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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GETFUGU, INC.,

Plaintiff and Respondent,

v.

PATTON BOGGS LLP et al.,

Defendants and Appellants.

B243244

(Los Angeles County
Super. Ct. No. BC468132)

APPEAL from an order of the Superior Court of Los Angeles County,

Deirdre Hill, Judge. Reversed with directions.

Sheppard, Mullin, Richter & Hampton LLP, Theona Zhordania,

Charles A. Danaher and Karin Dougan Vogel, for Plaintiff and Respondent.

Robie & Matthai, Edith R. Matthai, Kyle Kveton and Natalie A. Kouyoumdjian,
for Defendants and Appellants.

Defendants and appellants Patton Boggs LLP (Patton), Richard J. Oparil (Oparil), Cummins & White LLP (Cummins) and Iman Reza (Reza) (collectively, the Attorney Defendants) appeal an order denying their special motion to strike a malicious prosecution complaint by plaintiff and respondent GetFugu, Inc. (GetFugu).

In a previous lawsuit, *GetFugu 1*, GetFugu sued the Attorney Defendants on various theories, including malicious prosecution. The malicious prosecution claim in *GetFugu 1* was eliminated by an order granting a special motion to strike that cause of action, an order which was affirmed in a previous appeal. Because that ruling is *res judicata* with respect to the instant malicious prosecution claim, and because GetFugu did not show that the Attorney Defendants acted with malice, we find that GetFugu has not shown a probability of prevailing on its claim. Accordingly, the order denying the special motion to strike is reversed with directions to grant the motion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Previous Lawsuit, GetFugu 1.*¹
 - a. *In GetFugu 1, GetFugu Alleged a Cause of Action Against the Attorney Defendants for Malicious Prosecution*

On August 26, 2010, following the dismissal of a lawsuit against GetFugu (*Davies et al. v. GetFugu, Inc. et al.*) in the United States District Court, GetFugu and its president, Carl Freer, filed suit against the Attorney Defendants, alleging various causes of action, including malicious prosecution. (*GetFugu, Inc. et al. v. Patton Boggs LLP et al.*, L.A. Super. Ct. No. BC444530.) GetFugu and Freer pled the Attorney Defendants “filed a frivolous RICO action against Plaintiffs” and that the RICO causes of action were dismissed with prejudice by the United States District Court.

¹ This summary is based in part on two previous decisions related to this matter, *GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141 (*GetFugu*) and *GetFugu, Inc. v. Patton Boggs* (July 3, 2014, No. B235138 [nonpub. opn.]) (subsequent reference *GetFugu, supra*, B235138). The latter opinion is citable pursuant to California Rules of Court, rule 8.1115(b)(1).

On September 20, 2010, GetFugu and Freer, joined by Richard Jenkins, who was GetFugu's Chief Executive Officer, filed the operative first amended complaint in that action against the Attorney Defendants, alleging causes of action for malicious prosecution and defamation. "The [amended] pleading consisted of two unlabeled causes of action, captioned as 'First Cause of Action' and 'Second Cause of Action.' . . . [T]he operative complaint purported to set forth claims against the Attorney Defendants for malicious prosecution and defamation as well as declaratory relief." (*GetFugu, supra*, 220 Cal.App.4th at p. 147, fns. omitted.)²

b. *Attorney Defendants Successfully Moved to Strike the Malicious Prosecution Claim*

On November 22, 2010, the Attorney Defendants filed a special motion to strike the first amended complaint.

On January 20, 2011, the matter came on for hearing. "After taking the matter under submission, the trial court [(Judge Minning)] granted the Attorney Defendants' special motion to strike, with respect to both the malicious prosecution claim and the claim for defamation." (*GetFugu, supra*, 220 Cal.App.4th at pp. 148-149.)

In granting the special motion to strike with respect to the malicious prosecution claim, "the trial court noted Plaintiffs' concession that 'there has not yet been a "favorable termination" of the underlying action'" (*GetFugu, supra*, 220 Cal.App.4th at p. 147, fn. 7.)³ Thus, GetFugu admitted it could not establish a probability of prevailing on its malicious prosecution claim because it was incapable of satisfying an essential element of the tort.

² Although the causes of action were unlabeled, the first amended complaint in *GetFugu* 1 pled, inter alia, the Attorney "Defendants were warned repeatedly that the lawsuit [was] without legal merit, but continued to prosecute the claims."

³ To establish a claim for malicious prosecution, a plaintiff must plead and prove that the prior action (here, the RICO action against GetFugu) "(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." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.)

GetFugu appealed the order granting the special motion to strike. (*GetFugu, supra*, 220 Cal.App.4th 141.) However, its “cause of action against the Attorney Defendants for malicious prosecution [was] not in issue on appeal.” (*Id.* at p. 147, fn. 7.) GetFugu confined its arguments to the trial court’s striking of its defamation claims. (*Id.* at p. 149.)

In a published decision, the order granting the special motion to strike was partially reversed. The reviewing court concluded a cause of action against two of the Attorney Defendants for defamation based on a March 22, 2010 press release had the requisite minimal merit to withstand the special motion to strike. (*GetFugu, supra*, 220 Cal.App.4th at pp. 154-158.)

c. *Attorney Defendants Were Awarded Attorney Fees in GetFugu 1 for Having Prevailed, inter alia, on GetFugu’s Malicious Prosecution Claim*

On May 5, 2011, the Attorney Defendants filed a motion for an award of attorney fees and costs, on the ground they were entitled to such recovery as the prevailing defendants on a special motion to strike. (§ 425.16, subd. (c).) On August 3, 2011, the trial court granted the motion and directed GetFugu, Jenkins and Freer to pay \$120,000 to the Attorney Defendants. GetFugu appealed.

GetFugu, supra, B235138, addressed the impact of *GetFugu, supra*, 220 Cal.App.4th 141, on the Attorney Defendants’ right to attorney fees and costs.

Two of the Attorney Defendants, Reza and Cummins, fully prevailed on the special motion to strike. They defeated both the malicious prosecution and the defamation claims of GetFugu, Jenkins and Freer. Therefore, Reza and Cummins were entitled to recover their reasonable attorney fees and costs as against GetFugu, Jenkins and Freer. (*GetFugu, supra*, B235138, slip opn. at p. 6.)

As for the other two Attorney Defendants, Oparil and Patton, they were partially successful on the special motion to strike, entitling them to a partial recovery of attorney fees and costs. Oparil and Patton were fully successful as against Jenkins. They successfully moved to strike both of Jenkins’s causes of action, malicious prosecution

and defamation, entitling Oparil and Patton to recover their reasonable attorney fees and costs as against Jenkins. Oparil and Patton also were entitled to recover reasonable attorney fees and costs as against GetFugu and Freer insofar as Oparil and Patton successfully moved to strike GetFugu and Freer's cause of action for malicious prosecution. Following the issuance of *GetFugu, supra*, 220 Cal.App.4th 141, the sole surviving claim was a cause of action by GetFugu and Freer against Oparil and Patton for defamation; therefore, Oparil and Patton were not entitled to recover attorney fees attributable to that claim. (*GetFugu, supra*, B235138, slip opn. at p. 6.)

2. *The Instant Action, Getfugu 2*

a. *Pleadings*

On August 19, 2011, during the pendency of the appeal in *GetFugu, supra*, 220 Cal.App.4th 141, GetFugu filed the instant action against the Attorney Defendants, alleging a single cause of action for malicious prosecution. (L.A. Super. Ct. No. BC468132.) GetFugu pled that on November 25, 2009, the Attorney Defendants initiated the meritless complaint in *Davies v. GetFugu* in the United States District Court, they lacked probable cause in bring the federal action, the lawsuit was brought with malice, and the RICO claims were dismissed by the court at the pleading stage, with prejudice, on or about August 26, 2010.

b. *Attorney Defendants' Special Motion to Strike*

On February 3, 2012, the Attorney Defendants filed a special motion to strike, contending GetFugu was incapable of stating a legally sufficient clam for malicious prosecution because its malicious prosecution claim already had been adjudicated on the merits by Judge Minning and was currently being appealed. Further, even if GetFugu could overcome the fatal legal insufficiency of its complaint, the special motion to strike should be granted because the Attorney Defendants had probable cause to bring the underlying federal action against GetFugu.

c. *GetFugu's Opposition*

In opposition, GetFugu argued its first amended complaint in the prior action "did not include a malicious prosecution claim. Rather, the complaint included only

claims for defamation and declaratory relief.” Further, even if the prior complaint “contained a malicious prosecution claim . . . , [the Attorney Defendants’] argument would still fail.” GetFugu argued “the defamation action cannot serve as *res judicata* in this action because the putative malicious prosecution claim was not decided on the merits in the previous action.” As for the merits, GetFugu contended its cause of action for malicious prosecution had the requisite minimal merit necessary to avoid an early dismissal.

d. *Trial Court’s Ruling*

On June 20, 2012, the matter came on for hearing. The trial court rejected the Attorney Defendants’ contentions that the operative pleading was legally insufficient and that the court lacked subject matter jurisdiction because the malicious prosecution claim was being appealed in *GetFugu* 1. However, the court acknowledged that the complaint before it “mirrors” the allegations in the prior lawsuit. The court then found that GetFugu met its burden to establish a probability of success and denied the special motion to strike.

The Attorney Defendants filed a timely notice of appeal from the order denying the special motion to strike.⁴

CONTENTIONS

The Attorney Defendants contend their special motion to strike should have been granted because: (1) this malicious prosecution case is barred by the doctrine of *res judicata*; and (2) assuming arguendo this action is not barred by *res judicata*, GetFugu failed to meet its burden to show a probability of prevailing on the merits.

DISCUSSION

1. *General Principles; Standard of Appellate Review*

A special motion to strike “involves a two-step process. First, the defendant must make a *prima facie* showing that the plaintiff’s ‘cause of action . . . aris[es] from’ an act by the defendant ‘in furtherance of the [defendant’s] right of petition or free

⁴ The order is appealable. (§ 425.16, subd. (i), § 904.1, subd. (a)(13).)

speech . . . in connection with a public issue.’ [Fn. omitted.] (§ 425.16, subd. (b)(1).) If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’ ” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*), fn. omitted.)

In other words, to defeat a special motion to strike, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.)

Review “of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 269, fn. 3.)

2. *GetFugu’s First Amended Complaint in GetFugu 1 Alleged a Cause of Action for Malicious Prosecution*

It is settled that malicious prosecution claims by their very nature arise out of a defendant’s protected petitioning activity, i.e., the filing of an underlying lawsuit, and therefore are subject to a special motion to strike. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Here, GetFugu argues that res judicata cannot apply to bar its claim because its first amended complaint in *GetFugu 1*, which was the operative complaint, merely pled a claim for defamation. In other words, GetFugu takes the position that because malicious prosecution was not an issue in *GetFugu 1*, said issue could not have been litigated therein. The argument does not detain us.

As set forth above, the reviewing court, in the two prior appeals, recognized that GetFugu’s malicious prosecution claim was eliminated by Judge Minning pursuant to the Attorney Defendants’ special motion to strike (*GetFugu, supra*, 220 Cal.App.4th at

p. 147, fn. 7), and that all four of the Attorney Defendants were entitled to recover attorney fees insofar as they successfully moved to strike the malicious prosecution claim. (*GetFugu, supra*, B235138, slip opn. at p. 6.) The latter decision, relating to attorney fees, specifically found Reza and Cummins “defeated both the malicious prosecution and the defamation claims” and that “Oparil and Patton successfully moved to strike GetFugu and Freer’s cause of action for malicious prosecution.” (*Ibid.*)

Therefore, the record belies GetFugu’s contention that it omitted a cause of action for malicious prosecution from its first amended complaint in *GetFugu* 1.

3. *The Order in GetFugu 1 Granting the Attorney Defendants’ Special Motion to Strike GetFugu’s Cause of Action for Malicious Prosecution Is Res Judicata; Therefore, in the Instant Case, GetFugu Cannot Demonstrate a Probability of Prevailing on its Malicious Prosecution Claim*

The doctrine of res judicata is applicable “if (1) the decision in the prior proceeding is *final and on the merits*; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding.” (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202, italics added; accord, *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 577.)

GetFugu contends that even assuming Judge Minning granted the Attorney Defendants’ special motion to strike with respect to a malicious prosecution claim in the first amended complaint, any such ruling “was not on the merits of the claim, and thus could not operate as a bar to refile the claim.” We reject the argument and conclude that all three elements of res judicata are satisfied.

An order “granting a motion to strike under section 425.16 results in the dismissal of a cause of action *on the merits*.” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193, italics added (*Varian*), citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) An “anti-SLAPP motion goes ‘*to the merits* of the issues involved in the main action’ [citation] to the extent it addresses the ‘probability . . . the plaintiff will prevail on the claim’ (§ 425.16, subd. (b)(1)).”

(*Varian, supra*, at p. 193, italics added.) A contrary rule, allowing a plaintiff to relitigate a cause of action that has been stricken pursuant to a special motion to strike would eviscerate the anti-SLAPP statute. Therefore, Judge Minning’s decision in *GetFugu 1* granting the Attorney Defendants’ special motion to strike the malicious prosecution claim, a ruling which was upheld after it was not challenged on appeal (*GetFugu, supra*, 220 Cal.App.4th at p. 147, fn. 7), was a decision on the merits of GetFugu’s malicious prosecution claim and became final long ago.⁵

Further, the instant proceeding involves the same cause of action as in *GetFugu 1*. In both lawsuits, GetFugu pled a cause of action against the Attorney Defendants for malicious prosecution for their role in bringing the RICO action against GetFugu in the United States District Court.

Finally, this proceeding and *GetFugu 1* involve the same parties. GetFugu, the plaintiff herein, also was a plaintiff in *GetFugu 1*. Likewise, the four Attorney Defendants herein were defendants in *GetFugu 1*.

Accordingly, the doctrine of res judicata precludes the instant cause of action for malicious prosecution.⁶

⁵ We are mindful Judge Minning’s decision did not become final until the issuance of the remittitur in *Getfugu 1*, which occurred on December 5, 2013, during the pendency of the instant appeal. However, “[w]here the judgment in one suit becomes final through lapse of time or affirmance on appeal while an appeal is still pending in another court from judgment in the other action, the first final judgment may be brought to the attention of the court in which an appeal is still pending and relied on as res judicata. [Citation.]” (*Domestic & Foreign Pet. Co., Ltd. v. Long* (1935) 4 Cal.2d 547, 562; accord, *Causey v. Board of Pension Commissioners* (1984) 152 Cal.App.3d 484, 490.) Therefore, the judgment in *Getfugu 1* is final for purpose of res judicata.

⁶ We observe GetFugu could have avoided the bar of res judicata by voluntarily dismissing its malicious prosecution claim in *GetFugu 1*, without prejudice, prior to the hearing before Judge Minning. “ ‘The term “without prejudice,” in its general adaptation, means that there is no decision of the controversy on its merits, and leaves the whole subject in litigation as much open to another application as if no suit had ever been brought.’ [Citations.]” (*Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 465.) Instead, GetFugu allowed its malicious prosecution claim to be submitted to Judge Minning for decision. In the present lawsuit, GetFugu cannot avoid the impact of

4. *GetFugu's Opposition to the Special Motion to Strike Failed to Address the Essential Element of Malice*

Leaving aside the issue of res judicata, there is an independent ground for reversing the order denying the special motion to strike.

As set forth in Section 1 of the Discussion, *ante*, a special motion to strike involves a two-step process. The initial burden is on the defendant, as the party bring the special motion to strike, to show the complaint against defendant arises out of defendant's protected activity. If a defendant meets this threshold showing, the cause of action must be stricken unless the plaintiff can establish a probability that it will prevail on its claim. (*Simpson, supra*, 49 Cal.4th at p. 21; *Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 457.)

Thus, the Attorney Defendants' burden was to demonstrate the malicious prosecution cause of action arose from protected activity. Since it is undisputed that the Attorney Defendants met their initial burden, the burden then shifted to GetFugu to establish a probability of prevailing on its malicious prosecution claim. In this regard, the trial court found: "As to the 'malice' element, plaintiff does not present any evidence. . . . Plaintiff has the burden to show a prima facie case, including evidence in support of each of the elements of a malicious prosecution cause of action. It has not done so. However, complaint at par. 22, which states that the evidence of defendants' malice includes 17 purported examples. Defendants do not argue that this element is lacking."

Contrary to the trial court's ruling, the Attorney Defendants did not have the burden to show the element of malice was lacking. Rather, the burden was with GetFugu, in resisting the special motion to strike, to show a prima facie case with respect to each of the elements of malicious prosecution. The trial court's resort to the allegations of GetFugu's *unverified* complaint to make out a prima facie case on

Judge Minning's adverse ruling simply by arguing that its malicious prosecution claim was premature at the time Judge Minning ruled on the matter.

GetFugu's behalf was clearly erroneous. In ruling on a special motion to strike, "[i]n assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence. [Citations.]" (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614; compare *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1290 ["verified allegations based on the personal knowledge of the pleader may be considered in deciding a section 425.16 motion"].)

In sum, in opposing the special motion to strike, GetFugu failed to make a prima facie showing with respect to the element of malice. Because GetFugu failed to meet its burden to show a probability of success, the Attorney Defendants' special motion to strike should have been granted.

DISPOSITION

The June 20, 2012 order denying the Attorney Defendants' special motion to strike is reversed with directions to grant the motion to strike GetFugu's malicious prosecution complaint in its entirety. As prevailing defendants on the special motion to strike, the Attorney Defendants shall recover their reasonable attorney fees. (§ 425.16, subd. (c)(1).) In addition, the Attorney Defendants shall recover their costs on appeal.

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LAVIN, J.*

WE CONCUR:

PERLUSS, P. J.

ZELON, J.

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