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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DOUGLAS SHIEPE, Plaintiff and Appellant, v. BANDER LAW FIRM, LLP, et al., Defendants and Respondents.	B196467 (Los Angeles County Super. Ct. No. BC353528)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed.

Thomasina M. Reed for Plaintiff and Appellant.

Law Offices of Martin L. Horwitz and Martin L. Horwitz for Defendants and Respondents.

Plaintiff Douglas Shiepe (Shiepe) appeals the dismissal of his complaint pursuant to the "anti-SLAPP" statute (Code Civ. Proc., § 425.16) and the award of attorney fees against him and his counsel.[1] We find no error, and we affirm.

FACTS AND PROCEDURAL HISTORY

I. The Wage Case

Shiepe is the former employer of defendant Babak Mahyari (Mahyari). In June 2005, Mahyari sued Shiepe and his company, Rocket Smog, Inc., for unpaid overtime, failure to provide meal and rest breaks, and wrongful termination (*Mahyari v. Rocket Smog Inc. et al.*, BC335317) (the wage case).

On January 12, 2006, Mahyari sought a restraining order against Shiepe in connection with the wage case. Mahyari alleged that Shiepe and his bodyguard came to Mahyari's workplace on December 30, 2005, showed Mahyari a gun, and threatened to kill him if he did not drop his lawsuit. The court granted a temporary restraining order, but subsequently denied a preliminary injunction.

II. The Present Case

Shiepe filed the present action against Mahyari, his attorneys (Joel Bander, Cathe Caraway-Howard, Rahul Sethi, and the Bander Law Firm), and Mahyari's mother, Mahroo Maghol (collectively, defendants), on June 6, 2006. The complaint alleges that Mahyari sought a restraining order to gain an advantage in the wage case and, even though the restraining order request was denied, defendants "continually state that Plaintiff threatened Defendant Mahyari with a gun to third-parties." Further, the complaint alleges that on April 17, 2006, Attorney Caraway-Howard "swore profanities" and called Shiepe a "'druggie'" and a "'junkie'" in the presence of third parties. The complaint asserts causes of action for abuse of process, malicious prosecution,

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

defamation, and intentional and negligent infliction of emotional distress and seeks damages of $1,000,000.

Defendants filed an answer generally denying the allegations of the complaint and asserting affirmative defenses on July 10, 2006. On August 9, 2006, defendants filed an "anti-SLAPP" motion to strike the complaint pursuant to section 425.16. The motion asserted that the present suit arises directly from the wage case and request for a restraining order, which are exercises of Mahyari's constitutional right to petition for grievances. Further, it asserted that Shiepe could not prevail on his causes of action for abuse of process, defamation, and negligent and intentional infliction of emotional distress because Mahyari's actions were absolutely protected by the litigation privilege, and that Shiepe could not prevail on his cause of action for malicious prosecution because the request for a temporary restraining order was supported by probable cause and defendants lacked malicious intent.

In support of the anti-SLAPP motion, defendants filed the declaration of Attorney Caraway-Howard, who stated that she deposed Shiepe on April 17, 2006, and that the statements attributed to her in the complaint were made at that deposition. Further, she said, all actions by her and her law firm were made "in good faith, with the sole purpose to protect [Mahyari] from physical harm and to faithfully pursue his wage and hour claim within the bounds of law." Defendants also filed the declaration of Attorney Rahul Sethi, who obtained the temporary restraining order on Mahyari's behalf. It stated that Sethi "believed then, and still . . . believe[s] that Plaintiff Shiepe threatened [Mahyari] with physical harm in order to get [Mahyari] to drop his lawsuit," and that all of his actions in connection with the wage case were made in good faith.

Shiepe opposed the motion to strike. In his supporting declaration, Shiepe stated that he had met with Mahyari on December 30, 2005, to discuss a resolution of the wage case, but that the meeting was "friendly," involving "exchanges of holiday pleasantries, handshakes, and hugs." After this meeting, defendants "surprisingly sought a restraining order against me under the guise that I threatened Mr. Mayhari [*sic*] into dismissing the wrongful termination action. Although all witnesses to the meeting support the fact that

Mr. Mayhari [*sic*] voluntarily, and without any coercion whatsoever, agreed to dismiss the action, Mr. Mayhari [*sic*] alone accused me of holding him at gunpoint and forcing him into signing the agreement of dismissal." Shiepe declared that he had suffered severe emotional distress and his reputation had been damaged by defendants' accusations.

Attorney Christopher Pham also submitted a declaration in opposition to the motion to strike, to which he attached portions of the transcript of Shiepe's April 18, 2006 deposition in the wage case. Those transcripts reflect that during Shiepe's deposition, Caraway-Howard referred to Shiepe as "a druggy and a junky" and stated that "Committing perjury is a very stressful experience for most people. It doesn't surprise me a bit that your client is suffering."

On September 22, 2006, the trial court issued a minute order granting the motion to strike, awarding defendants sanctions of $4,745, and ordering defendants to submit a proposed order and judgment. The trial court signed an order of dismissal on November 21, 2006.[2] Judgment of dismissal and notice of entry of judgment were filed the same day.

On November 30, the court entered an amended judgment that stated that the sanctions were "to be paid by Douglas Shiepe and his attorney of record Christopher Q. Pham." Notice of entry of the amended judgment was filed on November 30, 2006. On January 25, 2007, Shiepe filed the present appeal from the amended judgment.

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[2] Defendants' initial proposed order omitted the reference to "sanctions" and instead would have awarded "attorney fees" of $4,745. Shiepe filed objections to defendants' proposed order, contending that the proposed order misstated the court's order by purporting to award "attorneys' fees," not "sanctions." Defendants then filed an amended proposed order, which reintroduced the reference to sanctions. The trial court signed that order on November 21, 2006.

DISCUSSION

On appeal, Shiepe contends that the trial court erred by: (1) dismissing the causes of action for abuse of process, defamation,[3] and intentional and negligent infliction of emotional distress; (2) dismissing defendants Mahyari and Maghol; and (3) awarding attorney fees to the Bander Law Firm. We address each contention below.

I. The Trial Court Properly Dismissed the Causes of Action for Abuse of Process and Defamation

A. The Anti-SLAPP Statute and the Standard of Review

A special motion to strike under section 425.16, the "anti-SLAPP" statute, allows a defendant to gain early dismissal of a lawsuit that qualifies as a "SLAPP." "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) A SLAPP is "[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 or California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) Such an act 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." (§ 425.16, subd. (e).)

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[3] Shiepe's reply brief suggests that he may be appealing from the dismissal of his causes of action for abuse of process and defamation only. Nonetheless, in an abundance of caution, we have addressed all four cause of action.

A SLAPP is 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." (§ 425.16, subd. (b)(1).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. "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." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) "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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

"Review of an order granting or denying a motion to strike under section 425.16 is de novo. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, 1056.) We consider 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' (*HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 212.)" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

B. Protected Activity

The defendant in an alleged SLAPP suit bears the initial burden of showing the suit falls within the class of suits subject to a motion to strike under section 425.16. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 304.) A defendant meets this burden by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e). (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569.)

Where a single cause of action alleges both acts protected under the statute and unprotected acts, the entire cause of action may be stricken under section 425.16. Plaintiffs "cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" (*Fox v. Searchlight Pictures, Inc. v. Paladino*, *supra*, 89 Cal.App.4th at p. 308, fn. omitted; see also Weil & Brown, Civil Procedure Before Trial (The Rutter Group 2007), § 7:239, p. 7-102.) However, "when the allegations referring to arguably unprotected activity are only incidental to a cause of action based essentially on protected activity, collateral references to unprotected activity should not obviate application of the anti-SLAPP statute to the complaint." (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 520; see also *Mann v. Quality Old Time Service, Inc*. (2004) 120 Cal.App.4th 90, 103 ["Published appellate court cases have concluded that where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct"].)

Here, the cause of action for abuse of process alleges that Mahyari obtained a temporary restraining order "to gain an advantage in the Lawsuit [the wage case] and to get [Shiepe] pay Mahyari the money he sought in his complaint against Plaintiff" (¶¶ 16-17). It also alleges that on April 17, 2006, Caraway-Howard swore at Shiepe and called him a "druggie" and a "junkie" (¶ 17). Finally, it alleges that defendants have harassed and defamed Shiepe by telling third parties that he threatened Mahyari with a gun (¶¶ 17-18). The causes of action for defamation and intentional and negligent infliction of emotional distress contain nearly identical allegations: They allege that defendants filed a request for a restraining order that accused Shiepe of threatening Mahyari with a gun (¶¶ 29, 33, 39); that Caraway-Howard called Shiepe a "druggie" and a "junkie" on April 17, 2006 (¶¶ 30, 34, 39); and that defendants have told third parties that Shiepe "threatened and pointed . . . a gun at Defendant Mahyari and is dangerous" (¶¶ 30, 33).

Mahyari's statements made in support of his request for a restraining order plainly were made "before a . . . judicial proceeding" in connection with "an issue under

consideration or review by a . . . judicial body." (§ 425.16, subd. (e); see also *Navellier v. Sletten, supra*, 29 Cal.4th at p. 90 [a claim for relief filed in court "indisputably is a 'statement or writing made before a . . . judicial proceeding"].) Caraway-Howard's statements about Shiepe's alleged drug use also were made in connection with "an issue under consideration or review by a . . . judicial body" because they were made during a deposition noticed in the wage case.[4] (§ 425.16, subd. (e); see also *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 612 [statements made in course of responding to discovery requests were protected by anti-SLAPP statute].) Accordingly, both statements are protected by the anti-SLAPP statute. (§ 425.16, subds. (b), (e).)

We cannot determine whether defendants' alleged statements to third parties also are protected by the anti-SLAPP statute because neither the complaint nor the declarations submitted in connection with the motion to strike reveal who the third parties allegedly are or in what context the alleged statements were made. However, as we have noted, to meet their burden under section 425.16, defendants need not prove that *all* of the acts alleged in a cause of action fall within the anti-SLAPP statute's protection. (*A.F. Brown Electrial Contractor, Inc. v. Rhino Electric Supply, Inc*. (2006) 137 Cal.App.4th 1118, 1124-1125.) Rather, where a cause of action is based on allegations that include protected and unprotected activities, the cause of action is vulnerable to a special motion to strike if "the protected conduct forms a substantial part of the factual basis for the claim." (*Ibid.*) Here, the protected activities are a substantial part of the factual basis for the abuse of process and defamation claims, and we therefore conclude that defendants have met their burden of establishing that these claims are within the class of suits subject to an anti-SLAPP motion.

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[4] The complaint does not identify the forum in which the statements were made, but the undisputed evidence establishes that the statements were made at Shiepe's deposition. We may properly consider this evidence on appeal from the grant of an anti-SLAPP motion. (*Mann v. Quality Old Time Service, Inc., supra,* 120 Cal.App.4th at p. 104 [when reviewing anti-SLAPP motion, "the court . . . considers the pleadings *and evidentiary submissions* of both the plaintiff and the defendant"], italics added.)

C. Probability of Prevailing

"'"In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must '"state[] *and substantiate*[] a legally sufficient claim."' [Citations.] Put another way, 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.] In deciding the question of potential merit, 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.]" ([*Wilson v. Parker, Covert & Chidester* (2002)] 28 Cal.4th [811,] 821 . . . .) (See also, e.g., *Equilon*, *supra*, 29 Cal.4th 53, 63 [section 425.16 "subjects to potential dismissal . . . those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits [citation], a provision we have read as 'requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim'"]; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 [under section 425.16 "the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation"].)' (*Taus v. Loftus* [(2007)] 40 Cal.4th [683,] 713-714.)" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 37, emphasis added and omitted.)

In the present case, Shiepe asserted in opposition to the anti-SLAPP motion (and asserts on appeal) that defendants "misus[ed] the TRO obtained to gain an advantage and get money sought in another lawsuit" and "use[d] the TRO with third parties, whom they told Appellant had threatened Mahyari with a gun." However, Shiepe has not introduced any *evidence* of this alleged misuse of the temporary restraining order. Indeed, although Shiepe submitted two declarations in opposition to the anti-SLAPP motion, neither substantiates the allegations in the complaint that defendants misused the restraining order or told third-parties that Shiepe threatened Mahyari with a gun. Shiepe thus failed

to make a prima facie case that defendants told third parties about the restraining order or the alleged gun incident and, accordingly, he has not met his burden with regard to that claim.

Shiepe contends that he was not required to establish even a prima facie case because defendants' declarations "[did] not negate the allegation made in the complaint." This contention misunderstands the parties' respective burdens under the anti-SLAPP statute. Once defendants have made a threshold showing that the challenged cause of action is one "arising from" protected activity (§ 425.16, subd. (b)(1)), the *plaintiff*, not the defendant, must demonstrate a probability of prevailing on the claim. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 76.) Stated differently, motions brought under the anti-SLAPP statute operate "like a demurrer or motion for summary judgment in 'reverse.' Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is 'substantiated,' that is, supported by competent, admissible evidence." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) Here, Shiepe failed to demonstrate that his claim was substantiated by *any* evidence—admissible or otherwise—and thus the claim properly was subject to a special motion to strike.

Shiepe did present prima facie evidence to support his two remaining claims—that Mahyari made false statements in support of his application for a TRO and that Caraway-Howard called Shiepe a "druggie" and a "junkie"—but these claims were properly stricken because they are barred by the litigation privilege codified in Civil Code section 47, subdivision (b). The litigation privilege "shields, among other things, any 'publication or broadcast' made '[i]n any . . . judicial proceeding.'" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830.) 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.' (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212.)" (*Olszewski v. Scripps Health*, *supra*, at p. 830.) Further, the privilege extends to "'any

publication . . . that is required [citation] or permitted [citation] by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked.' (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 380-381.)" (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, *supra*, 137 Cal.App.4th at p. 1126.) The litigation privilege "is 'absolute in nature' (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 215), and its 'principal purpose . . . is to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions' (*id*. at p. 213)." (*A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc*., *supra*, 137 Cal.App.4th at p. 1126.) It is broadly applied and doubts are resolved in favor of the privilege. (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 500.)

Shiepe's allegation that Mahyari made false statements in his application for a restraining order is barred by the litigation privilege. Mahyari's statements, even if false, indisputably were made "in [a] judicial . . . proceeding[]" (an application for a restraining order) by a party authorized by law to seek such an order. (*Olszewski v. Scripps Health*, *supra*, 30 Cal.4th at p. 830.) Further, the statements indisputably had a "connection or logical relation to" the restraining order application and were made to "achieve [its] objects"—indeed, they were the basis on which the restraining order was sought. (*Ibid*.) Thus, Mahyari's statements in his application for a restraining order are privileged under Civil Code section 47. (See also *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1422 [counsel's letter was privileged under Civil Code section 47 because defendants "had the right to apply for a renewal of the restraining order they had obtained against [plaintiff]"]; *Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 886 [plaintiff's allegation that defendants knowingly filed a false and libelous declaration could not provide the basis for an abuse of process action, as the declaration was subject to the privilege].)

Shiepe's allegation that Caraway-Howard called Shiepe a "druggie" and a "junkie" also is barred by the litigation privilege. Shiepe apparently concedes that, because these statements were made by defendants' attorney at a deposition, they were

"'made in judicial . . . proceedings'" by "'litigants or other participants authorized by law.'" (*Olszewski v. Scripps Health*, *supra*, 30 Cal.4th at p. 830.) He contends, however, that they had no logical relation to the action and were not made to achieve its objects because they "had no bearing on any issue that was before the court or involved in Mahyari's wage and hour claim." Thus, he suggests, they are not shielded by the litigation privilege.

We do not agree. The principal purpose of section 47, subdivision (b) "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 213.) "Since the 'external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice' (*McClatchy Newspapers, Inc. v. Superior Court* [(1987)] 189 Cal.App.3d [961,] 970), courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." (*Silberg v. Anderson*, *supra*, at p. 213.) Further, while the privilege applies only to statements that have "'some connection'" with the proceedings, there is no requirement "'of relevancy, materiality or pertinency, in their technical sense.'" (*Sacramento Brewing Co. v. Desmond, Miller & Desmond* (1999) 75 Cal.App.4th 1082, 1089, quoting *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80.) "'The test . . . appears to be purposely couched in nontechnical legal language: does the utterance have "some relation" to the judicial proceeding?'" (*Sacramento Brewing Co.*, *supra*, 75 Cal.App.4th at p. 1089.)

Applying this standard, the court in *Izzi v. Rellas* (1980) 104 Cal.App.3d 254 held that counsel's defamatory statements made in a letter to opposing counsel were protected by the litigation privilege. There, plaintiff's counsel agreed to extend defendant's time to answer the complaint only in exchange for a series of concessions; defendant's counsel responded in a letter that characterized counsel's demands as extortion. (*Id*. at pp. 257-260.) Plaintiff's counsel filed a separate suit alleging libel per se, claiming that the statements on which the libel suit were based were not protected by the litigation

privilege because defendant's counsel's letter "bears no relationship to respondent's representation of his client." (*Id*. at pp. 260-262.) The court disagreed: "We find it more plausible to view the unflattering words involved as nothing more than a rhetorical reiteration of respondent's position with regard to appellant's suggestions as to how discovery be conducted and settlement be approached. By way of his letter, respondent was pointing out, albeit forcefully, that he felt appellant's demands were less than reasonable. . . . [¶] . . . Although it need not be, this type of language is part of the adversary system, and, as such, is to be anticipated in the course of 'heated battle' between adverse parties to proceedings considered to be within the context of 'judicial proceedings.'" (*Id*. at pp. 263-264.) It concluded: "It is true, as appellant claims, that the allegedly defamatory statements unveil an emotionally charged and angered attorney. It matters little, however, whether or not respondent was seeking to vent his personal ire as opposed to the anger of his client, upon appellant. In view of the highly unfavorable conditions of settlement which appellant proposed to respondent, and, thereby respondent's client, it is clear that respondent was speaking for his client's best interests. The indisposition of a party or his attorney to conditions for settlement proposed by an adverse party or his attorney is inherently part of the pursuit of the party objectives in the course of litigation." (*Id*. at p. 265; see also *Thornton v. Rhoden*, *supra*, 245 Cal.App.2d at pp. 86, 90, 93-94 [allegedly defamatory statements made during deposition were protected by the litigation privilege; statements had "'some relation to'" the proceeding although "no contention is made that . . . [the statements] were admissible as such, either directly or for the purpose of impeaching any witness or that they were calculated to lead to the discovery of admissible evidence"].)[5]

The *Izzi* court's analysis applies with equal force in the present case. Caraway-Howard referred to Shiepe's alleged drug use at his deposition in response to Shiepe's

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[5] *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, cited by Shiepe, does not articulate a different rule. It holds that because press conferences and press releases do not advance a litigant's case, statements made in those forums are not shielded by the litigation privilege.

accusation that he was "under medication right now because of [Caraway-Howard]." Caraway-Howard responded that "No, you're under medication because you're a druggy and a junky, sir." While her comments were undoubtedly "emotionally charged" and "inflammatory" (*Izzi v. Rellas*, *supra*, 104 Cal.App.3d at pp. 264, 265), they were made in direct response to Shiepe's accusation of inappropriate litigation tactics. Thus, although inflammatory and perhaps untrue, counsel's comments bear a reasonable relationship to her representation of her client and are protected by the litigation privilege.

We reach the same conclusion with regard to Caraway-Howard's perjury accusation. That comment apparently followed Shiepe's request to continue his deposition on the grounds that his use of prescription drugs for anxiety and sleeplessness would prevent his accurate testimony. Caraway-Howard responded that Shiepe had not provided a doctor's letter substantiating his claims, and Shiepe's counsel answered that he would produce a letter from Shiepe's doctor saying that Shiepe was taking prescription medication and was "under a lot of stress." Caraway-Howard rejoined that "Committing perjury is a very stressful experience for most people. It doesn't surprise me a bit that your client is suffering, but I don't think that precludes his ability to proceed." Again, Caraway-Howard's comments were intemperate, but they were responsive to Shiepe's assertion that he could not testify at his deposition and, therefore, were directly related to the proceedings. Thus, they are protected by the litigation privilege.

II. The Trial Court Properly Dismissed the Complaint Against All Defendants

Shiepe claims that the trial court erred by dismissing the complaint as against Mahyari because defendants' anti-SLAPP motion was not supported by Mahyari's declaration "and it was therefore impossible for the Court to determine that his motives in filing the TRO were anything other than what the Complaint alleged them to be." We do not agree. As we have discussed, in the anti-SLAPP context the defendants do not have the burden of demonstrating the complaint's lack of merit—rather, the plaintiff has the

burden of establishing arguable merit. (See section I.C, *ante*.) Thus, the absence of Mahyari's declaration is irrelevant to the merits of the anti-SLAPP motion.

Shiepe also claims that the trial court erred in granting the motion as to Mahyari's mother, defendant Maghol, because she was not named in the notice of motion to strike the complaint. Again, we do not agree. While Shiepe is correct that Maghol was not named in the body of the notice, her name appears in the "attorneys for" designation on the cover sheet and the signature block. Further, the memorandum of points and authorities in support of the motion to strike asserts that "Plaintiff Shiepe's complaint against Bobby [Mahyari], his attorneys, *and his mother***,** should be struck under the anti-SLAPP statute because: [¶] Plaintiff Shiepe sued Bobby, his counsel, *and his mother* in response to Bobby's protected activities of petitioning the government and free speech." (Emphasis added and omitted.) And, Shiepe's opposition to the motion states that it is submitted in opposition to "Defendant Bander Law Firm, L.L.P.'s, Joel Bander's, Cathe Caraway-Howard's, Rahul Sethi's, Babak Mayhari's [*sic*], *and Mahroo Maghol's*" motion to strike. (Italics added.) Thus, Shiepe had adequate notice that the anti-SLAPP motion was brought on behalf not only of Mahyari and the attorneys, but Maghol as well.

Further, even if the trial court erred by granting the motion to dismiss as to Maghol, the error was not prejudicial. Shiepe did not make any unique allegations against Maghol: the complaint alleges that she, like the other defendants, "continually state[s] that Plaintiff threatened Defendant Mahyari with a gun to third-parties" and "[w]ithout probable cause or plausible evidence, [she] misused the filing of [the] Request for a Temporary Restraining Order merely to harass, oppress, and defame Plaintiff . . . ." We have already concluded that these allegations cannot survive a special motion to strike. Thus, Shiepe was not prejudiced by Maghol's dismissal because the claim against her would be subject to dismissal on a subsequent anti-SLAPP motion. (E.g., *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548 [only prejudicial error constitutes basis for reversal]; cf. *Powers v. Sissoev* (1974) 39 Cal.App.3d 865, 870 ["To dismiss her appeal merely to have a judgment formally entered below with a new appeal would be a useless waste of judicial and litigant time. Accordingly, . . . we order the trial court to enter,

nunc pro tunc as of a date prior to September 22, 1972 [fn. omitted], a judgment in favor of the driver and against Karen; we then treat Karen's notice of appeal now on file as a premature but effective appeal from that judgment."]; *Karnes v. State Dept. of Public Health* (1969) 1 Cal.App.3d 867, 872 ["Even though the amended certificate originally was improperly issued, Bill is presently entitled to a birth certificate amended in the same particulars. We thus agree with the trial court in the instant case that to order respondent to strike the certificate from its records would be an idle and useless act."].)

III. The Trial Court Properly Granted the Attorney Fees Requested by Defendants

Shiepe contends that the trial court's imposition of sanctions on him and his counsel was improper because (1) section 425.16 does not authorize an award of fees against plaintiff's counsel, and (2) the Bander Law firm and its attorneys were not entitled to attorney fees because they represented themselves. We decline to reach this issue because Shiepe did not raise it in the trial court. Defendants' motion to strike sought attorney fees against both Shiepe and his counsel; Shiepe opposed the motion to strike, but he did not contend that fees should not be awarded if defendants prevailed. Because Shiepe did not present these arguments to the trial court, we will not consider them for the first time on appeal. (*Garcia v. Duro Dyne Corp*. (2007) 156 Cal.App.4th 92, 111; *Wachovia Bank v. Lifetime Industries, Inc*. (2006) 145 Cal.App.4th 1039, 1060 [appellant "may not raise the matter for the first time on appeal"]; *Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 454 ["Appellant's objection was waived in the trial court. Thus, he may not now raise it on appeal. [Fn. omitted.]"].)

Additionally, Shiepe lacks standing to appeal the award of sanctions against his attorney, and Attorney Christopher Pham did not himself appeal. An attorney who is personally subject to sanctions has a distinct and separate right to appeal the order. (§ 904.1, subd. (b); *20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1276-1277.) When the order imposes sanctions against the attorney, he, not the client, must file a timely notice of appeal from the order, and the client has no standing to raise a

challenge to the order on behalf of the attorney. (*20th Century Ins. Co. v. Choong, supra*, 79 Cal.App.4th at pp. 1276-1277; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42.) Although we liberally construe the notice of appeal, when the attorney fails to either add his name as an appellant in the client's notice of appeal, or alternatively to file a viable separate appeal, the attorney will lose the right to challenge the sanctions order against him because the order is not reviewable on the client's appeal. (*Calhoun v. Vallejo City Unified School Dist.*, *supra*, 20 Cal.App.4th at p. 42 [absent attempt by attorney, not party, to file an appeal, ruling not reviewable]; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 761 [no jurisdiction to review portion of sanction order applicable to counsel because attorney did not include himself in notice of appeal]; but see *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 974 [deeming notice of appeal that named only a party to include party's attorney, against whom the sanctions had been assessed].)

Here, the notice of appeal identifies the sole appellant as "Douglals [*sic*] Shiepe," and Attorney Pham did not separately appeal. Thus, we have no jurisdiction to review the sanction award against counsel.

DISPOSITION

The judgment as amended is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J. MANELLA, J.