Filed 11/22/05 Dureza v. Tenet Healthcare Corp. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| CATALINO D. DUREZA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>TENET HEALTHCARE CORPORATION et al.,<br><br>Defendants and Respondents. | B177559<br><br>(Los Angeles County Super. Ct. No. BC310478) |
| CATALINO D. DUREZA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TENET HEALTHCARE CORPORATION et al.,<br><br>Defendants and Appellants. | B180079<br><br>(Los Angeles County Super. Ct. No. BC310478) |

APPEAL from orders of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed in part, reversed and remanded in part.

Riley & Reiner, Raymond L. Riley, Douglas D. Winter and James B. Hillsburg for Plaintiff and Appellant and for Plaintiff and Respondent.

McDermott Will & Emery, Russell Hayman, Thomas A. Ryan and Terrence P. Mann for Defendants and Respondents and for Defendants and Appellants.

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In these consolidated appeals plaintiff Catalino D. Dureza and defendants[1] separately appeal from the superior court's orders granting and denying two special motions to strike causes of action of the second amended complaint and all of the causes of action of the third amended complaint pursuant to Code of Civil Procedure section 415.16[2] (section 425.16). Plaintiff initiated his lawsuit after his staff privileges at the Hospital were suspended. In his appeal from the superior court's order granting defendants' special motion to strike (SLAPP[3] motion) as to causes of action in the second amended complaint, plaintiff contends that the superior court erroneously determined that those causes of action arose from defendants' filing of a report with the Medical Board of California pursuant to Business and Professions Code section 805 (the 805 Report), a protected activity under section 425.16. Defendants appeal the superior court's denial of their second SLAPP motion and contend that all of the claims asserted in the third amended complaint arose out of the filing of the 805 Report and the exercise of their free speech rights, subjecting the claims to section 425.16.

We find the gravamen of plaintiff's lawsuit to be that defendants engaged in a course of conduct directed at avoiding their contractual obligations to pay plaintiff. We further find that any protected activity alleged in the second and third amended

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**1** The three defendants in this action are Tenet Healthsystem Desert, doing business as Desert Regional Medical Center (the Hospital), its corporate parent, Tenet Healthcare Corporation (collectively referred to as Tenet), and Truman L. Gates (Gates), the chief executive officer of the Hospital.

**2** All statutory references are to the Code of Civil Procedure unless otherwise indicated.

**3** "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

complaints is tangential to plaintiff's claims. Accordingly, we reverse the trial court's order granting defendants' motion to strike causes of action of the second amended complaint, and affirm the denial of the motion against the third amended complaint.

## FACTUAL AND PROCEDURAL BACKGROUND

*The Agreements.*

Pursuant to a written "Relocation Agreement" (Relocation Agreement) dated October 31, 2001, plaintiff agreed to move his neurosurgery medical practice to the Hospital in exchange for a minimum monthly guaranteed payment from Tenet of $50,343.33. Under the Relocation Agreement, plaintiff was required to maintain a full-time practice in the specialty of neurosurgery in medical office space within the Hospital's primary service area for a minimum term of three years, establish medical staff membership and appropriate privileges in his specialty at the Hospital, comply with medical staff bylaws and Hospital rules, regulations, and policies, and participate in and accept calls from the Hospital's emergency department call rotation within his specialty.

In another written contract, the "Emergency Room On-Call Panel Services Agreement" (the On-Call Agreement), dated November 1, 2001, plaintiff agreed to provide on-call specialty services as requested by the Hospital. Plaintiff also agreed to maintain an unrestricted license to practice medicine in the state and maintain Hospital medical staff membership in good standing. In return, plaintiff would be paid $1,000 for each 24-hour period during which he provided emergency room on-call neurosurgery coverage services for the Hospital.

*Tenet's Alleged Failure to Pay Plaintiff Under the Two Agreements.*

Plaintiff commenced performance under the Relocation and On-Call Agreements in November 2001, but Tenet stopped making payments to plaintiff in October 2002, and according to plaintiff, continues to refuse to pay plaintiff as required under the two agreements. On May 3, 2003, plaintiff and Hospital CEO Gates met to discuss Tenet's refusal to pay plaintiff under the Relocation and On-Call Agreements. Gates advised plaintiff that the number of surgeries plaintiff was performing had declined in recent

months, and he needed to significantly increase the number of surgeries he performed in order to be paid.

*Notification Concerning Plaintiff's Unauthorized Use of the "Cadence Cage" for Spinal Surgeries.*

By letter dated May 22, 2003 the Hospital notified plaintiff that until the FDA lifted its prohibition against use of the Cadence Titanium Cement Restrictor (the Cadence Cage) in the spine, plaintiff was not authorized to use the device in spinal surgeries.[4] The letter further stated that any attempt to circumvent this prohibition would result in immediate suspension of plaintiff's staff privileges at the Hospital. The letter contained no indication that any investigation of plaintiff had commenced.

*Plaintiff's Notice of Resignation and Request for Leave of Absence*.

On June 1, 2003 plaintiff notified defendants of his intention to resign his hospital privileges effective June 30, 2003. On the same day, plaintiff again met with Gates, who convinced him to withdraw his notice of resignation and instead take a leave of absence. Unaware that a leave of absence required Hospital board approval, plaintiff advised the Hospital by letter dated June 4, 2003 that he was changing his resignation to a six-month leave of absence to commence June 30, 2003. At the same time, plaintiff advised the Hospital that his liability insurance would expire on June 30, 2003, and he would not be able to provide services after that date.

*The Hospital's Response to Plaintiff's Notice of Leave of Absence.*

On June 17, 2003 the Hospital notified plaintiff that it had received his request for a leave of absence effective June 30, 2003, and referred him to the bylaws for information regarding the approval process. Thereafter, on June 25, 2003, the Hospital

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**4** Plaintiff vigorously disputes the Hospital's assertion that the FDA had prohibited use of the Cadence Cage for spinal surgery. Rather, he contends that the FDA had simply not yet approved the device for spinal surgery, but in fact issued such approval on June 19, 2003. Moreover, although the Hospital's letter was dated May 22, 2003, plaintiff claims he did not receive it until June 10, 2003, after he notified the Hospital of his intent to take a leave of absence.

advised plaintiff that his leave of absence would not commence until July 17, 2003, when the Hospital's governing board was scheduled to approve the request. The Hospital's correspondence specifically noted that plaintiff would be expected to cover the emergency department back-up call schedule from July 7 through July 14, 2003, and made no reference to any investigation of plaintiff.

*The Hospital's Investigation of Plaintiff and Suspension of His Privileges.*

In a letter dated July 7, 2003 the Hospital advised plaintiff:

"Recently, you requested that your pending resignation from the Medical Staff be changed to a request for a leave of absence. As you are aware, the Medical Staff is currently investigating certain incidents concerning your care of patients at Desert Regional Medical Center. As such, please be aware that California Business and Professions Code Section 805 requires that a report be submitted to the Medical Board of California within fifteen days after a physician resigns or takes a leave of absence from membership, staff or employment after the receipt of notice of an investigation has been received by the practitioner. Accordingly, should you decide to resign from the Medical Staff or take a leave of absence prior to the conclusion of the investigation commenced by the Medical Staff, a report will be sent to the Medical Board of California and to the National Practitioner Data Bank setting forth the subject of the investigation. [¶] Based on the above, it is recommended that you confer with counsel familiar with Medical Staff and reporting matters prior to making your decision."[5]

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**5** Despite the Hospital's reference to an ongoing investigation, there is no evidence in the record that plaintiff was notified of the pending investigation prior to the July 7, 2003 correspondence. Indeed, the parties dispute whether any investigation had even been commenced before July 7, 2003. In his declaration in support of the SLAPP motion, Gates stated, "On May 22, 2003, the Hospital's Medical Staff initiated an investigation into Plaintiff's conduct at the Hospital." And defendants' respondents' brief contains a litany of "problematic behavior," which defendants claim formed the basis for the Hospital's investigation and ultimate suspension of plaintiff. But the May 22 letter contains no hint that plaintiff's unauthorized use of the "Cadence Cage" had triggered an investigation, and other evidence cited by defendants—a letter from the medical staff to plaintiff dated July 15, 2003 concerning a lapse in a patient's care—concerns conduct that occurred after July 10, 2003, more than a month after plaintiff had

On July 16, 2003, the day before the Hospital's governing body was to approve plaintiff's leave of absence, the Hospital medical staff suspended plaintiff's staff membership and privileges at the Hospital. On July 22, 2003 the Hospital's medical executive committee upheld plaintiff's suspension.

Plaintiff claims that following his suspension, he observed photographs of himself placed in conspicuous locations throughout the Hospital which identified him as a security risk, and suggested that he was dangerous. He also asserts he was effectively locked out of the Hospital because reception employees would call security whenever he attempted to enter the Hospital.

*The 805 Report.*

Business and Professions Code section 805 requires a hospital to file a report with the Medical Board of California within 15 days after a physician's privileges are suspended or a physician resigns or takes a leave of absence in the face of an impending investigation. On July 30, 2003, the Hospital submitted a report to the medical board pursuant to section 805, which stated:

"On July 16, 2003, the Medical Staff summarily suspended Dr. Dureza's membership and privileges based on serious concerns about Dr. Dureza's use of certain medical devices, various behavioral issues, allegations concerning Dr. Dureza's failure to respond while on ER call and lack of timely follow-up of hospitalized patients. After allowing Dr. Dureza and/or his counsel an opportunity to appear and present their position, the [Medical Executive Committee] upheld the summary suspension on July 22, 2003. Dr. Dureza has 30 days to request a Judicial Review hearing."

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given notice of his leave of absence. Defendants also cite an accusation against plaintiff filed by the Attorney General of the State of California, acting on behalf of the medical board, seeking revocation of plaintiff's medical license due to his conduct at the Hospital. But the accusation, which concerned eight instances of unauthorized use of the Cadence Cage prior to May 2003, and inadequate pre and postoperative histories for four of those patients, was not filed until August 9, 2004.

*Judicial Review Proceedings and the Initiation of Plaintiff's Lawsuit.*

Plaintiff requested a hearing before the Hospital's Judicial Review Committee on August 27, 2003. After several postponements of the hearing and *voir dire* of the members of the Judicial Review Committee, plaintiff initiated his lawsuit for damages against defendants on February 11, 2004. On February 23, 2004, plaintiff notified the Hospital that he was abandoning his administrative challenge to the suspension of his staff membership and privileges.

*The Second Amended Complaint.*

Plaintiff filed a second amended complaint (SAC) which asserted the same twelve causes of action as plaintiff's original complaint and first amended complaint (FAC).[6] The gravamen of the SAC was plaintiff's assertion that after he changed his resignation to a leave of absence, the Hospital and Tenet "began a disgraceful campaign to avoid paying [plaintiff] the past due amounts owed to [plaintiff]" under the Relocation and On-Call Agreements, "and to avoid fulfilling its future contractual obligations to [plaintiff] and to force [plaintiff] to continue working for the hospital without pay. This included creating an investigation of [plaintiff] for the purpose of giving Tenet the ability to make a damaging report to the California Medical Board."

In his breach of contract causes of action, plaintiff alleged he was owed monies under the Relocation and On-Call Agreements, and that defendants had breached those agreements as well as the medical staff bylaws by failing to pay him, by initiating an investigation without a written request and without the requisite approval by the medical

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**6** The FAC, filed in response to defendants' demurrer, lacked the identified exhibits. The day after filing the FAC, plaintiff served and attempted to file a SAC with exhibits, but the trial court rejected the filing pursuant to Code of Civil Procedure section 472. Ultimately, the SAC was accepted for filing pursuant to stipulation of the parties and alleged 12 causes of action: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) breach of fiduciary duties; (4) interference with contractual advantage; (5) interference with prospective business advantage; (6) slander; (7) libel; (8) intentional infliction of emotional distress; (9) constructive trust; (10) negligent misrepresentation; (11) constructive fraud; (12) civil conspiracy.

executive committee, and by failing to give notice of the investigation to plaintiff. Plaintiff alleged that the investigation, suspension and 805 Report were all in furtherance of defendants' efforts to avoid their payment obligations to plaintiff.

The other causes of action in the SAC were based on plaintiff's allegations that: defendants effectively locked him out of the Hospital, thus preventing access to his patients; defendants made oral and written statements to Hospital staff and patients that plaintiff was dangerous and posed a security risk; and defendants set out to destroy plaintiff's career and reputation in order to avoid paying monies owed to him.

*Defendants' SLAPP Motion Against the SAC.*

Defendants demurred, and subsequently moved to strike ten of the twelve causes of action in the SAC asserting that the filing of the 805 Report and the underlying investigation were in furtherance of their right to petition, and were subject to section 425.16, subdivisions (e)(1) and (2).[7] It was defendants' position that plaintiff could not demonstrate a probability of prevailing because, among other things, the SAC was barred by the California Supreme Court's decision in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*).

*The Trial Court's July 28, 2004 Rulings on Defendants' SLAPP Motion and Demurrer to the SAC; Appeal.*

The trial court granted defendants' SLAPP motion in its entirety. The court concluded that the gravamen of the SAC was that "Ds investigated P and filed an 805 Report with the California Medical Board. . . . [¶] Specifically, the SAC falls within CCP Section 425.16(e)(1) ('any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;')." The trial court further determined that because plaintiff had failed to pursue his administrative remedies under the Hospital bylaws following his suspension in accordance with the *Westlake* decision, he could not show a probability of prevailing in

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[7] This SLAPP motion was directed at all causes of action except (10) negligent misrepresentation and (11) constructive fraud.

his lawsuit. The court granted the motion and struck all of the causes of action in the SAC except plaintiff's breach of contract causes of action.

The trial court sustained the demurrer to the causes of action for negligent misrepresentation and fraud, with leave to amend.

Plaintiff filed a timely appeal from the trial court's order granting the SLAPP motion.

*The Third Amended Complaint.*

Plaintiff filed his third amended complaint (TAC), which consisted of four causes of action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) negligent misrepresentation, and (4) fraud. Defendants then filed a SLAPP motion against the TAC, contending that plaintiff's entire action was based on the filing of the 805 Report and underlying investigation—conduct covered by section 425.16.

The superior court denied defendants' SLAPP motion in its entirety, finding that the "alleged investigation and the filing of the 805 report are tangential to the gravamen of the TAC."[8]

Defendants timely appealed the superior court's denial of the SLAPP motion against the TAC. This Court consolidated the two appeals.

## DISCUSSION

Section 425.16 is aimed at curbing lawsuits, referred to as SLAPP's, "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).)

Section 425.16, subdivision (b)(1) sets forth a two-step process for determining whether an action should be stricken as a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) "First, the court decides whether the defendant has made a threshold

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**8** The trial court sustained the demurrer to the cause of action for breach of the covenant of good faith and fair dealing with leave to amend. The demurrer was otherwise overruled.

showing that the challenged cause of action is one arising from protected activity." (*Ibid.*) A defendant meets this burden by demonstrating that the conduct underlying the plaintiff's cause of action falls under one of the categories listed in section 425.16, subdivision (e). (*Navellier, supra,* at p. 88.) Second, the court must "determine whether the plaintiff has demonstrated a probability of prevailing on the claim," by stating and substantiating a legally sufficient claim. (*Ibid.*; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Section 425.16, subdivision (j) provides that "'[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1.'" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

Protection under section 425.16 extends to "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)(2).) When the defendant's statements are made in furtherance of the constitutional right to petition, the defendant is not required to demonstrate that the matter concerns a "public issue" within the meaning of the statute. (*Briggs v. Eden Council for Hope & Opportunity, supra,*19 Cal.4th at pp. 1113-1123.) The statute also applies to written or oral statements or conduct concerning "a public issue or an issue of public interest." (§ 425.16, subd. (e)(3), (4).) The Legislature has mandated that the provisions of section 425.16 be broadly construed. (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 735.)

Whether section 425.16 applies to a particular complaint presents a legal question subject to de novo review on appeal. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.) The appellate court independently reviews whether the complaint arises out of the defendant's exercise of a protected activity, and if so, whether the plaintiff nevertheless established a reasonable probability of prevailing on the complaint. (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1017; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

Defendants contend that the gravamen of all of plaintiff's causes of action in both the SAC and TAC was the filing of the 805 Report. They further assert that the

805 Report and underlying peer review investigation involved petition-related activity subject to section 425.16 because (1) the mandatory filing of an 805 Report with the Medical Board of California, along with any preparation (i.e., investigation), must be construed to be in furtherance of the right to petition (*Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 942 ["Business and Professions Code section 805 *requires* a hospital administrator to report to [the Medical Board] all actions undertaken to suspend, revoke or curtail the staff privileges of any physician or surgeon"]); and (2) an 805 Report, as well as the underlying investigation, constitutes a request for agency action and is therefore part of an official proceeding. (*ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at p. 1009 [letter of complaint to SEC qualified as statement before an official proceeding pursuant to § 425.16(e)(1)].) As explained below, we conclude that the allegations regarding the filing of the 805 Report were incidental to plaintiff's claims in both the SAC and TAC, and thus do not support the application of section 425.16 in this case.

**A. *The 805 Report***

There is little doubt that the filing of the 805 Report itself qualified as a statement before an official proceeding under section 425.16. (See *ComputerXpress, Inc. v. Jackson, supra,* 93 Cal.App.4th at p. 1009.) The Medical Board of California is an administrative agency created by the Legislature whose responsibilities include the duty to investigate complaints and the power to initiate disciplinary proceedings against practitioners. (Bus. & Prof. Code, §§ 2001, 2004, 2220; Gov. Code, § 11500 et seq.; *Dorn v. Mendelzon, supra,* 196 Cal.App.3d at p. 941.) But we disagree with defendants' assertion that all of plaintiff's claims in both the SAC and TAC must be deemed to arise out of the Hospital's preparation and filing of the 805 Report.

"[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77; *Navellier, supra,* 29 Cal.4th at p. 89.) "Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from

such. ([*City of Cotati v. Cashman, supra,* 29 Cal.4th] at p. 78.) In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. (*Id.* at pp. 76-78; see also *Briggs, supra,* 19 Cal.4th at p. 1114; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001.)" (*Navellier, supra,* at p. 89.) A defendant's burden to show a cause of action arises from protected activity "is not met simply by showing that the *label* of the lawsuit appears to involve the rights of free speech or petition; he or she must demonstrate that the *substance* of the plaintiff's cause of action was an act in furtherance of the right of petition or free speech. ([*City of Cotati v. Cashman, supra,*] at p. 78.)" (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630.)

Although both the SAC and TAC made reference to the filing of the 805 Report as part of defendants' course of conduct aimed at avoiding defendants' payment obligations under the Relocation and On-Call Agreements, the gravamen of plaintiff's claims was not the filing of the report or even the suspension of plaintiff's staff privileges in either complaint.[9] Rather, plaintiff's claims arose from conduct unrelated to defendants' filing of the 805 Report, most of which even predated the investigation concerning alleged problems with plaintiff's patient care at the Hospital.

The crux of the causes of action for breach of contract in the TAC as well as the claim for constructive trust in the SAC was defendants' alleged unjustified failure to pay plaintiff's minimum salary and expenses under the Relocation Agreement after July 2002, and under the On-Call Agreement after October 2002. Plaintiff further alleged that defendants breached the Relocation Agreement and the medical staff bylaws by initiating an investigation without a written request or a determination by the medical executive committee that such an investigation was warranted, and without written notice to plaintiff that an investigation had commenced. The contract cause of action also alleged that defendants breached the Relocation Agreement by "effectively locking [plaintiff] out

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[9] Indeed, during oral argument on appeal, counsel for plaintiff argued that none of the claims seeks to challenge the suspension of plaintiff's staff privileges.

of the hospital," and identifying plaintiff as a security risk. It is clear these claims do not arise from the Hospital's filing of the 805 Report.

The causes of action for breach of fiduciary duty in the SAC and for negligent misrepresentation in the TAC were based on defendants' efforts to have plaintiff change his notice of resignation to a request for leave of absence, defendants' representations that plaintiff would be paid the amounts owed under the Relocation and On-Call Agreements if he requested a leave of absence instead of resigning, and defendants' failure to approve the leave of absence. The negligent misrepresentation claim further alleged that defendants made false representations to plaintiff that he was in danger and defendants were protecting plaintiff from persons who were seeking to harm him, that plaintiff was required to perform an excessive number of surgeries each month, and that plaintiff was required to use a medical device known as the "bone" in his surgeries rather than the "cadence cage" device. These allegations also have nothing to do with the filing of the 805 Report.

The gravamen of the causes of action for interference with contractual advantage, interference with prospective business advantage, slander, and libel in the SAC was that defendants effectively locked plaintiff out of the hospital, and falsely informed hospital staff, physicians and patients that plaintiff was dangerous and represented a security risk. There is nothing in the record before us to link these allegations with the Hospital's filing of the 805 Report or its preparation.

Plaintiff's remaining claims for intentional infliction of emotional distress and conspiracy in the SAC, and constructive fraud in the TAC realleged the conduct underlying plaintiff's contract and tort claims, charging defendants with improperly initiating an investigation, failing to give him timely written notice of any investigation, making the false representations set forth above, and seeking to destroy plaintiff's career and reputation in order to avoid paying amounts due under plaintiff's contracts with the Hospital. Like plaintiff's other causes of action, these claims are wholly unrelated to the filing of the 805 Report.

In short, plaintiff's entire lawsuit is premised on defendants' alleged efforts to avoid paying plaintiff amounts due him under his contracts. Plaintiff does not attack defendants' constitutional right to petition the Medical Board of California, but rather, the alleged misconduct that occurred prior to defendants' filing of the 805 Report. The filing of the 805 Report is tangential to plaintiff's claims. Accordingly, since the challenged conduct is not in itself "an act in furtherance of the right of petition or free speech," neither the SAC nor the TAC falls within the purview of section 425.16.[10] (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78.)

**B. *The Likelihood that Plaintiff Will Prevail on the Merits***

The second step in resolving an anti-SLAPP motion requires the court to assess whether the plaintiff will prevail on the causes of action in the complaint. (§ 425.16, subd. (b)(1).) This prong of the analysis need not be addressed if the defendant fails to establish that the challenged cause of action arises from protected activity connected to a public issue. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *Navellier, supra*, 29 Cal.4th at p. 88.) Defendants have not established that plaintiff's claims implicate defendants' constitutional rights. Accordingly, plaintiff need not demonstrate a probability of prevailing, and we express no opinion on the merits of plaintiff's claims.

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[10] This action is not one "arising from" the Hospital peer review proceeding. (Code Civ. Proc., § 425.16, subd. (b)(1).) We therefore do not reach the issue of whether such a proceeding involves protected conduct under the anti-SLAPP statute. We note, however, that review was granted in *Kibler v. Northern Inyo County Local Hospital District* (S131641) and *O'Meara v. Palomar-Pomerado Health System* (S313874) regarding the issue of whether an action arising out of the hospital peer review mandated by Business and Professions Code section 809, subdivision (a)(8), is subject to a special motion to strike under the anti-SLAPP statute because such review is an official proceeding or implicates a public issue or issue of public interest within the meaning of Code of Civil Procedure section 425.16, subdivision (e)(2) and (e)(4).

## DISPOSITION

The November 11, 2004 order denying defendants' special motion to strike is affirmed. The July 28, 2004 order granting defendants' special motion to strike is reversed and the matter is remanded to the trial court with instructions to enter a new order denying the motion. Defendants are ordered to bear plaintiff's costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
DOI TODD

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST