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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GERALD V. HOLLINGSWORTH, Plaintiff and Appellant, v. JIMMY LOH AND SU LIU et al., Defendants and Respondents.	B275749 (Los Angeles County Super. Ct. No. BC603587)

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

Gerald V. Hollingsworth, in pro. per., for Plaintiff and Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Marc E. Rohatiner and Edward E. Weiman for Defendants and Respondents Jimmy Loh and Su Liu, CPAs, APC; and Su Liu.

Law Offices of Lee & Wong and Bryan Y. Wong; Law Offices of Steven P. Chang and Steven P. Chang for Defendant and Respondent Steven L. Sugars.

In this malicious prosecution action attorney Gary Hollingworth appeals from orders granting the anti-SLAPP special motions to strike (Code Civ. Proc., § 425.16) filed by respondents Jimmy Loh and Su Liu, CPAs, APC (hereafter, JLASL), an accounting firm, and its president, Su Liu; as well as by their former counsel, respondent Steven Sugars. Appellant has not made the requisite showing that a cross-complaint for defamation and intentional infliction of emotional distress filed against him in an earlier lawsuit was favorably terminated on the merits, or that it was brought without probable cause. We, therefore, affirm the orders.

FACTUAL AND PROCEDURAL SUMMARY

Appellant's malicious prosecution action stems from two earlier lawsuits.

In April 2012, JLASL sued its former employee Jenny Hui Duan Deng for misappropriation of trade secrets, unfair competition, and breach of fiduciary duty, alleging she had stolen its client list and had solicited its clients after her termination (hereafter, the JLASL action). A first amended complaint added allegations that Deng had stolen client files and business records as well, and asserted additional claims for conversion and accounting. Appellant represented Deng; attorney Peter Hwu represented JLASL. The JLASL action was voluntarily dismissed in September 2012. At the time, Hwu advised

appellant that the dismissal was due to JLASL's concern that Deng was judgment proof.

On October 8, 2012, appellant circulated a letter to Deng's customers, associates, and friends, in which he stated that her former employers had filed the JLASL action in an attempt to stop Deng from doing business as a bookkeeper and tax preparer; that by dismissing that action they had "implicitly admitted that their claims were without merit," and that the request for dismissal showed "there was never any justification for the lawsuit." The letter also advised that Deng was considering claims against her supervisors "for their conduct during the course of the lawsuit," and that she was ready to provide bookkeeping and tax preparation services.

On October 18, 2012, attorney Hwu circulated a letter, stating that the JLASL action had been dismissed because of concerns that any judgment against Deng would be uncollectable, and that the Los Angeles County Sheriff's Department was still conducting an investigation of JLASL's complaint against Deng.

In December 2012, Deng, still represented by appellant, sued JLASL and her former supervisors, Jimmy Loh[1] and Su Liu, for disability discrimination, harassment, and retaliation (hereafter, the Deng action). Deng also asserted claims for defamation, Labor Code violation, and intentional infliction of emotional distress based on Loh and Liu's alleged efforts to prevent her from obtaining other employment. Attorney Hwu was named as a defendant largely based on his October 18, 2012

[1] Appellant represents that Loh has since passed away.

letter.[2] On October 31, 2013, the defendants in the Deng action, represented by attorney Sugars, cross-complained against Deng by reasserting the claims that had formed part of the JLASL action. In addition, they asserted defamation and intentional infliction of emotional distress claims against Deng and appellant, based on appellant's October 8, 2012 letter.

Deng and appellant demurred to the cross-complaint. The demurrer was based in part on the argument that the defamation and intentional infliction of emotional distress claims could not be brought against appellant without leave of court under Civil Code section 1714.10 because they essentially alleged a conspiracy.[3] The alternative argument was that appellant's letter was not actionable because it expressed "predictable opinion" about the merits of a lawsuit, rather than a false statement of fact. The demurrer was overruled after a hearing in

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[2] Hwu's anti-SLAPP motion was denied on the sole ground that the claims against him were not covered by the anti-SLAPP statute, and the denial was affirmed on appeal. (*Deng v. Loh*, June 27, 2014, No. B249012 [nonpub. opn.].)

[3] Civil Code section 1714.10, subdivision (a) requires leave of court before a cause of action "against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client," is included in a complaint. Under subdivision (b), failure to obtain a court order is a defense to any action for civil conspiracy that can be raised by demurrer. The section does not apply if "the attorney has an independent legal duty to the plaintiff," or if the conspiracy is "in furtherance of the attorney's financial gain." (*Id.*, § 1714.10, subd. (c).) Any order under these subdivisions is appealable as a final judgment. (*Id.*, § 1714.10, subd. (d).)

December 2013. In January 2014, appellant appealed the ruling in case No. B253727 and answered the cross-complaint.

In May 2014, Deng filed a motion for judgment on the pleadings, arguing in part that the defamation claim was barred by the one-year statute of limitations. Her motion was denied as to that claim because the statute of limitations on the cross-complaint was tolled by the filing of her own complaint in the Deng action. The court granted the motion as to the claim for intentional infliction of emotional distress, reasoning that the cross-complaint failed to allege sufficiently outrageous conduct.

In August 2014, Sugars was replaced by JLASL and Liu's current attorney, Marc Rohatiner. On November 13, 2014, Rohatiner offered to dismiss the cross-complaint against appellant for a waiver of costs. Appellant did not respond. The cross-complaint against him was nevertheless dismissed in January 2015. In June 2015, Rohatiner wrote appellant that the cross-complaint was dismissed because Rohatiner had determined that it was likely barred by the statute of limitations.

The appeal in case No. B253727 from the overruling of appellant's demurrer originally was dismissed, then reinstated. No respondents' brief was filed. Appellant dismissed the appeal as moot in May 2015. The case summary of the Deng action indicates a request for dismissal of the cross-complaint as to Deng was filed on February 5, 2015. A notice of settlement of the entire case was filed in March 2015, and the case was dismissed. It was then reinstated, and a new request for dismissal as to Deng and an amended notice of settlement were filed in June 2015.

In December 2015, appellant filed this action for malicious prosecution. JLASL and Liu jointly, and Sugars separately, filed

a motion to strike under the anti-SLAPP statute. At separate hearings and in separate orders in May 2016, the court granted both motions, sustaining some of the evidentiary objections to appellant's declaration.

The court sustained objections to portions of the declaration that purported to state, on information and belief, facts pertaining to Deng's claims against Loh and Liu, and to report Deng's belief that the JLASL action was "frivolous and designed to quash competition from Deng."[4]

The court overruled the objections to appellant's claim that at the hearing on the demurrers in the Deng action, Sugars requested that appellant be disqualified as Deng's attorney.[5] After the hearing, Sugars reportedly offered to dismiss appellant if he withdrew, and threatened him with massive discovery and elimination of the attorney-client privilege if he did not. Appellant claimed that, because of the pending cross-complaint, he was "forced" to withdraw as Deng's counsel in March 2014.

In ruling on the motions, the court found the anti-SLAPP statute applied, and appellant failed to establish a probability of prevailing on the merits of his malicious prosecution action. Specifically, the court found that the cross-complaint was voluntarily dismissed as to appellant on a procedural ground—that it was barred by the statute of limitations—and thus was not favorably terminated. The court rejected as speculative appellant's alternative theories—that respondents dismissed

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[4] In the same portion of the declaration, appellant suggested broadly that demurrers were sustained to the original and amended complaints in the JLASL action, without clarifying what causes of action were affected.

[5] The request was denied.

appellant after they achieved their goal of forcing him to withdraw as Deng's attorney and after settling with Deng in December 2014. The court noted that the overruling of appellant's demurrer to the cross-complaint supported the finding of probable cause, and that it was reasonably debatable whether his October 8, 2012 letter included predictable opinions or false statements of fact. At the hearing on JLASL and Liu's motion, the court also found it was reasonably debatable whether the letter was a fair and true report of the JLASL action. At the hearing on Sugars's motion, the court noted appellant apparently was sued for an improper purpose—"to gain leverage to force him to withdraw as counsel"—but found it unnecessary to address the malice element after finding that the other two elements of the malicious prosecution tort were not satisfied.

This appeal from both orders followed.

DISCUSSION

I

Under the anti-SLAPP statute, a cause of action arising from a defendant's act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).) A malicious prosecution action falls within the purview of the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 (*Jarrow*).) To prevail on the merits of such an action, the plaintiff must demonstrate that the underlying case "(1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was

initiated with malice. [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).)

We review an order granting an anti-SLAPP motion to strike de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) We do not "*weigh* the credibility or comparative probative strength of competing evidence." (*Jarrow*, *supra*, 31 Cal.4th at p. 741, fn. 10.) Rather, we accept as true the evidence that favors the plaintiff and evaluate the defendant's evidence "'only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.) The plaintiff's action need only have "'minimal merit' [citation]" to survive an anti-SLAPP motion. (*Id.* at p. 291.)

Nevertheless, to prevail on an anti-SLAPP motion the plaintiff must "adduce competent, admissible evidence" as the courts will "disregard declarations lacking in foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory [citation]." (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 713, 714.) A party that fails to challenge the trial court's evidentiary rulings on appeal forfeits any claim of error as to them, and may not rely on evidence to which evidentiary objections were sustained. (See *Frittelli, Inc. v. 350 North Canon Drive , LP* (2011) 202 Cal.App.4th 35, 41.)

I

The "favorable termination" element requires that the end of the prior action ""reflect on the merits"" and tend to indicate the malicious prosecution plaintiff's "'innocence of or lack of responsibility for the alleged misconduct.' [Citation.]" (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 455–456.) Whether a termination by voluntary dismissal is favorable

depends "not on the malicious prosecution plaintiff's opinion of his *innocence*, but on the opinion of the dismissing party. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.) "The test is whether or not the termination tends to indicate the innocence of the [malicious prosecution plaintiff] or simply involves technical, procedural or other reasons that are not inconsistent with [that plaintiff's] guilt. [Citations.]" (*Ibid.*) Thus, "[a] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. [Citations.]" (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893–894.)

It is undisputed that the cross-complaint against appellant in the Deng action was voluntarily dismissed in January 2015. Respondents rely on attorney Rohatiner's reason for the dismissal, of which appellant was apprised in June 2015 (months before his filed the malicious prosecution action): that Rohatiner had determined the cross-complaint against appellant was likely barred by the statute of limitations. Appellant challenges that reason on several grounds, none of which is sufficiently grounded in law or supported by competent evidence.

Appellant argues that since he had not raised the statute of limitations as a defense, it could not have been the true reason for dismissing the cross-complaint against him. While the defense was not raised by way of Deng and appellant's demurrer, we do not know if any defenses were raised in the answer appellant filed after the demurrer was overruled as the answer is not in the record on appeal. Even assuming appellant had not raised the defense at the time the cross-complaint was dismissed,

it would be speculative to conclude that had the case against him proceeded further, appellant would not have attempted to assert that defense, just as Deng had done, or that the trial court would have declined to entertain it as to him. (See *Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859 [as to cross-complaint against non-party to the complaint, statute of limitations is not tolled by complaint]; *Sprague v. County of San Diego* (2003) 106 Cal.App.4th 119, 132 ["A trial court has discretion to permit the amendment of an answer to raise a statute of limitations defense in the furtherance of justice"].) In *Warren v. Wasserman, Comden & Casselman* (1990) 220 Cal.App.3d 1297, 1299 (*Warren*), a case on which appellant relies, the statute of limitations was raised as a defense to a cross-complaint in a motion for nonsuit at trial, and the court dismissed the cross-complaint based on that defense alone.

Based on Sugars's reported statements at and after the hearing on the demurrer in the Deng action, appellant urges us to accept as true his theory that the cross-complaint against him was dismissed once its true goal had been achieved—appellant had been forced to withdraw as Deng's counsel, and respondents had settled with Deng. That theory is problematic.

Like the appellant in *Warren*, *supra*, 220 Cal.App.3d 1297, 1302–1303, appellant confuses two of the elements of the malicious prosecution cause of action. Whether respondents—attorney Sugars and his clients—brought the cross-complaint against appellant for a strategic purpose independent of its merits may be relevant to the element of malice. (See *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1407 ["'malice is present when proceedings are instituted primarily for an improper purpose'"].) But it does not negate the

reason for dismissing the cross-complaint stated by attorney Rohatiner, whom appellant has not sued for malicious prosecution; nor does the fact that Sugars used the cross-complaint strategically to force appellant's withdrawal as counsel tend to establish that appellant was innocent of the charges against him. (See *Warren*, at p. 1303 [different elements of malicious prosecution tort serve different purposes].)

The record does not support appellant's claim that the cross-complaint was dismissed once the goals he identifies were achieved. In his declaration, appellant stated that he withdrew as counsel from the Deng action in March 2014; yet, the cross-complaint against him was not dismissed until January 2015. Meanwhile, in August 2014, attorney Sugars was replaced as well, and appellant makes no showing that attorney Rohatiner agreed with Sugars's strategy. That Rohatiner chose not to file a respondents' brief in the appeal in case No. B253727 and instead offered to settle the case against appellant for a waiver of costs does not tend to prove Rohatiner believed the cross-complaint against appellant was frivolous any more than it tends to prove that he believed, as he said, that it was procedurally barred.

Appellant assumes that a settlement with Deng was reached in December 2014; yet, there is no competent evidence supporting that assumption. Appellant admits he was not privy to any such settlement, but he speculates that a tentative agreement must have been reached at an October 2014 mediation. No such mediation is listed on the case summary of the Deng action to which he cites.

As the trial court correctly noted, appellant's contention that the voluntary dismissal of the cross-complaint was a favorable termination as to him is purely speculative. He has not

made a prima facie case on this element of the malicious prosecution action.

II

The "probable cause" element requires a determination whether an action was legally tenable based on the facts known to the attorney who initiated or prosecuted it. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878 (*Sheldon Appel*).) What facts the attorney knew is a factual question, but when the facts are undisputed, the probable cause issue is a legal question to be determined under an objective standard. (*Id*. at p. 881.) The test is whether "any reasonable attorney would have thought the claim tenable. . . ." (*Id*. at p. 886.)

As a general rule, probable cause may be established if a court has made an interim ruling on the merits in favor of the plaintiff in the underlying suit. (See *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1020 [grant of preliminary injunction]; *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 625 (*Swat-Fame*) [overruling of demurrer], overruled on others grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526 & *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [denial of summary judgment motion].) However, an interim ruling on "procedural or technical grounds . . . says nothing regarding the potential merit of the action and hence does not establish probable cause for its initiation." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 823.)

Appellant argues that the overruling of the demurrer in the Deng action was not on the merits since the court gave no reason for its ruling, and the demurrer did not address the merits of the defamation cause of action asserted against appellant in the

cross-complaint. That is not entirely correct. The demurrer raised both the technical defect of filing a defamation claim against appellant without prior leave of court and the substantive argument appellant makes on this appeal: that the October 8, 2012 letter expressed non-actionable opinions about the JLASL action. In overruling the demurrer, the court necessarily rejected both grounds. If the statements in appellant's letter "were so clearly expressions of opinion that any reasonable attorney would have so viewed them," the court would have sustained the demurrer since the cross-complaint would have failed to state a defamation claim as a matter of law. (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 69 (*Hufstedler*).)

Appellant relies on *Ross v. Kish* (2006) 145 Cal.App.4th 188, to argue that the overruling of a demurrer says nothing about the factual sufficiency of the complaint unless the court overruling the demurrer makes a finding that the allegations were true to the best of the attorney's knowledge. (See *id.* at p. 203, distinguishing *Swat-Fame*, *supra*, 101 Cal.App.4th at p. 625–626.) *Swat-Fame* does not stand for the proposition that such a factual finding must be made on demurrer. Rather, as the appellate court in *Swat-Fame* explained, on demurrer the trial court "concluded that a cause of action for fraud was stated" based on an "allegedly false statement." (*Id.* at p. 625.) The appellate court explained further that the lawyers' knowledge of the facts alleged in the complaint was undisputed on appeal. (*Ibid.*)

This appeal similarly raises no factual disputes regarding probable cause since the trial court sustained respondents' objections to the portion of appellant's declaration that offered his

and Deng's beliefs about the lack of merit of the JLASL action. The only arguments appellant made in the trial court and on appeal concern the legal sufficiency of the defamation claim against him on the sole ground that the October 8, 2012 letter cannot form a basis for such a claim either because it states non-actionable opinions, or because it is privileged. These are legal, not factual, arguments, except where reasonable minds may differ on the application of facts to law. (See *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 (*Ferlauto*).) *Swat-Fame*, *supra*, 101 Cal.App.4th 613 is, thus, not distinguishable. In light of "the trial court's special role in ruling on dispositive motions in libel cases," the overruling of the demurrer "is tantamount to a judicial declaration that, at a minimum," respondents' defamation claim was "objectively tenable." (See *Hufstedler*, *supra*, 42 Cal.App.4th at p. 69.)

On the merits, appellant relies on the fair report privilege in Civil Code section 47, subdivision (d), which allows some "flexibility and literary license" in "communications to the media concerning judicial proceedings." (*J-M Manufacturing Company, Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 105.) "The fair report privilege 'confers an absolute privilege on any fair and true report in, or a communication to, a public journal of a judicial proceeding, or anything said in the course thereof.' [Citation.]" (*Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 431.) It protects media defendants and "those who communicate information *to the media*. [Citation.]" (*Ibid*.) Appellant fails to explain how a private letter he sent to a select group of individuals qualifies as a communication to the media comparable to the press release in *J-M Manufacturing*. He cites

no authority for application of the fair report privilege under the circumstances of this case.

Appellant's alternative argument is that "disparaging comments by business litigants [are] generally understood not as statements of fact but as predictable opinion of the other side's motives." (*Ferlauto*, *supra*, 74 Cal.App.4th 1394, 1402, citing *Information Control v. Genesis One Computer Corp.* (9th Cir. 1980) 611 F.2d 781, 784 [applying California law].) However, as the court in *Information Control* acknowledged, "[i]t is often quite difficult to determine whether a publication constitutes a statement of fact or statement of opinion." (*Id.* at p. 783.) California courts apply a totality of the circumstances test, which requires careful examination of the facts of the particular case. (*Ferlauto*, at p. 1401.)

Appellant's assumption that any statement regarding litigation is a predictable opinion under California law is unwarranted. Respondents were free to argue that the statements in a press release to a trade journal in *Information Control*, *supra*, 611 F.2d 781, 784, which were "cautiously prefaced as representing 'the opinion of . . . management'" were distinguishable from the statements in appellant's private letter to Deng's friends and clients, which solicited business on Deng's behalf by representing that the JLASL action had been dismissed as meritless, even after JLASL's attorney had advised appellant that the action had been dismissed without prejudice for a different reason. If the defamation claim was arguable either as an application or extension of existing law, then the cross-complaint was pursued with probable cause.[6] (See *Sheldon*

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[6] Appellant does not separately challenge the claim for intentional infliction of emotional distress, and we do not address

Appel, *supra*, 47 Cal.3d at pp. 885–886; *Hufstedler*, *supra*, 42 Cal.App.4th at p. 69.)

Appellant has failed to state a prima facie case on the second element of the malicious prosecution tort. "If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated. [Citations.]" (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 875.) Since his malicious prosecution action fails as a matter of law, we affirm the orders without addressing the element of malice.

DISPOSITION

The orders are affirmed. Respondents are entitled to their costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.

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whether that claim was independently supported by probable cause.