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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BIG CASEY'S, INC.,

Plaintiff and Appellant,

v.

OCTALION, LLC et al.,

Defendants and Respondents.

B268875
(Los Angeles County
Super. Ct. No. BC584761)

APPEAL from an order of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Freedman + Taitelman, Bryan J. Freedman and Bradley H. Kreshek for Plaintiff and Appellant Big Casey's, Inc.

Thompson Coe & O'Meara, Stephen M. Caine, Frances M. O'Meara and Kenny C. Brooks for Defendants and Respondents Simkin & Associates, Inc. and Michael J. Simkin.

Maranga • Morgenstern, Robert A. Morgenstern, Ninos Saroukhanioff and Dennis S. Newitt for Defendant and Respondent Octalion, LLC.

Appellant Big Casey's, Inc. (Big Casey's) brought an action for malicious prosecution against respondents Octalion, LLC (Octalion), Simkin & Associates, Inc., and attorney Michael J. Simkin. Respondents filed a motion to strike 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."[1] The trial court granted the motion, and Big Casey's timely appealed. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Big Casey's malicious prosecution claim is predicated on an unlawful detainer action initiated by Octalion in April 2015. Attorney Simkin represented Octalion in that proceeding. Octalion sought the recovery of commercial premises following a 30-day notice to quit to Big Casey's, alleging the existence of a month-to-month tenancy on the basis of an oral agreement. Octalion also requested an

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

award of the reasonable rental value of the property for Big Casey's unlawful occupancy.

In a deposition prior to trial and at trial, the principals of Octalion stated that Big Casey's had paid them monthly rent as a tenant, but offered conflicting testimony regarding the existence of an oral agreement between Octalion and Big Casey's. Before the trial court issued a judgment, Octalion voluntarily dismissed the action with prejudice.

In June 2015, Big Casey's commenced the underlying action against respondents for malicious prosecution. Big Casey's complaint alleged that in filing and maintaining the unlawful detainer action, respondents knew there was no oral lease between Octalion and Big Casey's, knew that Big Casey's was not the tenant, and knew that the true lessees were three other parties, namely, Big Casey's Leasing, Inc. (Leasing), Michael Winn, and Mark Verge. The complaint further alleged that respondents undertook and maintained the action solely in order "to gain leverage in lease negotiations." Respondents filed motions under the anti-SLAPP law to strike the complaint. Following a hearing, the trial court granted the motions. This appeal followed.

DISCUSSION

Big Casey's contends the trial court erred in denying the anti-SLAPP motions. For the reasons discussed below, 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).)

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.) The defendant has the burden on the first issue. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.) "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.]" (*Id.* at p. 151.) We review the trial court's determinations de novo. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

A malicious prosecution action arising from the prior filing of a civil lawsuit satisfies the first prong of the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, 741 (*Jarrow Formulas*).) Accordingly, respondents shifted the burden to Big Casey's to demonstrate a probability that it would prevail on its malicious prosecution claim. We therefore limit our analysis to whether Big Casey's carried this burden.

Big Casey's burden resembles that imposed on a plaintiff opposing a motion for summary judgment on his complaint. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.) Big Casey's was obliged to demonstrate its complaint was "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [Big Casey's] is credited."[2]

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[2] In determining whether respondents carried this burden, the trial court was required to consider the pleadings and their supporting affidavits, to the extent that these contained admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 (*HMS Capital*).) The trial court also was obliged to consider admissible evidence that respondents submitted in support of their motions, but only to determine whether this evidence defeated Big Casey's showing as a matter
(*Fn. continues on the next page.*)

(*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; accord, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

These standards obliged Big Casey's to make a prima facie showing regarding *all* the elements of its malicious prosecution 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, 871-872 (*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.)

The trial court's grant of the anti-SLAPP motions thus must be affirmed if Big Casey's failed to make the requisite prima facie showing regarding any element of the malicious prosecution claim. As explained below, Big Casey did not demonstrate the absence of probable cause.

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of law. (*Ibid.*) In assessing whether Big Casey's carried its burden, the trial court was precluded from weighing the evidence or making credibility determinations. (*Ibid.*)

B. *Probable Cause*

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 v. Stroud* (2004) 32 Cal.4th 958, 970-971 (*Zamos*)). 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, we do not examine respondents' subjective state of mind in pursuing the unlawful detainer action or the adequacy of Simkin's legal research. (*Sheldon Appel Co.*, *supra*, at pp. 882-883; *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 (*Roberts*).)

This standard places a "high threshold" on malicious prosecution claims. (*Roberts*, *supra*, 76 Cal.App.4th at p. 382.) "Probable cause may be present even where a suit lacks merit. . . . Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit -- that is, those which lack probable cause -- are the least meritorious of all meritless suits. Only this subgroup of meritless suits

present[s] no probable cause. [Citation.]" (*Ibid.*) Thus, 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 (*Hufstedler, Kaus & Ettinger*).) This standard for bringing suits serves a vital policy consideration, as it "assures that litigants with potentially valid claims won't be deterred by threat of liability for malicious prosecution." (*Roberts*, *supra*, 76 Cal.App.4th at p. 382.)

Notwithstanding the "high threshold" described above, the probable cause standard does not oblige a plaintiff asserting a malicious prosecution claim to show that the entire prior action was legally untenable; it is sufficient to demonstrate that the action involved at least one untenable "theory" or "ground" of liability. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 677-679 (*Crowley*).) That rule promotes the fundamental interest protected by the malicious prosecution tort, namely, ""freedom from unjustifiable and unreasonable litigation."" (*Crowley*, *supra*, at pp. 686-687, italics omitted, quoting *Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 882.) Nor is it necessary to show that a party's lawsuit was tortious at the inception of the prior action, as the party "may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos, supra,* 32 Cal.4th at p. 970.)

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*, *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. of the Discussion, *ante*), Big Casey's had two alternative methods by which it could make a prima facie showing that the unlawful detainer action lacked probable cause. First, it could point to undisputed and relevant facts that upon a "fully developed" record demonstrated the absence of probable cause. (*Hufstedler, Kaus & Ettinger, supra*, 42 Cal.App.4th at p. 62; see *HMS Capital*, *supra*, 118 Cal.App.4th at pp. 216-217.) Second, it could submit sufficient evidence of relevant facts which -- if accepted by a jury -- established the absence of probable cause. (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881; see *Zamos*, *supra*, 32 Cal.4th at pp. 970-973.) Here, Big Casey's motion contended "the undisputed facts" showed that respondents lacked probable cause "to commence and/or maintain" the unlawful detainer action.

C. *Unlawful Detainer Actions*

As the issue of probable cause here concerns an unlawful detainer action, we examine the principles governing that type of proceeding. Generally, "[a]n unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain the possession of real property in the situations specified by statute. [Citations.] The statutory procedure must be strictly followed. [Citation.]" (*Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 746 (*Vasey*).) Under the statutory scheme, the remedy is available only for certain relationships, including the landlord-tenant relationship (*Taylor v. Nu Digital*

Marketing, Inc. (2016) 245 Cal.App.4th 283, 288-289), and "[t]he only triable issue is the right to possession and incidental damages resulting from the unlawful detention" (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 452).

The issues properly raised within an unlawful detainer action are thus limited in scope. "[A] defendant is not permitted to file a cross-complaint or counterclaim and, 'a defense normally permitted because it "arises out of the subject matter" of the original suit is generally excluded . . . if such defense is extrinsic to the narrow issue of possession. . . .' [Citation.] Nor may an unlawful detainer action be tried in conjunction with other causes or claims, except perhaps by mutual consent of the parties. [Citation.] . . . The denial of certain procedural rights which are enjoyed by litigants in ordinary actions is deemed necessary in order to prevent frustration of the summary proceedings by the introduction of delays and extraneous issues. [Citations]." (*Vasey, supra,* 70 Cal.App.3d at p. 747, quoting *Green v. Superior Court* (1974) 10 Cal.3d 616, 632-633.)

Section 1161 sets forth five situations in which the remedy applies, one of which involves nonpayment of rent. (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 650.) Pertinent here is the situation set forth in subdivision 1 of the statute, which does not implicate the nonpayment of rent: "When [the tenant] continues in possession . . . of the property . . . after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault

nature however brought about without the permission of his or her landlord . . . ; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code." Under the subdivision, a landlord may recover possession of the property and the reasonable rental value of the property after the tenancy is properly terminated. (§ 1174, subd. (b).) That value need not correspond to the rent set forth in any applicable lease. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1069.)

Here, Octalion's complaint alleged the existence of a month-to-month tenancy with Big Casey's based on an oral agreement. A month-to-month tenancy is potentially established in four ways, three of which involve the existence of a lease constituting a valid contract or agreement, namely, a written lease, an oral lease, or an implied-in-fact lease. (10 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 34:16, pp. 34-48 ["The relationship of landlord and tenant is the result of a contract, whether oral or written, express or implied"].) The enforceability of any such lease, viewed as a contract, is subject to the statute of frauds. (*Friedman v. Bergin* (1943) 22 Cal.2d 535, 539.) However, under that statute, an unwritten lease for an indefinite term requiring monthly rental payments is ordinarily enforceable. (*Gabel v. Page* (1907) 6 Cal.App. 618, 622-623; see *Psihozios v. Humberg* (1947) 80 Cal.App.2d 215, 221.)

Independent of the existence of a lease constituting a valid contract, a month-to-month tenancy may arise from a

so-called "tenancy at will." As our Supreme Court has explained, "Tenancies in property need not necessarily be created by valid leases. One may become a tenant at will or a periodic tenant under an invalid lease, or without any lease at all, by occupancy with consent. Such tenancies carry with them the incidental obligation of rent, and the liability therefore arises not from contract but from the relationship of landlord and tenant. The tenant is liable by operation of law." (*Ellingson v. Walsh, O'Connor & Barneson* (1940) 15 Cal.2d 673, 675.) Thus, when a tenant occupies the premises with the landlord's consent and pays monthly rent, there is a month-to-month tenancy, regardless of the existence of a valid contractual lease. (*Kevich v. R.L.C., Inc.* (1959) 173 Cal.App.2d 315, 323; *Kingston v. Colburn* (1956) 139 Cal.App.2d 623, 625.)

D. *Facts*

We summarize the key facts relating to the malicious prosecution action, none of which are in dispute.

1. *Events Preceding Unlawful Detainer Action*

In 2000, Fair Breeze Company Limited (Fair Breeze), as lessor, and Casey's Bar & Grill, Inc., as lessee, executed a written commercial lease relating to premises in downtown Los Angeles. The lease provided for a ten-year term, with an option to extend the term for two five-year periods, and

barred assignment of lease and subletting without Fair Breeze's written consent.

In 2003, with Fair Breeze's written consent, Casey's Bar & Grill, Inc., executed a written assignment of the lease that identified the "assignee" as collectively Big Casey's Leasing, LLC (Leasing), Michael Winn, and Mark Verge.

In 2010, Fair Breeze and Leasing entered into a first amendment to the lease extending its term for five years. The amendment identified the sole "[t]enant" as Leasing. Winn executed the amendment as president of Leasing.

In November 2011, Octalion bought the leased premises. Octalion received rent checks bearing Big Casey's name and signed by Cedd Moses. In March 2014, the California Franchise Tax Board suspended Leasing's powers, rights, and privileges (Rev. & Tax Code, § 23301 et seq.).[3]

In a letter to Octalion dated October 3, 2014, and bearing the business names "213 Made By DTLA" and "213NIGHTLIFE.COM," Verge requested that the lease be

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[3] Generally, "'the purpose of section 23301 of the Revenue and Taxation Code is to put pressure on [a] delinquent corporation to pay its taxes . . . .'" (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1366.) For that reason, "except for filing an application for tax-exempt status or amending the articles of incorporation to change the corporate name, a suspended corporation is disqualified from exercising any right, power or privilege." (*Id.* at p. 1365.) The suspension of a corporation, however, does not necessarily invalidate contracts it executed before the suspension. (*Erb v. Flower* (1967) 248 Cal.App.2d 499, 500; Rev. & Tax Code, § 23304.1, subd. (a).)

extended for an additional five-year term. Verge identified himself simply as "Lessee" and "President."

On December 15, 2014, Simkin sent a letter to Verge stating: "This office has been retained by Octali[o]n . . . concerning the above-referenced premises. Please identify for me who seeks to be a tenant at the above-referenced premises. The reason is while you may have a 'business name' of Casey's Irish Pub, I have no idea who or what is behind that business name from your October 3, 2014 letter."

On December 23, 2014, in response to a phone call on Verge's behalf by Peter Stanislaus, Simkin stated: "I reiterated to [Peter] that I need to know who, if anyone, you believe is the tenant. . . . [M]y review of the documentation that I have makes it appear that there is no existing lease with anyone concerning 'Casey's Irish Pub' . . . . Peter stated that . . . Verge and Cedd Moses are the principals behind 'Casey's Irish Pub.' However, I do not see their names on any lease documents."

On January 28, 2015, attorney David J. Lederer sent a letter to Simkin captioned: ". . . Re: Lease . . . between [Fair Breeze] and Casey's Bar and Grill, Inc., and First Amendment to Lease dated August 1, 2010 between [Fair Breeze] and [Leasing] and successor(s) in interest Casey's Bar and Grill Inc., and [Big Casey's]." The letter stated: "[O]ur office represents the above-referenced Tenant(s). This correspondence is . . . sent to confirm that my client does intend to exercise its option to extend said lease agreement . . . ."

On March 3, 2015, Octalion served a 30-day notice to quit on Big Casey's stating that its "tenancy or consent" to occupy the premises would end in thirty days and that it did not have "a lease with the landlord/owner." In a letter to Simkin dated March 10, 2015, Lederer asserted that Octalion had breached the lease agreement and the first amendment to that agreement, and that Simkin had "wrongfully denied the existence" of those documents.

2. *Unlawful Detainer Action*

On April 3, 2015, Octalion initiated an unlawful detainer action against Big Casey's by filing a form complaint, namely, Judicial Council Form UD-100. As completed, the complaint alleged in section 6(a) that on November 1, 2014, Big Casey's agreed to rent the premises as a month-to-month tenancy and agreed to pay $10,500 on the first of the month. In section 6(b), the form complaint offered only two choices -- in the form of boxes to be checked -- as to the nature of the agreement, namely, written or oral. As completed by respondents, the box for an oral agreement was checked, and section 6(b) otherwise alleged that the agreement was made with Big Casey's agent. The complaint sought recovery of the premises from Big Casey's as an unauthorized occupant following a 30-day notice to quit, as well as the reasonable rental value of the unauthorized occupancy. Narayanasami Ramachandran verified the complaint as a principal of Octalion.

On April 23, 2015, Leasing, Winn, and Verge filed prejudgment claims of right of possession. Those claims, executed under penalty of perjury, stated that Leasing, Winn, and Verge occupied the premises on the date Octalion's complaint was filed. Later, in a letter dated May 6, 2015, attorney Bryan J. Freedman, acting on behalf of Big Casey's, Leasing, Winn, and Verge stated that the complaint was meritless. He asserted that Leasing, Winn, and Verge were the sole lessees, and that Leasing was no longer a suspended corporation.

On May 7, 2015, Simkin responded that Freedman's clients "ha[d] deceived [his] client, dragged their feet and . . . only responded to [his] client after it ha[d] taken legal action." Simkin stated: "Since November 2014 my client has tried to informally resolve this matter and get a lease agreement at a fair market rental rate."

On May 13, 2015, Narayanasami Ramachandran appeared for a deposition as the person most qualified to testify on behalf of Octalion. Ramachandran stated that he was not a professional investor, and that the premises in question were located in the first commercial building he owned. According to Ramachandran, after Octalion bought the leased premises, it received rent checks from Big Casey's, which appeared to be occupying the building but was not the named lessee, namely, Leasing. Confused, Ramachandran engaged Simkin, who discovered that Leasing was a suspended corporation. When asked whether Octalion specifically entered into an oral month-to-month

agreement with Big Casey's, Ramachandran replied in the negative, but stated that "it could have been a month to month because when they don't have a lease and they're paying with a similar name, it's probably a month to month . . . ."

Trial occurred on May 20, 2015. Winn testified that although the first amendment of the lease identified only Leasing as the tenant, he and Verge were also lessees. He stated that Big Casey's was formed to handle Leasing's day-to-day operations, and denied that Big Casey's had a lease with Octalion. According to Winn, for reasons related to business efficiency, Big Casey's paid Leasing's rent. Winn also testified that he recently had learned that Leasing was no longer a suspended corporation.

Ramachandran testified that although the written lease agreement identified Leasing as the lessee, when he and his wife Manju became the owners of the leased premises, they received rent checks from Big Casey's. In November 2011, he entered into an oral month-to-month tenancy agreement with Big Casey's through discussions with Jeff Marino, who was "the face" of Big Casey's, and acted as its "decision maker pretty much." According to Ramachandran, Marino appeared to be "the only tenant" in the leased premises, which were small. Ramachandran stated, "I had this month-to-month arrangement with this gentleman, as long as someone was coming in to pay my small business administration dues and . . . loans, I was

comfortable with that. 'Cause I was not planning to evict them or throw them out."

Ramachandran explained the apparent inconsistency between his testimony in deposition and at trial by stating that he "might not have understood" the questions directed at him in the deposition; he also stated that English is not his first language. He further testified that in 2014, he became unhappy with Big Casey's as a tenant and the adequacy of its rent; additionally, he developed concerns regarding the precise nature of Octalion's relationship with Big Casey's. He thus engaged Simkin.

Manju Ramachandran testified that upon receiving Verge's October 3, 2014 letter, she decided that it was "the time to look into exactly what is [Octalion's] arrangement with [its] tenant." At that time, she was dissatisfied with Big Casey's as a tenant and Octalion's "terms." She did not believe that the amount of Big Casey's monthly rent -- which was identical to that set under the written lease -- was fair. Big Casey's also made deductions from the rent "as it pleased," and requested "other things" in a way that left her unhappy with Big Casey's way of "do[ing] business." Additionally, Manju did not understand Marino's relationship to Big Casey's. She viewed the situation as an opportunity to "get everything correct," and decided to ask a lawyer, "Do I have the right lease with the right company?" She denied that she ever entered into an oral agreement for a tenancy at the premises.

In view of Narayanasami Ramachandran's testimony, the trial court granted Octalion leave to amend the complaint to allege that the oral agreement was established in 2011. Following the close of testimony, Simkin requested leave to amend the complaint to add Leasing as a defendant and allege a claim for breach of the written lease. After the trial court denied that request, Big Casey's asserted a motion for judgment (§ 631.8). Before the court ruled on the motion, Octalion filed a voluntary dismissal of the action with prejudice.[4]

E. *Ruling on the Anti-SLAPP Motions*

In granting the anti-SLAPP motions, the trial court concluded that Big Casey's failed to show that respondents lacked probable cause in initiating and maintaining the unlawful detainer action. While acknowledging that Octalion probably did not demonstrate a month-to-month tenancy based on an oral agreement, the court determined that the facts available to Octalion reasonably showed the

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[4] We observe that in addition to these facts, Big Casey's malicious prosecution complaint alleged that during a settlement discussion prior to trial, Simkin made statements bearing on respondents' motivation in litigating the unlawful detainer action. In connection with the anti-SLAPP motions, Big Casey's submitted declarations supporting those allegations, and Simkin submitted a declaration denying that he made any such statements. As the alleged statements are not relevant to the existence of probable cause, we do not include them in our summary of the facts.

existence of such an implied-in-law tenancy based on Big Casey's monthly rent payments. The court determined that respondents reasonably believed that Leasing, the sole entity identified on the lease documents, was "an improper tenant or was out of the picture," as it was a suspended corporation and only Big Casey's paid rent. The court further determined that respondents reasonably believed that "some other entity" -- that is, Big Casey's -- "was actually in possession," noting that Big Casey's offered no evidence that it was not in possession. The court stated: "Where there was a reasonable basis to believe that a tenant can be evicted with 30 days notice . . . , alleging an oral agreement with Big Casey's . . . (apparently based on a layman's constructions of his conversations with the person authorizing payments for the occupant) . . . cannot constitute malicious prosecution."

F. *Analysis*

We see no error in the trial court's determinations. To make a prima facie case of a lack of probable cause in response to the anti-SLAPP motions, Big Casey's was required to submit substantial evidence showing that no reasonable attorney would have thought the unlawful detainer action was tenable in light of the facts known to respondents at the time the suit was filed, or that they continued pursuing the lawsuit after they had discovered the action lacked probable cause. (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1449.) Big Casey's was thus obliged

to show more than that it contested Octalion's factual allegations before or during the unlawful detainer action. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 167.) Rather, Big Casey's was required to raise a reasonable dispute regarding a narrower issue, namely, whether at some point respondents lacked an objectively reasonable basis for the unlawful detainer action. (*Ibid*.)

That issue focuses on whether respondents possessed "evidence sufficient to prevail in the [unlawful detainer] action or at least information reasonably warranting an inference there is such evidence." (*Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195.) Under that standard, a lawyer is generally entitled to rely on information provided by the client. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 223 (*Daniels*).) The lawyer may not rely on that information, however, upon discovering that it is false (*ibid*.), or upon presentation of "specific information as to verifiable facts that, if true, would totally negate [the] cause of action" (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 627, overruled on other grounds in *Zamos*, *supra*, 32 Cal.4th at p. 973 and *Reid v. Google* (2010) 50 Cal.4th 512, 532, fn. 7.) Nonetheless, a letter from opposing counsel containing a "'boilerplate'" denial of the allegations does not suffice to put the lawyer on notice of the falsity of the client's allegations. (*Daniels*, *supra*, at p. 223.)

Big Casey's failed to make a prima facie showing that respondents lacked probable cause to initiate the unlawful detainer action against Big Casey's. The record shows that

the initial written lease had a ten-year term that expired in 2010. Although Leasing, Winn, and Verge became assignees of the original lease in 2003, only Leasing was named as a tenant in the first amendment to the written lease, which extended the lease's term for five years. After Octalion acquired the property in November 2011, the Ramachandrans accepted monthly rent payments from Big Casey's, an entity not named in first amendment to the lease, which appeared to be the occupant of the premises. When the Ramachandrans became dissatisfied with Big Casey's as a tenant and received Verge's request to extend the lease, Simkin asked for clarification regarding Big Casey's status as tenant. Although attorney Lederer's January 28, 2015 letter referred to the lease documents and characterized Big Casey's as a "successors in interest," he did not state that Big Casey's had become a tenant under the lease by assignment or subletting, or request written consent for such a tenancy, as required by the lease. After receiving no answer to Simkin's question regarding Big Casey's status as tenant and learning that Leasing was a suspended corporation, respondents reasonably concluded that Big Casey's was a month-to-month tenant and gave it due notice to quit.

Big Casey's also failed to make a prima facie showing that respondents lacked probable cause in maintaining the unlawful detainer action against Big Casey's. Prior to the trial, Leasing, Winn, and Verge filed prejudgment claims of right of possession alleging that they occupied the premises

on the date of the complaint, and Big Casey's counsel informed respondents that Leasing was no longer a suspended corporation. However, those acts did not identify new evidence potentially fatal to Octalion's central contention that since November 2011, the sole rent-paying occupant of the premises was Big Casey's. Rather, Octalion received notice of issues collateral to that contention, namely, whether the premises had more than one occupant, and whether Leasing was an active corporation. As the trial court noted, the record discloses no direct evidence that Big Casey's was not an occupant of the premises.[5]

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[5] On appeal, Big Casey's asserts that Big Casey's, Leasing, Winn, and Verge, jointly filed a verified answer to the unlawful detainer complaint expressly denying that Big Casey's was in possession of the premises. Although that answer was not submitted to the trial court and is not part of the record, Big Casey's has included it in the appellant's appendix and relies on it in its briefs. Big Casey's suggests that the answer is cognizable on appeal because the trial court, in ruling on the anti-SLAPP motion, granted Octalion's request for judicial notice of "[a]ll pleadings, court testimony, and the court file pertaining to the underlying unlawful detainer action . . . ."

The answer is not properly before us. "Generally speaking, the [appellant's] appendix must contain only documents that were filed or lodged with the superior court." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 988; Cal. Rules of Court, rules 8.122(b)(3), 8.124(b)(1) & (2).) The trial court's grant of judicial notice did not circumvent that restriction, as it merely authorized the inclusion of the pleadings *submitted to it* in the record. (Cal. Rules of Court, rule 3.1306(c).) We therefore strike
(*Fn. continues on the next page.*)

Before the trial court and on appeal, Big Casey's has contended that Octalion lacked probable cause because its complaint alleged the existence of an oral agreement, but its principals presented inconsistent testimony in deposition and at trial whether such an agreement existed. Big Casey's maintains that the determination of probable cause is limited to "the allegations and theories of [Octalion's] complaint," arguing that unpleaded theories must be disregarded, even if meritorious. The crux of its contention is that the allegation of an oral agreement, as found in section 6 of the form complaint, necessarily restricted the inquiry regarding probable cause to whether respondents reasonably believed that there was a month-to-month tenancy due to such an agreement. We disagree.

As explained above (see pt. B. of the Discussion, *ante*), in *Crowley*, our Supreme Court held that to establish a malicious prosecution claim, the plaintiff need show only that at least one theory or ground of recovery litigated in the underlying action lacked probable cause. (*Crowley*, *supra*, 8 Cal.4th at pp. 677-679.) The court noted that although the defendant in the prior action must defend against any valid theory of liability, the presence of invalid theories of liability may require the defendant to present an additional burdensome defense impairing the defendant's "interest in

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the answer from the appendix. (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404; Cal. Rules of Court, rule 8.124(g).)

freedom from unjustifiable and unreasonable litigation." (*Id.* at p. 687.)

Crowley affirmed the Supreme Court's prior decision in *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 55 (*Bertero*). (*Crowley*, *supra*, 8 Cal.4th at p. 679.) The court in *Bertero* stated "A plaintiff . . . may safely sue on alternative theories after full disclosure to counsel when he possesses a reasonable belief in the validity of each of those theories. If his original pleading . . . advances a theory which subsequent research or discovery proves to be untenable the pleading may be amended. We see no reason for permitting plaintiffs . . . to pursue shotgun tactics by proceeding on counts and theories which they know or should know to be groundless." (*Bertero*, *supra*, 13 Cal.3d at p. 57, italics omitted.) As a corollary to the rule set forth in *Crowley* and *Bertero*, a party cannot escape liability for litigating a theory lacking probable cause by identifying another meritorious but *unlitigated* theory. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542; *Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 835-836.)

In our view, within the context of the unlawful detainer action at issue here, the four potential bases for a month-to-month tenancy (written lease, oral lease, implied-in-fact lease, and implied-in-law tenancy at will) are not reasonably viewed as distinct "theories," for purposes of the *Crowley-Bertero* rule. As explained below, the existence of those four bases presents no possibility of "shotgun tactics" (*Bertero*, *supra*, 13 Cal.3d at p. 57), and the allegations

relating to them on the form complaint do not identify facts requiring distinct and burdensome defenses. Octalion's complaint thus relied on a single theory of recovery -- namely, that of a month-to-month tenancy -- which Octalion possessed probable cause to assert throughout the unlawful detainer action.

Under the statutory scheme governing unlawful detainer actions, Octalion's complaint necessarily focused on a small set of issues. As explained above (see pt. C. of the Discussion, *ante*), the scheme governing such proceedings narrowly limits the issues that may be litigated. That is especially true under subdivision 1 of section 1161, which governed the underlying proceeding. Because Octalion's complaint alleged a month-to-month tenancy, it focused the proceeding on whether Big Casey's occupied the premises with Octalion's consent and paid monthly rent. The distinctions among the four bases for a such a tenancy merely reflected the manner in which any such consent was given. Those distinctions presented no factual questions potentially requiring separate and burdensome defenses capable of impairing Big Casey's "interest in freedom from unjustifiable and unreasonable litigation." (*Crowley*, *supra*, 8 Cal.4th at p. 687.)

Furthermore, Octalion's allegation of an oral agreement, as found in section 6 of the form complaint, identified no fact material to Big Casey's defense. Section 1166, which sets forth the key allegations required for an unlawful detainer complaint, does not demand any such

allegation.[6] Rather, the alternative options regarding the nature of the relevant agreement provided in section 6 of the form complaint -- namely, written or oral -- reflect the pleading requirement stated in section 430.10, subdivision (g), which authorizes a special demurrer when the complaint in a civil action "founded upon a contract" fails to specify whether the contract is written, oral, or implied by conduct. The key function of that requirement is to alert the defendant to potential defenses based on the statute of frauds (5 Witkin. Cal. Procedure (5th ed. 2008) Pleading, § 977, pp. 390-392) and the statutes of limitations (see *Bollotin v. Cal. State Personnel Board* (1955) 131 Cal.App.2d 197, 202). Any such contract-related defenses are ordinarily irrelevant when, as here, the landlord seeks recovery of possession from a month-to-month tenant and the reasonable value of any unlawful occupation following

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[6] Subdivision (a) of section 1166 states: "The complaint shall: [¶] (1) Be verified and include the typed or printed name of the person verifying the complaint. [¶] (2) Set forth the facts on which the plaintiff seeks to recover. [¶] (3) Describe the premises with reasonable certainty. [¶] (4) If the action is based on paragraph (2) of Section 1161, state the amount of rent in default. [¶] (5) State specifically the method used to serve the defendant with the notice or notices of termination upon which the complaint is based. This requirement may be satisfied by using and completing all items relating to service of the notice or notices in an appropriate Judicial Council form complaint, or by attaching a proof of service of the notice or notices of termination served on the defendant."

appropriate notice. (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2016) ¶¶ 8:218 - 8:219, pp. 8-87 - 8-88; see *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1074-1077.)

We therefore conclude that for purposes of the proceeding, the complaint's sole theory of recovery arose from the allegation (as amended at trial) that since November 2011, there was a month-to-month tenancy. The Ramachandrans consistently testified to facts supporting that allegation -- namely, that they had permitted Big Casey's to occupy the premises and pay monthly rent. The complaint's additional allegation regarding an oral agreement cannot reasonably be regarded as invoking a distinct theory of liability, as it functioned solely to spotlight possible defenses irrelevant to the action. Respondents thus possessed probable cause to initiate and maintain the unlawful detainer action, notwithstanding the Ramachandrans' conflicting testimony regarding the existence of an oral agreement. To conclude otherwise would be to chill the use of the unlawful detainer action, which is intended to be an expedited summary procedure.

Big Casey's also contends Octalion necessarily lacked probable cause predicated on an implied-in-law month-to-month tenancy, arguing that no such tenancy was possible because the premises were the subject of a written lease known to Octalion. We disagree.

Big Casey's relies on *Wal-Noon Corp v. Hill* (1975) 45 Cal.App.3d 605, 608 (*Wal-Noon Corp*.) which involved a

written commercial lease obliging the lessors to repair the pertinent building unless the damage was due to the lessee's neglect. After replacing the building's roof, the lessors discovered that the roof's leaks were attributable to the lessees, against whom they asserted a claim for damages based on the lease. (*Id.* at pp. 608-610.) The trial court concluded that although the lessors were entitled to damages, their recovery was properly reduced to reflect their failure to give notice that the roof was deteriorating due to the lessees' neglect. (*Id.* at p. 610.) On appeal, the lessors contended they were entitled to a full recovery of damages, asserting the existence of an implied-in-law contract grounded on equitable considerations. (*Id.* at pp. 612-613.) The appellate court disagreed, stating: "There cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time. [Citations.] The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." (*Id.* at p. 613.)

Wal-Noon Corp. thus stands for the well established proposition that "an action based on an implied-in-fact or quasi-contract cannot lie where there exists *between the parties* a valid express contract covering the same subject matter" (*Lance Camper Manufacturing Corp. v. Republic*

Indemnity Co. (1996) 44 Cal.App.4th 194, 203, italics added). This principle does not prohibit the existence of an express lease and an implied lease or tenancy relating to the same property but involving different parties. (See *Caron v. Andrew* (1955) 133 Cal.App.2d 412, 414-418 [after leasing construction equipment under written lease, lessors entered into separate enforceable implied-in-fact lease regarding its use with third party].) That is the situation presented here. In sum, the trial court did not err in granting the anti-SLAPP motions for want of a prima facie showing that Octalion lacked probable cause to initiate and maintain its unlawful detainer action.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.