Filed 7/10/17 Floor Tech v. Milstein Adelman CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FLOOR TECH, INC., Plaintiff and Respondent, v. MILSTEIN ADELMAN, LLP, Defendant and Appellant.	B270825 (Los Angeles County Super. Ct. No. LC102846)

APPEAL from an order of the Superior Court of Los Angeles County, Russell Kussman, Judge. Affirmed.

Fluetsch & Fluetsch, Michael Fluetsch and Michael Figone for Plaintiff and Respondent.

Milstein Adelman Jackson Fairchild & Wade, Lee Jackson and Mayo L. Makarazyk for Defendant and Appellant.

I. INTRODUCTION

Defendant Milstein Adelman, LLP appeals from a February 10, 2016 order denying its special motion to strike pursuant to Code of Civil Procedure section 425.16.[1] The target of defendant's motion is a malicious prosecution complaint filed by plaintiff Floor Tech, Inc. Defendant contends plaintiff fails to present evidence showing it acted with malice.

But malice can be inferred based on defendant's continued prosecution of the underlying construction defect action after being notified plaintiff had no involvement in the construction project. By demonstrating that defendant knew there was no probable cause to maintain the underlying action, plaintiff makes a sufficient showing to defeat defendant's special motion to strike under section 425.16. Accordingly, we affirm the order denying defendant's special motion to strike.

II. HISTORY AND PROCEDURAL BACKGROUND

A. Underlying Construction Defect Action

Plaintiff's malicious prosecution action arises from a construction defect lawsuit brought by defendant on behalf of its client, 5703 Laurel Palms, Inc. The underlying action sought compensation for damages caused by the defective construction of a multi-unit condominium property at 5703 Laurel Canyon Boulevard in North Hollywood. On July 30, 2014, defendant named "Floor Tech, Inc. dba R S Concrete" in a "Doe"

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

amendment to the complaint. Plaintiff was served with the complaint on the same date.

On August 27, 2014, plaintiff filed an answer and served discovery on 5703 Laurel Palms, Inc. On December 9, 2014, defendant received plaintiff's verified responses indicating plaintiff had nothing to do with the construction of the property. Later, plaintiff was dismissed without prejudice.

B. Complaint for Malicious Prosecution

On April 13, 2015, plaintiff brought an action against defendant and 5703 Laurel Palms, Inc. for malicious prosecution.[2] The complaint alleges defendant had no reasonable basis to name plaintiff in the underlying construction defect lawsuit because plaintiff did not furnish any labor, material or services related to the property and did not even exist at the time of the construction project. According to the complaint, the filing of the underlying lawsuit against plaintiff was done without probable cause and with malice.

C. Defendant's Special Motion to Strike Under Section 425.16

On July 24, 2015, defendant moved to strike the malicious prosecution complaint under section 425.16. Defendant argued it had probable cause to name plaintiff based on the list of subcontractors provided by the developer and acted in good faith and without malice in suing plaintiff in the underlying action.

In support of the motion, defendant submitted a declaration from Mayo L. Makarczyk, an associate at Milstein Adelman, LLP. He stated the following: On June 12, 2014, he received a list of names of subcontractors who worked on the

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[2] 5703 Laurel Palms, Inc. is not a party to this appeal.

construction project from the developer's counsel. The list did not contain addresses or describe the nature or extent of each subcontractor's involvement in the construction of the project. As Makarczyk and his legal assistant went through the list, they found the names listed were often incomplete or incorrect. They conducted research "by going through the records maintained by the California Secretary of State or Contractors' State Licensing Board, or other records available through internet searches." The list did not name "Floor Tech"; however, there was a listing for "R.S. Concrete Pumping." They were unable to find "R.S. Concrete Pumping" by going through records available on the internet; but, they did find an entity called "Floor Tech, Inc. dba R S Concrete." Defendant named plaintiff in the "Doe" amendment and served plaintiff with the underlying complaint on July 30, 2014.

On August 27, 2014, plaintiff filed an answer and served written discovery in the underlying complaint. On October 1, 2014, Makarczyk served objections based on the discovery stay in a case management order that had been previously issued during the course of litigation. But Makarczyk's legal assistant did not send the case management order to plaintiff's counsel until October 13, 2014. On December 9, 2014, Makarczyk received plaintiff's verified responses to the discovery requests along with a December 2, 2014, letter from plaintiff's counsel, Michael Fluetsch, by mail. The responses state plaintiff was not involved in the construction of the project.

On December 10, 2014, Makarczyk sent an e-mail to Fluetsch offering to dismiss plaintiff in exchange for a waiver of costs. In an e-mail of December 11, 2014, Fluetsch refused to waive costs but offered to release any malicious prosecution

claims against defendant in exchange for $15,000. In that same e-mail he indicated that he faxed letters to defendant on August 7 and October 6, 2014, that stated plaintiff had nothing to do with the project and requested dismissal of the action against plaintiff. Makarczyk denies defendant received these letters.

On December 29, 2014, Markarczyk caused to be filed a request for dismissal of plaintiff from the underlying action. Markarczyk declares: "I did not bring Floor Tech into the underlying action as a Doe defendant for any reason than to obtain compensation for the injuries suffered by 5703 Laurel Palms, Inc. from subcontractors who were involved in the construction of the Property. When I received discovery responses stating that Floor Tech had nothing to do with the construction of the Property, I offered to dismiss in exchange for a waiver of costs. When this offer was refused, I caused Floor Tech to be dismissed 18 days later. It was never my intention to proceed for any reason against an entity that bore no responsibility for the claims at issue in the underlying matter."

D. Plaintiff's Opposition to Special Motion to Strike

On January 14, 2016, plaintiff filed its opposition to the special motion to strike. Plaintiff argued defendant had no reasonable basis to sue it in the underlying construction defect action. According to plaintiff, defendant was repeatedly informed it had sued the wrong party but refused to dismiss plaintiff from the underlying lawsuit. Plaintiff contended defendant's continued prosecution of plaintiff constituted malicious prosecution.

In support, plaintiff submitted a declaration from Fluetsch that stated that after plaintiff was served with the lawsuit, he

sent a letter, dated August 7, 2014, to defendant explaining that plaintiff did not have any involvement with the construction project. The August 7, 2014 letter notes plaintiff did not even exist at the time of the construction of the project.

Plaintiff's answer in the underlying construction defect action includes the following first affirmative defense: "Plaintiff has no reasonable basis to name Floor Tech, Inc. dba R S Concrete as a defendant in this action because defendant never furnished any labor, materials, or services, and never had any involvement whatsoever in the project. Defendant's attorney informed plaintiff's counsel and requested they dismiss defendant, but plaintiff's counsel did not respond. Plaintiff's maintenance of this action against defendant, without any reasonable basis, is malicious prosecution."

On behalf of plaintiff, Fluetsch propounded discovery but defendant waited until the last day to answer, and that answer was in the form of an objection to the request with the assertion that a May 29, 2014 case management order stayed discovery. Fluetsch and plaintiff were unaware of the stay because defendant failed to serve plaintiff with the case management order.

Fluetsch sent a second letter to defendant on October 6, 2014, requesting a copy of the case management order by fax because plaintiff had not been served with a copy of it. Fluetsch reiterated that plaintiff had nothing to do with the project and should be dismissed from the underlying construction defect case.

Later, Fluetsch obtained a copy of the case management order from the trial court. The order required each defendant in the underlying action to submit responses to interrogatories and statements of work and insurance. Plaintiff served verified

responses and statements on December 2, 2014, stating it had no connection to the project and was improperly named as a defendant. Along with the discovery responses, Fluetsch sent a December 2, 2014, letter to defendant. He wrote, "As you can see, my client has stated under penalty of perjury that it did not contract for, or provide, any work for this project. As I have repeatedly told you, you named the wrong party. Even if you initially thought my client had something to do with the project, I have disabused you of that notion. . . . I ask again that you dismiss my client from the lawsuit."

At a January 2, 2015 case management conference, the trial court instructed defendant to dismiss any parties that did not belong in the case. According to Fluetsch, it was only at the conference that defendant responded to his dismissal request. Defendant offered to dismiss plaintiff in exchange for a waiver of costs, which Fluetsch rejected as unacceptable. Defendant then filed a request to dismiss plaintiff without prejudice. On February 1, 2015, Fluetsch sent a fourth letter asking defendant and its client to reimburse plaintiff for litigation costs incurred in the underlying action. Defendant did not respond to the letter.

Fluetsch refutes defendant's assertion that it did not receive the August 7 and October 6, 2014 letters. He declares, "Defendants claim they never received any correspondence from my office. The letters were mailed to Milstein Adelman, LLP at . . . the address they list on their pleadings. The letters were not returned to sender, so presumably, they were delivered to defendants. The letters also may have been faxed to defendants; however plaintiff's file does not indicate whether the facsimile transmission went through or not. It is my practice to send

letters by regular mail, with the fax being redundant, so either way we believe the letters were delivered to defendants."

E. Hearing on Special Motion to Strike

On February 1, 2016, the trial court held a hearing on defendant's special motion to strike. Defendant argued it did not get the faxed letters and evidence showed that the August 7 and October 6, 2014 letters were faxed to the firm's telephone number and not the fax line. In response, Fluetsch asserted his office mails letters that are faxed. He stated, "[W]ith regard to the letters, when I was preparing the opposition to this motion, I pulled out the letters from the file. I saw that they indicated they were faxed, and that's why I initially said in my declaration that we faxed the letters. [¶] But they pointed out that the fax number was wrong, and I'm not disputing that. . . . [¶] But what I am representing to the court is that our standard operating procedure on every letter is that even if we fax it, whether it goes through or not, we always mail the letters. So I believe that they probably did receive the letters. . . . [¶] But even aside from that, they concede that they received our answer. . . . [T]he very first affirmative defense makes it very clear that they've got the wrong party." Makarczyk acknowledged receiving the answer but argued, "It's not uncommon to see that kind of language in the answer."

After oral argument, the trial court denied defendant's special motion to strike under section 425.16. It found defendant satisfied the first prong because the malicious prosecution case arose from defendant's conduct in the underlying construction defect action. As to the second prong, the trial court concluded plaintiff established a probability of prevailing on the malicious

prosecution case. The trial court found the underlying action was brought against plaintiff without probable cause and with malice. It reasoned there was malice based on "the manner in which the lawsuit was initiated" and defendant's continued prosecution of the action after plaintiff's answer provided notice that defendant had sued the wrong party.

III. DISCUSSION

A. Standard of Review

We review de novo the trial court's ruling on a special motion to strike under section 425.16. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326 (*Flatley*); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) In determining the special motion to strike, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16 subd. (b)(2); *Flatley, supra*, 39 Cal.4th at p. 326; *Soukup, supra*, 39 Cal.4th at p. 269, fn. 3.) "'[W]e neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by plaintiff as a matter of law."
[Citation.]' [Citation.]" (*Flatley, supra*, 39 Cal.4th at p. 326, quoting, *Soukup, supra*, 39 Cal.4th at p. 269, fn. 3; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*).)

B. Special Motion to Strike Under Section 425.16

Section 425.16, subdivision (b)(1) states: "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 Constitution or the 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 court must engage in a two-step process when determining a special motion to strike. First, the moving party must make a threshold prima facie showing that the challenged cause of action is one "arising from" the moving party's actions in furtherance of the right of petition or free speech. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*); *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) Second, if the court finds such a showing has been made, the burden shifts to plaintiff to establish a probability of prevailing on the claim. (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 477; *Flatley, supra*, 39 Cal.4th at p. 314.)

1. "Arising From" Protected Activity

Here, there appears to be no dispute that a malicious prosecution claim falls within the preview of section 425.16. Moreover, our Supreme Court has so held in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 (*Jarrow Formulas*): "[W]e decline to create a categorical exemption from the anti-SLAPP statute for malicious prosecution causes of action. Accordingly, we hold that this action is not exempt from anti-SLAPP scrutiny merely because it is one for malicious prosecution."

2. Probability of Prevailing on the Malicious Prosecution Claim

Because the defendant has met its burden, plaintiff must state and substantiate a legally sufficient cause of action to establish a probability of prevailing on the claim. (§ 425.16 subd. (b)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *Wilson, supra*, 28 Cal.4th at p. 821.) "'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 plaintiff is credited."' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; accord, *Baral, supra*, 1 Cal.5th at p. 396.) To avoid being stricken under section 425.16, plaintiff need only establish that the claim has minimal merit. (*Soukup, supra*, 39 Cal.4th at p. 291; *Jarrow Formulas, supra*, 31 Cal.4th at p. 738.)

To establish a cause of action for malicious prosecution, plaintiff must show the prior action was: (1) commenced by or at the direction of defendant and pursued to a legal termination favorable to plaintiff; (2) brought without probable cause; and (3) initiated with malice. (*Soukup, supra*, 39 Cal.4th at p. 292; *Zamos v. Stroud* (2004) 32 Cal.4th 958 (*Zamos*).) "Malicious prosecution . . . includes continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos, supra*, 32 Cal.4th at p. 973.)

On appeal, defendant's sole contention concerns whether plaintiff has presented evidence to sustain a finding of malice. "'The "malice" element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been

something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil case of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.' [Citations.]" (*Soukup, supra*, 39 Cal.4th at p. 292; accord, *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224 (*Daniels*).)

"[M]alice can also be inferred from the evidence that defendants lacked probable cause to initiate and maintain the underlying action against [plaintiff]." (*Soukup, supra*, 39 Cal.4th at p. 296.) "If the prior action was not objectively tenable, the extent of a defendant's attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice." (*Daniels, supra*, 182 Cal.App.4th at pp. 224-225.) "'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' [Citation.]" (*Id.* at p. 225.)

Defendant argues the malice element cannot be satisfied based on a mere showing of constructive knowledge. Defendant asserts once it received plaintiff's verified discovery responses, it immediately offered to dismiss plaintiff in exchange for a waiver of costs. When plaintiff refused, defendant went ahead and dismissed plaintiff from the underlying case.

Defendant disregards plaintiff's evidence showing it provided notice that the wrong party had been sued in the underlying construction defect case. Fluetsch, plaintiff's counsel, declared that on several occasions he informed defendant in writing that it had named the wrong party. Although Fluetsch admits the August 7 and October 6 letters were faxed to defendant's telephone number and not the fax number, he avers in his declaration, "It is my practice to send letters by regular

mail, with the fax being redundant, so either way we believe the letters were delivered to defendants." In addition, it is undisputed plaintiff filed an answer on August 27, 2014. The first affirmative defense in the answer clearly put defendant on notice that plaintiff should not have been named in the action filed by defendant.

Defendant further contends there is no evidence of ill will or an improper purpose to establish malice. Relying on *Daniels*, defendant argues failure to adequately investigate is "not enough on its own to show malice." (*Daniels, supra*, 182 Cal.App.4th at p. 225.) Further, an offer to dismiss conditioned on a waiver of all malicious prosecution claims is insufficient as a matter of law to establish defendant acted with malice. (*Id.* at p. 227.) But *Daniels* is distinguishable from this case.

In that case, Wilhelmina Daniels filed suit against a law firm named Quinlivan Wexler LLP and two attorneys (Quinlivan) for, among other things, malicious prosecution. (*Daniels, supra*, 182 Cal.App.4th at p. 210.) Quinlivan had represented James T. Young in a slander action against her. (*Id.* at pp. 210-211.) The allegations in the slander action were that she falsely stated to different people that Young had kidnapped her son and forced him into a sexual relationship. (*Id.* at p. 211.) The lawsuit was dismissed after the court granted terminating sanctions due to Young's repeated failure to comply with discovery obligations. (*Ibid.*) During settlement discussions before the dismissal, Young had offered to dismiss the complaint with prejudice but only if Daniels waived all malicious prosecution claims. (*Id.* at p. 213.) In response to Daniels' lawsuit, Quinlivan filed a motion to strike the complaint under section 425.16. (*Id.* at p. 211.) In response, Daniels asserted that Quinlivan had no probable cause

to file the slander action against her and pursue it once it became clear that there was no evidence to support the factual contentions in the complaint. (*Id.* at p. 225.)

Although Daniels was able to produce evidence of ill will toward her on the part of Young, the court found that, "[t]he Quinlivan Attorneys' sustained inability to provide any support for Young's allegations, on its own, does not allow an inference that they knew there was no probable cause for continuing to prosecute the underlying action." (*Daniels, supra*, 182 Cal.App.4th at p. 227.) The fact Young sought a waiver of any malicious prosecution claim before he would dismiss his complaint with prejudice did not change the court's conclusion. It held: "In sum, the evidence marshaled against the Quinlivan Attorneys is as follows: an apparent lack of evidentiary support for the factual allegations in the underlying action; a lack of factual investigation as evidenced by an inability to provide formal or informal discovery; a client who may have had actual ill will against Wilhelmina; and a refusal by Young to dismiss without a waiver of claims by Wilhelmina. This record, which lacks any affirmative evidence that the Quinlivan Attorneys met the requirements of malice, including knowledge the case lacked probable cause, is insufficient as a matter of law to establish malice as to the Quinlivan Attorneys." (*Id.* at p. 227, fn. omitted.)

Unlike in *Daniels*, plaintiff here presented evidence that defendant was informed it had named the wrong party in the underlying construction defect action and if a proper investigation had been conducted that would have been made clear. Although there is no evidence defendant initiated the prior action with "ill will," plaintiff met its burden by putting forth evidence that defendant maintained the action after receiving

notice that plaintiff had no involvement in the construction project. "[M]alice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Daniels, supra*, 182 Cal.App.4th at p. 226.)

Similarly, defendant's reliance on *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660 (*Roger Cleveland*) overruled on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239, is misplaced. As here, the attorneys filed a motion to strike under section 425.16. (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 672.) On the issue of whether the plaintiff could show a probability of prevailing on a malicious prosecution claim, the Court of Appeal found plaintiff met its minimal burden on the lack of probable cause element. (*Id*. at p. 687.) It affirmed the order granting the motion to strike, however, because plaintiff did not present a sufficient prima facie showing of malice to sustain a favorable judgment. (*Id*. at p. 688.) The only evidence presented on this point was a declaration by plaintiff's counsel to the effect that when he told attorney Marc Smith that his lawsuit was frivolous and it should be dismissed Smith said: """That may be true but all I have to do is get the case to a jury."""" (*Ibid*.) The appellate court reasoned Smith's statement was "typical of comments attorneys make to one another during the course of litigation." (*Ibid*.) The court concluded no inference of malice could be drawn from the attorney's statement even when viewed in the light most favorable to plaintiff. (*Ibid*.)

Unlike *Roger Cleveland*, malice may be inferred based on defendant's continued prosecution of the underlying action after being notified that plaintiff had no involvement in the construction project. By demonstrating that defendant knew there was no probable cause to maintain the construction defect

case, plaintiff meets its minimal burden sufficient to defeat defendant's special motion to strike under section 425.16. (*Soukup, supra*, 39 Cal.4th at p. 296; *Zamos, supra*, 32 Cal.4th at p. 973.)

IV. DISPOSITION

The order denying defendant Milstein Adelman, LLP's special motion to strike under section 425.16 is affirmed. Plaintiff Floor Tech, Inc., shall recover its costs on appeal from defendant Milstein Adelman, LLP.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, J., Concurring

I concur in the result reached by the majority. I write separately to briefly explain the reasons why I conclude the record permits an inference of malice in the context of the legal framework that governs resolution of anti-SLAPP motions.

When confronted by an anti-SLAPP motion, a court must accept as true evidence that is favorable to the party opposing the motion. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.) That means, for purposes of this appeal, I must accept as true the statements in the declaration submitted by Michael Fluetsch, including the assertion that he has a "practice to send letters by regular mail, with the fax being redundant . . . ." I therefore proceed on the understanding that Fluetsch mailed defendant Milstein Adelman (defendant) an August 7, 2014, letter that states: "My [i.e., Fluetsch's] client did not furnish any labor, materials or services related to the property described in your complaint. My client has never done business in Southern California. In fact, my client did not exist until 2010, which I believe is after the construction project that is the subject of your lawsuit."

There is good authority for the proposition that malice can be inferred "when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226.) At least two prior cases that discuss whether such an inference can be drawn

involved situations where a party prosecuting a lawsuit was apprised of some under-oath assertion of facts defeating liability. (See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958, 961-962 [malice inferred when plaintiff continued to prosecute action despite receiving deposition transcripts defeating liability]; *Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1464, 1467 [no inference of malice when plaintiff dismissed action against defendant immediately after reading deposition transcripts].) That an inference of malice can be drawn when a plaintiff entirely disregards under-oath factual assertions makes sense; in the at times contentious world of litigation, a representation made with some solemnity distinguishes what might otherwise be written off by opposing counsel as mere bluster or posturing (see, e.g., *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 688, disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225).

In my view, when a lawyer writes to opposing counsel and makes a specific, readily verifiable representation of fact that would (if true) eliminate grounds for his or her client's liability, that too may support an inference of malice. An attorney acting in good faith who receives such a communication would take it seriously and make some effort to determine whether the fact asserted is true before continuing to prosecute the lawsuit. Defendant, however, promptly undertook no such effort in response to the August 7, 2014, letter that includes a representation of the type I describe. That lack of inquiry, in addition to the process by which defendant identified the parties it would name in its lawsuit, justifies an inference of malice under the "'minimal merit'" standard that applies at this stage. (*Park v. Board of Trustees of California State University* (2017) 2

Cal.5th 1057, 1061.) I therefore agree defendant's anti-SLAPP motion was correctly denied.

BAKER, J.