Court of Appeal, Fourth District, Division 3, California.
Louis MAZZELLA, Sr., Plaintiff and Respondent;
Anne J. Mazzella, Plaintiff and Appellant,
v.
Robert SAVITSKY, Defendant and Appellant.
No. G039323.
(Super.Ct.No. 07CC04832).

July 10, 2008.
As Modified July 30, 2008.

Appeal from orders of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Krongold Law Firm and Steven L. Krongold for Plaintiff and Respondent Louis Mazzella, Sr., and for Plaintiff and Appellant Anne J. Mazzella.
Manning & Marder, Kass, Ellrod, Ramirez, Dennis B. Kass and Sylvia Havens, for Defendant and Appellant.

OPINION

BEDSWORTH, Acting P.J.
***1** Anne J. Mazzella appeals from an order that granted a special motion to strike her multi-count complaint against Robert Savitsky as to all but a slander cause of action. Mazzella argues none of the claims arose from protected speech, and she established a probability of success on the merits. Savitsky appeals from the denial of the motion as to the slander claim, and from an order that denied a second special motion to strike an amended complaint. Savitsky argues the slander claim arose from protected speech, and Mazzella failed to establish a probability of success. He makes the same arguments as to the amended complaint. We conclude no errors are shown and affirm both orders.

FACTS

This lawsuit grew out of a real estate matter in Riverside County. Anne Mazzella and Louis Mazzella, Sr. sued Savitsky in April 2007 over an incident they alleged took place the previous summer.[FN1]

> FN1. The facts are drawn from the pleadings and the evidence submitted in declarations on the special motions to strike.

On June 20, 2006, the redevelopment agency of the City of La Quinta (La Quinta) considered at one of its regular meetings "potential terms and conditions of acquisition" of a parcel of property from Anne.FN2By July, the parties had come to terms, signed a contract of sale, and opened escrow.

> FN2. To avoid confusion, we shall refer to the Mazzellas by their first names.

On July 5, 2006, Savitsky allegedly sent the following e-mail to the La Quinta city clerk (June Greek): "[S]aw on the internet where Anne Mazzella ... was on the June redevelopment authority schedule.... This is to notify the city that I Robert Savitsky, Frackville, Pa have a docketed judgment unpaid to me by Anne J. Mazzella in [f]ederal court in Philadelphia and a separate fraudulent transfer/conspiracy action in [f]ederal [c]ourt 2nd Circuit in NY. Under [f]raudulent transfer laws any transfers of her property while the N.Y. action is pending could be subject to reversal. I send this to protect my interest so that the purchasing party is aware of the suit and judgment and thus are put on notice. This would make any transferee knowing of this a party to a fraudulent transfer and thus loss of some of purchaser defenses at any future litigation to attach assets/collect on judgment. I have judgments entered in several Cal. counties as well as [f]ederal

[c]ourt in Cal .” This action followed.

The complaint alleged a long-running dispute between the Mazzellas and Savitsky, dating to the time when Louis Mazzella ran an insurance company in Pennsylvania and Savitsky was an investigator with that state's insurance department. It alleged Savitsky sent the e-mail quoted above, and “[u]pon information and belief, Savitsky directed other false statements to California residents to the effect that Lou Mazzella embezzled funds, engaged in insurance fraud, and had all of his assets seized by federal authorities.”The complaint averred Savitsky had no judgment against Anne in Pennsylvania, but rather only against Louis, who had “tendered” full payment of the judgment to Savitsky. It also claimed the New York fraudulent transfer action had been dismissed by the trial court, was appealed, and the dismissal affirmed in December 2006 (which we note was after the July 2006 e-mail). Causes of action were set out for libel (Anne: false claim of unpaid judgment and false claim of fraudulent transfers), trade libel (Louis), slander (both), abuse of process (both: recording the judgment in California and using it to harass the Mazzellas), interference with contract (both), and interference with prospective economic advantage (both).

***2** Savitsky moved to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), FN3 and he demurred to the complaint. He argued the complaint arose out of statements protected by the litigation privilege and/or the anti-SLAPP statute, and the statements were true.

> FN3. All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

In support of the motion, Savitsky offered evidence of the following. In 1991, Savitsky obtained a $90,000 judgment against Louis in Pennsylvania for wrongful use of civil process. In 1992, he obtained a $911.50 judgment against Anne and Louis for costs in the same action. In 1998, Savitsky commenced a fraudulent conveyance action in federal court in California that alleged certain properties owned by Anne in Riverside and San Diego Counties had been transferred to her by Louis. (Whether the La Quinta property was one of those in issue is unclear from the record.) The fraudulent conveyance action was subsequently transferred to federal court in New York. In December 2005, it was dismissed on the Mazzellas' motion for summary judgment, the court finding all of the California properties in issue had been purchased by Anne and were owned solely by her.[FN4] Savitsky appealed the dismissal, which was affirmed on December 21, 2006. As of December 2006, the Pennsylvania wrongful process judgment remained unsatisfied. Savitsky claimed the amount due was $12,490.18. Louis said it was $6,009.

> FN4. The unreported December 2, 2005 federal district court opinion in the case described it as “tortured” and noted it “remains alive, has not been mooted, and requires resolution.”

In an opposing memorandum of points and authorities, the Mazzellas admitted “[t]he thrust of each cause of action, except [the slander claim] concern[s] false statements made in [the] July 5, 2006 e-mail.”Louis submitted the only opposing declaration. He said Anne had entered into a contract to sell a parcel to the city, which he had negotiated, and had opened an escrow. The e-mail was received by the city clerk while the sale was in escrow. Louis declared Savitsky also “told June Greek (the city clerk) and others within the City of La Quinta, as well as certain adversaries of mine, including attorney Thomas Pistone, that all of my assets had been seized in Florida.”He said the statement was false, led people to stop doing business with him, and his companies were required to liquidate assets “at significant losses.” Louis also claimed the statements put the La Quinta sale in jeopardy, required him to hire attorneys, brokers, and “others,” and “caused substantial financial injury to me and my

family."

Louis declared Savitsky knew the judgment against Anne was taken by mistake and later vacated. A docket sheet for that action was attached. It reveals the judgment against Anne was indeed stricken-but in September 2006, *after* the date of the e-mail. Louis claimed he had tendered a check in full satisfaction of the Pennsylvania judgment against him. He admitted Savitsky thought otherwise, and he admitted a motion to designate the judgment satisfied had been denied but claimed it had been on appeal (without providing any supporting information).

***3** Louis also set out the history of the disputes with Savitsky, which we need not recount. But some details stand out. Louis admitted "I mistakenly took money from Sentinel [an insurance brokerage he ran] to pay off Colonial's claims [Colonial was the insurance company Mazzella owned]....." He also conceded he pled nolo contendere to insurance fraud, and was placed on five years' probation. The declaration ended with a request for a continuance "should the court desire more detailed information," claiming Louis and Anne were both in poor health and unable to assist counsel to the extent they would have preferred.

In a June 11, 2007 order, the trial court granted the special motion to strike save for Louis' slander cause of action. It found the litigation privilege applied and the e-mail was protected speech. It also found Anne failed to make a prima facie case because she offered no evidence of damages. The court did not explain why it denied the motion as to Louis' slander claim. Somewhat confusingly, in sustaining the demurrer to the slander claim with leave to amend it said "the statements allegedly made about [Louis] are true."

In a verified amended complaint, Louis alleged Savitsky made five defamatory statements to "employees of ... La Quinta, including the City Clerk, June Greek, to lawyers for adversaries, including Thomas A. Pistone, and to other persons."The statements were "[Louis] Mazzella stole $10 million dollars from Colonial, Mazzella committed insurance fraud, Mazzella embezzled funds from Colonial, Mazzella had all of his assets seized by federal authorities, and Mazzella is a dishonest and untrustworthy person."The amended complaint set out two causes of action, for slander per se and slander per quod.

Savitsky's special motion to strike the amended complaint raised the same arguments as his first motion. In a supporting declaration, Savitsky said he had learned Thomas Pistone was representing someone in an action against the Mazzellas, and he consulted Pistone about representing him in collecting from Louis. Savitsky said any statements he may have made to Pistone were as a prospective client to an attorney.

In an opposing declaration, Louis said Savitsky's statements caused financial loss he would prove at trial. Louis was more forthcoming about his past this time. He admitted he had pled nolo contendere to mail and wire fraud that alleged he had fraudulently diverted approximately $2.4 million dollars in reinsurance premiums." While protesting the assets were not seized by federal authorities, Louis conceded he was "ordered to surrender to the U.S. Marshal all securities in which [he] had an interest," but the order was later limited to "all property found within the Eastern District of Pennsylvania that was solely owned by [him]." By order dated September 11, 2007, the trial court treated the motion as one for reconsideration of the prior anti-SLAPP ruling and denied it on the ground no new facts were presented.

I

***4** Anne argues her claims did not arise from protected speech. She is mistaken.

Section 425.16 provides a cause of action that arises from "any act ... in furtherance of the ... right of petition or free speech" is subject to a special motion to strike, unless the plaintiff establishes a

probability he will prevail on the merits. (§ 415.16, subd. (b)(1).) An act in furtherance of the right of petition or free speech includes, among others, "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).)

Statements protected by the litigation privilege are also protected speech under section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564.) A communication is so privileged if made in "any ... judicial proceeding." (Civ.Code, § 47 subd. (b).) "The usual formulation is that the privilege applies to any communication (1) made in a 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* (1990) 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365.) "Communications with 'some relation' to judicial proceedings [are] absolutely immune from tort liability by the [litigation] privilege."(*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193, 17 Cal.Rptr.2d 828, 847 P.2d 1044.) The privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057, 39 Cal.Rptr.3d 516, 128 P.3d 713.)

There is no doubt the litigation privilege protects postjudgment collection efforts. (*Rusheen v. Cohen, supra,* 37 cal.4th at pp. 1059-1060, 39 Cal.Rptr.3d 516, 128 P.3d 713 [allegedly perjured declaration of service used to obtain default judgment, upon which creditor obtained levy of execution]; *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 100 Cal.Rptr.2d 602 [allegedly wrongful levy on bank account and filing of abstract of judgment]; *Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 75 Cal.Rptr.2d 83 [allegedly wrongful application for writ of sale].) And it applies as well to a letter that furthers the objects of litigation and has some relevance to it. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 956, 56 Cal.Rptr.3d 477, 154 P.3d 1003 [letter from county victim witness program official regarding child molestation by a person being considered for visitation in family law case]; *Healy v. Tuscany Hills Landscape & Receation Corp.* (2006) 137 Cal.App.4th 1, 5-6, 39 Cal.Rptr.3d 547 [letter from homeowners association lawyers advising members that landscaping would cost more because of actions of one owner involved in pending litigation against association]; but see *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 150-151, 81 Cal.Rptr.2d 392 [no protection for statements about criminal record in letter that accused former employee of unfair competition, where criminal record had no connection to the claimed unfair competition.)

***5** The e-mail was protected by the litigation privilege. Savitsky had a judgment against Anne, and a pending action to set aside California real estate acquisitions by Anne as fraudulent conveyances. The e-mail was sent to achieve the purpose of the litigation-collection of the judgments against Anne and Louis (if the conveyance to Anne could be set aside). And there is no doubt the e-mail had "some ... relation" to the pending actions, since it notified La Quinta of the judgment, action, and Savitsky's claim that the pending purchase of property from Anne might be set aside.

Anne argues the e-mail had no logical connection to the fraudulent conveyance action because too much had to be established before Savitsky could set aside the La Quinta purchase. She reasons he had to prevail on the appeal, try and win the case, then sue in California and establish Anne was not a bona fide purchaser for value. But the argument itself is illogical. A message that advises an interested party of pending litigation that might affect it is protected by the litigation privilege (*Healy v. Tuscany Hills Landscape & Receation Corp., supra,* 137 Cal.App.4th 1, 39 Cal.Rptr.3d 547), and that is not changed by the difficulty the writer may

have in prevailing in the litigation. The e-mail was logically related to the fraudulent conveyance action, as well as the judgment Savitsky obtained against Anne in the wrongful process action.

Since the litigation privilege is absolute and immunizes a defendant from all tort liability save for malicious prosecution (*Silberg v. Anderson, supra,* 50 Cal.3d at pp. 215-216, 266 Cal.Rptr. 638, 786 P.2d 365), Anne cannot prevail on her claims for libel, slander, abuse of process, interference with contract, or interference with prospective economic advantage. The special motion to strike was properly granted.

II

Anne argues the trial court erred when it denied a request for a continuance to allow her to offer further evidence in opposition to the motion. We disagree.

There has been no showing the ruling was unreasonable. Anne did not move for a continuance. Instead, the "request" was included at the end of Louis's opposing declaration. Louis said both he and Anne had "recently" had surgery, he was weak, and Anne had not been able to discuss the case with counsel. He concluded by saying "[s]hould the court desire more detailed information on the losses caused by Savitsky," he requested additional time to prepare a supplemental declaration. Denial of the request was entirely reasonable. It is not the duty of the court to tell the parties what information it desires on a motion; rather, each party is responsible for offering such evidence as he or she deems appropriate. Given the conclusory, vague description of the Mazzellas' claimed medical conditions, and the absence of any statement of what evidence could be provided, denial of a continuance-if, indeed, a continuance was being requested-was reasonable. No abuse of discretion is shown.

III

***6** That brings us to Savitsky's appeal. Savitsky argues Louis' slander claim should have been stricken because it arose from protected speech, and Louis failed to show a probability of success. He is mistaken on the first point, so we do not reach the second.[FN5]

> FN5. Anne argues Savitsky's appeal was untimely because the motion was decided on June 11, 2007 and he did not file a notice of appeal until September 25, 2007. Her theory is the minute order said "notice waived," so the 60 day time to file a notice of appeal ran from the date of the minute order. No supporting authority is cited. Here Anne misreads the record. The minute order addressed three motions, and on the special motion to strike it directed "defendant to give notice." Since notice of entry was not served, the time within which to file a notice of appeal was 180 days after entry of an appealable order. (Cal. Rules of Court, rules 8.104(a)(3), (f).) We also note the argument is curious in light of the fact that Anne did not file her own notice of appeal until September 26, 2007. In any event, Savitsky's appeal was timely.

We first clarify what is, and is not, in issue. Louis' slander claim was not based on the e-mail. The only allegations are as follows: "On July 5, 2006, and continuing thereafter, Savitsky [uttered] statements ... concerning the Mazzellas to employees of the City, including June Greek, to lawyers for the City, including Thomas Pistone, and to other persons, to the effect that ... Lou Mazzella had embezzled funds, engaged in insurance fraud, and had all of his assets seized by federal authorities."So the e-mail cannot be used to bootstrap Louis' claim into protected speech.

Here, the litigation privilege does not help Savitsky. The alleged statements about Louis's alleged past criminal conduct have no connection to either collecting the Pennsylvania judgment or pursuing

the fraudulent conveyance action. The situation is analogous to *Nguyen v. Proton Technology Corp., supra,* 69 Cal.App.4th 140, 150-151, 81 Cal.Rptr.2d 392. There, the court found the privilege did not protect allegations of criminal conduct in a letter that accused a former employee of unfair competition and advised his new employer the individual had a criminal record, since the alleged criminal record had no connection to the unfair competition claim. As the court put it, "section 47(b) does not prop the barn door wide open for any and every sort of prelitigation charge or innuendo, especially concerning individuals"(*Id.* at p. 150, 81 Cal.Rptr.2d 392.) The same is true of the instant postjudgment charges. Whether Louis embezzled funds, was convicted of fraud, or suffered asset seizures is irrelevant to collecting the judgment or establishing that Louis fraudulently conveyed the La Quinta property to avoid paying the judgment. Gratuitous accusations are not protected by the litigation privilege simply because uttered by one involved in litigation.

Savitsky argues the privilege applies because the complaint alleged he made false statements about Louis to the FBI, and communications to law enforcement about possible criminal conduct are privileged. But that misrepresents the complaint. The only allegations in the slander claim were that Savitsky told various La Quinta employees that Louis was an embezzler, had committed insurance fraud, and had his assets seized. The reference to the FBI is found in a rambling introduction to the complaint that lays out Louis's version of his travails, including a statement he was unfairly prosecuted for mail and wire fraud after Savitsky gave false information to the FBI. But Louis does not allege those statements were slanderous. So the slander claim is not based on statements made to law enforcement, and those it *is* based on are not protected by the litigation privilege.

Savitsky argues the slander claim is protected under the anti-SLAPP statute for several reasons. We take up each in turn, but none has merit.

***7** Savitsky asserts the statement that Louis' assets were seized has " 'some relation' " to judicial proceedings to collect a judgment, so the slander claim was based on statements made "before a judicial ... proceeding." (§ 425.16, subd. (e)(1).) That simply is not so. The only authority cited is *Rusheen v. Cohen, supra,* 37 Cal.4th 1048, 39 Cal.Rptr.3d 516, 128 P.3d 713, but that case is distinguishable. *Rusheen* held the litigation privilege applies to action taken to collect a judgment under certain circumstances. Here, the alleged statement about Louis' assets was not made in any proceeding to collect the judgment against Louis. To the contrary, the La Quinta transaction had nothing to do with Louis, since the city was purchasing property owned solely by Anne. Thus, the slander claim was not based on any statement made in a judicial proceeding.

Savitsky next contends the statements were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" (§ 425.16, subd. (e)(2)) because he was trying to collect his judgment and set aside fraudulent transfers to Anne. This argument is also without merit.

"The statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding."(*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866, 117 Cal.Rptr.2d 82.) No connection to any official proceeding is shown. The only issue under consideration by La Quinta was the purchase from Anne. Statements about Louis (embezzled, committed insurance fraud, had assets seized) were not shown to have anything to do with that acquisition. The only other issue under consideration was in the fraudulent transfer appeal. But here again, the alleged statements about Louis were unconnected to the pending action-past crimes and lost assets have no bearing on fraudulent transfers to avoid creditors, the subject of the appeal. So it has not been shown the slander cause of action is

based on an issue under consideration in an official proceeding.

Finally, Savitsky argues the slander claim was based on speech "in connection with ... an issue of public interest."(§ 425.16, subd. (e)(4).) The argument is Louis' alleged conviction for insurance fraud was something La Quinta "might want to consider" before it bought land from Anne, in a deal negotiated by Louis. We don't see why, but even if it was, that is not the test to be applied.

An issue of public interest as used in the anti-SLAPP statute means "statements [that] concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants (citations), or a topic of widespread, public interest [citation]." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924, 130 Cal.Rptr.2d 81.) None of those criteria are met here. There is no evidence Louis or the La Quinta purchase was in the public eye, that the purchase could affect a large number of people, or that it was a matter of widespread public interest. Nor is this case analogous to *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 132 Cal.Rptr.2d 57, a case cited by Savitsky. There, it was undisputed that a proposed development of city waterfront property was a matter of public interest, so statements concerning the proposal were within section 425.16, subdivision (e)(4). But the fact that a municipal land purchase was a subject of public interest in one case does not establish that every acquisition by a city generates widespread public interest. That is a question of fact upon which no evidence was offered in this case. Since Savitsky has not shown Louis' slander claim was based on a statement made in connection with an issue of public interest-or any other protected speech-the motion was properly denied as to the slander claim.

IV

***8** We briefly address Savitsky's argument that his special motion to strike the amended complaint should have been granted. It is mistaken.

A special motion to strike may be addressed to an amended complaint. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835, 111 Cal.Rptr.2d 582), but Savitsky fails to establish the amended complaint was based on protected speech. He argues the amended slander claims were based on the e-mail and incorporates his arguments addressed to the original slander claim. But the flaw here is that the original slander claim was not based on the e-mail, nor are the amended slander claims. There is no showing the amended complaint falls within the anti-SLAPP statute, so the special motion to strike it was properly denied.

DISPOSITION

In fine, Anne Mazzella cannot prevail on her claims, since they are based on an e-mail that is protected by the litigation privilege. But Louis Mazzella's slander claims are not based on either privileged communications or protected speech. The June 11, 2007 order that granted the special motion to strike the complaint, save for the slander claim, is affirmed. The September 11, 2007 order that denied the special motion to strike the amended complaint is also affirmed. Savitsky is entitled to costs on the appeal by Anne Mazzella, and Louis Mazzella is entitled to costs on the appeal by Savitsky.

WE CONCUR: O'LEARY, and ARONSON, JJ.
Cal.App. 4 Dist.,2008.
Mazzella v. Savitsky
Not Reported in Cal.Rptr.3d, 2008 WL 2690725 (Cal.App. 4 Dist.)

END OF DOCUMENT