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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ELLIOT D. FELMAN et al., Plaintiffs and Respondents, v. MBM COMMERCIAL PROPERTY etc., et al., Defendants and Appellants.	B163981 (Los Angeles County Super. Ct. No. SC066724)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Bingham McCutchen, Steven S. Spitz and David Laufer for Defendants and Appellants.

Green & Marker and Richard A. Marker; Law Offices of Bo Thoreen and Bo Thoreen for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants, Metropolitan Business Management, Inc., sued as MBM Commercial Property Management & Brokerage ("MBM") and John Khaki, appeal from an order denying their special motion to strike the fraud action filed against them by plaintiffs, Cyndi and Elliot D. Felman, pursuant to Code of Civil Procedure[1] section 425.16. We affirm.

II. BACKGROUND

A. The Third Amended Complaint

The third amended complaint, which is the operative pleading, contains three causes of action for fraud (first through third) and one for conspiracy (fourth). The third amended complaint alleges MBM and Mr. Khaki are co-conspirators of Dominic Annino, (who is not a named defendant) and Catherine Annino (who is named defendant but not a party to this appeal). Mr. Khaki is the president of MBM.

On June 12, 1998, Mr. Annino agreed to sell plaintiffs a residential property located in Malibu. After Mr. Annino refused to perform under the terms of the agreement, plaintiff filed an action entitled *Felman v. Annino* (Super. Ct. L.A. County, No. SC057566) which, in July 2000, led to the issuance of a court order for specific enforcement of the agreement.

The first cause of action for fraud in the third amended complaint in this case alleges that, in September 2000, MBM and Mr. Khaki falsely represented and demanded that Mr. Annino pay off a first deed of trust secured by the Malibu property in the amount of $1,060,000. The demand letter, which was attached to complaint as exhibit "A" and

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

dated September 20, 2000, was alleged to be a fraudulent misrepresentation to obtain payment on a note that had been paid off in its entirety. The September 20, 2000, demand letter was communicated to plaintiffs, the Chicago Title Company (the escrow company) and ultimately the superior court in the specific performance action.

The second cause of action alleges that, in November 2000, MBM and Mr. Khaki submitted a false beneficiary demand to the Chicago Title Company for payoff of the first trust deed. The demand was communicated to the superior court and plaintiffs. The third fraud cause of action is against Ms. Annino, who allegedly made a false demand in the amount of approximately $450,000 for a payoff of a lien against the Malibu property.

In the fourth cause of action for conspiracy, plaintiffs alleged that MBM, Mr. Khaki, and Ms. Annino conspired with Mr. Annino to fraudulently impede the court-ordered sale of the Malibu property. The conspirators are alleged to be agents of each other. The demands were made as part of a conspiracy to prevent the sale of the property based on the false premise that there was insufficient equity to pay off the first trust deed and other encumbrances on the Malibu property. It was alleged the misrepresentations were made with the intent: to deceive plaintiffs to induce them to believe the Malibu property was not marketable; to delay or thwart the completion of the sale of the Malibu property; to persuade plaintiffs to accept a higher purchase price by misleading them regarding the state of the Malibu property; to force plaintiffs to resolve the matter on terms that they would not have otherwise accepted; and to force the plaintiffs and the court to expend time and money that would not have otherwise been spent. It was further alleged that, as of September 2000, MBM had little or no secured or other interest in the Malibu property but that plaintiffs reasonably relied on the false demand. Likewise, as of November 2000, plaintiffs reasonably relied on the false demand made by Ms. Annino. As a result, plaintiffs were required to: pursue contempt and other proceedings against Mr. Annino thereby incurring legal fees; experience tax losses; and release claims against Mr. Annino.

B. The Special Motion to Strike

MBM and Mr. Khaki filed a special motion to strike the first, second, and fourth causes of action of the third amended complaint on the ground the claims arose from an act in the furtherance of their right of free speech and petition. The motion was brought on the additional ground that plaintiffs could not establish the probability of prevailing on the merits due to: the insufficiency of allegations and evidence to support the claims in the third amended complaint; a settlement agreement with Mr. Annino which encompassed his agents; and the statements were absolutely privileged under Civil Code section 47, subdivision (b). Defendants also demurred to the third amended complaint.

In support of the special motion to strike, defendants presented the following evidence. Plaintiffs sued Mr. Annino regarding the June 12, 1998, purchase and sale agreement. Plaintiffs prevailed in a binding arbitration conducted before Retired Judge Lawrence Waddington. Plaintiff received a total award of $26,174. In addition, Mr. Annino was ordered to specifically perform the contract to sell the Malibu property and to perform all necessary conditions to implement the terms of the June 12, 1998, purchase and sale agreement.

On July 13, 2000, Judge Patricia Collins entered a judgment confirming the arbitration award in *Felman v. Annino*, *supra* lawsuit. As part of the judgment, Mr. Annino was ordered to specifically perform pursuant to the June 12, 1998, agreement and to sell the Malibu property within 90 days of July 13, 2000. Because Mr. Annino failed to comply with Judge Collins's July 13, 2000, order to specifically perform the June 12, 1998, agreement, plaintiffs filed an application for an order to show cause re contempt. The hearing on the order to show cause was held on November 21, 2000. The trial court ordered Mr. Annino to complete the sale of the Malibu property by November 27, 2000, which he failed to do.

On January 26, 2001, Mr. Annino was held in contempt of court for failing to comply with Judge Collins's July 13, 2000, order. In finding Mr. Annino in contempt,

Judge Collins made the following findings. “[D]efendant has failed and refused to perform under the Purchase and Sale Agreement despite the court’s order of July 13, 2000, in that he has refused to deliver marketable title. The court finds by clear and convincing evidence that defendant has made and is making no efforts to clear the liens. This conclusion is supported by the unequivocal statement of defendant’s counsel to . . . counsel for plaintiffs, that defendant would not pay off the liens and therefore that the sale will never be concluded. The clear meaning of [defendant’s counsel’s] statement that the property sale would never conclude is that defendant planned to take no action to clear the liens, no evidence was produced to support that argument and in any event, such a request by the escrow officer would be an exercise in futility given the unequivocal position of defendant that he would not pay off the liens. [¶] The court also finds by clear and convincing evidence that defendant’s failure to sell the property as ordered is willful. This conclusion is supported by the abundance of circumstantial evidence that defendant will go to any length to thwart and defeat the order of the court. First, the order requiring him to specifically perform was entered July 13, 200 giving defendant a full 90 days to comply. The defendant did absolutely nothing during this [90-]day period. He certainly did not ask the court for any clarification of its order. Instead, only after the Order to Show Cause issued, did he begin to assert several ridiculous excuses for his nonperformance. First, he made the specious argument that the property was held in trust and he had no power to transfer the property. Even after it was revealed that the defendant was both the trustee and the beneficiary and that he retained power to remove assets from the trust, defendant continues to claim that the trustee should have been named as a party to the arbitration and subsequent lawsuit. Even more specious, and further evidence of defendant’s willfulness, was defendant’s argument that he agreed to sell only to the plaintiffs as individuals and the grant deed he was ordered to sign conveyed the property to plaintiffs’ family trust. Given that the sale was for cash, defendant has no interest in the manner in which title is taken, particularly where as here it is simply a matter of form. Finally, defendant has failed to take any action to clear the

liens; instead he takes the outrageous, irrational and unsupported position that the parties had implicitly agreed that in exchange for a purchase price of $1.075 million he would convey the property with liens in excess of $1.5 million. Moreover, rather than clearing liens, defendant has added yet another cloud on title by recording a lis pendens on December 15, 2000. While the defendant may under ordinary circumstances record a lis pendens, doing so under the circumstances here serves as further evidence of defendant's willful intent to thwart the order and prevent the sale. . . ."

The third amended complaint alleged that defendants were involved in the attempts to thwart the court-ordered sale of the Malibu property by making fraudulent demands for payments on a trust deed. Defendants explained their involvement with the alleged fraudulent claims against the Malibu property as follows. Mr. Khaki declared that between 1985 and 1987, Mr. Annino owed MBM approximately $250,000 for leasing and construction of tenant improvements on real properties located in Agoura Hills. MBM and Mr. Annino agreed that the amount would be considered as a first trust deed on the Malibu property. At that time MBM was managing the Malibu property. The loan had an interest rate of 12 percent per annum. The first deed of trust, dated December 29, 1987, was recorded on the Malibu property on September 14, 1988.

On September 20, 2000, Mr. Khaki, who was concerned over the dispute about the Malibu property, wrote a letter to Mr. Annino demanding full payment of the first trust deed. On November 29, 2000, Mr. Khaki wrote a beneficiary's demand letter concerning the first trust deed. Mr. Khaki requested that Chicago Title Company forward to him information concerning a non-judicial foreclosure proceeding. On February 21, 2002, the Malibu property was sold and MBM was paid through escrow $250,000 plus $858,080.10 in interest.

In opposition to the special motion to strike, plaintiffs argued section 425.16 did not apply because: the present action was not brought to chill the valid exercise of the right to free speech; defendants failed to make the threshold showing the lawsuit arises from an act by them in the furtherance of their First Amendment rights in that

misrepresentations were made to individuals who are not defendants in this case; defendants are attempting to assert the protections of other parties but their actions are the only relevant conduct in this case; and defendants' misrepresentations were not made in any official proceeding or in connection with issues before a judicial body. Plaintiffs further argued that defendants were not agents within the meaning of a "settlement agreement" between plaintiffs and Mr. Annino.

In their opposition, plaintiffs presented evidence that the money that was allegedly owed to MBM and paid in escrow was ultimately returned to Mr. Annino. Plaintiffs attached documents showing that, on February 22, 2001, MBM returned a check in the amount of $1,108,080.10 to the escrow company. The escrow company was instructed to pay the money directly to Mr. Khaki. By March 2001, the escrow company was instructed by Mr. Annino and Mr. Khaki to deposit a check in the amount of $1,108,080.10. Upon clearance of that check along with another one in the amount of approximately $30,972.99, the escrow company was instructed to pay over $1.1 million directly to Mr. Annino. On March 9, 2001, an attorney representing Mr. Annino, Rosario Perez, wrote a letter to MBM and Mr. Khaki. The March 9, 2001, letter provided in part: "By copy of this letter we are confirming that no funds are due MBM Inc. or you (John Khaki) from the sale of the property . . . ."

On October 17, 2002, Judge Lisa Hart Cole denied the special motion to strike on the ground the representations as alleged in the third amended complaint did not arise from any act of defendants in the furtherance of defendants' petition or free speech rights. Defendants filed a timely appeal challenging the denial of the special motion to strike. Judge Cole also overruled demurrers to the third amended complaint.

III. DISCUSSION

A. Standard of Review and Burdens of Proof

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Section 425.16, which was enacted in 1992, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) There is no requirement though that the suit be brought with the specific intent to chill the defendant's exercise of free speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at pp. 58-67.) The purpose of the statute was set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ."

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the courts finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 783.) Section 425.16, subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution 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; (4) or 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." In order to protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

When a special motion to strike is filed, the trial court must consider two components. First, the moving party has the initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123, fn. 10; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 784; *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at pp. 819-821.) Section 425.16 does not apply to every claim which may have some tangential relationship to free expression or petition rights. The Supreme Court has held: "[Section 425.16] cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77, quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002, orig. italics.)

Quoting from *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at page 1002, the Supreme Court in *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at page 77 explained: "California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.' [Citation.]" A defendant who meets the burden of showing the cause of action arises out of the exercise of the rights of petition or free speech has no additional burden of proving either plaintiff's subjective intent to chill (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 74-76; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at pp. 58-68) or a chilling effect. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 74-76.)

Second, once a defendant establishes the complaint's claims arise out of the exercise of petition or free expression rights, the burden shifts to plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at pp. 784-785.) The Supreme Court has defined the probability of prevailing burden as follows: "'[T]he 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."' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [], quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [ ].)" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88-89; *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123.)

In reviewing the trial court's order granting the motion, we use our independent judgment to determine whether the defendant was engaged in a protected activity (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, *supra*, 65 Cal.App.4th at p. 721;

Foothills Townhome Assn. v. Christiansen (1998) 65 Cal.App.4th 688, 695, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5) and the plaintiff met its burden of establishing a probability of prevailing on the claim. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) The trial court can strike one or more causes of action and permit others to remain. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.)

B. Defendants' Initial Burden

The sole question we must resolve is whether the causes of action alleged against defendants arose from conduct in furtherance of the exercise of their petition or free speech rights. The third amended complaint alleged that defendants made fraudulent creditor claims against the Malibu property that was at issue in the specific performance action. The misrepresentations concerning the outstanding debts: were made by letter; repeated to the plaintiffs; submitted in the pending escrow; and were ultimately repeated in the superior court.

Defendants argue, because the misrepresentations were ultimately made in the superior court, the special motion to strike should have been granted. As a general rule, communications made in an superior court action involve conduct arising from the exercise of petition and free speech rights. (§ 425.16, subd. (e)(2); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at pp. 1115-1120; see also *Shekhter v. Financial Indemnity Co.*, *supra*, 89 Cal.App.4th at pp. 151, 153; *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 237-238; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 784; *Ludwig v. Superior Court* (1995)

37 Cal.App.4th 8, 19.) The Supreme Court has also concluded that statements made in preparation for litigation are subject to a special motion to strike: "[C]ourts considering the question have concluded that '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.' (*Dove Audio, Inc.*[*v. Rosenfeld, Meyer & Susman*], *supra*, [47 Cal.App.4th] at p. 784, citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195 [] and *Ludwig v. Superior Court*, *supra*, 37 Cal.App.4th at p. 19; see also *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*[, *supra*,] 65 Cal.App.4th [at p.] 728 [].)" (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115.) Any written and oral statements made to the superior court by defendants during the underlying specific performance action resolved by Judge Collins would be subject to section 425.16, subdivision (e)(2). (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 784; *Ludwig v. Superior Court*, *supra*, 37 Cal.App.4th at p. 19.)

Defendants' problem is that the alleged false creditor claims were not made by them in the superior court action nor were they proffered solely in preparation or anticipation of litigation. Rather, the claims were made to an escrow company and repeated to plaintiffs. The false creditor claims were apparently made to interfere with or delay the sale of the Malibu property, which was the subject of a specific performance action. However, the fact that the false representations concerning the debt were ultimately repeated in the superior court does not mean defendants' misrepresentations arose from any petition rights. The Supreme Court has held the fact that an action has been filed after protected the activity has occurred does not automatically subject the cause of action to a special motion to strike because there is a mention of a protected activity. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) As the California Supreme Court explained in *City of Cotati*

v. Cashman, *supra*, 29 Cal.4th at page 78: "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (See *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1001, and cases cited.)" The inquiry in this case must be whether the defendants' protected conduct is the gravaman of the challenged causes of action. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 79.)

The gravaman of the third amended complaint is that defendants allegedly made false representations that a debt was owed by a third party who also happened to be a litigant in the specific performance action. The false demand for the money was made by letter and was repeated in the specific performance lawsuit between plaintiffs and Mr. Annino. This does not establish that defendants' acts underlying the fraud claims were themselves acts in the furtherance of the right of petition or free speech. Thus, although there a numerous references to the specific performance lawsuit in the third amended complaint, there is no cause of action based on the underlying action itself. The gravaman of this lawsuit is not defendants' conduct which arose from free speech or petition activity in the specific performance action. The activity of repeating the demand in the judicial proceeding is only incidental to the fraud cause of action, which is based on a false demand for money, nonprotected conduct. Simply stated, the false representation about the debt may have been "triggered" by the specific performance action, which is arguably protected; however, defendants' conduct in making the false representation in the escrow to interfere with the sale of the Malibu property "does not entail [that] it is one arising from" a protected activity. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.)

In that respect, this case is similar to *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284-285, in which an insurance company brought a fraud action against a building permit consultant and its owner. It was alleged the defendants were part of a scheme to defraud the insurance

company by preparing and submitting fraudulent and inflated damage and repair estimates for claims arising out of the Northridge earthquake. When the insurance company did not pay the amount demanded in the claims, the defendants would then select appraisers. The appraisers then allegedly utilized the inflated and fraudulent cost estimates of the defendants. The defendants in the *20th Century* action argued that the action was subject to a special motion to strike because the damage reports were prepared for submission to clients and their counsel. The reports were ultimately submitted to the insurer in support of the insureds' earthquake claims. In addition, it was argued that most of the reports had been prepared in anticipation of litigation, some of which were part of discovery proceedings in lawsuits. (*Id.* at pp. 284-285.)

The Court of Appeal rejected the defendants' claims that the trial court erred in denying the special motion to strike. The Court of Appeal held: "While some of the reports eventually were used in official proceedings or litigation, they were not created 'before,' or '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)(1) & (2).) . . . [¶] . . . [¶] Here, the damage reports were sent to 20th Century Insurance to demand performance on the insurance contract. At the time defendants created and submitted their reports and claims, there was no 'issue under consideration' pending before any official proceeding. If we protect the reports and claims under section 425.16 because they eventually could be used in connection with an official proceeding, we would effectively be providing immunity for any kind of criminal fraud so long as the defrauding party was willing to take its cause to court. Defendants have cited nothing to us that demonstrates [section 425.16] embraces such actions. We are satisfied it does not." (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, *supra*, 86 Cal.App.4th at pp. 284-285.)

Likewise in this case, section 425.16 is inapplicable. The basis of the third amended complaint in the present case is that defendants made a false demand for a debt that was not owed in order to prevent the Malibu property sale between plaintiffs and

third party. There are no allegations in the third amended complaint nor have defendants established the false demands were acts in the furtherance of their right to free speech or petition. (§ 425.16, subd. (b)(1); *Kajima Engineering & Construction, Inc. v. City of Los Angeles*, *supra*, 95 Cal.App.4th at p. 929.) As a result, defendants did not meet their threshold burden of establishing their conduct arose from an act in furtherance of their rights of petition or free speech. Because the third amended complaint does not arise from such activity, we need not address whether plaintiffs established a probability of prevailing on their claims.

IV. DISPOSITION

The order denying the special motion to strike is affirmed. Plaintiffs, Cyndi Felman and Elliot D. Felman, are entitled to recover their costs on appeal from defendants, Metropolitan Business Management, Inc. and John Khaki.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.