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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

STEVEN J. BERNHEIM et al., Plaintiffs and Respondents, v. AMY E. CLARK KLEINPETER, Defendant and Appellant.	B230210 (Los Angeles County Super. Ct. No. BC440829)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Affirmed.

Clark Kleinpeter Law and Amy Elizabeth Kleinpeter for Defendant and Appellant.

The Bernheim Law Firm, Steven Jay Bernheim and Nazo S. Semerdjian for Plaintiffs and Respondents.

The trial court denied a motion by appellant Amy E. Clark Kleinpeter under Code of Civil Procedure section 425.16 -- the law designed to curtail the filing of strategic lawsuits against public participation, often called the "anti-SLAPP law" -- in an action for negligence and malicious prosecution by respondents Steven J. Bernheim and Bernie Bernheim, A.P.C.[1] We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Kleinpeter, an attorney, represented Magdelena Cuprys in a lawsuit against attorney Bernheim and his law firm, Bernie Bernheim, A.P.C., which Kleinpeter initiated on Cuprys's behalf in April 2007. The complaint, which alleged that respondents had employed Cuprys as an associate attorney, asserted claims for sexual harassment, gender discrimination, and national origin discrimination under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), as well as claims for wrongful termination in violation of public policy and infliction of emotional distress. On August 28, 2007, Kleinpeter voluntarily dismissed the claims for wrongful termination and infliction of emotional distress.

In early January 2008, respondents filed motions for summary judgment on the remaining claims. The motions argued (1) that Cuprys's claims were time-barred due to her failure to file administrative complaints within one year of the alleged misconduct, and (2) that Cuprys had no evidence to support her allegations of discrimination and sexual harassment.

On or about January 4, 2008, Kleinpeter requested leave to withdraw as Cuprys's counsel, asserting a breakdown in the attorney-client relationship. On January 29, 2008, the trial court granted Kleinpeter's request, effective upon notice

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[1] All statutory citations are to the Code of Civil Procedure unless otherwise indicated.

to Cuprys (§ 284), who then resided in Florida. Pending notice to Cuprys, Kleinpeter continued to represent her, but filed no opposition to respondents' motions for summary judgment.

On February 19, 2008, respondents requested an award of sanctions against Cuprys and Kleinpeter (§ 128.7). Pointing to the evidence supporting the summary judgment motions, respondents contended that Cuprys and Kleinpeter had knowingly pursued false, perjured, and time-barred claims for discrimination and sexual harassment.

On March 12, 2008, Kleinpeter applied for a continuance of the hearings on respondents' motions and confirmation of the order relieving her as Cuprys's counsel. On March 19, 2008, the trial court conducted a hearing on the application during which Cuprys appeared by telephone. Cuprys denied receiving formal notice of the prior order relieving Kleinpeter as her counsel and opposed Kleinpeter's withdrawal. The trial court ordered that Kleinpeter was no longer Cuprys's counsel, and continued the hearing on respondents' motions for 60 days to permit Cuprys to obtain new counsel.

Cuprys filed no oppositions to the motions. During the May 22, 2008 hearing on the motions, Cuprys requested an additional continuance in order to secure representation by counsel. After rejecting the request, the trial court granted the summary judgment motions, concluding that Cuprys's claims were time-barred and that there were no triable issues regarding discrimination and sexual harassment. In addition, the court denied respondents' sanctions motion. On July 1, 2008, the court entered judgment in favor of respondents and against Cuprys.

In July 2010, respondents initiated the underlying action against Kleinpeter for malicious prosecution and negligence. On September 28, 2010, Kleinpeter filed a motion under the anti-SLAPP law to strike respondents' complaint. Following a hearing, the trial court denied the anti-SLAPP motion, insofar as it

challenged respondents' claims for malicious prosecution and negligence.[2] This appeal followed.

DISCUSSION

Kleinpeter contends the trial court erred in denying her anti-SLAPP motion. We disagree.

A. *Anti-SLAPP Motions*

Under section 425.16, "[w]hen a lawsuit arises out of the exercise of free speech or petition, a defendant may move to strike the complaint. [Citations.] The complaint is subject to dismissal unless the plaintiff establishes 'a probability that [he or she] will prevail on the claim.' [Citations.]" (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949, quoting § 425.16, subd. (b).) The anti-SLAPP law encompasses actions arising from conduct "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

Resolution of an anti-SLAPP motion "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) When an anti-

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[2] Respondents' complaint also asserted claims for intentional and negligent infliction of emotional distress. To the extent the anti-SLAPP motion attacked these claims, the trial court concluded that the motion was moot, as respondents had voluntarily agreed to strike the claims from the complaint.

SLAPP motion attacks several claims within a complaint, this process is properly applied to individual claims. (*Mann v. Quality Old Time Service, Ltd.* (2004) 120 Cal.App.4th 90, 106-110; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929-935; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.)

"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]'. . . In terms of the so-called threshold issue, the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once it is demonstrated the cause of action arises from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation. . . . [T]he trial court, in making its determination, considers the pleadings and affidavits stating the facts upon which the liability or defense is based. [Citations]." (*Shekhter v. Financial Indemnity Co*., *supra*, 89 Cal.App.4th at p. 151, italics omitted.) We review the trial court's determinations de novo.[3] (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

B. *Negligence Claim*

We begin with respondents' claim for negligence, which is predicated on allegations that Kleinpeter "negligent[ly] fail[ed]" to return confidential information and items belonging to respondents that Cuprys gave to Kleinpeter. In

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3 Kleinpeter asserted numerous evidentiary objections to respondents' showing, which the trial court sustained in part and overruled in part. Neither Kleinpeter nor respondents have challenged these rulings on appeal, and thus they have forfeited any contention of error regarding them. (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1015.) We therefore limit our analysis to the evidence admitted by the trial court.

denying the anti-SLAPP motion, the trial court found that Kleinpeter had not shown that the claim arose from protected activity under the anti-SLAPP law. For the reasons discussed below, we conclude that although the court erred in making this determination, respondents demonstrated a probability that they will prevail on the claim (§ 425.16, subd. (b)).

1. *Underlying Proceedings*

In support of the anti-SLAPP motion, Kleinpeter contended that respondents could not show a probability of prevailing on the negligence claim, arguing that she was entitled to receive confidential information from her client Cuprys. Additionally, Kleinpeter argued that the claim was time-barred under the two-year statute of limitations applicable to negligence claims (§ 335.1), as respondents knew of the purported misconduct approximately three years before they filed their action on July 1, 2010.

According to Kleinpeter's supporting declaration and the attached exhibits, after she initiated Cuprys's action in April 2007, respondents sent her a letter on June 20, 2007, demanding that Kleinpeter return documents belonging to them that Cuprys had given to Kleinpeter. The documents in question were respondent's employee handbook, memoranda distributed to Cuprys as an employee, and "all notes" prepared by Cuprys in connection with her employment. Kleinpeter determined that Cuprys had received the handbook before respondents hired her and that the notes contained no attorney-client confidences; in addition, following legal research, Kleinpeter concluded that Cuprys was entitled to disclose facts relevant to the lawsuit to her counsel, even if they included her former employers' confidences. Later, a law firm affiliated with respondents sent Kleinpeter a second letter dated July 11, 2007. The letter requested that she return instant messages to

respondents that Cuprys had allegedly recorded in violation of Penal Code section 630 et seq. Following an investigation, Kleinpeter decided that Cuprys had not contravened the criminal statutes because the instant messages were not confidential when recorded.

Respondents opposed the anti-SLAPP motion on two grounds. First, they maintained that Kleinpeter's retention of their property was not protected activity under the exception stated in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*) for conduct that is "illegal as a matter of law." On this matter, respondents argued that Kleinpeter was legally obliged to return their property regardless of its relevance to Cuprys's litigation, and that her only legitimate access to the property was through discovery procedures. Second, they contended that their claim was not time-barred because it was subject to the three-year limitations period applicable to claims for the conversion of personal property (§ 338, subd. (c)).

2. *Analysis*

In denying the anti-SLAPP motion, the trial court agreed with respondents that Kleinpeter's retention of the property was not protected activity. To assess this ruling, we examine the substance of respondents' claim, rather than its label. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) As explained in *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 653, "'it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies . . . .'"

Although respondents' complaint denominates the claim as one of negligence, the gravamen of the claim concerns the conversion of personal property. Generally "'"[c]onversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights

therein."'" (*Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329.) As "the tort of conversion is a species of strict liability" (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 747-748), a showing of negligence is not essential to establish conversion. (*Poggi v. Scott* (1914) 167 Cal. 372, 375 ["The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action."]; *Fresno Air Service v. Wood* (1965) 232 Cal.App.2d 801, 805-806). Here, the overall thrust of the claim is that Kleinpeter improperly refused to return documents belonging to respondents.[4]

The trial court erred in determining that Kleinpeter's conduct was not protected activity under the anti-SLAPP law. In *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 298-299 (*Fox Searchlight*), an attorney sued her former employer for wrongful termination on the basis of gender discrimination. In response, the employer cross-complained, alleging that the employee had improperly communicated confidential information and documents to her counsel. (*Id*. at p. 299.) After the trial court denied the employee's anti-SLAPP motion, the appellate court reversed, concluding that the employee's conduct in providing information to her counsel in furtherance of her lawsuit -- including her refusal to return purportedly confidential documents -- was protected activity under the anti-SLAPP statute, notwithstanding the employer's allegations

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[4] The remedies for conversion include specific recovery of the property, damages, and a quieting of title. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 700, pp. 1024-1025.) Respondents' claim sought damages and "other and further relief as the [c]ourt deem[ed] just and proper."

that the conduct was wrongful. (*Fox Searchlight*, at pp. 305-308.) In view of *Fox Searchlight*, Kleinpeter's receipt of information from Cuprys in furtherance of her lawsuit was also protected activity, even if it involved the transfer of respondents' documents.

In an effort to distinguish *Fox Searchlight*, respondents maintained before the trial court and contend on appeal that their claim focuses primarily on Kleinpeter's refusal to restore their property, which they argue is not protected activity because it is "illegal as a matter of law" (*Flatley*, *supra*, 39 Cal.4th at p. 320). We reject this contention. In *Flatley*, an entertainer sued a lawyer and one of his clients for civil extortion, alleging that the lawyer had threatened to appear on television and accuse the entertainer of raping the client. (*Id*. at pp. 305-306.) In examining the trial court's denial of the lawyer's anti-SLAPP motion, our Supreme Court determined that such a motion fails when "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley*, *supra*, at p. 320.) As the evidence accompanying the lawyer's motion unequivocally showed that he had engaged in criminal extortion, the court held that the motion was properly denied. (*Id*. at pp. 328-333.)

Following *Flatley*, numerous courts have concluded that its rule "is limited to criminal conduct." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 [discussing cases]; see, e.g., *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 971 ["The term 'illegal' in *Flatley* means criminal, not merely violative of a statute."]; *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654 ["Our reading of *Flatley* leads us to conclude that the Supreme Court's use of the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute."].) Under *Flatley*, "when a defendant's assertedly protected activity *may or may not be*

criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law. . . . [A]n activity c[an] be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 446.)

In view of these demanding standards, Kleinpeter's retention of respondents' documents was not criminal as a matter of law. As explained in *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1284-1289 (*Pillsbury*), a party to litigation ordinarily may not remove or retain documents belonging to another party without the latter's consent, regardless of whether the documents are relevant or related to the litigation. "[S]elf-help" of this type is not warranted by any privilege, defense, or discovery procedure. (*Id*. at p. 1288.) However, a party's taking or receipt of property belonging to another may not constitute *criminal* conduct when the party acts with the good faith belief that he or she is entitled to hold the property. (*People v. Stewart* (1976) 16 Cal.3d 133, 139-140; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1427; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, Supp. 11.) Here, Kleinpeter's declaration stated that after due inquiry, she believed she was entitled to retain the property in question. Accordingly, as Kleinpeter did not concede criminality and the evidence did not conclusively show it, her conduct cannot be regarded as criminal as a matter of law.

Nonetheless, the trial court's error was not prejudicial because respondents demonstrated a probability of prevailing on their claim. On this matter, respondents' burden resembled that imposed on a plaintiff opposing a motion for summary judgment on his or her complaint. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.) Respondents were obliged to establish that their claim was "both legally sufficient and supported by a sufficient prima facie showing of facts

to sustain a favorable judgment if the evidence submitted by [respondents] is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) In determining whether respondents carried this burden, the trial court was required to consider the pleadings and their supporting affidavits, to the extent these contained admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 (*HMS Capital)*.) The trial court was also obliged to consider admissible evidence that Kleinpeter submitted in support of the motion, but only to determine whether it defeated respondents' showing as a matter of law. (*Ibid*.)

Here, respondents carried their burden. For the reasons discussed above, their claim was legally sufficient under the principles stated in *Pillsbury*. Furthermore, they presented sufficient evidence that Kleinpeter failed to return the documents upon request.

Kleinpeter contends that the claim fails under the two-year statute of limitations applicable to negligence claims (§ 335.1), arguing that respondents filed their complaint on July 1, 2010, approximately three years after they asked her to return the documents. We disagree. To the extent respondents assert the conversion of personal property, their claim is subject to the three-year limitations period in section 388, subdivision (c). (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 619, p. 804.) Under this provision, when the original taking is lawful, the limitations period is not triggered "until the return of the property has been demanded and refused or until a repudiation of the owner's title is clearly and unequivocally brought to his attention." (*Bufano v. City & County of San Francisco* (1965) 233 Cal.App.2d 61, 70; *Niiya v. Goto* (1960) 181 Cal.App.2d 682, 688.)

Because Cuprys initially possessed the documents in a lawful manner, the limitations period did not begin to run until Kleinpeter rejected respondents' demands for the documents or in some manner made respondents aware that she

would not return them. (See *Bufano v. City & County of San Francisco*, *supra*, 233 Cal.App.2d at pp. 70-71.) However, there is no evidence when Kleinpeter first told respondents that she refused to return the documents. Furthermore, to the extent Kleinpeter's conduct may have constituted a repudiation of respondents' demand, a reasonable factfinder could determine that the limitations period was triggered *after* the July 11, 2007 letter, as neither Cuprys nor Kleinpeter appears to have answered the June 20, 2007 letter, and respondents continued to seek the return of items in the July 11, 2007 letter. Kleinpeter thus failed to show that respondents' claim was untimely as a matter of law. In sum, the trial court correctly denied Kleinpeter's anti-SLAPP motion, insofar as it challenged this claim.

C. *Malicious Prosecution Claim*

We turn to respondents' claim for malicious prosecution. Because such claims fall within the scope of the anti-SLAPP statute (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, 741), Kleinpeter shifted the burden to respondents to demonstrate a probability that they would prevail on their claim. We therefore limit our analysis to whether respondents carried this burden.

Respondents were obliged to make a prima facie showing regarding *all* the elements of their claim. (See *Jarrow Formulas*, *supra*, 31 Cal.4th at pp. 742-743 & fn. 13.) "[T]o establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citations.]" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel Co.)*.)

The elements of a claim for malicious prosecution against an attorney mirror the elements of such a claim against his or her clients. (*Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th 481, 487-488.) To establish such a claim against an attorney, it is not necessary to show that the entire prior action was legally untenable and malicious; it is sufficient to demonstrate that the attorney pursued the litigation of at least one untenable claim with the requisite state of mind. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 677-679.) Nor is it necessary to show that the attorney's conduct was tortious at the inception of the prior action, as "an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 (*Zamos*).)

Here, Kleinpeter does not dispute that Cuprys's action ended in a manner favorable to respondents. Accordingly, the focus of our inquiry is on whether respondents made an adequate showing regarding the remaining elements.

1. *Lack of Probable Cause*

Kleinpeter contends respondents failed to make a sufficient prima facie showing that the underlying action lacked probable cause. We disagree. To show the absence of probable cause, respondents were required to demonstrate that Kleinpeter pursued the litigation of at least one untenable claim. Here, the trial court determined that respondents made an adequate showing that the gender discrimination and sexual harassment claims lacked probable cause. As explained below, we see no error in this ruling.

a. *Governing Principles*

The "probable cause" element of a malicious prosecution action requires an "objective determination of the 'reasonableness' of the defendant's conduct"

(*Sheldon Appel Co., supra*, 47 Cal.3d at p. 878), that is, to determine whether, on the basis of the facts known to the defendant, the initial assertion *or* continued litigation of the underlying claims was legally tenable (*Zamos, supra,* 32 Cal.4th at pp. 970-971). The key question is "whether any reasonable attorney would have thought the claim tenable . . . ." (*Sheldon Appel Co., supra*, at p. 886; accord, *Zamos, supra*, at p. 971.) Under this standard, lawyers do not lack probable cause when they "present issues that are arguably correct, even if it is extremely unlikely that they will win. [Citation.]" (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 71.)

Unlike the "'malice'" element, which "relates to the subjective intent or purpose with which the defendant acted in initiating the prior action" and ordinarily presents a question for the jury, the presence of probable cause is determined by the trial court as a question of law when the pertinent facts are undisputed. (*Sheldon Appel Co., supra*, 47 Cal.3d at pp. 874-876.) This is because "[t]he question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . ." (*Id*. at p. 875.)

When there is a dispute as to the state of the defendant's factual knowledge and the existence of probable cause turns on resolution of that dispute, the jury must resolve the threshold question of the defendant's knowledge. (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 881.) However, the extent of the defendant's knowledge during the underlying suit is not per se relevant to the determination of probable cause. (*Hufstedler, Kaus & Ettinger v. Superior Court, supra*, 42 Cal.App.4th at p. 62.) Thus, the issue of probable cause may be properly adjudicated on summary judgment when "the record in the underlying action was fully developed . . . ." (*Ibid.*) In such circumstances, evidence about what the attorney knew or did not know at the time when he or she prosecuted the

underlying action is irrelevant on summary judgment when "undisputed evidence establishes an objectively reasonable basis for instituting the underlying action . . . ." (*Ibid*.)

Here we confront an anti-SLAPP motion, rather than a motion for summary judgment. In view of the principles governing anti-SLAPP motions (see pt. A., *ante*), respondents had two alternative methods by which they could make a prima facie showing that a claim lacked probable cause. First, they could point to undisputed and relevant facts that upon a "fully developed" record established that Kleinpeter had no "objectively reasonable basis" for pursuing a claim on Cuprys's behalf. (*Hufstedler, Kaus & Ettinger v. Superior Court*, *supra*, 42 Cal.App.4th at p. 62; see *HMS Capital*, *supra*, 118 Cal.App.4th at pp. 216-217.) Second, they could submit sufficient evidence of relevant facts which -- if accepted by a jury -- established that Kleinpeter had no basis for the claim. (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881; see *Zamos*, *supra*, 32 Cal.4th at pp. 970-973.)

Here, respondents attempted the former, pointing to Cuprys's deposition, during which she purportedly negated the allegations underlying her claims, as well as the evidence they submitted in support of their summary judgment motions to demonstrate the falsity of the allegations. As respondents noted, Cuprys and Kleinpeter presented no conflicting evidence in opposition to the summary judgment motions.

b. *Gender Discrimination and Sexual Harassment Claims*

Because the trial court determined that only Cuprys's claims for gender discrimination and sexual harassment lacked probable cause, the focus of our

analysis is on these claims.[5] Under FEHA, discrimination claims concern "personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or non-assignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64-65.) Here, Cuprys alleged that respondents intentionally treated her less favorably than male attorneys, thereby driving her out of the law firm.

Claims of intentional discrimination are assessed in light of a three-stage burden shifting test. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) Under the test, had Cuprys reached trial on her claim, she "would . . . have borne the initial burden of proving unlawful discrimination, under well-settled rules of order of proof: '[T]he employee must first establish a prima facie [showing] of wrongful discrimination. If she does so, the burden shifts to the employer to show a lawful reason for its action. Then the employee has the burden of proving the proffered justification is mere pretext.' [Citations.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) However, as respondents' opposition to the anti-SLAPP motion tendered a nondiscriminatory rationale for their conduct based on Cuprys's deposition testimony and other evidence, we need not address the existence of a prima facie case. (See *Guz*, *supra*, 24 Cal.4th at p. 357.) Our inquiry is limited to whether respondents showed

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[5] Because the termination of an action due to a successful statute of limitations defense does not establish a lack of probable cause, we further limit our inquiry to respondents' substantive challenges to the claims. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 752.)

that Kleinpeter manifestly lacked any basis to assert the existence of intentional discrimination. (See *ibid*.)

Under FEHA, sexual harassment ordinarily consists of conduct outside the scope of "'necessary personnel management duties.'" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 408, quoting *Janken v. GM Hughes Electronics, supra*, 46 Cal.App.4th at p. 63.) Regarding sexual harassment, Cuprys alleged only a hostile or abusive work environment. To establish such a claim under FEHA, the employee must demonstrate conduct "severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*), italics omitted.)

Although Cuprys directed her discrimination claim solely against Bernie Bernheim, A.P.C., and her harassment claim solely against Bernheim as an individual, the claims relied on the same factual allegations. According to Cuprys's complaint, Bernheim engaged in a variety of misconduct while Cuprys was the sole female attorney in the law firm. The complaint alleged that Bernheim berated Cuprys for work habits and errors that he overlooked in the case of male attorneys in the firm; that he required Cuprys -- but no male attorneys -- to perform tasks such as making coffee at firm meetings and carrying his briefcase; that he displayed an ex-girlfriend's "soft-porn" Web site at a firm meeting after she became the firm's client; that he once kissed and fondled a woman in Cuprys's office; that during firm meetings, while in Cuprys's "partial view," he sometimes urinated in an adjoining bathroom as he spoke to attorneys through an open door; and that he made sexually inappropriate remarks in Cuprys's presence and referred to women -- including his girlfriends -- as "bitches."

c. *Parties' Showings*

In opposition to the anti-SLAPP motion, respondents submitted evidence supporting the following version of the underlying events: On March 14, 2005, when Cuprys resigned from respondents' employment, she made no reference to the allegations she later asserted in her April 2007 complaint. Shortly before Cuprys's deposition, Kleinpeter served interrogatory responses in which Cuprys reaffirmed the allegations under penalty of perjury. However, in the course of the deposition, which occurred in August and November 2007, Cuprys effectively admitted that she had no evidence to support the allegations.

Regarding the allegations that Bernheim treated Cuprys less favorably than male attorneys in the firm, Cuprys testified that Bernheim provided her with good training, that he drew no distinction between her and the male attorneys regarding training, and that he gave her discretionary bonuses for good performance. Cuprys also testified that she never prepared coffee for the firm meetings. She admitted that she did "sloppy work" while respondents employed her, that the reasons Bernheim criticized her were "always valid," and that she may have made errors that would have entitled respondents to discharge her. Although Cuprys maintained that Bernheim criticized her more frequently and vigorously than male attorneys who made similar errors, she acknowledged that on at least one occasion, Bernheim used harsher terms to criticize a male attorney for such an error. She also suggested that her bonuses may have been smaller than those given to the male attorneys, but admitted she did not know whether she received more or fewer bonuses.

Regarding the allegation that a pornographic Web site was accessed during a firm meeting, Cuprys testified that during or after a firm meeting, a computer was used to access a Web site showing an image of a woman. Cuprys did not know who accessed the Web site, and she could recall little regarding the image, other

than that the woman was not fully clothed, and may have been wearing lingerie. When Cuprys showed visible discomfort with the image, Bernheim immediately had it removed. Cuprys also testified that on two other occasions, she saw similar images of other women on firm computers, although she could not remember the details of the images. Cuprys acknowledged that one of the firm's clients was involved in a lawsuit concerning the unlawful use of the client's image.

Regarding the allegation that Bernheim kissed and fondled a woman in Cuprys's office, Cuprys testified that once when she was working on a weekend, she left her office for a cup of coffee. When she returned, she found Bernheim hugging a woman. Although Cuprys thought that the pair may have been kissing, she did not see them do so. Upon noticing Cuprys, Bernheim stopped, turned toward Cuprys, and introduced the woman to her. Cuprys could recall little regarding the incident, other than that the woman was fully clothed.

Regarding the allegation that Bernheim urinated while in Cuprys's "partial view," Cuprys testified that on two occasions, during firm meetings, Bernheim walked into an adjoining bathroom and continued to talk while he urinated. She did not recall whether she looked into the bathroom or whether she could see its interior, but she heard Bernheim urinate, and once saw part of Bernheim's underwear as he entered the bathroom.

Regarding the allegations that Bernheim made inappropriate remarks and used the term "bitch," Cuprys did not identify any specific sexually inappropriate comment by Bernheim. Cuprys also acknowledged that he never referred to her or any current employees of the firm by that term, and that he did not appear to apply it to women in general, but only to express his dissatisfaction with specific conduct. According to Cuprys, she heard him apply the term "bitch" to a female opposing attorney due to her lack of cordiality, a female attorney who had left

Bernheim's firm, and some neighbors of the firm's office who had complained to Bernheim.

Although Kleinpeter was not present during the sessions of Cuprys's deposition in August 2007, she appeared at the sessions in November 2007. During the November sessions, Bernheim told Kleinpeter that respondents intended to file a malicious prosecution action because Cuprys had admitted that her allegations of discrimination and sexual harassment were false.

In January 2008, when respondents sought summary judgment, they relied on Cuprys's deposition testimony and declarations from Bernheim and respondents' employees, including several attorneys. The declarations stated that Bernheim was a demanding but fair employer; that he never engaged in discrimination or sexual harassment toward Cuprys or any other employee; that he did not require employees to make coffee, although he sometimes asked attorneys -- including males -- to carry his briefcase; that when a female client's Web site was viewed during a firm meeting regarding the client's claim that her work as a model had been misappropriated, a "nearly naked" image briefly appeared before Bernheim ordered it removed; that Bernheim never engaged in inappropriate conduct in the office or conducted conversations from his bathroom; and that he did not make sexually charged remarks or apply the term "bitch" to women as a gender slur. No evidence was offered to contradict these declarations, as neither Kleinpeter nor Cuprys filed oppositions to the summary judgment motions.

Kleinpeter's evidentiary showing in support of her anti-SLAPP motion did not supplement Cuprys's testimony regarding the merits of the discrimination and sexual harassment claims. Kleinpeter's declaration maintained that "[a]t no time" did she pursue Cuprys's claims while believing them to lack probable cause, and that she sought to withdraw as Cuprys's counsel due to breakdown in the attorney-client relationship.

d. *Analysis*

We conclude that respondents made a sufficient prima facie showing that Kleinpeter lacked probable cause in litigating Cuprys's gender discrimination and sexual harassment claims. In examining the parties' showings, we "accept as true the evidence favorable to [respondents]." (*HMS Capital, supra,* 118 Cal.App.4th at p. 212.) Respondents' evidence established that the claims were fatally defective.

Cuprys's deposition disclosed no evidence of any adverse employment action flowing from intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 355.) She testified that Bernheim did not distinguish between her and the male attorneys in terms of training, that Bernheim had validly criticized her work as an attorney, and that her performance had been sufficiently poor to warrant her termination. She appeared to abandon her allegations of disparate treatment with respect to "personnel management actions" (*Janken v. GM Hughes Electronics, supra*, 46 Cal.App.4th at pp. 64-65), with the exception of her suggestions that Bernheim criticized her more harshly than the male attorneys for her errors and denied her equal discretionary bonuses for good work. However, these suggestions relied exclusively on her subjective self-assessment of the gravity of her errors and the value of her good work, which is insufficient by itself to show that Bernheim's conduct was motivated by discriminatory motives. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 79 [employee's self-assessment of his qualification for promotion insufficient to show his employer's ostensibly legitimate reasons for denying promotion were a pretext for discrimination]; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816 [employee's subjective personal judgments of competence alone cannot show that employee's ostensibly legitimate reasons for denying promotion were a pretext for discrimination].)

Cuprys's deposition also showed no evidence of cognizable sexual harassment. As our Supreme Court has explained, "an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Lyle*, *supra*, 38 Cal.4th at p. 283.) The environment "'must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" (*Id*. at p. 284, quoting *Faragher v. Boca Raton* (1998) 524 U.S. 775, 787.) Furthermore, the offensive conduct must be traceable to the employee's gender, that is, the employee must show that "'"if the plaintiff 'had been a man she would not have been treated in the same manner.'"' [Citation.]" (*Lyle*, *supra*, at p. 280.) Under these principles, a hostile environment is not established for purposes of a sexual harassment claim when "a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general." (*Id*. at p. 282.) Moreover, courts have concluded that the term "'bitch'" is not so "derogatory that its mere use necessarily constitutes harassment because of sex." (*Ibid*.)

Here, Cuprys's testimony established no "concerted pattern of harassment." (*Lyle*, *supra*, 38 Cal.4th at p. 283.) Bernheim's conduct in criticizing her work and allocating discretionary bonuses was not cognizable harassment, as Cuprys offered no evidence that the conduct was objectively improper. Although on three occasions Cuprys saw images of women that she found subjectively offensive, her inability to recall the content of the images rendered it impossible to determine whether they were objectively offensive. Furthermore, the fact that Bernheim hugged a woman cannot be regarded as a hostile act directed at Cuprys or women in general because he stopped his activity upon seeing Cuprys. Similarly, Cuprys's

testimony that Bernheim twice continued conversations while he urinated in a nearby bathroom does not establish acts of this type, as Bernheim's conduct occurred during firm meetings, and Cuprys could remember little more than that she heard Bernheim urinating as he talked. (*Lyle, supra,* 38 Cal.4th at pp. 287-292 [scriptwriters' vulgar and sexually charged antics during meetings were not sexual harassment because they were not directed at women present].) Finally, Bernheim's sporadic application of the term "bitch" to women outside the firm, usually in connection with specific conduct he disliked, is not reasonably viewed as sexual harassment, as Cuprys had no evidence that Bernheim used the term to disparage women in general.

In addition to Cuprys's failure to support her claims during her deposition, respondents' evidence supporting their summary judgment motions comprehensively denied Cuprys's allegations of discrimination and sexual harassment. As noted above, Kleinpeter and Cuprys submitted no conflicting evidence in opposition to the motions for summary judgment. Although respondents' evidentiary showing supporting the motions conflicted with Cuprys's deposition testimony concerning some matters, for example, whether Bernheim talked at firm meetings while in an adjoining bathroom, Cuprys's allegations of discrimination and sexual harassment failed regardless of how the conflicts were resolved. Accordingly, respondents, in opposing the anti-SLAPP motion, adequately demonstrated that Cuprys's claims lacked probable cause.

Kleinpeter contends that the ruling on respondents' request for sanctions in Cuprys's action establishes the existence of probable cause. We disagree. Upon granting respondents' summary judgment motions, the trial court denied respondents' motion for sanctions under section 128.7, concluding that Cuprys's

action was not "totally frivolous or unwarranted by existing law."[6] However, rulings on motions for sanctions are not binding in subsequent actions for malicious prosecution under principles of collateral estoppel. (See *Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1195.) When, as here, the material facts are undisputed, the determination of probable cause is a question of law that we resolve de novo. (*Enterprise Ins. Co. v. Mulleague* (1987) 196 Cal.App.3d 528, 540.)

2. *Malice*

Kleinpeter contends that respondents failed to make a sufficient prima facie showing of malice. She is mistaken. "'The malice element of the malicious prosecution tort goes to the defendant's subjective intent. . . . It is not limited to actual hostility or ill will toward the plaintiff.' [Citation.] . . . Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. [Citation.]" (*HMS Capital, supra*, 118 Cal.App.4th at p. 218.)

Although the absence of probable cause is insufficient by itself to establish malice (*HMS Capital, supra*, 118 Cal.App.4th at p. 218), "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, italics omitted). That is the case here. As explained above (see pt. C.1.c., *ante*), Cuprys offered no evidence during her deposition to support her allegations of

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6 Section 128.7 requires every attorney filing a "pleading, petition, written notice of motion, or other similar paper" to certify that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that, inter alia, "[t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (§ 128.7, subds. (a), (b), & (b)(2).

discrimination and sexual harassment, and materially retracted the allegations. During the deposition session on November 12, 2007, when respondents protested that Cuprys had repudiated her most inflammatory allegations regarding Bernheim, Kleinpeter laughed in response. On May 22, 2008, Kleinpeter told the trial court that her request to withdraw as Cuprys's counsel arose solely from a breakdown in the attorney-client relationship, and was unrelated to "the merits." This evidence, viewed as a whole, raises the reasonable inference that months after Kleinpeter knew from her client's deposition testimony that the gender discrimination and sexual harassment claims were meritless, she made no attempt to have them dismissed.

Kleinpeter contends that her evidence in support of the anti-SLAPP motion establishes that she acted reasonably in connection with the action. She points to her dismissal of three of Cuprys's claims, and maintains that she always acted with the belief that Cuprys's remaining claims were tenable. However, because Kleinpeter's evidence -- though sufficient to raise triable issues of fact -- does not conclusively rebut respondents' prima facie showing of malice, it cannot defeat that showing as a matter of law.

Kleinpeter also contends that respondents' showing of malice conclusively fails because the attorney-client evidentiary privilege bars her from disclosing whether she advised Cuprys to dismiss her claims. We disagree. Generally, when the resolution of a claim against an attorney hinges on evidence shielded by the attorney-client privilege, and the client refuses to waive the privilege, the claim must be dismissed. (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-466.) However, "[i]n the absence of evidence justifying an alteration in the normal allocation of the burden of proof, the rule in California is that 'a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' [Citations.]" (*Sander/Moses*

Productions, Inc. v. NBC Studios, Inc. (2006) 142 Cal.App.4th 1086, 1095.) Because Kleinpeter submitted *no* evidence that Cuprys declined to waive the privilege, Kleinpeter failed to establish that the privilege precluded her from rebutting respondents' showing of malice.[7] In sum, the trial court properly denied Kleinpeter's anti-SLAPP motion.

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[7] Nothing in our resolution of the appeal before us bars Kleinpeter from reasserting her contention regarding the attorney-client privilege at trial.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.