection Action

RCA is a local collection agency. (*Leonard I, supra,* 237 Cal.App.4th at p. 36.) RCA provides collection services for Dignity Health, doing business as Sierra Nevada Memorial Hospital (Sierra Nevada). (*Ibid.*) RCA commenced the underlying collection action on January 6, 2012. RCA's complaint alleges that Leonard breached a contract by failing to pay $2,340 for medical services provided by Sierra Nevada. (*Ibid.*)

We have not been provided with a copy of RCA's complaint. However, the record suggests that the complaint attached documents pertaining to the provision of medical services to Leonard and/or her minor son (together, the complaint exhibits).[2] Leonard answered the complaint in propia persona, denying the alleged debt and arguing that the charges had been "waived."

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[2] For convenience, we shall refer to Leonard and her son together as "Leonard."

A. The Original Cross-Complaint

On February 22, 2012, Leonard filed a propia persona cross-complaint against RCA. The cross-complaint asserts a cause of action for declaratory relief based on an allegation that the complaint exhibits violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub.L. No. 104-191 (Aug. 21, 1996) 110 Stat. 1936) and the California Confidentiality of Medical Information Act (CMIA) (Civil Code, § 56 et seq.) by disclosing personal health information (i.e., "date of medical visits, medical record number, [and] account numbers"). On the front page of the form cross-complaint, Leonard checked a box stating, "ACTION IS A LIMITED CIVIL CASE ($25,000 or less)." In the cross-complaint, Leonard checked a box requesting "compensatory damages" for "limited civil cases" and typed in the amount "$5,500." She also requested injunctive relief in the form of a court order requiring RCA to remove the allegedly confidential medical information from the complaint exhibits.

On April 24, 2012, Leonard filed a propia persona motion to amend the cross-complaint to add Sierra Nevada as a defendant and transfer the case to a general jurisdiction department. (*Leonard I, supra,* 237 Cal.App.4th at p. 37.) In an accompanying memorandum of points and authorities, Leonard argued that the complaint exhibits were not necessary for the prosecution of the collection claim. (*Ibid.*) Leonard hypothesized that RCA and Sierra Nevada " 'disclosed and published this information, for the purpose of intimidation and financial gain,' " adding that " 'Civil statutory penalties for such actions could reach $250,000.00.' " (*Ibid.*) The trial court denied the motion without prejudice, noting that Leonard " 'failed to attach the proposed [a]mended [c]ross-[c]omplaint to the motion,' " and, as a result, the court was " 'unable to determine what the proposed changes include.' " (*Ibid.*)

B. The Court Trial

A court trial was held on RCA's complaint and Leonard's original cross-complaint on June 11, 2012. During the trial, RCA introduced itemized billing statements showing

medical services provided to Leonard by Sierra Nevada (together, the trial exhibits). According to the trial court's minutes, Leonard asked that "all parties in the courtroom be asked to leave as this is a confidential case." The trial court denied the request. The trial exhibits were marked and moved into evidence.

We have not been provided with copies of the trial exhibits. However, the record indicates that the trial exhibits included: (1) a document entitled "Sierra Nevada Memorial Hospital Patient Information, Emergency Information and Consent to Treatment and Itemized Billing Statement," (2) a document entitled "Sierra Nevada Memorial Hospital Conditions for Outpatient Treatment and Itemized Billing Statement," and (3) a document entitled "Sierra Nevada Memorial Hospital Patient Information, Conditions for Outpatient Treatment and Itemized Billing Statement." The documents were redacted to omit the dates on which Leonard received medical services. According to RCA's regular outside counsel, Jennifer Walters, RCA routinely offers such documents as exhibits in collection cases.

The trial court's minutes reflect a judgment for RCA on the complaint and cross-complaint. On July 31, 2012, RCA filed a motion for contractual attorney's fees in the amount of $518 based on an attorney's fee provision in Leonard's contract with Sierra Nevada.[3] On September 18, 2012, the trial court entered a corrected judgment in RCA's favor in the principal amount of $2,340, plus prejudgment interest, attorney's fees, and costs.

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[3] The attorney's fee provision provides in pertinent part, "Should the patient's account be referred to any attorney or collection agency for collection, you agree to pay [Sierra Nevada's] reasonable attorneys' fees and costs and collection expenses."

C. The First Round of Appeals: The Appellate Division, This Court, and the U.S. Supreme Court

On August 13, 2012, Leonard, now represented by counsel, appealed to the appellate division of the trial court. On November 1, 2013, the appellate division held that neither the complaint exhibits nor the trial exhibits violated CMIA. The appellate division further concluded that the complaint exhibits did not violate HIPAA, but the trial exhibits did. Specifically, the appellate division concluded, the trial exhibits "disclose[d] protected health information that exceeded the scope of the safe harbor created in [45 Code of Federal Regulations part 164.512(e)]."[4] The appellate division further concluded, "The trial court erred in not fashioning a remedy at trial to protect that confidential information," and the error was not harmless. The appellate division remanded the case to the trial court for a new trial.

Dissatisfied with the appellate division's ruling, Leonard filed an application to transfer the case to this court. The appellate division denied the application, but reiterated that the trial court committed reversible error in admitting the trial exhibits. The appellate division also reiterated that the trial court was required to "conduct a new trial and to adopt procedures at that new trial to mitigate to the extent possible the disclosure of protected health information at the new trial." The appellate division issued remittitur to the trial court on January 10, 2014.

Leonard then filed a petition to transfer the case with this court. The petition was denied.

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[4] 45 Code of Federal Regulations part 164.512 sets out standards for disclosures of protected health information. Subsection (e) authorizes the disclosure of protected health information by court order, individual consent or an appropriate attempt to obtain consent, or a qualified protective order. (45 C.F.R. § 165.512(e)(1)(i)-(v).)

On May 7, 2014, Leonard filed a petition for certiorari with the U.S. Supreme Court, arguing that the appellate division's ruling effectively created a "safe harbor" for the public disclosure of personal health information in debt collection litigation. The high court denied the petition. (*Leonard v. Retailer's Credit Association*, *supra*, __ U.S. __ [135 S.Ct. at p. 85].)

D. The FACC

The parties returned to the trial court in early 2014. (*Leonard I*, *supra*, 237 Cal.App.4th at p. 38.) Shortly thereafter, Leonard filed a motion for leave to file the operative FACC. (*Id.* at p. 38.) The FACC, which is verified, names RCA and Sierra Nevada as cross-defendants and asserts five causes of action based on their alleged misuse of Leonard's personal health information.[5]

First, the FACC asserts a cause of action for invasion of privacy against Sierra Nevada for disclosing Leonard's personal health information to RCA. Second, the FACC asserts a cause of action for invasion of privacy against RCA for (a) attempting to "extort" Leonard into paying the alleged debt by intimating that RCA would reveal sensitive personal health information to "unauthorized persons (including the public)" if she did not pay, (b) attaching the complaint exhibits to the complaint without first obtaining a protective order or taking other measures to preserve the confidentiality of Leonard's personal health information, (c) introducing the trial exhibits at trial without first obtaining a protective order or taking other measures to preserve the confidentiality of Leonard's personal health information, and (d) failing to return or destroy personal health information that was not necessary to collect the alleged debt. Third, the FACC asserts a cause of action under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) against Sierra Nevada and RCA based on their alleged violation of

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[5] For convenience, we shall refer to Leonard and her son together as "Leonard."

Leonard's right to privacy. Fourth, the FACC asserts a purported cause of action for "conspiracy to violate right of privacy" against Sierra Nevada and RCA based, again, on their alleged misuse of Leonard's personal health information.[6] Finally, the FACC asserts a cause of action against Sierra Nevada for breach of a contract for medical services.

The FACC seeks compensatory damages "in excess of $25,000, the exact amount to be proved at trial." The FACC also seeks exemplary and statutory damages. The trial court accepted the FACC for filing on April 11, 2014. (*Leonard I, supra*, 237 Cal.App.4th at p. 39.)

E. The Anti-SLAPP Motion

RCA filed the anti-SLAPP motion on June 6, 2014. The trial court granted the motion, rejecting Leonard's contention that the motion was untimely. Turning to the merits, the trial court found that, "all of the allegations in Leonard's [FACC] arise out of RCA's litigation in the underlying collection action." Having determined that Leonard's claims were "unquestionably" related to protected activity, the trial court further concluded that they were barred by the litigation privilege in Civil Code section 47, subdivision (b). Accordingly, the trial court found that Leonard could not demonstrate a probability of prevailing on the merits.

F. The Second Round of Appeals: *This Court and Our Supreme Court*

On October 1, 2014, Leonard filed an appeal from the grant of RCA's motion to strike, "checking the box for 'NOTICE OF APPEAL' from an 'unlimited civil case.' " (*Leonard I, supra,* 237 Cal.App.4th at p. 39.) Later that day, the trial court filed a minute

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[6] "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

order setting aside the notice of appeal as improper.[7] (*Ibid.*) Leonard then moved to reclassify the action from limited to unlimited. (*Ibid.*) The trial court denied the motion. (*Id.* at p. 41.)

On October 22, 2014, Leonard filed a petition for writ of mandate with this court. (*Leonard I, supra,* 237 Cal.App.4th at p. 41.) The court denied the petition. (*Ibid.*) Leonard then filed a petition for review in the California Supreme Court, which was granted. (*Ibid.*) Our Supreme Court directed us to vacate the order denying mandamus and order the trial court to show cause why the relief sought in the petition should not be granted, which we did. (*Ibid.*) We then granted the petition and issued a peremptory writ of mandate directing the trial court to reclassify the case as unlimited, and accept for filing Leonard's notice of appeal from the order granting RCA's anti-SLAPP motion as of the date the notice was originally presented, October 1, 2014. (*Id.* at pp. 41, 45.)

G. RCA's Voluntary Dismissal and Leonard's Request for Attorney's Fees

On October 29, 2014, RCA voluntarily dismissed the collection complaint against Leonard. On November 25, 2014, Leonard filed a motion for costs against RCA. The motion sought attorney's fees pursuant to Civil Code section 1717 based on the attorney's fee provision in Leonard's contract with Sierra Nevada. Specifically, the motion sought a "lodestar" award of $69,375, based on a reported 277.5 hours of work, and a multiplier of 2.

In the alternative, the motion argued that Leonard should recover attorney's fees under section 1021.5, the private attorney general statute. Among other things, Leonard argued that she "was successful in not only overturning the judgment, she was successful

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[7] The trial court apparently concluded that Leonard's notice of appeal was untimely. While Leonard's notice of appeal met the 60-day deadline applicable to an appeal from an unlimited civil case, it did not meet the 30-day deadline applicable to an appeal from a limited civil case. (*Leonard v. Superior Court, supra,* 237 Cal.App.4th at p. 39, fn. 2; Cal. Rules of Court, rules 8.104 and 8.822.)

in establishing that protected health information to be used or disclosed in a judicial tribunal in this state must either be subject to a written authorization of the patient or a protective order that meets the requirements of HIPAA."

RCA opposed the motion, inter alia, on the ground that Leonard was not the prevailing party, as the complaint had been voluntarily dismissed by RCA. RCA additionally argued that Leonard was not entitled to attorney's fees under section 1021.5, as she did not obtain a significant benefit for the general public or a large class of people.

The trial court denied the motion on the grounds that (1) Leonard was not entitled to contractual attorney's fees as a prevailing party because RCA voluntarily dismissed the complaint (Civ. Code, § 1717, subd. (b)(2)), and (2) Leonard's demand for attorney's fees incurred on appeal was untimely because she failed to file the motion within 40 days of the appellate division's issuance of remittitur. (Cal. Rules of Court, rule 8.278, subd. (c)(1).)[8] To the extent Leonard sought attorney's fees incurred on appeal in connection with her appeal to this court, the trial court denied the motion as premature, noting that the court did not issue the remittitur until July 2015, and Leonard filed her motion eight months earlier.

Leonard filed timely notices of appeal.

II. DISCUSSION

A. The Anti-SLAPP Motion

Leonard contends the trial court erred in granting RCA's anti-SLAPP motion, challenging both the timeliness of the motion, as well as the merits. We consider these arguments in turn.

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[8] Unspecified rule references are to the California Rules of Court.

1. Timeliness of the Motion

Section 425.16, subdivision (f) provides that a special motion to strike "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Section 425.16, subdivision (h) specifies that the term "complaint," as used in the statute, includes a "cross-complaint" or "petition." Thus, section 425.16, subdivisions (f) and (h) required RCA to file the special motion within 60 days of service of the cross-complaint.

Leonard contends the clock for bringing an anti-SLAPP motion began to run on February 22, 2012, when she filed her original cross-complaint. She argues that RCA's motion, which was filed more than two years later, was untimely and prejudicial. She emphasizes that she spent time and money pursuing appeals that now appear to have been for naught, and speculates that RCA only filed the motion as a tactical manipulation in the absence of any other defense to the FACC.

RCA, for its part, contends the time for bringing an anti-SLAPP motion began to run on April 11, 2014, when Leonard filed the FACC. By this measure, RCA argues, the anti-SLAPP motion, which was filed on June 6, 2014, was "well within the 60-day limit." In the alternative, RCA argues that the trial court had discretion to consider even an untimely motion, and impliedly found that the motion was not brought for any improper purpose.

The parties' contentions raise the question whether the filing of an amended complaint (or cross-complaint) reopens the 60-day period for filing an anti-SLAPP motion without court permission. Relying on *Lam v. Ngo* (2001) 91 Cal.App.4th 832 (*Lam*), RCA argues that the term "complaint," as used in section 425.16, subdivision (f), includes amended complaints, such that the 60-day period runs from the filing of the most recent amended complaint. (*Id.* at pp. 840-841.) RCA urges us to read *Lam* for the proposition that the filing of an amended complaint (or cross-complaint) automatically reopens the 60-day period for filing an anti-SLAPP motion. We decline to read *Lam* so

broadly. Instead, we adopt the rule expressed in *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174 (*Hewlett-Packard*).

There, a software developer (Oracle) waited until the eve of the second phase of a bifurcated trial to bring a special motion to strike, "at least 618 days after the 60-day period began to run, and 558 days after it ended." (*Hewlett-Packard*, *supra*, 239 Cal.App.4th at p. 1189.) The trial court denied the motion as untimely and Oracle appealed, bringing all further proceedings in the trial court to a halt. (*Id.* at p. 1178.) The Court of Appeal for the Sixth District affirmed, noting that the 60-day period for bringing an anti-SLAPP motion reinforces the underlying purpose of the statute—to promptly dispose of qualifying causes of action—and serves as a bulwark against abuse. (*Id.* at p. 1188.) The court explained:

"The overarching objective of the anti-SLAPP statute is 'to prevent and deter' lawsuits chilling speech and petition rights. [Citation.] 'Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPS by *ending them early and without great cost to the SLAPP target*' " [citation.] Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure *at an early stage of the litigation*. [Citation.]' [Citations.]

"A late anti-SLAPP motion cannot fulfill the statutory purpose if it is not brought until after the parties have incurred substantial expense. Recognition of this fact is implicit in the 60-day requirement, which entitles a defendant to use the statute's 'special' procedure (§ 425.16, subd. (b)(1)) only by bringing the motion early enough to avoid the cost of resolving the case by more conventional means. [Citations.] By failing to act within this time, a defendant incurs costs—and permits the plaintiff to incur costs—that a timely motion might be able to avert. As these costs accumulate in the course of conventional discovery and motion practice, the capacity of an anti-SLAPP motion to satisfy the statutory purpose diminishes. And as the utility of the motion

diminishes, so does the justification for the statute's deviations from more conventional modes of disposition. It is therefore to be expected that every case will come to a point beyond which an anti-SLAPP motion simply cannot perform its intended function. If such a motion is untimely—as it will be in the absence of some event which has reopened the 60-day period—the trial court cannot abuse its discretion by refusing to hear it." *(Hewlett-Packard, supra,* 239 Cal.App.4th at pp. 1188-1189.)

Although Oracle's untimely motion was not precipitated by an amended pleading, the *Hewlitt-Packard* court recognized that an amended pleading may reopen the 60-day period in appropriate circumstances. The court explained:

"The rule that an amended complaint reopens the time to file an anti-SLAPP motion is intended to prevent sharp practice by plaintiffs who might otherwise circumvent the statute by filing an initial complaint devoid of qualifying causes of action and then amend to add such claims after 60 days have passed. (See *Lam, supra,* 91 Cal.App4.th 832, 840-841 ['Causes of action subject to a special motion to strike could be held back from an original complaint . . .'].) But a rule properly tailored to that objective would permit an amended pleading to extend or reopen the time limit only as to *newly pleaded* causes of action arising from protected conduct. A rule automatically reopening a case to anti-SLAPP proceedings upon the filing of *any* amendment permits defendants to forego an early motion, perhaps in recognition of its likely failure, and yet seize upon an amended pleading to file the same meritless motion later in the action, thereby securing the 'free time-out' condemned in [*People ex rel. Lockyer v.*] *Brar* [(2004)] 115 Cal.App.4th 1315, 1318." (*Hewlett-Packard, supra,* 239 Cal.App.4th at p. 1192, fn. 11.)

We agree with the *Hewlitt-Packard*'s court reasoning, and likewise conclude that a defendant (or cross-defendant) must file an anti-SLAPP motion within 60 days of service of the first complaint (or cross-complaint) that pleads a cause of action coming within section 425.16, subdivision (b)(1) unless the trial court, in its discretion and upon terms it

deems proper, permits the motion to be filed at a later time (§ 425.16, subd. (f); see also *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 286 ["The statute expressly provides that a late anti-SLAPP motion shall not be filed unless the court affirmatively exercises discretion to permit it to be filed"].) An amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion. (*Hewlett-Packard, supra,* 239 Cal.App.4th at p. 1192, fn. 11.)

Applying this rule, we conclude the motion was timely.[9] As noted, the FACC asserts causes of action for invasion of privacy, violations of the UCL, and conspiracy to violate privacy rights. None of these purported causes of action were asserted in the original cross-complaint, which sought declaratory and injunctive relief only. The FACC alleges that RCA violated Leonard's right to privacy by (a) attempting to "extort" Leonard into paying the alleged debt by intimating that RCA would reveal sensitive personal health information to "unauthorized persons (including the public)" if she did not pay, (b) attaching the complaint exhibits to the complaint without first obtaining a protective order or taking any other measures to preserve the confidentiality of Leonard's personal health information, (c) introducing the trial exhibits at trial without first obtaining a protective order or taking any other measures to preserve the confidentiality of Leonard's personal health information, and (d) failing to return or destroy personal health information that was not necessary to collect the alleged debt. None of these allegations appear in the original cross-complaint.

Although the original cross-complaint and FACC both challenge RCA's publication of Leonard's personal health information in the complaint exhibits, the two

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[9] The parties do not address whether anti-SLAPP motions are permitted in limited civil cases. We assume without deciding that they are. (See § 92, subd. (e).)

pleadings advance different theories of liability and seek different types of relief. The two pleadings also offer differing, though not inconsistent, versions of the operative facts. Though both pleadings focus on RCA's use of Leonard's personal health information, the FACC provides significantly more factual detail, and includes allegations concerning events which had not occurred at the time of the original cross-complaint, namely, RCA's use of the trial exhibits. On this record, we conclude that the FACC pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, and therefore reopened RCA's time for filing an anti-SLAPP motion. We therefore conclude that RCA's motion was timely.

Having so concluded, we necessarily reject Leonard's contention that the trial court should have denied RCA's motion as a mere "tactical manipulation." Although Leonard has undoubtedly incurred costs that might have been avoided had the motion been filed earlier, nothing in the record suggests that RCA was dilatory. To the contrary, the record reveals that RCA participated in a trial on the merits of Leonard's original cross-claims on June 11, 2012, less than four months after the original cross-complaint was filed. Although another two years would pass before RCA filed the anti-SLAPP motion, we see no sign that RCA was responsible for the delay. Rather, the timing of the motion was dictated by the unseasonable filing of the FACC, which was in itself the result of events outside of RCA's control. We therefore reject Leonard's contention that the motion was untimely or interposed merely for delay.

2. Merits of the Motion

Next, Leonard argues the motion should not have been granted because RCA cannot establish that the FACC's causes of action arise from protected activity, and Leonard can show a probability of success on the merits. We address these arguments momentarily, pausing first to consider the applicable statutory background and standard of review.

a. Anti-SLAPP Statute and Standard of Review

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 Constitution or the 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." The statute " 'provides a procedure for the early dismissal of what are commonly known as SLAPP suits . . .—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights.' [Citation.] A SLAPP suit is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 40.)

Section 425.16, subdivision (e) describes the type of activity protected by the anti-SLAPP statute. An " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

The analysis of an anti-SLAPP motion involves two steps. " 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has

demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.)

Our review of the trial court's order on an anti-SLAPP motion is de novo. (*Oasis West Realty, LLC v. Goldman, supra,* 51 Cal.4th at p. 820.) If the trial court's decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion. (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573.)

b. Arising From Protected Activity

As noted, RCA had the burden to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

As relevant here, acts in furtherance of the rights of free speech or petition include "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." (§ 425.16, subd. (e).) This subdivision covers a statement that " 'relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.' " (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962.) "The protection provided for written or oral statements made in connection with judicial proceedings [citation] includes communications preparatory to or in anticipation of such proceedings." (*Karnazes v. Ares* (2016) 244 Cal.App.4th 344,

353.) "Thus, the [moving party's] burden may be satisfied by showing that the statements at issue were made in anticipation of litigation." (*Ibid.*)

Applying these standards, we have little difficulty concluding that Leonard's claims against RCA arise from protected activity. The FACC alleges that RCA misused Leonard's personal health information in connection with the underlying collection action. Specifically, the FACC alleges that RCA implicitly threatened to disclose Leonard's personal health information in the months leading to the filing of the complaint, attached the complaint exhibits to the complaint, introduced the trial exhibits at trial, and failed to return or destroy personal health information unnecessary to RCA's collection efforts.[10] All of these communications occurred in the context of anticipated or pending litigation, and therefore constitute protected petitioning activity within the meaning of section 425.16, subdivision (e). (See, e.g., *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 616 [wife's attorney's filing of husband's unredacted credit report in connection with postdissolution motion in marital proceedings was protected petitioning activity under the anti-SLAPP statute].)

Leonard attempts to avoid this conclusion by arguing that the FACC asserts an ongoing course of noncommunicative conduct, rather than a single communicative act. We discuss this contention in greater detail momentarily, in the context of Leonard's related contention that RCA's conduct was not protected by the litigation privilege of Civil Code section 47, subdivision (b). For present purposes, we note that RCA's entire alleged course of tortious conduct consists of protected litigation activities in various collection actions. For example, the FACC alleges that RCA misused Leonard's personal

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[10] Leonard does not contend that RCA's prelitigation demand constitutes criminal extortion as a matter of law. Consequently, we do not consider whether the illegality exception to the anti-SLAPP statute applies. (See generally *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-333.)

health information in the underlying collection action, and "engaged in similar unauthorized uses and disclosures of [personal health information] belonging to other patients treated by [Sierra Nevada] for about the last twelve years." Elsewhere, the FACC alleges, "RCA ha[s] been using and disclosing patient protected health information for about 12 years by attaching copies thereof to complaints filed in the California Superior Court without a protective order or any other measure to preserve the confidentiality thereof." These allegations merely suggest that RCA *repeatedly* misused personal health information in connection with its protected litigation activities. They do not show that RCA engaged in noncommunicative conduct. That RCA's protected petitioning activity was repetitive in nature does not make it any less protected. Indeed, the FACC does not identify any conduct by RCA that was *not* a communication made in connection with a judicial proceeding. On this record, we conclude that all of Leonard's claims against RCA, including her claims based on RCA's alleged course of tortious conduct, arise from protected activity.

c. Probability of Prevailing

Having concluded RCA met the threshold burden of showing Leonard's claims arise from protected activity, we next consider whether Leonard met her burden of establishing a probability of prevailing on the merits. " 'To establish a probability of prevailing, the plaintiff "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." [Citations.] For purposes of this inquiry, "the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." [Citation.] In making this assessment it is "the court's responsibility . . . to

accept as true the evidence favorable to the plaintiff . . . .' " [Citation.] The plaintiff need only establish that his or her claim has "minimal merit" [citation] to avoid being stricken as a SLAPP.' " (*Hawran v. Hixon* (2012) 209 Cal.App.4th 256, 273-274.)

At the outset, we note that Leonard offered no evidence to support her claims, relying instead on the allegations of the FACC. RCA correctly observes that a plaintiff (or cross-complainant) opposing an anti-SLAPP motion may not rely solely on the allegations of her complaint (or cross-complaint). (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672-673.) Nevertheless, "verified allegations based on the personal knowledge of the pleader may be considered in deciding a section 425.16 motion." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1290.) Furthermore, the trial court was undoubtedly aware of the appellate division's determination that the trial exhibits violated HIPAA. Although we are not required to do so, we view the record charitably, giving Leonard the benefit of the doubt as to allegations based on her own personal knowledge and the appellate division's conclusions. Even viewing the record most favorably to Leonard, she still fails to make the required showing.

1. The Litigation Privilege Bars Leonard's Claims

The trial court found that Leonard could not demonstrate a probability of prevailing on her claims because they are barred by the litigation privilege of Civil Code section 47, subdivision (b). We agree.

" 'A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim.' " (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 814 (*Bergstein*); see also *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 38 ["The privilege in [Civil Code] section 47 is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense plaintiff must overcome to demonstrate a probability of prevailing' "].) The litigation privilege applies to all torts except malicious prosecution. (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 322.) The litigation privilege " 'precludes liability arising from a

publication or broadcast made in a judicial proceeding or other official proceeding.' " (*Bergstein, supra,* at p. 814.) It applies to any communication " '(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Ibid.*) " 'Many cases have explained that [Civil Code] section 47[, subidivision](b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.' " (*Ibid.*)

Relying on *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 345 (*LiMandri*), Leonard argues that the litigation privilege does not apply because the FACC alleges a tortious course of conduct that was "primarily non-communicative in nature." (Italics omitted.) We have already rejected Leonard's contention that the FACC alleges a noncommunicative course of conduct. We reiterate that the FACC describes an accumulation of communicative acts, rather than a course of noncommunicative conduct. We also observe that Leonard offered no evidence of any alleged course of conduct, noncommunicative or otherwise. Although the trial court may consider verified allegations based on personal knowledge in reviewing an anti-SLAPP motion (*Salma v. Capon, supra,* 161 Cal.App.4th at p. 1290), the FACC contains no such allegations concerning RCA's alleged course of conduct. Instead, so far as the alleged course of conduct is concerned, the FACC is expressly based on Leonard's information and belief. These allegations do not come close to meeting Leonard's burden under the anti-SLAPP statute. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 656 ["an averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim"], disapproved on other grounds in *Equilon Enterprises, v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

In any case, Leonard's reliance on *LiMandri* is unavailing. There, the court concluded that the litigation privilege did not bar the plaintiff's cause of action for

intentional interference with contractual relations because it was based on an alleged tortious course of conduct that included the preparation and execution of documents creating a security interest in certain settlement proceeds and the "refusal to concede the superiority of [the plaintiff's] contractual lien." (*LiMandri, supra*, 52 Cal.App.4th at p. 345.) The court's rationale was that the alleged tortious conduct was the creation of a competing and superior security interest in the settlement proceeds. (*Ibid.*) The only privileged conduct was the filing of a notice of lien, which caused no additional injury. (*Ibid.*)

Here, by contrast, the entire alleged course of conduct consists of protected litigation activity in various collection actions. As previously discussed, the FACC does not identify any conduct by RCA that was *not* a communication made in connection with a judicial proceeding. (See *Bergstein, supra*, 236 Cal.App.4th at p. 811 ["Almost all of the 'specific acts of alleged wrongdoing' in the complaint are litigation activities"].) We therefore conclude that *LiMandri* is inapposite. The trial court correctly concluded that Leonard's claims are barred by the litigation privilege.

2. No Exception to the Litigation Privilege Applies

Next, Leonard encourages us to create an exception to the litigation privilege for communications made in the course of judicial proceedings that violate HIPAA. We decline to do so.

Courts recognize exceptions to the litigation privilege "under statutes that (1) are 'more specific' than the privilege, and (2) would be 'significantly or wholly inoperable' if the privilege applied." (*Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 339 (*Komarova*).) For example, in *Komarova*, a debt collection agency doggedly pursued the plaintiff in an attempt to collect a consumer debt, employing methods that the plaintiff characterized as unfair debt collection practices within the meaning of the Rosenthal Fair Debt Collection Practice Act (the Rosenthal Act) (Civ.

Code, § 1788 et seq.). (*Id.* at pp. 331-335.) The plaintiff sued the collection agency for the alleged violations of the Rosenthal Act, and the collection agency invoked the litigation privilege as an affirmative defense. (*Id.* at pp. 335-336.) The court rejected the collection agency's contention that the challenged conduct was shielded by the litigation privilege, noting that application of the privilege would "effectively immunize" the collection agency from liability for the specific conduct that the Rosenthal Act was intended to prohibit, thus rendering the statute "significantly or wholly inoperable." (*Id.* at pp. 338, 339.)

Relying on *Komavara*, Leonard argues that HIPAA is "more specific" than the litigation privilege, and would be rendered "inoperable" if the litigation privilege applied.[11] We need not reach the merits of these arguments, if any, because the FACC does not allege a violation of HIPAA (and HIPAA does not provide a private right of action in any case). (*Webb v. Smart Document Solutions, LLC* (9th Cir. 2007) 499 F.3d 1078, 1081 ["HIPAA itself provides no private right of action"].)[12] Indeed, the FACC mentions HIPAA only once, in the context of Leonard's contract with Sierra Nevada. The FACC does not mention HIPAA in connection with any claim against RCA. Although the original cross-complaint sought a declaration that RCA violated HIPAA, Leonard's current claims against RCA are predicated on the theory that RCA's litigation activities violated her right to privacy. Because the FACC was the operative pleading at the time of the anti-SLAPP motion, and because the FACC does not assert a violation of

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[11] We note that the Court of Appeal for the First District, Division 4, recently considered—and rejected—a similar argument involving the disclosure of medical information protected from disclosure by the CMIA. (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1165-1168.)

[12] The remedy for an alleged HIPAA violation is to lodge a written complaint with the Secretary of Health and Human Services, through the Office of Civil Rights, who has the discretion to investigate the complaint and impose sanctions. (45 C.F.R. § 160.306.)

HIPAA, we decline to consider Leonard's contention that HIPAA offers an exception to the litigation privilege. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884 [" 'an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading' "]; *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130-1131 ["The amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment"].)[13] Likewise, and for the same reason, we decline to consider Leonard's claim that HIPAA preempts the litigation privilege.

Having thus framed the issue, we readily conclude that Leonard's claims against RCA are barred by the litigation privilege. As the California Supreme Court explained in *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, Civil Code "[s]ection 47[, subdivision](b)'s litigation privilege bars a privacy cause of action whether labeled as based on common law, statute, or Constitution." (*Id.* at p. 962.) Here, Leonard's claims against RCA are expressly based on an alleged violation of her right to privacy. Because "the litigation privilege applies even to a constitutionally based privacy cause of action" (*id.* at p. 961), the trial court properly determined that Leonard could not demonstrate a probability of prevailing on her privacy-based claims.

B. Attorney's Fees and Costs

Finally, Leonard challenges the trial court's denial of her motion for attorney's fees and costs. On appeal, as in the trial court, Leonard argues that she was the "prevailing party" within the meaning of Civil Code section 1717, subdivision (b)(1)

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[13] We note that Leonard could not amend the cross-complaint to allege a violation of HIPAA. (*Salma v. Capon*, *supra*, 161 Cal.App.4th at p. 1293 ["When a cause of action is dismissed pursuant to section 425.16, the plaintiff has no right to amend the claim"]; *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477-478 ["A plaintiff or cross-complainant may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint or cross-complaint in response to the motion"].)

because "RCA took nothing." In the alternative, Leonard renews her request for attorney's fees under the private attorney general statute, section 1021.5.

We review a trial court's award of attorneys' fees and costs, including its determination that litigant is a prevailing party, for abuse of discretion, unless these issues involve statutory interpretation, in which case they present a question of law we review de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332; see *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 774.)

Civil Code section 1717, subdivision (a), on which Leonard relies, authorizes the trial court to award reasonable attorneys' fees to the prevailing party in a contract action if the contract provides for such an award. (Civ. Code, § 1717, subd. (a); *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425.) Civil Code section 1717, subdivision (b)(2), however, provides that, "[w]here an action has been voluntarily dismissed . . . , there shall be no prevailing party for purposes of this section." (See *Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 902 [" '[w]here an action [on a contract] has been voluntarily dismissed . . . , there shall be no prevailing party for purposes of' recovering attorney fees"].) Thus, "[w]hen a plaintiff files a complaint containing causes of action within the scope of [Civil Code] section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, Civil Code section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees.*" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617; accord *Mitchell Land and Imp. Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486.)

Leonard argues that she was the prevailing party because, "although RCA dismissed its original complaint, *that was after* Leonard had won the appeal on her cross[-]complaint and had obtained a *final ruling* of the Appellate Division granting the relief she requested." "In other words," Leonard continues, she "had already prevailed on

the merits with the primary purpose of the cross[-]complaint and *already was a prevailing party* under [Civil Code section] 1717." We reject Leonard's argument.

"In cases where Civil Code section 1717's definition of 'prevailing party' applies, the identification of the party entitled to a fee award must be determined by the final result of the litigation, *i.e.*, after conclusion of the appeal if an appeal is taken. [Citations.] [¶] Thus, for example, if a litigant successfully obtains reversal on appeal of an unfavorable summary judgment on a contract cause of action, he or she cannot collect an award of attorney fees under [Civil Code] section 1717 until the case has been remanded, tried on the merits and reviewed on appeal, if an appeal is taken, because the party ultimately prevailing on the cause of action cannot be known with certainty until the case is at an end. If the successful appellant loses on the merits after trial, he or she will not be entitled to [Civil Code] section 1717 attorney fees for the appeal because he or she ultimately was not the prevailing party with respect to the contract cause of action." (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 928.)

Here, though Leonard may have won a battle, she did not win the war. The appellate division reversed the judgment and remanded the case with instructions to "conduct a new trial and to adopt procedures at that new trial to mitigate to the extent possible the disclosure of protected health information at the new trial." The merits of RCA's contract cause of action would have been determined following the new trial and any appeal from judgment in the new trial. (*Butler-Rupp v. Lourdeaux*, *supra*, 154 Cal.App.4th at p. 928.) Because RCA voluntarily dismissed the complaint before that could happen, we cannot say who would have ultimately prevailed on the contract cause of action. (*Ibid.*) Under these circumstances, Civil Code section 1717, subdivision (b)(2) required a finding that there was no prevailing party on the contract cause of action. That Leonard enjoyed a momentary victory on her unrelated HIPAA argument does not make her a prevailing party for purposes of Civil Code section 1717.

In the alternative, Leonard claims an entitlement to attorney's fees under section 1021.5. As noted, the trial court rejected the request for attorney's fees incurred on appeal as untimely under rule 8.278, subdivision (c)(1). Though Leonard devotes a substantial portion of her appellate brief to the issue of attorney's fees, she does not address the trial court's reasoning for rejecting her request for private attorney general fees. She does not suggest that the trial court misinterpreted rule 8.278 or otherwise misapplied the law. She merely renews her request for attorney's fees, as if this court were ruling on it in the first instance.

An appellant must affirmatively demonstrate error in the trial court's reasoning. (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 588; *Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1336.) Leonard does not even attempt to demonstrate error in the trial court's ruling. Under the circumstances, we decline to consider the matter further.[14]

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[14] Likewise, and for the same reasons, we decline to consider Leonard's contention that the trial court erred in denying her request for costs.

III. DISPOSITION

The judgment and order are affirmed. Retailer's Credit Association shall recover its costs on appeal. (Rule 8.278(a)(1) & (2).)

RENNER, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Leonard v. Retailer's Credit Association of Grass Valley, Inc.
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Patrick H. Dwyer
Attorney at Law
P.O. Box 1705
17318 Piper Lane
Penn Valley, CA 95946

Mark E. Ellis
Ellis Law Group, LLP
740 University Avenue, Suite 100
Sacramento, CA 95825

✓ Honorable Linda J. Sloven
Judge of the
Nevada County Superior Court - Main
201 Church Street, Suite 5
Nevada City, CA 95959