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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

RICHELLE OLSON, et al., Plaintiffs and Appellants, v. SACHA BARON COHEN, et al., Defendants and Respondents.	B221956 (Los Angeles County Super. Ct. No. MC020465)

APPEAL from an order of the Superior Court of Los Angeles County, Randolph Rogers, Judge. Affirmed and remanded.

Marjorie A. Marenus for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Vicki Greco and Judith M. Tishkoff for Defendants and Respondents.

Appellants Richelle and Lance Olson appeal from an order granting respondents' Sacha Baron Cohen, NBC Universal, Inc., Cold Stream Productions, LLC, MRC II Distribution Company, L.P., Media Rights Capital II L.P., Everyman Pictures and Monica Levinson, motion to strike under Code of Civil Procedure[1] section 425.16. Respondents' motion, generally referred to as an anti- SLAPP[2] motion, sought the dismissal of appellants' complaint which alleged tort claims based on conduct that occurred during the filming of the feature film comedy *Bruno*, starring Sasha Baron Cohen as "Bruno"— a gay, Austrian fashion reporter. Appellants, allegedly unaware of Cohen's celebrity and his prior films, agreed to allow respondents to film scenes for a "documentary-style film" during an evening of charity bingo games. Respondent Cohen acting as Bruno was allowed to "call" bingo numbers during a game. During the course of the second bingo game, appellants claim Cohen began using vulgar and offensive language. Appellant Richelle Olson confronted Cohen and as a result of the confrontation she alleges she suffered injuries for which she and her husband sued in tort.

Before this court, appellants assert that the lower court erred in concluding that appellants' tort actions arose from respondents' conduct in furtherance of his First Amendment rights to free speech under section 425.16. As we shall explain fully below, appellants' claim lacks merit. Respondents made the threshold showing that the acts at issue arose from protected activity under section 425.16. Cohen's conduct at the bingo hall in connection with the filming of *Bruno* was in furtherance of the constitutional right of free speech in connection with a public issue or an issue of public interest. In addition, appellants failed to carry their burden to demonstrate a probability of prevailing on the merits of the claim. Consequently, the trial court properly granted the section 425.16

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

2 "SLAPP" is an acronym for "strategic lawsuit against public participation.

motion. Accordingly, we affirm the judgment, and remand for further proceedings concerning attorney fees.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Parties.

Appellant Richelle Olson was the executive director of a non-profit charity that managed charity bingo events at Angel's Bingo Hall in Palmdale, California. Her husband, appellant Lance Olson, assisted her in managing the bingo games.

Respondent Sacha Baron Cohen is an actor and comedian. He is nationally known as the creator and embodiment of certain character disguises showcased in the television series *The Ali G Show*, and the full length feature film *Borat*. As appellants allege, Cohen's film and television productions "are solely for the purpose of shocking the conscience" by prompting (and capturing on film) "emotionally charged reactions" from unsuspecting[3] people.

Cohen created the fictitious character of "Bruno" and starred in the film mock-documentary, comedy *Bruno* released in 2009.[4] Appellants claim that "[t]he character 'Bruno' is an extreme, outrageous, offensive caricature of a gay man with a faux Austrian accent meant to elicit a response from individuals through vulgar, sexually charged statements." According to the movie's producer, the character of "Bruno" was portrayed as a "gay Austrian celebrity, who among other things, addresses the issue of American homophobia by placing the 'Bruno' character into situations intended to expose society's homophobic nature and tendencies."

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[3] As appellants' complaint suggests, the people with whom Cohen interacts (while Cohen is disguised and acting in-character), do not recognize Cohen or know the actual purpose of his actions, which appellants claim are designed to humiliate and embarrass his subjects for entertainment value.

[4] All of the respondents in this action were involved in the production of *Bruno*.

Events Giving Rise to Appellants' Claims.

At some point prior to May 24, 2007, appellants agreed to participate in a "documentary-style" movie respondents planned to film at the Angel's Bingo Hall during an evening of charity bingo games. Appellants alleged that they were told a well-known host/celebrity wanted to visit the charity bingo game and wanted to "call" the bingo numbers during the game while being filmed. They also alleged that they were informed that the filmed segments would be included in a documentary about bingo that would be shown on such television channels as PBS and the Discovery Channel. Appellants claimed, however, that they did not know the actual identity of the "celebrity," nor the true purpose of the visit and filming.

Appellant Richelle Olson, signed a "Standard Location Agreement" with respondent Cold Stream Productions to allow respondents to enter the bingo hall and to bring the cast, crew and all of the equipment, and to use the location for the purpose of filming ("Location Agreement"). Olson was paid $300 for use of the property during the filming. In the agreement, Richelle Olson also specifically agreed that she was "not relying upon any promises or statements made by anyone about the nature of the Film or the identity, behavior or qualifications of any of the cast or persons involved in the Film," and that she had executed "this release without regard to any expectations or understandings concerning the events that may occur during the filming on the Property, offensive or otherwise." Under the Location Agreement, Richelle Olson also agreed "not to bring . . . any claims" in connection with the production, including any claims for emotional distress, intentional torts, or fraud (based on any alleged deception about the Film, or the cast or this consent agreement).

Appellants Richelle and Lance Olson also executed a "Standard Consent Agreement." Under the Consent Agreement appellants were to be paid $20 each to be filmed for a "documentary-style film" ("Consent Agreement"). The agreement further stated that the Producer "hopes to reach a young adult audience by using entertaining content and formats." It was further agreed that "this is the entire agreement between" the parties and that appellants had "not rel[ied] upon any promises [as to] the nature of

the Film or the identity, behavior or qualifications of any of the cast members or other persons involved in the Film." Appellants also agreed that they had executed the agreement "with no expectations or understandings concerning the conduct, offensive or otherwise, of anyone involved in this Film." In addition, the Consent Agreement provided that appellants "without limitation to waive[d], and agree[ed] not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, which are related to the Film or its production or this agreement."

Thereafter on May 24, 2007, Cohen, disguised as the character "Bruno" appeared at the bingo hall. Appellants agreed to allow Cohen to "call" the numbers for two bingo games that evening. Cohen engaged in a discussion in a backroom with appellant Lance Olson, who instructed Cohen on how to "call" a bingo game. Thereafter, Cohen proceeded to the stage in the bingo hall and began to "call" out the numbers in the first game. During the second bingo game, while calling out the numbers appellants allege that Cohen began using "vulgar and offensive" language over the loud speaker system in the bingo hall.

The video footage submitted to this court,[5] shows Cohen announcing bingo numbers as the bingo balls are randomly selected from the bingo machine. During the second game, after announcing a few numbers Cohen began to make comments to the

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[5] In the lower court and here, respondents submitted an exhibit containing approximately 28 minutes of unedited video footage which depicts the events respondents filmed at the bingo hall on May 24, 2007. The first minutes of the footage showed appellant Richelle Olson advising the audience assembled in the bingo hall that filming was about to begin, and that those who chose to remain in the bingo hall were effectively agreeing to appear in the film. During filming respondents used approximately three video cameras positioned in different places in the bingo hall, including at the stage area, to capture the events on the stage as well as the reaction of audience members/bingo players. The film footage taken by respondents at the bingo hall on the evening of May 24, 2007, did not appear in the final version of the film released in theaters.

audience in which he related some of the bingo numbers to certain aspects of his homosexual life style.[6]

Appellants alleged that the bingo hall players present that evening were members of the local community with a "large population of elderly residents all of whom [appellant Richelle Olson] has known for many years and felt protective towards." According to the complaint, as the "verbal assault escalated" Richelle Olson became alarmed by the vulgarity and "concerned for the Bingo players." She approached the stage area and told Cohen to stop. Appellants alleged that Cohen/Bruno "continued to instigate" Richelle Olson by using "offensive and vulgar language" towards her while the film crew came to the stage area to "intentionally capture the humiliating emotional reaction" that Cohen instigated.

The video footage of Cohen and Richelle Olson's interaction on stage lasts less than two minutes. Specifically it shows Richelle Olson pull the chair out from under Cohen, as she tells him to "get out of my chair now." Cohen then inquires as to why he cannot continue the game. Appellant Richelle Olson, waves at him and says "bye-bye. See ya, bye-bye." Cohen responds by asking: "why are you being so rude?" and he suggests that she take a poll of the bingo players in the audience to determine whether they wanted him to continue calling numbers or wanted appellant Richelle Olson to call the Bingo numbers. Richelle Olson agrees and inquires of the audience. The clapping, shouting indicate that the audience prefers Richelle Olson. Cohen then states to Richelle Olson: "[y]ou heard them [the audience] say 'get lost' you faggot." Thereafter, Cohen makes a reference to fashion designers Gucci and Tom Ford, to which appellant Richelle

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[6] After Cohen called out the Bingo number 36, he states that "36" was the age of his former male partner. Later, when he calls out the number 3, he says that his former partner's birthday was "May 3." When he later calls out the number 59, he remarks that 59 was the number of his hotel room he stayed in when he met his former partner, and a few minutes later when he announces number 42, Cohen offers that "42 inches was his partner's chest size. Finally, after Cohen announces the number 7, he comments that he met his partner on "July 7." Some members of the audience can be heard laughing after each comment.

Olson replies that she prefers "Chanel." Over the loud speaker, appellant Richelle Olson then asks security to come to the stage to remove "it" from the building and to get the cameras away from her. As security officers escort Cohen and his crew to the exit, Richelle Olson announces to the audience: "I will not have anyone make a mockery of this bingo hall."[7]

According to the complaint, after respondents left the premises, appellant Richelle Olson, "disturbed and mortified by the planned and intentional attack upon her in front of the bingo players which she felt responsible for, attempted to regain her composure by calling a bingo game." But, unable to "stabilize" herself from the confrontation, Richelle left the stage area and went into a side room in an attempt to calm herself down. Thereafter, a co-worker came to the room to check on Richelle who was allegedly "sobbing uncontrollably." Appellants assert that when the colleague sought to consol her, Richelle Olson stood up and "simultaneously lost consciousness falling forward onto" the concrete floor and striking her forehead. Paramedics were summoned. Appellants claim that Olson suffered "two brain bleeds" as a result of the fall and has been confined to a wheel chair and walker since the incident.[8]

Litigation

In May of 2009, appellants filed an unverified complaint asserting nine causes of action against respondents arising out of the filming of *Bruno* at the bingo hall in May 2007, and specifically Cohen's interaction with Richelle Olson that evening. Specifically the complaint asserts claims for: (1) negligence; (2) intentional infliction of emotional

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[7] Appellant Richelle Olson also states: "Can you believe that they did this to a woman who has cancer? . . . I haven't been out of bed for more than five hours in the last three weeks and I come out here to do this. . . ."

[8] Appellants submitted their own one-minute video footage to the lower court. But, appellants did not submit their video to this court. According to the trial court's account, the footage showed a person, who appears to be Richelle Olson and another unidentified person walking away from the camera and toward a room. The video then cuts to a shot of Richelle Olson lying face down on the floor with her eyes closed as several individuals attempt to turn her over.

distress; (3) negligent infliction of emotional distress; (4) conspiracy to defraud; (5) unfair competition; (6) intentional concealment; (7) false promise; (8) fraudulent misrepresentation; and (9) loss of consortium.

In September of 2009, respondents filed a motion to strike the complaint under section 425.16,[9] and a motion for attorney's fees. Respondents asserted that the acts underlying appellants' claims were the conduct and words spoken by Cohen while he appeared as "Bruno" at the bingo hall, and that this conduct was done in furtherance of respondents' right of free speech in making the film in connection with a public issue or matter of public interest. They also asserted that appellants had waived and released any and all claims arising out of the filming under the Location and Consent Agreements.

In support of the motion, respondents submitted exhibits, including, the Location and Consent Agreements executed by appellants, declarations from the Production Manager of *Bruno*, and a Field Supervisor for the film who maintained the video footage, and the 28 minutes of video footage depicting the events of the evening of May 24 at the bingo hall.[10] Respondents also submitted as exhibits, seven news articles dating from 2009 from various Internet and news outlets, including Time, USA Today, Chicago Tribune, Washington Post and Boston.com, which reported reactions to the release of *Bruno*, reviewed *Bruno*, and/or described Cohen's prior film work and persona. In addition, respondents also submitted a request for judicial notice of a 2007 order granting a section 425.16 motion to strike a lawsuit, alleging tort claims in connection with Cohen's film *Borat*.

Appellants opposed the motion, and objected to the court's consideration of the news articles. Appellants argued that respondents had failed to meet their burden under

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9 In the alternative, respondents filed a motion to strike certain causes of action based upon the consent agreements and the releases.

10 Appellants initially objected to the lower court's consideration of the video, but apparently withdrew their objection when the court agreed to allow appellants to submit their own video.

section 425.16. They maintained that Cohen's conduct was not "free speech," but instead was a verbal attack on Richelle Olson which occurred at a private venue. They asserted that they were misled as to the purpose of the filming and therefore the consent to be present was invalid; and that once Olson asked respondents to leave they became "trespassers." Therefore, appellants argued, respondents' conduct was illegal and not protected as free speech under section 425.16. Appellants further argued that the conduct at issue was not connected to a public issue, but instead was designed to make a profit. They further urge that the character of "Bruno" was not of public interest at the time of the incident because the film had yet to be released. Appellants' opposition also noted that they "*can* provide affidavits documents and other admissible evidence" to demonstrate that their claims are legally and factually sufficient to support a favorable judgment. Nonetheless, appellants did not submit any such evidence in support of their opposition.

On October 23, 2009, the court heard oral argument on the motion. In discussion with counsel, the court indicated that it had taken judicial notice of the news articles submitted in support of the motion. The court noted that the facts concerning Cohen's work, his portrayal of characters, and the fact that *Bruno* presented a satirical perspective on homosexuality, gay culture, were in the court's view notorious and of common knowledge. The court observed that the issues presented by *Bruno* were of public interest and were historically and continuously controversial; and the protected speech and conduct consisted of Bruno's references to homosexual relations, which Cohen expressed to provoke a reaction from appellant for the purpose of satire and commentary.

The court issued its statement of decision in late November 2009, granting the motion. The court found respondents had carried their burden under section 425.16 to demonstrate that the claims arose from conduct that was protected free speech. Specifically the court found that the conduct upon which appellants had based all of their causes of action stemmed from conduct of respondents while filming the movie *Bruno* and that such action constituted protected conduct under the first amendment. The court also found that a public issue was implicated because Richelle Olson had become

involved in a public issue because of her interaction with Cohen during the filming in which she had agreed to participate. The court also found the film implicated an issue of public interest relating to homosexuality, gay culture and same sex marriages all of which are "hot button topics" in the state. The court, further determined appellants had failed to satisfy their burden of showing that they had a probability of prevailing on their claims. The court observed that other than the one-minute video footage, which did not substantiate their claims, appellants had submitted no admissible evidence in support of their causes of action.

This timely appeal followed.

DISCUSSION

Before this court appellants argue that the lower court erred in granting the section 425.16 motion. They urge that the conduct underlying their claims had no connection to the exercise of respondents' rights to free speech or an issue of public interest. As we shall explain, we do not agree.

I. Basic Legal Framework of Section 425.16

Section 425.16, subdivision (b)(1), provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." "'The anti-SLAPP statute arose from the Legislature's recognition that SLAPP suit plaintiffs are not seeking to succeed on the merits, but to use the legal system to chill the defendant's first amendment right of free speech.' [Citation.]" (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 866 (*Nguyen-Lam*).)

The purpose of the statute is "to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; § 425.16, subd. (a).) Nonetheless, "section 425.16 nowhere states that in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the cause of action complained of has had, or will have, the actual

effect of chilling the defendant's exercise of speech or petition rights. Nor is there anything in section 425.16's operative sections implying or even suggesting a chilling-effect proof requirement." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75) Rather, section 425.16 manifests the Legislature's "unqualified desire to 'encourage continued participation in matters of public significance' (§ 425.16, subd. (a))." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) Courts have construed section 425.16 to "encourage participation by all segments of our society in vigorous debate related to issues of public interest." (*Seelig v. Infinity Broadcasting Corporation* (2002) 97 Cal.App.4th 789, 808.) Thus, the provisions of section 425.16 are "construed broadly" to effectuate the statute's purpose. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 75; § 425.16, subd. (a).)

The trial court engages in a two-step process to determine whether to grant or deny a section 425.16 motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) The court first decides whether the defendant has made a threshold showing that the acts at issue arose from protected activity. (§ 425.16, subd. (b)(1); *Navellier*, supra, at p. 88.)

If the defendant makes this showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits of the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88; *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.) The plaintiff must state and substantiate a legally sufficient claim: "'[p]ut 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.]' " (*Ibid*.) For purposes of this inquiry, "the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]." (See § 425.16 subd. (b)(2).) However, "'the court does not weigh the evidence or make credibility determinations. [Citations.]'" (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197.) In addition to considering the substantive merits of the plaintiff's claims, the trial court must also consider all available defenses to the

claims, including constitutional defenses. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

"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, supra,* 29 Cal.4th at p. 89.) If the trial court's decision is correct on any theory applicable to the case, we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357.) Nonetheless, on appeal, we independently review whether section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits. (*ComputerXpress, Inc. v. Jac*kson (2001) 93 Cal.App.4th 993, 999; *Lieberman v. KCOP Television, Inc*. (2003) 110 Cal.App.4th 156, 163-164 (*Lieberman*).) "[We] review a ruling on an evidentiary objection in connection with a special motion to strike for abuse of discretion. [Citation.]" (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.)[11]

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11 We note that appellants complain to this court that the lower court failed to rule on appellants' evidentiary objections to respondents' exhibits, specifically seven news articles which reported reactions to the release of *Bruno,* reviewed *Bruno,* and/or described Cohen's prior film work and persona. First, a review of the transcript from the hearing on the motion makes clear the trial court overruled appellants' objections to these articles. Second, although this evidence does not inform this court's consideration of the issues, we cannot say that the lower court abused its discretion in considering the articles as relevant to the issue of whether the movie *Bruno* and the issues raised by the film generated media attention and public interest.

In addition, appellants also complain that the lower court erred in granting respondents' request for judicial notice of a 2007 order granting a section 425.16 motion to strike a lawsuit, alleging tort claims in connection with Cohen's film *Borat.* Although the trial court made a passing reference to the 2007 case at oral argument on the motion, there is no indication that the court took judicial notice of the case or that it played any role in the outcome below; the court made no reference to it in the 15-page statement of decision. Furthermore, even if the trial court had considered it, appellants have not articulated any prejudice they suffered as a result. Finally, and most significantly, we do not rely on this evidence in formulating our analysis and conclusion.

II. Applicability of Section 425.16

A defendant satisfies its initial burden under section 425.16 by demonstrating that the act underlying the challenged claims fits one of four categories described in section 425.16, subdivision (e). (*Navellier, supra,* 29 Cal.4th at p. 88.) These acts include (1) written or oral statements made before a legislative, executive, or judicial proceeding, (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).) Of these categories, the one implicated in this case is "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)(4).)

A. Whether the claims arose from conduct in furtherance of the person's right of free speech in connection with a public issue.

Respondents contend appellants' claims arose from Cohen's words and actions during the filming of *Bruno*. We first examine whether respondents' actions where in furtherance of free speech rights and then consider whether appellants' claims arose from those actions.

1. Conduct in Furtherance of Free Speech

Movies and films generally are considered "expressive works" subject to First Amendment protections. (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 865, superseded by statute on another ground as stated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*(1998) 68 Cal.App.4th 744 ; *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280; *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501.) Movies are a "significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a

political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." (*Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. at p. 501.) Whether exhibited in theaters or on television, a film is a medium which is protected by the constitutional guarantees of free expression. (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I, § 2; *Joseph Burstyn, Inc. v. Wilson*, *supra*, 343 U.S. at pp. 501-502; *Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367, 386-390.) Nor do films and movies lose their constitutional protection because they are undertaken to generate a profit. (*Guglielmi v. Spelling-Goldberg Productions*, *supra*, 25 Cal.3d at pp. 867-868.)

Here there is no dispute that respondents were engaged in making a feature film, *Bruno*, in May 2007 and that they came to the Bingo Hall to shoot video footage of respondent Cohen calling bingo games. Even appellants' complaint acknowledges that respondents were engaged in making a "documentary style film" that evening. Appellants were aware of the presence of the cameras and film crew, and had agreed to appear in the film. That appellants claim they were misled as to the nature of the film or that the film was a comedy intended to entertain and make a profit does not deprive respondents of the constitutional protections afforded to film and movies. Furthermore, Cohen's actions that evening—his words and non-expressive conduct while acting as the character Bruno—amounted to conduct in furtherance of making the movie. As used in this context "furtherance" means helping to advance or assisting. (See *Lieberman*, *supra*, 110 Cal.App.4th at p. 166 [holding that newsgathering was conduct in furtherance of the news media's right to free speech under section 425.16].)[12] Respondents' evidence

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12 In *Lieberman*, KCOP television employees secretly recorded their consultations with the plaintiff doctor, which KCOP broadcast in a news report. (*Id.* at pp. 161-162.) The doctor filed a complaint against KCOP for violation of Penal Code section 632, which prohibits secretly recording confidential communications. (*Id.* at pp. 163-164.) The appellate court found that "the broadcast was an act in furtherance of the appellant's exercise of a constitutional right to free speech in connection with a public issue, as defined in section 425.16. [Citations.]" (*Id.* at pp. 163, 165.) The court concluded that

demonstrates that the purpose of the movie was to depict "Bruno" in various locations and under circumstances where his conduct and statements might prompt a strong homophobic reaction from those around him for the purpose of entertainment and social satire. Cohen's conduct was in aid of and incorporated into the film, and is thusly entitled to constitutional protection. (See *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1074, 1077 [Expressive and nonexpressive conduct that intrinsically facilitates one's ability to exercise the right of free speech is entitled to constitutional protection].)

2. "Arising from" Requirement

Having determined that respondents were engaged in a constitutionally protected activity of filmmaking at the bingo hall on May 24, we next examine whether appellants' claims arose from those activities.

"California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.'" (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 77, quoting *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at p. 1002.) "Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.) Instead, "the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78; *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.) The Supreme Court has also "cautioned that the 'anti-SLAPP

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the secret recordings "were in aid of and were incorporated into a broadcast in connection with a public issue," and therefore, also "fell within the scope of section 425.16." (*Id.* at p. 166.)

statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 187, quoting *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92.)

Before this court, appellants argue that respondents did not satisfy their threshold showing under section 425.16 that appellants' claims arose from any act in furtherance of free speech. Appellants claim that appellant Richelle Olson's injuries arose from a private controversy—Cohen's refusal to leave the stage of the bingo hall and from her realization that she had been misled by respondents as to the nature of the film and respondents' purpose. Appellants assert that neither Cohen's words nor any other constitutionally protected activities underlie the causes of action.

Appellants' argument is unconvincing. It is belied both by the allegations in the first amended complaint and by the video footage of the events at the bingo hall. Appellants alleged in their complaint that after Cohen started "using vulgar and offensive language" over the loud speaker while calling the second bingo game, Richelle Olson became "alarmed by [Cohen's] vulgarity and concerned for the Bingo players." As the video shows, Olson's concern over Cohen's words prompted her to come to the stage and ultimately to confront Cohen on camera in front of the audience of bingo players. Appellants further alleged that Cohen "continued to instigate [Olson] by using offensive and vulgar language in close proximity to [her] ear, and that "cameramen rushed to the edge of the stage . . .to intentionally capture the humiliating emotional reaction instigated by [Cohen] against her." It is clear that appellant Olson's reaction, her anger at the apparent deception and her humiliation and embarrassment, giving rise to her various tort claims were caused by free speech conduct, i.e., Cohen's words and the filming of the event.

In any event, even assuming that Cohen's refusal to leave the stage and appellant Richelle Olson's alleged realization that she had been misled gave rise to her injuries, those circumstances are inseparable from respondents' constitutionally protected actions. Cohen's expressive activity prompted appellant Richelle Olson to ask him to leave the

stage. Indeed, appellant Richelle Olson would have never approached the stage to ask Cohen to leave but for the fact that she was offended by his comments and references to his homosexual lifestyle—that she subsequently characterized as making a "mockery" of the bingo hall. Moreover, Cohen's verbal exchange with Richelle Olson on stage aided in Cohen's effort to obtain a reaction from Richelle Olson captured on video for subsequent use in the film. As such it is an indistinguishable part of the constitutionally protected expressive conduct of making the movie.[13]

Seelig v. Infinity Broadcasting Corp., *supra*, 97 Cal.App.4th 798 is illustrative on this point. In *Seelig* the plaintiff was one of 50 contestants in the television program *Who Wants To Marry A Multimillionaire* (Fox Network, Feb. 15, 2000). Before the show was broadcast, a San Francisco radio show mocked the plaintiff's participation in the show. The plaintiff sued the radio station for slander and other torts. (*Id*. at pp. 801-806.) The appellate court concluded the suit was subject to a special motion to strike under section 425.16. In so holding, the court rejected plaintiff's argument that the act giving rise to her claims was her refusal to participate in the radio show rather her participation in the television show. The court found the distinction between the two unpersuasive, observing that "[t]he topic under discussion on the radio program was plaintiff's appearance on the [television] Show . . . Indeed, it is evident that defendants talked about plaintiff only because she had participated in the Show. Disparaging her refusal to appear on the radio program . . . was indistinguishable from criticizing her participation in the televised contest." (*Id.* at p. 808.) So too here, Cohen's refusal to leave the stage and appellant Olson's reaction to the situation cannot be divorced from respondents' protected free speech activities.

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[13] Indeed it is the fact that the claims here are inextricably tied to the Cohen's expressive conduct that also distinguishes this case from the analogy appellants offer to the *Twilight Zone* movie, in which the actor Vic Morrow and two child actors were killed while shooting a scene of the movie. In *Twilight Zone* the cause of the injuries was an equipment malfunction during the filming. In contrast here, appellants alleged claims arise from the words Cohen spoke while calling the Bingo game.

Finally, in concluding that the causes of action in appellants' claim arose from conduct in furtherance of respondents' constitutionally protected right of free speech, we reject as unfounded appellants' argument such a conclusion would expand the scope of the anti-SLAPP law to provide protection to motion picture defendants and celebrities in every context. Indeed, although in general movies and activities in furtherance of filmmaking are considered "expressive works" subject to First Amendment protection, our conclusion does not mean that all films are entitled to automatic protection under section 425.16. For anti-SLAPP statutory scheme to apply in the context of movies, motion picture defendants must also prove that the protected free speech activity is connected to a public issue. (See *Dyer v. Childress, supra,* 147 Cal.App.4th 1273, 1284 [rejecting the argument that section 425.17, subd. (d)(2)[14] enlarges the protection afforded under the anti-SLAPP statute for motion picture defendants, and reaffirming that section 425.16 requires a demonstration of a public issue or an issue of public interest].) It is the issue of public interest to which we now turn.

3. Issue of Public Interest

Section 425.16 does not provide a definition for "an issue of public interest." "However, the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) Nonetheless, in keeping with that statutory command to broadly construe section 425.16, the case law has set a low threshold for meeting the requirement that the speech be in connection with an "issue of public interest."

Two cases involving television, films and celebrities illustrate the point. For example, in *Seelig*, the court concluded the offending comments about the television

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[14] Section 425.17, subdivision (c) provides a limited exception to the anti-SLAPP statute for certain commercial speech, but under section 425.17, subdivision (d)(2), this exception does not apply to "[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation."

show contestant arose in the context of an on-air discussion between the talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media. This program was a derivative of *Who Wants to Be a Millionaire*, which had proven successful in generating viewership and advertising revenue. By having chosen to participate as a contestant in the television show, plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media. (*Seelig, supra,* 97 Cal.App.4th at pp. 807-808.)

Similarly, in *Hall v. Time Warner, Inc*. (2007) 153 Cal.App.4th 1337 (hereafter *Hall*), the plaintiff was the elderly former housekeeper of Marlon Brando. (*Id*. at p. 1342.) When Brando died and reports revealed that he had named the plaintiff in his will, a reporter for the television show Celebrity Justice visited her (she resided in a retirement home and "had been suffering from dementia and Alzheimer's disease for several years") and videotaped an interview with her, part of which was included in a segment broadcast that evening. (*Ibid*.) The entire segment lasted "approximately three minutes." (*Ibid*.) Because "[t]he public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest," the plaintiff "became involved in an issue of public interest by virtue of being named in Brando's will." (*Id*. at p. 1347.)[15]

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15 Additional examples of matters of public interest were found in the following cases: *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628 at page 651 (disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68), concerning statements about a large and wealthy church that had been the subject of extensive media coverage; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, at page 1175, involving statements about the placement of a shelter for battered women that had been the subject of considerable public controversy, including local land use hearings; *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, at pages 238-239, concerning allegations of domestic violence against a nationally known political consultant who successfully had used the domestic violence issue in a number of political campaigns; and *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479, involving political statements regarding self-government of 3,000 persons who lived in a gated community.

In contrast, the court found no public interest in *Dyer* in which plaintiff sued the filmmakers of *Reality Bites* alleging defamation and false light invasion of privacy for use of his name to identify a character in the movie. (*Dyer v. Childress, supra,* 147 Cal.App.4th at pp. 1279-1282.) The court found that the specific dispute at issue concerned the misuse of plaintiff's persona. The appellate court further concluded that the film's representation as a "rebellious slacker [was] not a matter of public issue and that there [was] no discernable public interest in Dyer's persona. Although *Reality Bites* may address topics of widespread public interest, the defendants are unable to draw any connection between those topics and Dyer's defamation and false light claims." (*Id.* at p. 1280.)

A few general concepts can be derived from decisional authorities. Preliminarily, for purposes of the statute, an issue of public interest is "any issue in which the public is interested." (*Nygård, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1042 (*Nygård*).) "In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." (*Ibid*.) While "public interest" does not equate with mere curiosity, it does include matters that could be described as mere "'celebrity gossip'" or " 'tabloid' issues." (*Id.* at p. 1027.) In addition, a matter of public interest should be something of concern to a substantial number of people. (*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 762.) A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 926 (*Rivero*.)[16] When an issue is not of interest to the general public, but is of interest to a

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16 In *Rivero* the plaintiff was the former supervisor of janitors at the International House on the campus of the University of California at Berkeley. (*Id*. at p. 916.) Some of the janitors made allegations of misconduct that were investigated and were not substantiated. Nonetheless, Rivero was demoted and then fired when he would not accept demotion. (*Ibid*.) Thereafter, the employees union published and distributed three documents containing claims of misconduct by Rivero. (*Id.* at pp. 916–917.) The court of appeal concluded that the publications did not involve a matter of public interest.

limited, definable segment of the public, such as a private group, organization or community, then the protected activity must take place "in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.) Moreover, there should be some degree of closeness between the challenged statements and the asserted public interest, and the assertion of a broad and amorphous public interest is not sufficient. (*Connick v. Myers* (1983) 461 U.S. 138, 148-149 [observing that the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy. . . ."].)

As the court in *Rivero* succinctly and aptly concluded, statements made in connection with a public issue or an issue of public interest, for purposes of section 425.16, subdivision (e)(3) or (4), are generally those that concern "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, supra*, at p. 924; see also *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33.) With these concepts in mind we turn to the party's contentions.

"Here, the Union's statements concerned the supervision of a staff of eight custodians by Rivero, an individual who had previously received no public attention or media coverage. Moreover, the only individuals directly involved in and affected by the situation were Rivero and the eight custodians. Rivero's supervision of those eight individuals is hardly a matter of public interest." (*Id.* at p. 924.) The court also rejected the claim that the defendant could turn a private matter into one of public interest simply by publishing it to numerous people. "If the mere publication of information in a union newsletter distributed to its numerous members were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect." (*Id.* at p. 926.)

Before this court appellants contend that no statement about a public issue is implicated in this case; but instead Cohen was simply being rude and obnoxious, and that his conduct was unrelated to any public concern or controversy. Respondents counter that the character of *Bruno*, his conduct in the movie, and specifically his behavior at the bingo hall on May 24, were intended to provide a satirical perspective on homosexuality, and gay culture by, among other things, eliciting homophobic reactions from those with whom Bruno interacted in the movie. Respondents assert that homosexuality, and gay lifestyle and more particularly homophobia are issues of widespread public interest and controversy. We find respondents' argument more convincing.

First, as to the matter of public issue—there can be no doubt that homosexuality gay culture, lifestyles, rights and the public reactions to those issues present matters of public interest and controversy. Second, the evidence in the record also supports the lower court's finding that "the purpose of *Bruno* was to show audiences what would happen when a film crew followed a blatantly-homosexual character . . . as he interacted with members of the public, raising issues of homosexuality, gay culture and same sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society." Contrary to appellants' contention, the video footage of the event shows that Cohen's conduct—his words (i.e., his comments about his gay partner) and his characterization of Bruno as a flamboyant gay fashion reporter—directly referenced issues related to homosexuality, gay stereotypes and gay culture. Thus, the movie and Cohen's conduct in the movie concerned issues of public interest.

Furthermore, whether or not appellants were aware of Cohen's purpose in coming to the bingo hall to participate in the games, appellants became involved in the issues Cohen sought to highlight when they agreed to allow Cohen to participate in the bingo games while making the film. Although a private person, appellant Richelle Olson nonetheless voluntarily engaged with Cohen while the cameras filmed the encounter. Richelle Olson approached the stage, and instigated the confrontation with Cohen because of what he was saying about his lifestyle.

Finally, our review of the record, in particular the videotape segments of the bingo games, demonstrates that appellants' claims are sufficiently connected to the public issues raised by the movie. Cohen did not utter expletives, profanity, and obscene language or describe overtly sexual behavior. He relayed information about his former partner and made comments about the history of their relationship. At most, some of his references might be considered sexual innuendo. Appellant Richelle Olson became upset and embarrassed by Cohen's comments. As discussed elsewhere, Cohen's references to his homosexual lifestyle prompted Richelle Olson's efforts to stop Cohen from calling bingo numbers and eject Cohen and his crew from the bingo hall. And it was her reaction to this sequence of events that led to her claims forming the basis of her complaint. Indeed, it is the connection between appellants' claims and the topics of widespread public interest that distinguishes this case from *Dyer*, where defendants failed to demonstrate that Dyer's defamation claims and privacy claims had anything to do with the public issues defendants had identified.

In view of the foregoing we conclude respondents' actions in filming scenes for *Bruno* at the bingo hall were in furtherance of the exercise of free speech in connection with a public issue. The evidence did not show that the respondents' conduct was illegal as a matter of law. Therefore, respondents made the necessary threshold showing that appellants' actions arise from a statutorily protected activity.

B. Whether appellants demonstrated a probability of prevailing on the merits of the claim.

In our *de novo* review of the anti-SLAPP motion, we next consider whether the evidence showed a probability appellants can prevail on the merits of their complaint.

To show a probability of success on the merits of the action, "'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.]" (*Navellier, supra*, 29 Cal.4th at pp. 88-89) A plaintiff opposing an anti-SLAPP motion cannot simply rely on allegations in the complaint, but must set forth evidence that would be admissible at trial. (*Morrow v.*

Los Angeles Unified School District (2007) 149 Cal.App.4th 1424, 1444.) The plaintiffs' showing must be made by competent admissible evidence within the personal knowledge of the declarant. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15.)

Appellants failed to carry their burden to prove a probability of success. Below in their opposition to the motion appellants indicated they *could* provide affidavits, documents and other admissible evidence to demonstrate that their claims were legally and factually sufficient to support a favorable judgment. However, the only evidence they presented below was their short video showing appellant after her confrontation with Cohen. Appellant did not submit the video to this court, but even if she had, it would have provided no support for her claims. Appellants did not submit any admissible evidence in support of their opposition. "Plaintiff must also substantiate the legal sufficiency of their claim. It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint. Substantiation requires something more than that." (*DuPont Merck Pharmaceutical v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) Once the court determines the first prong of the statute has been met, a plaintiff must provide the court with sufficient evidence to permit the court to determine a probability of success.[17] Appellants' failure to do this is dispositive on this prong.

In view of all the foregoing, we conclude that the lower court properly granted the motion to strike appellants complaint under section 425.16.

III. Attorneys Fees on Appeal

Respondents' attorneys have requested an order for attorney fees on this appeal. Subdivision (c)(1) of section 425.16 provides for an award of attorney fees to the defendant who successfully brings a motion to strike. "'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]' [Citation.] Section 425.16, subdivision

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[17] In view of this conclusion we need not decide the applicability or the validity of the waivers and releases in the Location and Consent Agreements.

[(c)(1)] provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery on appeal. [Citation.]" (*Church of Scientology v. Wollersheim* , *supra* 42 Cal.App.4th 628, 659, disapproved on another point in *Equilon Enterprises, supra*, 29 Cal.4th at p. 68, fn. 5.) Consequently, respondents are entitled to an award of attorney fees on this appeal, the amount of which is to be determined by the trial court upon remand.

DISPOSITION

The order granting the special motion to strike is affirmed. The matter is remanded to the trial court to conduct proceedings as appropriate to determine costs and reasonable attorney fees, including attorney fees on appeal, to be awarded the attorneys.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**