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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

COREY GRAY, Plaintiff and Respondent, v. GEORGE GELSEBACH, Defendant and Appellant.	B288574 (Los Angeles County Super. Ct. No. BC644227)

APPEAL from orders of the Superior Court of Los Angeles County. Robert Leslie Hess, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman, Barry Zoller; Schwimer Weinstein and Michael E. Schwimer for Defendant and Appellant.

Cyrus Sanai for Plaintiff and Respondent.

Corey Gray (Gray), a tenant in a building formerly owned by George Gelsebach (Gelsebach),[1] sued Gelsebach for malicious prosecution arising out of a 2015 unlawful detainer action decided in Gray's favor. Gelsebach filed a special motion to strike under Code of Civil Procedure section 425.16[2] claiming the unlawful detainer action was supported by probable cause. His motion was denied and the trial court subsequently granted Gray leave to amend his operative pleading. Gelsebach challenges both orders. We reverse the denial of the anti-SLAPP motion because Gelsebach had probable cause to bring his 2015 unlawful detainer action. Given that the anti-SLAPP motion should have been granted, the trial court erred when it permitted Gray leave to amend and we reverse that order, too.

FACTS

Gray's Rental Agreement

In 1999, Gray signed a lease for an apartment in a building owned by Robert and Dorothy Schoon (collectively Schoons). Gray's parents cosigned.

Gelsebach's Acquisition of the Apartment Building

Gelsebach purchased the apartment building from Dorothy Schoon in 2012. She provided him with the leases for the tenants, including leases for Gray, Shaz Bennett (Bennett), and Gretchen Johnson (Johnson). The leases were comprised of two

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[1] Gelsebach sold the building in October 2017.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 425.16 is called the anti-SLAPP statute. "'SLAPP is an acronym for strategic lawsuit against public participation.'" (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1055, fn. 1.)

forms. The first was a "Standard Month To Month Rental Agreement" (rental agreement) and the second set forth rules and regulations in a document entitled "Obligations Of A Resident." The rental agreements were provided by the Apartment Association of Greater Los Angeles. Portions of the copies of Gray's and Johnson's rental agreements were illegible, apparently from being copies of copies. In contrast, Bennett's rental agreement contained a greater number of legible terms.

Gray's lease came with one parking space.

In the general terms, Gray's rental agreement provided that "each of the terms of this Agreement and of Owner's Obligations Of A Resident, if any, constitute[] a covenant and condition on Renter's right to possession of the Premises. Any failure by Renter to comply with any such term shall constitute a default hereunder and Owner may terminate Renter's right to possession of the Premises and/or forfeit this Agreement in any manner provided by law."

Gray's rental agreement specified that the unit came with no storage. The "Obligations Of A Resident" form provided: "No alterations, painting or hanging pictures or other items on walls may be done without prior consent in writing from the owner or manager." "No personal belongings, including bicycles, play equipment or other items may be placed in halls, stairways or about the building except in storage areas where allowed." In relevant part, term No. 10 in Gray's rental agreement provided, inter alia, "Renter shall not alter or add to the Premises[.]"[3]

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[3] Gray repeatedly contends that the rental agreement bearing his signature is illegible. We note that we could read many of the material terms after magnifying them. They were difficult but not impossible to decipher.

Bennett's 2001 lease, which was on a form that appeared to be identical to the rental agreement that bore Gray's signature, provided in part, "Parking: If Renter is assigned a parking space in the parking area of Owner's real property, Renter shall use such space exclusively for parking of operable passenger automobiles."

The First Unlawful Detainer Action (13U02730)

After Gelsebach asked Gray to stop storing his personal property in his parking space and Gray refused, Gelsebach filed an unlawful detainer action, Los Angeles Superior Court case No. 13U02730. A default judgment was entered.

The Second Unlawful Detainer Action (13U07418)

Because Gray claimed he was not properly served in the first unlawful detainer action, Gelsebach filed a second unlawful detainer action, Los Angeles Superior Court case No. 13U07418. The issue remained Gray's refusal to remove his personal property from his garage space. Gray filed a demurrer and argued that the complaint failed to state a cause of action. Also, he argued that the relevant portions of the lease were unreadable. In his reply papers, Gray stated: "[Gray] was leased the 'Garage under [Apartment] 905' but did not receive any ADDITIONAL storage space in the building."

The demurrer was sustained with leave to amend. Gray then removed most of the items from his parking space. Gelsebach dismissed the second unlawful detainer action without prejudice.[4]

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[4] Following Gray's request for attorney fees, Gelsebach's attorney filed a declaration stating, "I chose to dismiss [the second unlawful detainer action] when the [trial] court ruled that

Gelsebach's Administrative Attempt to Oust Gray

In 2013, Gelsebach filed an application with the Housing Department of the City of Los Angeles to recover possession of Gray's unit for the occupancy of a resident manager. The application was denied.[5]

Conflict Related to Gray's Air Conditioning Unit and His Use of a Storage Closet

In 2015, Gelsebach sent the following e-mail to his tenants: "We are in the process of installing or remodeling all windows in the building. [¶] In an effort to maintain the integrity and look of the new windows and building, we prohibit window Air Conditioning [(AC)] units. Recognizing that you may want an [AC] [U]nit, it is permissible to have . . . portable [AC] Units with an exhaust hose that can expel hot air out of the window but not hanging out of the window. [¶] We remind tenants that any alterations to the windows and any items hanging out of the window[s] is a violation of the rules and regulations of the lease agreement." At the time, Gray and two other residents had AC units hanging out of their windows. Gelsebach informed them that the AC units would have to be removed. Though the other two residents removed their AC units, Gray refused to remove his.

During the renovations, Gelsebach discovered that Gray was storing his personal property in a closet in a common area of the apartment building. Gelsebach wanted to use the closet to

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the lease had no provision prohibiting the storage of anything[] but a motor vehicle."

[5] At trial, Gray's attorney represented that the application was denied because Gray is a person with a disability and therefore could not be removed.

store paint, ladders and equipment. He directed Gray to remove his property. Gray refused.

The Three-Day Notices to Perform or Quit

Gelsebach served Gray with three-day notices to either perform by removing his AC unit from his window and his personal property from the hallway closet or to quit his lease and vacate his apartment. The first notice stated that there had been no storage space allocated to Gray and he was in violation of that provision by using a hallway storage closet. The second notice stated that Gray was in violation of paragraph 10 of his rental agreement "by altering or adding to the Premises by installing an 'in window' air conditioner without the permission of the landlord. Said 'in window' air conditioner was not approved or installed correctly, and has damaged the window opening and the portion of the wall beneath the window opening."

The Third Unlawful Detainer Action (15U14110)

On November 13, 2015, Gelsebach filed an unlawful detainer complaint in Los Angeles Superior Court case No. 15U14110. The matter went to trial on December 21, 2015.

At trial, Gray testified that he signed a lease agreement with the Schoons. He was shown an exhibit and said that it bore his signature.[6] Even though his signature was on it, he said he did not know if it was his lease because it was illegible. After being shown the notice to perform or quit relating to the AC unit, Gray testified that the AC unit was never removed.

Gray was asked to explain the circumstances by which he was given the right to utilize the closet. He stated: "[I]t might have been one or two meetings with the landlords initially, but

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[6] The record indicates that the exhibit included a rental agreement and an "Obligations Of A Resident" form.

we'd agreed that all of the floors in the apartment would be redone, hardwood floors and then old school linoleum in both the bathroom and the kitchen. And prior to that process starting, a lease was signed—sorry, I signed the lease that I had . . . fax[ed] to my parents. After that was done, . . . Dorothy [Schoon], one of the landlords, she walked me around, and we went out the back door of my kitchen, which is right next to the outdoor closet . . . [a]nd she said, 'This is the closet that is used by the tenant of 901.' [¶] . . . She . . . indicated that this was for my use as the tenant in 901." According to Gray, two tenants above him use exterior cabinets as storage.

Turning to the AC unit, Gray testified that it was installed in approximately 2007. He had the landlord's permission.

Gelsebach was called to the stand next. He testified that he received a copy of the lease signed by Gray when the building was purchased. Gelsebach did not have the original. At no point did Gray say it was not his lease. Per Gelsebach, he was not aware that Gray supposedly had permission from the prior landlord to use the storage closet. His use of it came to light during renovations.

Asked why he thinks Gray does not have the right to use the storage closet, Gelsebach said, "It's a building closet, and it's not marked on the rental agreement that he leased or rented [it], and he has manufactured that story."

Gelsebach testified that Gray's failure to remove the AC unit was grounds for eviction "[b]ecause it's outside the building. And in order for the building to ever look right, it can't have all these air conditioner[s] with all these makeshift holes on either side that plugs up with plywood[.]" When asked if he noticed the air conditioners when he purchased the building, Gelsebach

stated, "There [were] so many horrible defects . . . that that was the least of my problem and the last thing I would have paid attention to."

Gray's counsel asked Gelsebach if he had a legible copy of the rental agreement. He replied: "I have seen the same form very legible because it's new, and it's the contract without any writing on here, and I think my attorney might have that. Totally legible. Same number on the contract. The same contract."

At the close of evidence, Gray's counsel objected to the lease being admitted into evidence because it was not authenticated. He then stated, "The fundamental problem here is I can't tell what it says. Portions that are legible, portions that are not legible. We do think that the last page does bear what appears to be the signature of my client and his parents, but there is no connection to the front page, and we have no idea if that indeed is the correct front page."

The trial court stated, "I'm inclined to sustain the objection to the . . . rental agreement on the basis that it lacks foundation. There's been no testimony by the [lessor], and, secondly, it is unintelligible."[7] Gelsebach's attorney stated he wanted to

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[7] While the trial court used the phrase "foundation," we employ the term "authentication" in this opinion. With respect to a writing, the terms are essentially interchangeable. As noted by a leading treatise, "The introduction of a writing in evidence requires a foundation by authentication[.]" (2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 2, p. 150.) The Evidence Code section 1400 et seq. pertaining to the admissibility of writings speak of authentication. (Evid. Code, § 1400 ["Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that

address pages one and two, which he said came from a standard form. The trial court, however, said it would not consider the matter further.

Later, the trial court addressed Gelsebach's attorney and stated, "It's my understanding . . . that the burden of proving the failure to consent is on [Gelsebach]." The attorney replied, "Your Honor, it doesn't matter what the prior owner did. My client was entitled to withdraw that consent. He was the owner of the premises. All he had to do was tell [Gray] to take it out." After that colloquy, the trial court stated, "So for no other reason than [Gelsebach's] failure to carry his burden of proof on lack of consent, I don't have any choice but to enter judgment for [Gray]."[8]

On May 23, 2017, the trial court awarded sanctions against Gelsebach.

The Malicious Prosecution Action

Gray sued Gelsebach for malicious prosecution. In his first amended complaint, he alleged the following:

"1. [] Gelsebach acquired the building in which [Gray] is a tenant. [Gray] pays rent which is substantially below market. Gelsebach has filed . . . meritless lawsuits and administrative proceedings seeking to evict [Gray].

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the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law"]; Evid. Code, § 1401, subd. (a) ["Authentication of a writing is required before it may be received in evidence"]; Evid. Code, § 1411 ["Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing"].)

[8] We have not been cited any evidence that Gelsebach knew about Gray's claim of consent until trial.

"2. Gelsebach engaged attorney William Vallejos [(Vallejos)], who in turn engaged attorney Michael Kiosk [(Kiosk)][,] to file the . . . third unlawful detainer lawsuit against Gray on November 13, 2015, Gelsebach v. Gray, 15U14410. A prior lawsuit using a similar theory had been filed by Gelsebach using a different attorney. When a demurrer was sustained, on grounds which included illegibility of the rental agreement attached to the complaint, Gelsebach's former lawyer dismissed the prior lawsuit without prejudice.

"3. Gelsebach engaged Vallejos to file a lawsuit with one of the same fundamental defects as the prior unlawful detainer lawsuits—Gelsebach was putting forward [an illegible copy of a form contract] and misrepresented the contents of that form to the trial court.

"4. Gelsebach, Vallejos and Kiosk . . . knew that the results of the prior lawsuit foreclosed any success. . . . However, they hoped . . . to improperly evict [Gray]. . . . Gelsebach was also motivated in filing and prosecuting the lawsuit by personal hatred of [Gray] due to [his] race, disability and sexual orientation.

"5. . . . Gelsebach, Vallejos and Kiosk filed and prosecuted the 15U14410 lawsuit knowing there was no probable cause. . . . The trial court, after hearing the case, granted a motion for judgment thus finding that Gelsebach's evidence, even if believed, could not sustain a verdict in Gelsebach's favor, and subsequently awarded sanctions under Code [of Civil Procedure, section] 128.5, holding that the 15U14410 lawsuit was totally and completely meritless and filed in bad faith and for the purposes of harassment."

Special Motion to Strike

Gelsebach filed a special motion to strike and claimed (1) every malicious prosecution falls within the ambit of the anti-SLAPP statute, and (2) his motion should be granted because Gray could not establish the second element of malicious prosecution, i.e., that the third unlawful detainer action was brought without probable cause.

In his statement of facts, he indicated that the trial court decided in favor of Gray in the third unlawful detainer action "based on the issue of consent" after "Gray testified at trial that the prior landlord gave verbal consent for Gray's window AC unit and the use of the building storage closet. The [trial] court also sustained Gray's objection to the rental agreement because portions of Gelsebach's copy were not sufficiently legible." Gelsebach noted that Gray testified that his signature was on the lease documents.

Regarding the merits, Gelsebach stated that he withdrew any consent for the window AC unit. Also, the prior landlord's permission to use the storage closet was unenforceable due to the parole evidence rule. Thus, he had grounds to evict Gray. Although the trial court sustained Gray's objection to the rental agreement, Gelsebach argued he could prove the contents of that agreement.

Gelsebach noted that there was circumstantial evidence to establish the authenticity of the lease. Gray testified that he signed a written lease for the subject apartment, and his parents cosigned. When presented with Gelsebach's copy of the lease at trial, Gray testified that the signatures on that copy were his signature and the signatures of his parents. Gelsebach received

Gray's lease from the prior property owner who had signed the lease with Gray.

Gelsebach argued: "Given that Gray confirmed his signature on the document, and the circumstances in which Gelsebach had received the document, there was probable cause to rely on this document as the lease for Gray's unit." Further, as to whether the secondary evidence established the terms of the lease, Gelsebach averred: "Gray's lease is a 'form' document. As stated in the footer of the document, it is a form provided by the Apartment Association of Greater Los Angeles. When Gelsebach purchased the property, he received leases for other tenants with the same form. . . . Those leases are entirely legible and easy to read. All of the legible portions of Gray's lease are identical to the same portions of the Johnson and Bennett leases, all of which also have the same footer from the Apartment Association of Greater Los Angeles." Gelsebach cited to *Rogers v. Prudential Ins. Co.* (1990) 218 Cal.App.3d 1132, as holding "that the terms of a lost insurance policy could be established with evidence of the terms on identical forms sold to other policy holders." Next, he cited *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059 (*Dart*), stating, "The Supreme Court held that a plaintiff does not need to establish the actual language of the destroyed or missing contract. Rather, the plaintiff only needs 'secondary evidence that attests to the substance but not the precise language' of the lost . . . contract."

Opposition to the Special Motion to Strike

In opposition, Gray argued because the anti-SLAPP statute does not protect criminal acts, and because Gelsebach's filing of three or more malicious lawsuits was the crime of barratry in

violation of Penal Code section 158, the special motion to strike had to be denied.

Also, Gray argued that Gelsebach could not establish probable cause because he did not present a legible copy of the lease in the third unlawful detainer action, he could not prove the terms of the lease, and he could not overcome the statute of limitations.

Per Gray, there were only two explanations for why Gelsebach did not provide evidence of the leases of other tenants to prove the terms of Gray's lease. "First, [he] knew he could prove the terms of the rental agreement applicable to Gray . . . with the [leases of other tenants], but chose not to do so, because he would then be liable for prevailing party attorney fees if he lost. If this is true, the mere filing of the complaint was in complete and total bad faith, because Gelsebach was litigating to harass, not to win. The second possibility is that Gelsebach did not know that the [leases of the other tenants] had the same terms as [Gray's lease][] but sued anyway."

Gray maintained that Gelsebach's trial testimony suggested that he did not have possession of leases from other tenants. Noting that Gelsebach testified that he had seen blank form documents, Gray stated, "[B]lank forms of this specific rental agreement with these exact terms are impossible to acquire; Mr. Gray's counsel spent days looking for a copy, but they are not publicly available."

Gray asserted that Gelsebach was not entitled to withdraw consent because, per Civil Code section 1698, an executed oral modification is enforceable. In a response to evidentiary objections lodged by Gelsebach, Gray argued, "Gelsebach not only had no evidence of any kind to support his theories of lack of

consent, he stated at trial that these issues were not ones that he ever investigated during due diligence. [¶] Gelsebach's lack of knowledge as to the consent was a product of willful ignorance. He did not know, and he repeatedly testified at trial that he did not want to know, about the air conditioners and closets."

Motion for Leave to Amend

While the special motion to strike was pending, Gray filed a motion for leave to file a second amended complaint to add a breach of contract claim.

February 15, 2018, Vacatur of the Sanctions Award in the Third Unlawful Detainer Action

The appellate division of the Superior Court granted a writ of mandate vacating the sanctions award due to improper notice to Gelsebach.

February 27, 2018, Rulings

In a minute order, the trial court denied the special motion to strike. It stated: "While there is no question that this complaint is based on previously filed litigation, plaintiff has established, as to this defendant, a probability [that] he will succeed on the merits of his claim that the prior litigation collectively constituted the crime of barratry under [Penal Code] [s]ections 158 and 159."

The trial court granted Gray's motion to file a second amended complaint.

This appeal followed.

Motion for Sanctions

Gray filed a motion for $104,270 in sanctions and attorney fees on the ground that the arguments raised by Gelsebach in this appeal are frivolous.

DISCUSSION[9]

I. Initial Comment.

There is no dispute that Gray engaged in the conduct alleged by Gelsebach in his third unlawful detainer action. Leaving the lease aside for the moment, Gray's conduct would be concerning to a reasonable landlord. Absent other facts, his use of a common area closet could be interpreted as an improper use of space reserved to the landlord. Absent other facts, Gray's refusal to remove an unsightly AC unit from a window and his apparent decision to thwart renovation plans could be viewed as damaging his building's appearance.

Turning to the lease, it contains terms that arguably prohibited Gray's conduct.

The record indicates that Gelsebach lost his case because the trial court believed the lease was not authenticated, and because Gray claimed to have consent to use the storage closet and a window AC unit. But, as we shall discuss, authenticating the lease was not impossible under California law, the issue of consent is not relevant to whether Gelsebach reasonably believed he could successfully evict Gray because Gray did not claim to have consent until he testified at trial and, in any event, Gray's testimony that he had consent did not automatically mean that Gelsebach would lose.

Any assertion by Gray that the third unlawful detainer action was barred by collateral estoppel must be rejected.

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[9] Gelsebach filed evidentiary objections to Gray's motion and contends the trial court should have sustained them. We need not review the evidentiary objections. Those objections aside, the record supports reversal.

"'"A prior determination by a tribunal will be given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits." [Citation.]'" (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342.)

The second and third unlawful detainer actions did not involve identical factual allegations. The former concerned whether the lease barred Gray's storage of items other than a vehicle in a parking space. The latter concerned whether the lease barred Gray's use of the storage closet and his AC unit. Whether the dispositions in the two cases were the same is not a relevant inquiry. Though Gray might suggest that the identical issue was whether Gelsebach could authenticate the lease, that involved proof, not a factual allegation.

All the foregoing aside, Gray cannot establish that the second unlawful detainer action resulted in a decision that was final and on the merits. Gelsebach voluntary dismissed the second unlawful detainer action without prejudice. "By definition, a voluntary dismissal without prejudice is not a final judgment on the merits." (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 879.)

At oral argument, Gray's counsel perceived that we planned to revisit issues decided by the trial court in the third

unlawful detainer action. He asserted that collateral estoppel bars us from doing so. Suffice it to say, the issue on appeal is whether Gelsebach had probable cause to file the third unlawful detainer action. That issue was not decided in the third unlawful detainer action, and collateral estoppel does not bar us from analyzing it.

To the degree Gray might suggest Government Code section 68081 dictates that we allow the parties to brief new issues discussed in this opinion, we cannot agree. "Section 68081 does not require that a party actually have briefed an issue; it requires only that the party had the opportunity to do so. By requiring the parties to file opening and responding briefs, the California Rules of Court automatically give the parties the opportunity to brief every issue that is raised in the appeal. (Cal. Rules of Court, rule 8.200(a)(1).) . . . [T]his also gives the parties the opportunity to brief any issues that are fairly included within the issues actually raised." (*People v. Alice* (2007) 41 Cal.4th 668, 677.) "[T]he fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of [Government Code] section 68081." (*Id.* at p. 679.)

All issues, modes of analysis and authority discussed in this opinion were either raised by the parties or fairly included in the issues.

II. Applicable Law; Standard of Review.

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 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." Based on section 425.16, subdivision (e)(1), the statute applies to lawsuits arising out of "any . . . writing made before a . . . judicial proceeding[.]" Case law establishes that the anti-SLAPP statute applies to malicious prosecution actions. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735.)

There is a two-prong analysis when a trial court rules on a special motion. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) First, the moving party must make an initial showing that the anti-SLAPP statute applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819 [overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5 (*Equilon*)].) If the moving party does so, the motion will be granted unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567–568.) The second prong analysis has been referred to as a summary-judgment-like procedure. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385.)

To establish a probability of prevailing, a plaintiff must provide admissible, competent evidence to substantiate each element of the causes of action under attack. (*Navellier*, *supra*, 29 Cal.4th at pp. 88–89.) "This requirement has been interpreted to mean that (1) when the trial court examines the plaintiff's affidavits filed in support of the plaintiff's *second step* burden, the court must consider whether the plaintiff has presented sufficient evidence to establish a prima facie case on his causes of action,

and (2) when the trial court considers the defendant's opposing affidavits, the court cannot weigh them against the plaintiff's affidavits, but must only decide whether the defendant's affidavits, as a matter of law, defeat the plaintiff's supporting evidence." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184.)

Our review of the denial of an anti-SLAPP motion is de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

III. First Prong Analysis.

The anti-SLAPP statute is not implicated if illegality is conclusively established by the evidence. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366, 1367 [overruled on other grounds in *Equilon*, *supra*, 29 Cal.4th at p. 68, fn. 5.]; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) Gray claims the evidence conclusively establishes that the malicious prosecution action arises from Gelsebach's criminal act of barratry under Penal Code section 158 because his three unlawful detainer actions were baseless.

A. Barratry.

"Common barratry is the practice of exciting groundless judicial proceedings[.]" (Pen. Code, § 158.)

"No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy." (Pen. Code, § 159.)

The statutory scheme is straightforward save one issue. Penal Code section 158 is not clear as to whether the alleged violator must have excited others to pursue judicial proceedings or if the statute also covers judicial proceedings pursued by the

alleged violator on behalf of him or herself. No California case has decided this issue. Consequently, this case requires interpretation of the statute. "When interpreting a statute, 'our primary goal is to determine and give effect to the underlying purpose of the law. [Citation.]' [Citation.] If the meaning of a statute is unmistakable, that meaning must be accepted. But if a statute is unclear or ambiguous, we may interpret its language in light of the statutory scheme, objects to be achieved, evils to be remedied, legislative history, public policy, and contemporaneous administrative construction. [Citation.] In addition, we may consider the consequences that will flow from a particular interpretation. [Citation.]" (*Moreno v. Quemuel* (2013) 219 Cal.App.4th 914, 918.)

In *People v. Budner* (1965) 15 N.Y.2d 253 (*Budner*), the court assumed "that the old common-law concept of barratry was the instigation of quarrels and controversies among honest and quiet subjects of the King . . . and that impliedly, at least, the quarrel was introduced by a third party." (*Id.* at p. 255.) The question presented was whether New York had changed the law by statute. One of its three barratry statutes under examination established "'the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of, is not a defense.'" (*Id.* at p. 256.) The court concluded that the statute's "clear intention . . . [was] to modify the common-law rule so as to render guilty of common barratry one who has himself instituted actions or legal proceedings, in at least three instances, with a corrupt or malicious intent to vex and annoy." (*Ibid.*)

The California statutes do not contain a provision eliminating the defense that a defendant was him or herself a

party to an action. The logic of the *Budner* case suggests that the common law rule is that the prior actions must have been instituted on behalf of third parties and, absent a statutory modification similar to the one in *Budner*, the common law rule was codified in California. Our Supreme Court offers some confirmation of this view in *Rubin v. Green* (1993) 4 Cal.4th 1187, 1190, which stated that the "modern successor of common law barratry, solicitation, is not only a misdemeanor when accomplished through the use of agents, but is also subject to discipline by the State Bar." No person, of course, solicits him or herself to initiate a judicial proceeding.

It appears that the evil to be remedied by common law barratry, and therefore Penal Code section 158, is the solicitation of others to file baseless lawsuits. Accordingly, we limit our interpretation of the statute to that specific scenario. No adverse consequences will flow from this interpretation. Our legal system retains sufficient disincentives for people to file their own baseless lawsuits. The opposing party can seek sanctions or later sue for malicious prosecution. Also, the vexatious litigant statutes protect against the pursuit of baseless lawsuits in certain contexts. (§ 391 et seq.)

B. The Allegation of Barratry Fails.

For multiple reasons, we conclude that the evidence does not conclusively establish barratry.

First, Gelsebach filed the three unlawful detainer actions on his own behalf. Even if they were baseless, Penal Code section 158 is not triggered.

Second, Gray did not sue Gelsebach for barratry. This malicious prosecution action arises from the filing of a single unlawful detainer action; it does not arise from the filing of three

separate actions. We therefore conclude that the illegality exception could not apply.

Without any citation to authority, Gray suggests that this is a "ridiculous" result.

We disagree. Even if the unlawful detainer action was a third instance of Gelsebach exciting groundless judicial proceedings, it would not matter. The question would be whether the illegality exception should apply when the petitioning activity giving rise to the lawsuit was part of, or the completion of, a crime even though it does not constitute a crime when considered by itself. We answer in the negative. This action arises from petitioning activity, something which is criminal in one very limited instance. Refusing to expand the illegality exception to the facts of this case will not allow substantial misuse of the anti-SLAPP statute by people engaged in illegal activity. In contrast, expanding the exception as urged by Gray would lead to litigation over matters otherwise outside the four corners of a case, and result in extraneous expense.

Third, even assuming Penal Code section 158 could apply and should be analyzed in the first prong of the section 425.16 analysis, the evidence does not conclusively establish that the first and second unlawful detainer actions were baseless and that Gray was entitled to store personal property other than a vehicle in his parking space.

There is no factual dispute as to how Gray was using his parking space. What matters here is whether he had a right to use it as he did. The record does not sufficiently shed light on why Gelsebach and his attorney may or may not have believed Gray was in breach of his lease. Thus, illegality is not conclusively established by the evidence. For that reason, the

illegality exception cannot apply. Regardless, we offer the following observations.

The lease provided Gray with one parking space and specified that he did not receive a storage space. Did these terms, by themselves, limit Gray to storing only a vehicle in his parking space? The answer to this question requires us to interpret the contract. The relevant rules of interpretation are set forth both by statute and case law.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If the intention of the parties is doubtful, then the rules in Civil Code section 1635 et seq. are to be applied. (Civ. Code, § 1637.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) A contract in writing should be interpreted based solely on its terms, but only if that is possible. (Civ. Code, § 1639.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Words are to be understood in their usual sense. (Civ. Code, § 1644.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.)

If a party urges that a contract has a meaning that is not immediately evident, ""'the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is

'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]" [Citation.] The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. . . . [Citation.]'" (*Wolfe v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

Gelsebach maintained that Gray could not store anything other than a vehicle in his parking space, and Gray maintained he could store other items. What was the mutual intention of the Schoons and Gray? The lease did not expressly specify that Gray could use his parking space to store personal items other than a vehicle. Arguably, then, there was an ambiguity. The common understanding of the phrase "parking space" is a space where a vehicle is parked. Moreover, the common understanding of the phrase "storage space" is a place where any manner of personal items can be stored. Because every part of a contract is to be taken together, it would have been reasonable for Gelsebach to assume the parking space term and no storage space term together meant that Gray's lease did not allow him to store anything but a vehicle in his parking space. Moreover, we can look at the circumstances under which the lease was entered. The idea of a tenant storing personal items in a parking space seems to be anathema to the aesthetics, orderliness and safety of a garage. It is difficult to imagine that the Schoons intended the use Gray made of his parking space. The parties did not have an opportunity to offer extrinsic evidence because the second unlawful detainer action was dismissed. Though Gelsebach's attorney stated that he filed the dismissal because the trial court found that the lease did not bar Gray's chosen use of his parking space, this cannot be construed as an admission that the case

lacked merit. Gelsebach's attorney may well have thought that the trial court erred and that it was not worth the expense of fighting that error.

Additionally, Bennett's lease, which was signed only two years after Gray's lease and appears to be on the same forms, contains a legible term expressly prohibiting the storage of anything but a vehicle in a tenant's parking space. If Gelsebach was aware of this, then he was aware of circumstantial evidence of the relevant term in Gray's lease.

If the first and second unlawful detainer actions were not baseless, there could be no barratry.

IV. Second Prong Analysis.

To show a probability of prevailing on the merits of his malicious prosecution claim, Gray was required to establish that Gelsebach maliciously initiated or maintained the third unlawful detainer action, that he lacked probable cause, and that Gray received a favorable termination of that action. (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 793–794.) An action lacks probable cause if "no reasonable attorney would believe that the action had any merit[.]" (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 926.) "The probable cause determination is objective and is based on the facts known to the malicious prosecution defendant at the time the action was initiated or [maintained]. [Citation.] Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. [Citation.]" (*Id*. at pp. 926–927, fn. omitted.) A court will examine what the defendant should have known as well as what he or she in fact knew. (*Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, 366.) The issue is whether the prior

action was legally tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 877, 883 ["if the trial court concludes that, on the basis of the facts known to the defendant, the filing of the prior action was objectively reasonable, the [trial] court has necessarily determined that the malicious prosecution plaintiff was not subjected to an unjustified lawsuit"].) "'A litigant will lack probable cause . . . if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.]" (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200.)

As to what a defendant "should have known," case law establishes the following. "'[I]n determining whether an actor was in possession of constructive knowledge described by the "reason to know" standard, we ask whether, after examining the facts in the actor's possession, a reasonable person of ordinary intelligence . . . would have inferred the existence of the ultimate fact at issue or regarded its existence as so highly probable as to conduct himself or herself as if it did exist.' [Citation.]" (*Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 773.) The reason to know standard is not same as the inquiry notice standard described in Civil Code section 19.[10] (*Deutsch*, *supra*, at p. 773.)

When the issues pertaining to the prior action involve interpretation of the law, precedent establishes that good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious

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[10] "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he or she might have learned that fact." (Civ. Code, § 19.)

prosecution claim. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114.)

Gelsebach contends that Gray failed to demonstrate a lack of probable cause related to Gelsebach's filing of the third unlawful detainer action.[11] This contention is premised on three assertions: he withdrew whatever consent the prior landlords may have given Gray for the AC unit and storage closet; the rental agreement portion of the lease was provable through the secondary evidence rule; and there was reason to believe that Gray breached the lease. Gray, in contrast, contends that his lease was orally modified, the modification was enforceable, Gelsebach could not prove the lease, and the suggestion that he breached the lease was frivolous.

A. Probable Cause Analysis (Part 1).

Gray's undisputed testimony in the third unlawful detainer action possibly suggests that Gray and the Schoons modified the rental agreement with fully executed oral agreements (Civ. Code, § 1698, subd. (b)) or that the landlords behaved in a manner antithetical to the rental agreement, induced Gray to rely, and it would be inequitable for Gelsebach to deny Gray the benefit of the potential modifications. (*Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1388.) The questions presented are whether Gelsebach had constructive knowledge

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[11] A tenant is guilty of unlawful detainer when he or she continues in possession of property "after a neglect or failure to perform . . . conditions or covenants of the lease or agreement under which the property is held, . . . and three days' notice, . . . in writing, requiring the performance of such conditions or covenants. (§ 1161, subd. (3).)

that consent had been granted, and whether challenging Gray's position was legally tenable.

1. *Gelsebach's Constructive Knowledge.*

Though Gelsebach did not learn of Gray's claim of consent until trial, Gray contends, "It is undisputed that the reason Gelsebach did not know about the oral modifications is that he did not investigate the matter by making inquiries of the prior landlord . . . or obtaining estoppel certificates from the tenants." Gray has not offered any authority establishing that this proved constructive knowledge. Simply put, there is no such "should have investigated" rule.

The relevant inquiry under *Deutsch* is whether Gelsebach had reason to know the prior landlord gave consent based on an examination of facts in his possession. Gray failed—both below and on appeal—to apply this standard. We conclude that Gray did not establish a probability of prevailing on this issue. From the record, it is apparent that Gelsebach received written leases from the Schoons, the legible portions of those leases did not permit tenants to use common area storage closets or window AC units, and Gray did not inform Gelsebach of the consent after receiving the notices to perform or quit. Based on these facts, we easily conclude that Gelsebach did not have constructive knowledge of consent.

Gray contends that if Gelsebach did not investigate, he was required to obtain an estoppel certificate before he could safely sue one of his tenants for unlawful detainer to either determine the existence of modifications or to foreclose them. Though Gray does not define what an estoppel certificate is, our research indicates that it is a document completed by tenants to confirm the terms of their leases prior to a landlord selling the leased

property to a third party. Gray cites no law supporting his implied assertion that the failure to obtain an estoppel certificate establishes constructive knowledge.

Our analysis of the consent issue could end here. If Gelsebach did not have constructive knowledge, consent does not factor into whether Gelsebach filed the third unlawful detainer action without probable cause.[12]

2. *The AC Unit*.

Whether Gelsebach had probable cause to challenge Gray's claim of consent regarding the AC unit is moot. To be complete, we offer the following thoughts.

The trial court never found the existence of an oral modification. It merely stated that Gray had consent to use the AC unit. If Gray had consent but not a modification, there are multiple reasons it cannot be said that Gelsebach knew or should

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[12] At oral argument, we indicated that the consent was a nonissue because Gelsebach did not learn about it until trial. In Gray's postoral argument motion to vacate submission, he claims we are relying on facts outside the anti-SLAPP motion. He avers that he was not required to offer evidence that Gelsebach had notice and therefore cannot be punished for not offering evidence of it. As with all of Gray's arguments, he relies on false premises. Here, the false premises are that Gelsebach was charged with discovering the alleged consent even if he had no reason to believe it existed, and that Gray did not have to establish that Gelsebach had sufficient knowledge.

In Gray's motion, he suggests that Gelsebach had notice because the verified answer raised consent as an affirmative defense. This was not in the appellate record, and it does not factor into our analysis. Even if Gray alleged consent as an affirmative defense, it does not mean that Gelsebach lacked probable cause. As we discuss, *post*, the meaning and efficacy of consent was subject to dispute.

have known the Schoons's consent was irrevocable. If there was consent but no modification, only equitable defenses stood in the way of Gelsebach's action. Certainly Gelsebach had a right to obtain a ruling on any such defenses. After all, an equitable defense would require a court to weigh the equities. Given that he wanted to renovate the windows and the building façade and thereby update the aesthetic of the building, and given that he offered to allow tenants to use nonwindow AC units, a reasonable attorney could have believed that a trial court would not find in favor of Gray.

Even if the trial court in the third unlawful detainer action believed there was a modification, it would not mean Gelsebach could not have challenged it.

A modification "is a change in the obligation by a modifying agreement which requires mutual assent. [Citation.] The question whether the necessary elements are present is one of fact[.]" (*Wade v. Diamond A. Cattle Co.* (1975) 44 Cal.App.3d 453, 457.) Based on Gray's testimony in the third unlawful detainer action, it is not possible to determine the parties' mutual intent regarding the AC unit. Did they intend to modify the lease, or was Gray given mere temporary and revocable approval to use a window AC unit? That was a question of fact, and Gray cited nothing in his moving papers below establishing that Gelsebach knew or should have known that it would be impossible to challenge a claimed modification.

If there was a modification, we would have to determine its scope. Did the modification mean that Gray could have a window AC unit in perpetuity? Or only that Gray would be allowed some type of AC unit but not necessarily one in the window as long as it provided necessary cooling? Assuming for the sake of

argument the parties contemplated only a window AC unit, the explicit language of a contract controls unless it involves an absurdity. Here, it was at least arguable that it would be absurd to interpret the modification to prevent Gelsebach from renovating the windows and building façade and updating the building's exterior aesthetic even if he could provide Gray with an adequate cooling alternative.

Next, we find it relevant that on its face the lease appears to bar the modification because it required alterations to be approved in writing. Though Gray objects to any such suggestion because Civil Code section 1698 recognizes the enforceability of an oral modification if it is executed, one case held that "[a] contract in writing may be subsequently modified by an oral agreement only if (i) the written contract does not contain an express provision requiring that modification be in writing; and (ii) such oral agreement has been performed by the parties, which may consist of full performance by one party only to the oral agreement[.]'" (*Marani v. Jackson* (1986) 183 Cal.App.3d 695, 704 (*Marani*), citing *Beggerly v. Gbur* (1980) 112 Cal.App.3d 180, 190.)

A reading of *Marani* suggests it conflated Civil Code section 1698, subdivisions (b) and (c),[13] only the latter of which disallows an oral modification if it is prohibited by the contract. It appears that *Marani* was wrongly decided because Civil Code section 1698, subdivision (b) applies if an oral modification is executed regardless of whether the contract required that modification to

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[13] Civil Code section 1698, subdivision (c) provides: "Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration."

be in writing. (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775 ["under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though . . . the original contract provides that all changes must be approved in writing"].) Still, *Marani* was never overruled. It was cited with approval by *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1465, which stated that "[o]ral modifications of written agreements are precluded only if the written agreement provides for written modification."

Would it have been tenable for Gelsebach to challenge any oral modification based on *Marani*? The issue would have at least been arguable.

Finally, the fact that Gray had no written evidence of consent or an oral modification means Gelsebach had no physical proof of what Gray claimed. We are aware of no law requiring a person in Gelsebach's position to accept Gray's word on what happened in the past. At most, Gelsebach knew at trial what Gray claimed. That is not the equivalent of knowing that Gray was telling the truth. This was a matter of credibility that had to be decided by a trier of fact.

3. *The Storage Closet*.

Whether Gray had consent to use the storage closet is moot. Briefly, we note that the trial court in the third unlawful detainer action did not find an oral modification. To the extent it relied on equity, this involved a decision that was not automatic even if the trial court believed Gray. Insofar as there may or may not have been an oral modification, we conclude that Gelsebach was permitted to litigate it.

B. Probable Cause Analysis (Part 2).

The next question is whether Gelsebach had probable cause to believe he could authenticate Gray's lease and prove its material terms. He did.

A document such as Gray's lease must be authenticated to be admissible. (Evid. Code, § 1401, subd. (a).) Also, "[a]uthentication of a writing is required before secondary evidence of its content may be received in evidence." (Evid. Code, § 1401, subd. (b).)[14] Authentication can be established with indirect and circumstantial evidence. (*Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915–916.) Here, there was circumstantial evidence that the copies of the rental agreement and the "Obligations Of A Resident" form submitted to the trial court comprised a copy of Gray's lease because he admitted he signed a lease, he testified that the copy of the rental agreement bore his signature, he was living in the apartment building, and the copy of his lease was in the batch of leases provided to Gelsebach when he purchased the apartment building.

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[14] The content of a writing may be proved by otherwise admissible secondary evidence, except when a genuine dispute exists concerning the material terms of the writing and justice requires its exclusion, or when the admission of secondary evidence would be unfair. (Evid. Code, § 1521, subd. (a); *Dart*, *supra*, 28 Cal.4th at p. 1068.) "A corollary of the rule that the contents of lost documents maybe be proved by secondary evidence is that the law does not require the contents of such documents to be proved verbatim." (*Id.* at p. 1069.) Thus, secondary evidence can attest to the substance if not the precise language of a contract. (*Id.* at p. 1074.)

Even though the trial court permissibly concluded that the lease was not authenticated, there was sufficient evidence for Gelsebach to believe authentication was possible.

Underlying Gray's position—and possibly the trial court's position—seems to be the notion that a partially illegible contract cannot ever be enforced even if the terms material to the dispute are legible. Gray has cited no such law, and we have not found support for such a rule. Even if that were the rule, certainly there would be a line. For example, it would be an unreasonable rule to say that one illegible word in a 100-page document invalidates the whole thing. Where should that line be drawn, if ever? Gray's failure to cite law on this issue or to tackle its nuances undermines his arguments. We conclude that there is no such rule, and that the law is designed to be flexible. "Under California law, a contract will be enforced if it is sufficiently definite (and this is a question of law) for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached. [Citations.] Stated otherwise, the contract will be enforced if it is possible to reach a fair and just result even if, in the process, the court is required to fill in some gaps. [Citation.]" (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623.)

As for the material terms, the copy of the rental agreement stated that the agreement came with no storage space and that the renter shall not alter or add to the premises. The copy of the "Obligations Of A Resident" form stated that a resident could not store personal property "about the building except in storage areas where allowed." It also stated that no alterations were allowed absent consent in writing from the owner or manager. Gelsebach had probable cause to believe that he could establish

the existence of these material terms because they were legible in the copies submitted below.

Now, seriatim, we address Gray's arguments.

First, he contends that "Gelsebach knew that he could not win the lawsuit without being able to prove the terms of the lease after his shellacking in [the second unlawful detainer action]. [He] filed the [third unlawful detainer action] without putting forward a new copy of the lease, and lost the case on this ground and on the merits." Continuing this theme, Gray argues, "It is undisputed that Gelsebach knew from his loss in the [second unlawful detainer] lawsuit he had to obtain a legible copy of the lease to prevail[.]"

Gray's position is easily rejected. The second unlawful detainer action pertained to his alleged use of his parking space for storage. The copy of the rental agreement bearing his signature does not contain a legible term prohibiting the storage of his personal property in that space. The third unlawful detainer, in contrast, pertained to a storage closet and the use of an AC unit. The rental agreement copy bearing Gray's signature contains related, or arguably related, terms that are legible. Thus, because the second unlawful detainer action rested on different terms, it did not establish that Gelsebach was required to produce a different copy of the rental agreement to succeed in the third unlawful detainer action.

Second, Gray suggests that Gelsebach cannot rely on the leases of others such as Bennett to prove the terms of the lease at issue because Gelsebach's trial testimony indicated he did not have them in his possession. This suggestion is moot. From our review of the record, we conclude that Gelsebach did not need to rely on third party leases to prove the material terms. But even

if he did, his trial testimony established that he received the leases from the Schoons and therefore had them at the time of trial. Though it's academic, we conclude that a reasonable attorney would believe that they supported the third unlawful detainer action. The copy of Bennett's lease, for example, is more legible than the copy of Gray's lease and it contains all the terms relied upon by Gelsebach.

On this point, Gray suggests that probable cause is not established because he does not concede that these other leases are real. Whether they are real is beside the point. What matters is the information that Gelsebach possessed, and whether it was reasonable for him to rely on it. He declared and testified that copies of all the leases were given to him when he purchased the building. Absent some reason for him to doubt their authenticity, it would have been reasonable for him to consult them as evidence of the terms of Gray's lease and conclude they supported his action.

Third, Gray suggests that if Gelsebach relied on blank forms to determine the terms of the lease, then he "did not, and could not, know whether or not the allegations in his lawsuit were true, and thus he lacked probable cause to file the lawsuit." This is moot.

Regardless, we note that Gelsebach testified in the third unlawful detainer action that he had seen blank forms and they were the same contract. If those blank form contracts—which Gelsebach testified had the same number—resembled the copy of the rental agreement bearing Gray's signature, it would have been reasonable for Gelsebach to rely on them to prove his case. Gray contests this, pointing to his counsel's declaration that the Apartment Association of Los Angeles produced many similar

looking forms that varied in terms but had similar formats, and further declaring that he could not obtain a copy of the form that was used for Gray's rental agreement. Gray suggests the forms were impossible to obtain and thereby also suggests that Gelsebach was lying when he testified at trial that he had seen such forms. This suggestion is speculative and does not undermine Gelsebach's testimony.

C. Probable Cause Analysis (Part 3).

The question remains whether the lease supported Gelsebach's position. It arguably did despite Gray's insistence that the third unlawful detainer action was barred by the four-year statute of limitations applicable to breach of contract claims, Gelsebach could not overcome the assertion of an oral modification, and the alleged terms of the lease did not bar the installation of the AC unit.

1. *Statute of Limitations*.

Gray's statute of limitations argument is unavailing.

He cited no law establishing that Gelsebach's claims for eviction accrued any sooner than after he asked Gray to perform or quit. Moreover, Gray's malicious prosecution cause of action is not viable unless the prior action was terminated favorably on the merits. "The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort [of malicious prosecution].' [Citations.]" (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) If a case is dismissed on technical grounds, it does not constitute a favorable termination. (*Ibid*.) "Termination of an action by a statute of limitations defense must be deemed a technical or procedural as distinguished from a substantive termination." (*Id*.

at p. 751.) At least in part, this result pertains because the statute of limitations is a defense that can be waived unless timely raised. (*Ibid.*) Based on the foregoing law, we conclude that the applicability of the statute of limitations is not relevant to the probable cause analysis. Even if the statute of limitations barred the third unlawful detainer action, and even if the trial court had ruled that the action was time barred, that would not have tended to indicate Gray's innocence and, in any event, it was a defense that could have been waived. Therefore, a ruling based on the statute of limitations could not have established the favorable termination element necessary to support Gray's malicious prosecution action.

2. *Oral Modification.*

Gray argues that Gelsebach had no evidence to refute the existence of an oral modification and therefore had no grounds to believe he could prevail in the third unlawful detainer action. We reject this argument—and any suggestions that there necessarily was an oral modification or that Gray's claim could not be challenged—for the reasons outlined in part IV.A of the Discussion.

3. *The AC Unit.*

Gray avers that nothing in the rental agreement bars the installation of the AC Unit because it was not an alteration of the apartment building.

Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal.App.3d 877 (*Allstate*) does not convince us. In that case, the court held that office computer systems should have been classified as personalty rather than fixtures for purposes of property taxation. (*Id.* at pp. 880–893.) The court stated that "[m]inor structural alterations to the realty in which such

computers are situated, such as movable partitions or flooring, supplemental air conditioning units, and 220-volt wiring, do not alter the character of such computers from personalty to realty." (*Id*. at p. 892.) This holding has no bearing on what Gray and the Schoons intended when they entered the lease because *Allstate* was a tax case rather than a contract case, and because it did not analyze the meaning of a term prohibiting a tenant from altering a building without permission.

Gray avers: "Since there was nothing in the alleged terms of the rental agreement that barred installation of an air conditioner, and there was no evidence that the installation was so negligent that it physically damaged the building, no written consent was required, period." This argument misses the point. The question, again, is what the contracting parties intended. In the absence of any extrinsic evidence, we conclude it is at least reasonably arguable that the no alteration clauses pertained, in part, to the look of the building. Also, if that AC unit was affixed inside the window, that was arguably a physical alteration. It does not matter whether such a position was unlikely to succeed. It was arguable.[15]

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[15] At oral argument, we indicated our thoughts on the second prong. Gray's counsel claimed that we must be second guessing the decisions in the second and third unlawful detainer actions, and he argued that this was improper.

Gray's counsel failed to appreciate that it is not inconsistent to conclude that Gelsebach had probable cause to believe he could prevail in the third unlawful detainer action based on Gray's conduct and the terms of his lease, and to also conclude that the trial court permissibly found in favor of Gray based on consent—which was raised at trial—and lack of authentication of the lease.

V. The Anti-SLAPP Motion Should Have Been Granted.

Because (1) unlawful detainer actions are petitioning activity protected by the anti-SLAPP statute, (2) no illegality exception applies, and (3) Gray failed to establish a probability of showing that Gelsebach lacked probable cause to file and prosecute his third unlawful detainer action, the trial court should have granted the anti-SLAPP motion to strike Gray's malicious prosecution action.

VI. Leave to Amend Was Improperly Granted.

Once a trial court grants an anti-SLAPP motion as to an entire pleading, it cannot grant leave to amend. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073–1074.) Because the trial court erred when it did not grant the anti-SLAPP motion, it erred when it allowed Gray to file a second amended complaint.

VII. Gray's Motion for Sanctions.

Gray moves for sanctions on the ground that Gelsebach's appeal is frivolous. Having concluded that the appeal has merit, we deny Gray's motion.

DISPOSITION

The orders are reversed. Gelsebach shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT