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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

CENTRAL ESCROW, INC., Plaintiff and Appellant, v. GREG MARTIN et al., Defendants and Respondents.	B234166 (Los Angeles County Super. Ct. No. BC448877)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael C. Solner, Judge. Affirmed.

Henry M. Lee Law Corporation, Henry M. Lee and Robert Myong for Plaintiff and Appellant.

Law Office of Steven M. Goldsobel and Steven M. Goldsobel for Defendants and Respondents Greg Martin, David M. Almaraz and Hamburg, Karic, Edwards & Martin, LLP.

Excelus Law Group, Inc., and William W. Bloch for Defendants and Respondents Jeenah Huh and Audrey Soh.

Law Office of Herbert Abrams and Herbert Abrams for Defendants and Respondents William W. Bloch and Excelus Law Group, Inc.

Plaintiff and appellant Central Escrow, Inc., appeals from four orders granting special motions to strike under Code of Civil Procedure section 425.16 (the anti-SLAPP statute)[1] and an order awarding attorney fees in favor of defendants and respondents Audrey Soh, Jeenah Huh, their attorney William W. Bloch and his law firm Excelus Law Group, Inc., and their trial attorneys Greg Martin, David M. Almaraz, and the law firm of Hamburg, Karic, Edwards & Martin, LLP (HKEM) in this malicious prosecution action based on a sexual harassment lawsuit. Central contends: 1) Huh's motion to strike and Bloch and Excelus's motion to strike were untimely, and the trial court lacked jurisdiction to hear them; 2) Central showed a probability of prevailing on its malicious prosecution claims; and 3) the trial court abused its discretion in awarding attorney fees to Soh, Huh, Bloch, and Excelus.

We hold the trial court did not abuse its discretion by allowing Huh, Bloch, and Excelus to file their motions to strike, nor did the court lack jurisdiction to hear their motions. We also conclude the denial of attorney fees on the FEHA causes of action in the underlying case precludes Central's malicious prosecution action. The court did not abuse its discretion in awarding attorney fees to Soh. Therefore, the orders granting the motions to strike and awarding attorney fees are affirmed.

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1 "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) An order granting or denying a special motion to strike under Code of Civil Procedure section 425.16 is appealable. (Code Civ. Proc., § 904.1, subd. (a)(13).) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

FACTS AND PROCEDURAL BACKGROUND

I. Underlying Sexual Harassment Action

Soh began working at Central's Los Angeles branch as a receptionist in January 2006, and was eventually promoted to escrow assistant. She resigned her position in July 2007. Huh performed marketing work for Central from 2004 to August 2007.

On February 6, 2008, Soh and Huh filed a complaint against Central and its employee Joseph Cho for sex discrimination in violation of the Fair Employment and Housing Act (FEHA)(Gov. Code, § 12900 et seq.), constructive termination, hostile work environment, intentional infliction of emotional distress, and breach of duty to prevent discrimination. Soh and Huh were represented by Bloch and Excelus. The operative amended complaint was filed on April 4, 2008.

Central and Cho filed motions for summary judgment against Soh and Huh. Soh and Huh opposed the motions. In support of their oppositions, they filed their own declarations and the declaration of former Central employee John Kim, who worked as an escrow assistant until January 2008. After a hearing, the trial court found triable issues of facts existed as to all causes of action and denied the motions on March 18, 2009.

On August 6, 2009, Kim withdrew the declaration that had been submitted in opposition to the motions for summary judgment and recanted the statements in it. He declared that he had agreed to sign the original statement as a favor to Soh. When he read the declaration, he told Bloch that some of the information was incorrect, but Bloch told him that it did not have to be completely accurate. Kim declared that he had been "distracted" by Bloch's statements that Central might owe him significant sums of money in unpaid wages. He stated, "I also thought William Bloch was acting in my best interests so I trusted him that I should not really worry about the contents of my Declaration before signing it." He did not know his declaration contained so many false statements until he read it more carefully later. The declaration recanted specific statements in the previous declaration.

Attorneys Martin and Almaraz of the law firm of HKEM associated in as trial counsel for Huh and Soh. A jury trial commenced on October 26, 2009. The jury found: Huh was not an employee of Central; Cho was not a supervisor; Cho's conduct was not severe and pervasive as to create a hostile work environment; and Cho did not engage in conduct that was outrageous as to Huh or Soh. Therefore, the trial court entered judgment in favor of Central and Cho on November 3, 2009.

Central and Cho filed a motion requesting attorney fees as authorized under the FEHA on the grounds that the lawsuit was frivolous and vexatious. Central and Cho claimed the women fabricated evidence, as shown by the following facts: the complaint contained false allegations of sexual advances that Soh and Huh later admitted were untrue; Huh and her counsel knew that Huh was prohibited from working as an employee of Central by law due to a criminal conviction; psychiatric reports prepared shortly before trial were suspect, because they duplicated declarations submitted in opposition to summary judgment; and John Kim's declaration recanting his original declaration reflected the frivolous nature of the lawsuit.

Huh and Soh opposed the motion for attorney fees on the ground that Central and Cho could not show the action was unreasonable, frivolous, groundless, or vexatious. They argued that Central and Cho were attempting to characterize the nature of the action based on one deposition question. They also argued that there had been a tenable legal argument that Huh's employment through a separate corporation was a sham. They stated that the similarities between the psychologist's reports and the women's declarations were simply a time-saving device by the psychologist's clerical staff. Soh and Huh asserted that Kim's second declaration was false and accused Central and Cho of witness tampering and suborning perjury.

In support of the opposition, Huh and Soh submitted a third declaration from Kim, which superceded his previous declaration and stated that his original declaration was truthful. Kim stated that he signed the second declaration when it was presented to him by a distant cousin, who still works for Central, because the cousin said a supervisor at Central would embarrass Kim at trial with his felony record.

Central and Cho filed a reply. The minute order reflects that after a hearing on February 1, 2010, the trial court denied the motion for attorney fees. No reporter's transcript of the hearing is contained in the record on the instant appeal.

II. Allegations of the Instant Malicious Prosecution Complaint

On November 4, 2010, Central filed a complaint against Huh, Soh, Bloch, Excelus, Martin, Almaraz, and HKEM alleging malicious prosecution as follows. Defendants each engaged in conduct including creating false pleadings without factual basis, suborning perjury, and offering compensation to witnesses to commit perjury. The underlying sexual harassment complaint contained allegations which defendants knew were false, including the allegation that Huh and Soh were compelled to provide sexual favors at Central. Defendants knew their claims were not legally tenable, because Huh was not an employee. Soh and the attorney defendants knew or should have known that Soh suffers from personality disorders which caused her to file the underlying complaint. The attorney defendants suborned perjury by third party witnesses with promises of compensation. The attorney defendants suborned perjury from their expert psychologist by providing documents which she relied upon and falsely stated at trial that she did not. The attorney defendants knew or should have known that Huh and Soh's claims had no merit and were devoid of factual support. Despite their knowledge, the attorney defendants submitted false allegations in pleadings and manufactured false discovery responses, witness declarations, and testimony.

III. Anti-SLAPP Motions and Subsequent Proceedings

A. HKEM's Anti-SLAPP Motion

Martin, Almaraz, and HKEM filed an anti-SLAPP motion on January 14, 2011. They argued the denial of the defense motion for summary judgment established probable

cause to prosecute the sexual harassment case as a matter of law. In addition, they argued that any reasonable attorney would have considered the claims tenable at the time they associated into the action due to the denial of the motion for summary judgment and after investigating the law and the facts as they did. HKEM, Martin, and Almaraz were not aware of any false testimony and never offered any fabricated testimony. Central cannot show they were aware of any facts that led them to believe the claims lacked probable cause. The trial court's denial of Central's motion for attorney fees also established probable cause for the sexual harassment lawsuit.

B. Opposition to Martin, Almaraz, and HKEM's Anti-SLAPP Motion

In opposition, Central did not dispute the anti-SLAPP statute applied. However, Central argued that it could demonstrate a probability of prevailing on its claims, because there was no probable cause to prosecute the sexual harassment complaint. The factual allegations of the complaint and verified interrogatory responses were false. Bloch and Excelus suborned perjury from Huh, Kim, and Dr. Elena Konstat. All of which Martin, Almaraz, and HKEM would have known from reviewing the pleadings and conducting a reasonable investigation of the claims. Evidence showed Huh was motivated by malice, and Soh had no intent to file a lawsuit until she spoke with Huh. Huh's theory to be considered an employee of Central was legally untenable. Central argued the rulings on the summary judgment motions were irrelevant, because the declarations of Soh, Huh, and Kim contained false statements. Moreover, the ruling on the attorney fee motion was irrelevant, because it was an ancillary ruling under a different standard.

C. Soh's Anti-SLAPP Motion

Soh filed an anti-SLAPP motion on February 22, 2011. Soh argued the denial of the defense motion for summary judgment in the sexual harassment case established probable cause as a matter of law. The exception for materially false facts submitted in

opposition to summary judgment did not apply, because even assuming Kim's testimony had been false, there was no evidence that summary judgment was denied based on Kim's declaration. Also, the denial of Central's motion for attorney fees established that the underlying action had foundation as a matter of law.

Soh submitted several declarations in support of her anti-SLAPP motion, including one from Bloch. With respect to the trial court's ruling on the motion for attorney fees under FEHA, Bloch declared, "the Court denied Central Escrow's motion for attorney fees on February 1, 2010, finding no support for the claims that Plaintiffs' lawsuit was 'unreasonable, frivolous, groundless or vexatious,' and in so doing, finding that the allegations against me alleged in Central Escrow's papers, that I suborned perjury and offered money to a witness to perjure himself, were groundless."

D. Central's Opposition to Soh's Anti-SLAPP Motion

Central filed an opposition to Soh's anti-SLAPP motion on substantially similar grounds as the opposition to Martin, Almaraz, and HKEM. Once again, Central did not dispute that the anti-SLAPP statute applied. However, Central argued it could demonstrate a probability of prevailing on its claims, because there had been no probable cause to prosecute the sexual harassment complaint. The factual allegations of the complaint and verified interrogatory responses were false. Central argued there was a genuine dispute as to which material facts were untrue and whether Soh knew those facts were not true when she filed her complaint and continued to prosecute the action. Central claimed that Soh's inconsistent allegations and statements were proof the claims were fabricated. Evidence showed Huh was motivated by malice, and Soh had no intent to file a lawsuit until she spoke with Huh. Central argued the rulings on the summary judgment motions were irrelevant, because the declarations of Soh, Huh, and Kim were false. Moreover, Central argued the ruling on the attorney fee motion was irrelevant, because it was an ancillary ruling under a different standard.

E. Rulings on Anti-SLAPP Motions of Soh, Martin, Almaraz, and HKEM

A hearing was held on April 26, 2011, on the motions to strike of Soh, Martin, Almaraz, and HKEM. The trial court found Central could not establish a probability of prevailing on its claim for malicious prosecution based on the summary judgment rulings in the underlying case finding the existence of triable issues of fact and the denial of the motion for attorney fees, which implied a finding that the action was not frivolous. The court entered an order granting the anti-SLAPP motions of Soh, Martin, Almaraz, and HKEM on May 17, 2011.

F. Huh's Anti-SLAPP Motion and Bloch and Excelus's Anti-SLAPP Motion

Huh filed an anti-SLAPP motion on June 22, 2011, on similar grounds to those asserted by Soh. Bloch and Excelus filed an anti-SLAPP motion that day on similar grounds as well. Bloch and Excelus additionally argued the women's declarations showed there was probable cause to prosecute the action when Bloch and Excelus made the decision to participate. Bloch and Excelus argued they were not aware of any false testimony and Central could not show they had knowledge of any perjury. Both motions were supported by similar evidence to the previous motions.

G. Central's Opposition to the Motions of Huh, Bloch, and Excelus

Central opposed the anti-SLAPP motions of Huh, Bloch, and Excelus on the grounds the motions were untimely and they had not sought permission to file late motions. Central asserted it could establish a probability of prevailing, because the complaint alleged facts proven to be false and the evidence showed Bloch had suborned perjury. Central argued the summary judgment rulings in the underlying action were not determinative, because they were obtained through fraud. In addition, Central argued the ruling on the motion for attorney fees was limited to the FEHA causes of action in the

underlying action. It did not, for example, address whether their claims for intentional infliction of emotional distress were brought with probable cause. Central also argued the ruling on the motion for fees did not preclude a subsequent malicious prosecution action, because it was an ancillary ruling and not a decision based on the merits.

H. Subsequent Proceedings

On July 1, 2011, Central filed a notice of appeal from the order entered on May 17, 2011, granting the anti-SLAPP motions of Soh, Martin, Almaraz, and HKEM.

Soh filed a motion seeking attorney fees of $14,815 for work performed by the law firm of Pflaster and Berman and $29,055 to Excelus for work performed by Bloch. A hearing was held on July 18, 2011. The trial court granted Soh's attorney fee motion with a slight reduction, awarding attorney fees of $12,015 to Pflaster and Berman and $27,392 to Excelus. Berman argued the original amount requested was reasonable, but the trial court stated the reduced amounts awarded were based on experience as a practitioner and a judge that the reasonable value of Berman and Pflaster's services was $12,015.

Central's attorney argued that attorney fees should not be awarded to Excelus, because Bloch had never appeared in the malicious prosecution on behalf of Soh, nothing showed that he was actually doing work on Soh's behalf as opposed to for his own case for which he was not entitled to recover, and there was no showing the work of the two firms was not duplicative. Berman responded the record was voluminous and Bloch's assistance had been critical.

The trial court found that Bloch not only assisted in his own defense but in his codefendants'. The court also found that the block billing records, in addition to the court's knowledge of reasonable billing for this type of matter, was sufficient for the court's purposes in making an award of attorney fees.

At the same hearing, the trial court granted the anti-SLAPP motions brought by Huh, Bloch, and Excelus, based on the denial of summary judgment in the underlying

action. The court found the statutory dates for filing an anti-SLAPP motion were triggered on April 26, 2012, when motions to quash service of process were taken off calendar in light of the court's ruling on the other anti-SLAPP motions.

On July 25, 2011, Martin, Almaraz, and HKEM filed a motion seeking attorney fees of $39,805. At some point, Martin, Almaraz, and HKEM were awarded attorney fees totaling $39,685.

On August 25, 2011, Central filed a notice of appeal from the orders on July 18, 2011, awarding attorney fees to Soh and granting the anti-SLAPP motions of Huh, Bloch, and Excelus.

Huh, Bloch, and Excelus filed a motion for attorney fees on August 25, 2011. At a hearing on October 17, 2011, the trial court granted the motion for attorney fees filed by Huh, Bloch, and Excelus but reduced the amounts requested and awarded as follows: $6,400 for fees of Bloch and Excelus, $4,000 for fees of Pflaster and Berman, and $18,000 for fees of the Abrams law firm in representing Soh, Huh, Bloch, and Excelus.

On November 23, 2011, judgment was entered in favor of all defendants against Central. On March 14, 2012, this court consolidated Central's two appeals.

DISCUSSION

I. Standard of Review and Analytical Framework

"In deciding an anti-SLAPP motion, the trial court must 'engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)" (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1103 (*Johnson*).) The first step is not disputed in this

case, because the anti-SLAPP statute applies to malicious prosecution claims. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 214-215 (*Daniels*).)

"'[T]o establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must "'state[] and substantiate[] a legally sufficient claim.'" [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)" (*Johnson, supra,* 204 Cal.App.4th at p. 1105.)

"'[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether "the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim" (italics added), past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.' [Citation.] '[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff.' [Citation.] '[T]he defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.' [Citation.]" (*Daniels, supra,* 182 Cal.App.4th at p. 215.)

"We review an order granting an anti-SLAPP motion de novo, applying the same two-step procedure as the trial court. [Citation.] We look at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the

defendant's evidence '"only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.] The plaintiff's cause of action needs to have only '"minimal merit" [citation]' to survive an anti-SLAPP motion. [Citation.]" (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1105 (*Cole*).)

II. Malicious Prosecution

Central concedes a cause of action for malicious prosecution is subject to an anti-SLAPP motion. However, Central contends it made a prima facie evidentiary showing defendants lacked probable cause to file and pursue claims against Central in the underlying action. We must disagree, based on the order in the underlying action denying recovery of attorney fees under FEHA.

A. Probable Cause Element of Malicious Prosecution

"To establish a cause of action for malicious prosecution, a plaintiff must prove that the underlying action was (1) terminated in the plaintiff's favor, (2) prosecuted without probable cause, and (3) initiated with malice." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333.) Central also may prevail by showing that defendants maliciously continued to prosecute the case against the company without probable cause. (*Ibid*.) It is undisputed that the underlying sexual harassment action terminated favorably to Central.

"Probable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts. [Citation.]" (*Cole, supra*, 206 Cal.App.4th at p. 1106.) A litigant lacks probable cause for her action if she relies on facts which she has no reasonable cause to believe are true or seeks recovery based on a legal theory which is untenable under the facts known to her. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).) "This objective standard of review is similar to the standard for determining whether a lawsuit

is frivolous: whether 'any reasonable attorney would have thought the claim tenable . . . .' (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885–886 (*Sheldon Appel*).)" (*Cole, supra,* at p. 1106.)

"Probable cause, moreover, must exist for every cause of action advanced in the underlying action. '[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted. . . .' (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57, fn. 5 [(*Bertero*)]; see *Crowley v. Katleman* (1994) 8 Cal.4th 666, 679, 695.)" (*Soukup, supra,* 39 Cal.4th at p. 292.)

"The probable cause element plays an essential role in cutting to the heart or purpose of the tort of malicious prosecution--protection of the individual's interest in freedom from unreasonable and unjustified litigation. This element requires the trial court to make an objective call as to the reasonableness of the defendant's conduct; that is, to determine whether, on the facts known to defendant, institution of the prior action was legally tenable. If the prior action was objectively reasonable, the malicious prosecution claim will fail. (*Sheldon Appel, supra,* 47 Cal.3d at pp. 878–879.)" (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1153 (*Sierra Club Foundation*).)

"As well, absence of probable cause can be shown by proof that the initiator commenced the prior action knowing that his or her claims were false. ([*Bertero*], *supra,* 13 Cal.3d at p. 50.) Reconciling *Bertero* with the objective test for probable cause, the court in *Sheldon Appel* highlights the distinction between a defendant's subjective belief in the legal tenability of a claim, as opposed to his or her disbelief in its factual predicates. (*Sheldon Appel, supra,* 47 Cal.3d at p. 880.) Probable cause does not depend on the defendant's subjective evaluation of the legal merits of the prior action. But if defendant *knows* that the facts he or she is asserting are not true, then defendant's knowledge of facts which would justify initiating suit is zero, and probable cause is nonexistent." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at pp. 1153-1154.)

"The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must

resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause. (*Sheldon Appel, supra,* 47 Cal.3d at pp. 879–881; *Axline v. Saint John's Hospital & Health Center* (1998) 63 Cal.App.4th 907, 917.)" (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154.)

B. Denial of Attorney Fees Motion in Underlying Action

Respondents contend that the denial of Central and Cho's motion for attorney fees on the FEHA causes of action in the underlying complaint conclusively established probable cause existed for pursuing the sexual harassment action. In this case, they are correct.

"Attorney fees are allowable as costs to a prevailing party when authorized by statute. (. . . §§ 1021, 1033.5, subd. (a)(10)(B).) Government Code section 12965 authorizes an award of attorney fees and costs to the prevailing party in any action brought under FEHA. Section 12965 provides, in pertinent part, 'In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs . . . .' A trial court's award of attorney fees and costs under this section is subject to an abuse of discretion standard. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.)" (*Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 921 (*Bond*).)

"California courts have followed federal law, and hold that, in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust. A prevailing defendant, however, should be awarded fees under the FEHA only 'in the rare case in which the plaintiff's action was frivolous, unreasonable, or without foundation.' (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 864 [(*Rosenman*)].)" (*Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474 (*Young*).)

"The [United States Supreme Court in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421] defined meritless as groundless or without foundation, rather than simply the fact that the plaintiff ultimately lost. The court also noted 'vexatious' does not imply that plaintiff's subjective bad faith is a necessary prerequisite to an award of attorney fees to defendant. [Citation.] The court concluded a court may award defendant attorney fees if it finds 'the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' [Citation.]" (*Bond, supra,* 50 Cal.App.4th at pp. 921-922.) A finding that the action never had a factual basis because the plaintiff simply lied about what occurred constitutes a finding that the action was "unreasonable," "frivolous," and "vexatious." (*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1229-1230.)

"The court also sounded a cautionary note: 'In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.' (*Christiansburg, supra,* 434 U.S. at pp. 421-422.)" (*Bond, supra,* 50 Cal.App.4th at p. 922.)

"*Rosenman* imposed 'a nonwaivable requirement that trial courts make written findings' reflecting the criteria supporting an award 'in every case where they award attorney fees in favor of defendants in FEHA actions.' (*Rosenman, supra,* 91 Cal.App.4th at p. 868.) *Rosenman* added that the trial court 'should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light

of the plaintiff's financial situation.' (*Id.* at p. 868, fn. 42.)" (*Young, supra*, 168 Cal.App.4th at p. 1474.)

Even if the trial court finds that a FEHA action against a defendant was frivolous, unreasonable, meritless or vexatious, the court has discretion to reduce or deny attorney fees based on the circumstances of the case. (*Young, supra*, 168 Cal.App.4th at p. 1475.) "*Rosenman* itself suggests circumstances in which the court could appropriately reduce or deny a prevailing defendant fees in a frivolous case, when it tells us that the trial court must consider the plaintiff's ability to pay attorney fees, and that an award should not subject the plaintiff to financial ruin. (*Rosenman, supra,* 91 Cal.App.4th at p. 868, fn. 42[.])" (*Young, supra*, at p. 1475.) The trial court may also deny attorney fees to a defendant, even when the court finds the FEHA claims against the defendant were frivolous, when the fee award would benefit another defendant who is not entitled to a fee award. (*Ibid*.)

The denial of an attorney fees award under the FEHA does not establish probable cause precluding a malicious prosecution action in every case, because the trial court may exercise its discretion to reduce or deny an award of attorney fees even when the court believes the FEHA action was frivolous, meritless, unreasonable, or vexatious.

However, in this case, the issue before the trial court on the motion for attorney fees in the underlying action was whether the FEHA claims were frivolous, meritless, unreasonable, or vexatious. Soh and Huh did not oppose the motion on any other grounds. Bloch declared the trial court expressly found no support that the lawsuit was unreasonable, frivolous, groundless, or vexatious. Central has not provided a reporter's transcript of the trial or the hearing on the motion for attorney fees. In opposition to the motion to strike, Central has not submitted any evidence to show the court did not make such a finding or that the denial of attorney fees was based on other circumstances. The trial court's findings are presumed to be supported by substantial evidence and binding on the appellate court, unless reversible error appears on the record. (*Kennedy v. Taylor* (1984) 155 Cal.App.3d 126, 128.) Therefore, the trial court's express finding that Soh and Huh's FEHA claims were not unreasonable, frivolous, groundless, or vexatious

establishes they had probable cause to maintain their FEHA claims and Central cannot show a probability of prevailing as to those claims.

Central has not argued that it can show a probability of prevailing on any of the non-FEHA claims in light of the finding as to the FEHA claims. Therefore, the trial court properly granted the motions to strike.

III. Timeliness of Motions

Central contends the motions of Huh, Bloch, and Excelus were untimely, because they were filed more than 60 days after service of the complaint. We find no abuse of discretion.

Section 425.16, subdivision (f), provides in pertinent part: "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." We review the trial court's ruling for an abuse of discretion that "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 681.)

Even assuming the anti-SLAPP motions were not timely filed, we find no abuse of discretion in the trial court granting permission to proceed. Central did not show that it suffered any prejudice as a result of any late filing of the anti-SLAPP motions. The company contends that it was prevented from opposing the late filing of the motions but admits it was able to raise the issue of untimely filing as a ground to deny the motions. The trial court exercised its discretion to allow the motions.

Central also contends the anti-SLAPP motions of Huh, Bloch, and Excelus should have been denied, because they had already chosen to litigate the case by filing motions to quash service before they filed anti-SLAPP motions. However, a motion to quash service of process is not a judicial investigation of the merits of the action. (*School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1131-1132.) Seeking a decision on service of process was not litigation on the merits of the case and did not

waive their right to file anti-SLAPP motions. The trial court did not abuse its discretion in permitting the anti-SLAPP motions to proceed.

IV. Jurisdiction

Central contends the trial court lacked jurisdiction to hear the motions of Huh, Bloch, and Excelus, because Central had appealed the trial court's ruling granting the motions to strike of Soh, Martin, Almaraz, and HKEM. This is incorrect.

Section 916, subdivision (a), states in pertinent part: "Except as [otherwise] provided . . . , the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

The merit of Central's claims against Huh, Bloch, and Excelus were not "embraced" within or affected by the trial court's rulings on the anti-SLAPP motions of Soh, Martin, Almaraz, and HKEM, which were on appeal. The trial court had jurisdiction to proceed as to the action against Huh, Bloch, and Excelus.

V. Attorney Fees Awards

Central contends that the trial court abused its discretion in awarding attorney fees to Soh. We find no abuse of discretion.

A. Standard of Review

Section 425.16, subdivision (c)(1), provides, in pertinent part, "a prevailing defendant on a[n anti-SLAPP motion] shall be entitled to recover his or her attorney's fees and costs." "'The language of the anti-SLAPP statute is mandatory; it requires a fee award to a defendant who brings a successful motion to strike. Accordingly, our

Supreme Court has held that under this provision, "any SLAPP defendant who brings a successful motion to strike is *entitled* to *mandatory* attorney fees." [Citation.]' [Citation.] At the same time, 'a defendant who brings a successful special motion to strike is entitled only to reasonable attorney fees, and not necessarily to the entire amount requested. [Citations.]' [Citation.] We review the trial court's ruling for abuse of discretion." (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 620.) "'The issue of a party's entitlement to attorney's fees is a legal issue which we review de novo.' [Citations.]" (*Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269, 1278.)

B. Amount of Award

Central contends the total amount of attorney fees awarded was unreasonable and duplicative. However, the trial court was in the best position to assess the value of the attorneys' services. The trial court exercised its discretion to reduce the requested amounts and found the amount of the fee award to be consistent with similar work in similar cases. Preparing the anti-SLAPP motion required reviewing all of the proceedings in the underlying action, including the summary judgment motion, trial proceedings and post-trial proceedings. We find no abuse of discretion.

C. Fees for Bloch's Work

Central contends that Soh should not have been awarded any amount for work performed by Bloch and Excelus. First, Central argues that Bloch and Excelus could not ethically represent Soh, because they were codefendants. However, Central does not have standing to object to Bloch and Excelus providing services to Soh. There is no evidence that Soh was not properly informed of any conflict of interest. In addition, a nonattorney client who prevails on an anti-SLAPP motion is entitled to recover attorney fees, even if the attorney who provided the services was a codefendant. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524-525.) No formal association on

the record is required in order for attorney fees to be recoverable. (*Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324-1325.)

Central's second argument is that Bloch and Excelus are not entitled to recover fees for work on their own defense. In awarding attorney fees, the trial court reduced the amount requested and awarded $27,392.50 for Bloch's services in connection with Soh's anti-SLAPP motion. The trial court considered Central's argument that Bloch's work was intended for his own defense, however, the court found that Bloch also provided services for his codefendants for which he could recover. The court expressly found that the amount awarded was consistent with the court's experience in similar cases for similar work. The trial court was in the best position to evaluate and allocate the value of the professional services rendered in connection with the various motions to strike. We find no abuse of discretion in the award of attorney fees for work on behalf of Soh.

None of the contentions raised in the briefs concerning other attorney fee awards are properly before the court in connection with this appeal.

DISPOSITION

The orders granting the motions to strike and awarding attorney fees are affirmed. Respondents Audrey Soh, Jeenah Huh, William Bloch, Excelus Law Group, Inc., Greg Martin, David Almaraz, and Hamburg, Karic, Edwards & Martin, LLP are awarded their costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.