Filed 1/23/18 La Grange v. Ward CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DEBRA LA GRANGE, Plaintiff and Appellant, v. R. JEFFERY WARD, Defendant and Respondent.	B275459 (Los Angeles County Super. Ct. No. BC522917)

APPEAL from an order of the Superior Court of Los Angeles County, Marc Marmaro, Judge. Affirmed.

Manahan Flashman & Brandon and David M. Brandon for Plaintiff and Appellant.

Seki, Nishimura, & Watase, Bill H. Seki, Andrew C. Pongrancz and Kari C. Kadomatsu for Defendant and Respondent.

INTRODUCTION

This is the second appeal in this malicious prosecution action. In the underlying action two plaintiffs sued their employer and his wife for employment discrimination and harassment. One plaintiff prevailed against the employer, the other did not, and neither plaintiff prevailed against the employer's wife, who subsequently filed this action for malicious prosecution against the plaintiff who did not prevail against the employer. The unsuccessful plaintiff in the underlying action, the defendant in the action for malicious prosecution, filed a special motion to strike under Code of Civil Procedure section 425.16,[1] commonly referred to as an anti-SLAPP motion. The trial court denied the motion in part (declining to strike the malicious prosecution cause of action), and we affirmed. (*La Grange v. Tran* (Nov. 12, 2015, B255835) [nonpub. opn.] (*La Grange I*).)

Meanwhile, while the appeal was pending but before we issued our opinion, the plaintiff in the malicious prosecution action added as a Doe defendant the attorney who had represented the plaintiffs in the underlying action. Pursuant to the parties' stipulation, the trial court stayed the malicious prosecution action pending our decision in *La Grange I*. After we issued the remittitur in *La Grange I*, the attorney defendant filed a special motion to strike under section 425.16. The trial court granted the motion, exercising its discretion to hear the motion even though it was untimely and ruling, among other things, the malicious prosecution plaintiff did not show a probability of

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1 Statutory references are to the Code of Civil Procedure.

prevailing because her action was barred by the statute of limitations. This is the appeal from that order.

We conclude the trial court did not abuse its discretion in hearing the attorney's special motion to strike more than 60 days after service of the complaint on the attorney. We also conclude the malicious prosecution action against the attorney is barred by the statute of limitations. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Action*

As described in detail in *La Grange I*, Tina Tran (Tran) and her sister Neenah Tran sued their employer Harry Haralambus, his company Beyond Blue, Inc., and his wife Debra La Grange (as a Doe defendant) for various and numerous employment-related torts. The Trans asserted 13 causes of action, including for sexual harassment and discrimination, sexual battery, civil rights violations, and intentional infliction of emotional distress. After a court trial, Neenah Tran prevailed and recovered $22,625 in compensatory damages. Tina Tran did not prevail. Regarding Tina Tran's claims against La Grange, the court found that Tran "failed to meet her burden of proving by a preponderance of the evidence any of the causes of action asserted by her against [La Grange]" and concluded there was "no factual basis for liability for [La Grange] as to any cause of action asserted by [Tran] in this action."

The court entered judgment on September 28, 2011. (*La Grange I*, *supra* B255835, at pp. 2-5.) This date is relevant to the statute of limitations issue in the malicious prosecution action.

B. *The Malicious Prosecution Action*

On September 27, 2013 La Grange filed this action against Tina Tran for malicious prosecution, abuse of process, and intentional infliction of emotional distress. La Grange alleged Tran had no factual basis for suing her in the underlying action and did so only to embarrass her and force a settlement of the action against her husband. (*La Grange I*, *supra* B255835, at pp. 2-5.)

On January 17, 2014 Tran filed a special motion to strike La Grange's complaint under section 425.16. Tran stated in her supporting declaration: "La Grange was added as a defendant based on my good faith belief that La Grange had aided and abetted Haralambus' harassment and discrimination, and that she retaliated against me after my allegations of harassment against her husband were made public. In making this determination, I consulted with R. Jeffery Ward, a licensed attorney. I disclosed all of the facts known to me to Mr. Ward and relied upon his advice that my claims against Ms. La Grange were tenable." (*La Grange I*, *supra* B255835, at pp. 7-8.) This part of Tran's January 2014 declaration is relevant to the statue of limitations issue in the malicious prosecution action because La Grange claims that, until she received this declaration and read these sentences (and for a reasonable amount of time afterward), she did not have grounds to add Ward as a defendant to this action.

On March 27, 2014 the trial court denied the motion to strike in relevant part. On April 22, 2014 Tran appealed.

C. *A Doe Defendant*

On January 20, 2015, while Tran's appeal from the order denying her special motion to strike the malicious prosecution action was pending, La Grange added Ward as a Doe defendant to that action, and served him with the summons and complaint by substitute service so that his response was due March 18, 2015. (See § 415.20.) On that date Ward filed a demurrer, but not a special motion to strike.

La Grange did not file an opposition to the demurrer. Instead, on May 22, 2015 the parties submitted a stipulation to stay the action pending Tran's appeal, which the trial court approved. This stipulation, which is relevant to one of the issues in this appeal, asked the court to vacate all dates and stay all "deadlines, hearings and aspects of" the case "pursuant to section 916 or pursuant to the Stipulation of the parties." The stipulation further provided, "Notwithstanding this Stipulation entered into by all the parties in this entire action, [La Grange] makes specific mention herein that said Stipulation is agreed to as a matter of judicial efficiency in respect of the proceedings, and states that Section 916 does not in itself stay the proceedings against Defendant Ward, which Defendant is unaffected by the order which . . . Tran has appealed." For some reason, probably for non-payment of the $20 fee, the parties submitted the same stipulation again on June 4, 2015, and the court approved it again.

D. *La Grange I*

On November 12, 2015 we filed our decision in Tran's appeal from the trial court's March 27, 2014 order denying Tran's motion to strike La Grange's malicious prosecution cause of

action. Among other things, we held that collateral estoppel did not bar La Grange's cause of action and that La Grange had made a sufficient showing of malice on the second step of the two-step analysis under section 425.16. (*La Grange I*, *supra*, B255835, at pp. 10-15; see *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.) We also held Tran's advice of counsel defense did not bar La Grange's malicious prosecution cause of action as a matter of law. (*La Grange I,* at pp. 15-17.) In connection with the latter ruling, we stated: "[W]hether the advice of counsel defense applies depends on a fact-specific inquiry into what Tran did and did not disclose to her attorney, including whether she fully and fairly disclosed all of the relevant facts or she withheld evidence that would have defeated her claims against La Grange. Tran's testimony in the underlying action that La Grange was not involved in the conduct that gave rise to Tran's claims, and the court's findings in the underlying action that Tran had no basis for asserting any of her causes of action against La Grange, strongly suggest that Tran did not make a full and fair disclosure to her attorney. And Tran did not submit any evidence that she made such a disclosure. In her declaration in support of her special motion to strike, Tran did not describe any of the facts she disclosed to her attorney, but stated only the general conclusion that she 'disclosed all of the facts known' to her. It may be, after Tran waives the attorney-client privilege and discloses the contents of her discussions with her attorney in the underlying action, and allows La Grange to take discovery on those discussions, that Tran will prevail on her advice of counsel defense (assuming she files an answer alleging that affirmative

defense). But not as a matter of law on this record." (*Id.* at p. 17.)

On January 19, 2016 this court issued its remittitur. On February 2, 2016 La Grange gave notice that this court had issued its remittitur. On February 10, 2016 the clerk of the superior court received the remittitur. On February 25, 2016 Tran filed a motion for attorneys' fees under section 425.16, subdivision (c), arguing that, because the court struck two of La Grange's three causes of action (for abuse of process and intentional infliction of emotional distress), Tran was the "prevailing party" entitled to attorneys' fees. The court ultimately denied the motion because neither side complied with the court's orders requiring further briefing.

E. *Ward's Special Motion To Strike*

On March 25, 2016 Ward filed a special motion to strike La Grange's complaint against him. He argued, among other things, that section 425.16 applied to La Grange's cause of action for malicious prosecution and that La Grange could not show a probability of prevailing because the statute of limitations and the litigation privilege barred her causes of action. Specifically, Ward argued the amendment adding him as a Doe defendant in January 2015 did not relate back to the filing of the complaint in September 2013. Ward also argued he had probable cause to bring claims on behalf of Tran against La Grange as an aider and abettor and he did not act or pursue the underlying action with malice.

La Grange objected to the court hearing Ward's special motion to strike because it was untimely under section 425.16, subdivision (f), which states that "[t]he special motion may be

filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." La Grange contended that Ward filed his special motion to strike more than a year after he was served with the complaint and that the court should not exercise its discretion to hear the motion so long after service. She argued, "Indeed, in this case it would be totally unjust and an abuse of discretion to allow the Defendant, Ward, a licensed attorney, to file his Special Motion to Strike some **393** days after being served with the Complaint."

In opposition to the motion, La Grange argued on the statute of limitations issue that her Doe amendment related back to the original complaint. La Grange also argued "it was not until the filing and serving of Tran's Declaration (in which she blames her attorney for her decision to sue [La Grange]) in this case on or about January 17, 2014 and a reasonable time thereafter, that [La Grange] learned of the bad acts of Defendant Ward. The trigger for the statute of limitations is after the filing of Tran's Declaration and a reasonable amount of time to discover Defendant Ward's actions. From this date, [La Grange] timely filed her Doe Amendment within one year."

The trial court granted the motion. The court overruled La Grange's timeliness objection because the parties had stipulated to, and the court had ordered, a stay of the case pending resolution of the appeal in *La Grange I*. The court ruled that, "taking into account the period of time during which the action was stayed, Ward filed this motion with relative diligence, even if not within 60 days of initially being served [with] the complaint as a doe defendant." The court stated that, in exercising its discretion to hear the motion, "the court determines that Ward should not be penalized for waiting to bring this

motion until after the Court of Appeal issued the remittitur, since pursuant to the parties' stipulation the action was stayed as to Ward as well as Tran. The result is that while Ward did not file this motion during the 104 days from service of the summons and complaint until entry of the stipulation staying the action, he did bring the motion 52 days after the issuance of the remittitur. In light of the policy underlying [section 425.16] to dispose of SLAPPs at the earliest stage of the case, and the court's determination that [La Grange] has not shown a probability of prevailing on the merits, the court finds that Ward's motion is not untimely . . . ." (Fn. omitted.)

On the merits, the trial court ruled Ward had met his burden of showing La Grange's cause of action for malicious prosecution against him arose from the protected activity of suing La Grange on behalf of Tran, and continuing to prosecute La Grange, in the underlying action. The court ruled, however, La Grange had not met her burden of showing a probability of success on the merits because the statute of limitations barred her cause of action for malicious prosecution and the litigation privilege barred her causes of action for abuse of process and intentional infliction of emotional distress. The court ruled that neither the discovery rule nor the relation back doctrine applied to La Grange's malicious prosecution cause of action against Ward. La Grange timely appealed, challenging only the court's order striking her malicious prosecution cause of action.

DISCUSSION

A. *Special Motions To Strike Under Section 425.16*

"'A strategic lawsuit against public participation, or SLAPP suit, is one which "seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances."' [Citations.] 'Section 425.16 . . . provides a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' [Citations.] 'The statute "authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue."'" (*Shahbazian v. City of Rancho Palos Verdes* (2017) 17 Cal.App.5th 823, 829-830, fn. omitted.)

"In ruling on a motion under section 425.16, the trial court engages in a two-step process: 'First, the defendant must establish that the challenged claim arises from activity protected by section 425.16.' [Citations.] If the moving party fails to demonstrate that any of the challenged causes of action arise from protected activity, the court denies the motion. [Citations.] If the defendant makes the required showing at the first step, 'the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.' [Citation.] We review de novo an order granting or denying a special motion to strike under section 425.16." (*Shahbazian v. City of Rancho Palos Verdes*, *supra*, 17 Cal.App.5th at p. 830.)

B. *The Trial Court Did Not Abuse Its Discretion in Hearing Ward's Special Motion To Strike*

A party must file a special motion to strike a complaint pursuant to section 425.16, subdivision (b), within 60 days of the service of the complaint "or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f); see *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 351; *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 775 (*Platypus Wear*).) Among other things, "[t]he purpose of these timing requirements is to facilitate the dismissal of an action subject to a special motion to strike early in the litigation so as to minimize the cost to the defendant" (*Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 682) and "'to avoid tactical manipulation of the stays that attend anti-SLAPP proceedings'" (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 624 (*San Diegans*)).

Ward concedes his special motion to strike was untimely, although how untimely is debatable. La Grange calculates Ward's motion was 393 days late because she includes the time the case was on appeal in *La Grange I*. Ward does not propose a precise number of days by which he missed the statutory deadline, but he excludes the time the case was stayed pending the appeal in *La Grange I* and he uses the date he received the remittitur from this court (a Saturday) rather than the date the clerk of this court mailed the remittitur. Based on these assumptions, Ward argues he filed his motion 48 days after he received the remittitur, which is less than 60 days. On the front end, Ward does not dispute the parties entered the stipulation to stay the case 95 days after Ward was served (which is more than 60 days), although he did file a timely demurrer to the complaint

(i.e., within 40 days), which the court never heard because the court stayed the case before the hearing on the demurrer. La Grange argues the trial court abused its discretion in hearing Ward's special motion to strike under the circumstances of this timeline.

Discretion under section 425.16, subdivision (f), "refers to a zone of latitude within which a trial court's actions must be upheld on appeal." (*Hewlett-Packard Company v. Oracle Corporation* (2015) 239 Cal.App.4th 1174, 1187.) "In determining whether to permit a late motion, the most important consideration is whether the filing advances the anti-SLAPP statute's purpose of examining the merits of covered lawsuits in the early stages of the proceedings. [Citations.] Other relevant factors include the length of the delay, the reasons for the late filing and any undue prejudice to the plaintiff." (*San Diegans*, *supra*, 240 Cal.App.4th at p. 624; see *Platypus Wear*, *supra*, 166 Cal.App.4th at p. 776 ["[i]n exercising its discretion in considering a party's request to file an anti-SLAPP motion *after* the 60-day period, a trial court must carefully consider whether allowing such a filing is consistent with [the] purpose" of "ensuring the *prompt* resolution of lawsuits that impinge on a defendant's free speech rights"].) The court may, but need not, consider the merits of the motion when exercising its discretion under section 425.16, subdivision (f), to hear an untimely motion. (See *Chitsazzadeh v. Kramer & Kaslow*, *supra*, 199 Cal.App.4th at p. 682 ["a court may wish to consider the merits of the motion to determine whether the purposes of the anti-SLAPP statute

would best be served if the court considered the merits of and granted the motion"].)[2]

The trial court's decision to allow Ward to file an untimely motion under section 425.16 advanced the purpose of the statute because it allowed the court to examine, in the early stages of La Grange's lawsuit against Ward, causes of action to which the statute applied. Although La Grange's action against Tran had been pending for several years (since September 2013), her action against Ward had not. In comparison to the action against Tran, the action against Ward was still in its infancy; it had been pending against Ward for less than two months (from March 17 when he appeared to May 11, 2015) when he and Tran agreed to stay it. The only thing that happened during that time was that Ward filed a demurrer Tran never opposed and the court never heard. After that, the case was stayed for eight months (May 2015 to January 2016), and Ward filed his motion two months later. And nothing happened between the issuance of the remittitur and the filing of Ward's motion. The trial court's decision to exercise its discretion to hear Ward's untimely motion was entirely consistent with the purpose of section 425.16 to

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[2] In arguing that the court cannot consider the merits of the motion to strike in exercising its discretion to hear an untimely motion, La Grange quotes *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 286 and asserts: "California courts have expressly held that a trial court's 'discretion to permit or deny an untimely motion ***cannot*** turn on the final determination of the merits of the motion.'" La Grange, however, does not quote the next sentence of the court's opinion in that case: "This is not to say that the trial court might not 'peek' at the strength of the merits as a factor." (*Olsen*, at p. 286.)

reach the merits of La Grange's action against Ward while it was still in its early stages. (See *Hewlett-Packard Company v. Oracle Corporation*, *supra*, 239 Cal.App.4th at p. 1188 ["'[s]ection 425.16 . . . establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure *at an early stage of the litigation*'"].)

Moreover, there was a good reason for the delay: The case was stayed for most of the time. And La Grange cannot be heard to complain about prejudice arising from a stay she requested. Indeed, the only prejudice she identifies is having to oppose two special motions to strike in the same case. La Grange, however, would suffer that "prejudice" even if Ward's motion were timely.

The cases relied on by La Grange are distinguishable. In *Platypus Wear*, *supra*, 166 Cal.App.4th 772 the court reversed an order granting a special motion strike, finding the trial court had abused its discretion in allowing a defendant to file an untimely special motion to strike. *Platypus Wear*, however, was a very different case. The defendant in that case waited two years before seeking permission to file a special motion to strike, "the parties had completed substantial discovery in the case" (*id.* at p. 776), the trial was three months away, and the only reasons the defendant gave "for allowing the late filing of his anti-SLAPP motion were that doing so would serve both judicial economy and the public policy behind the anti-SLAPP statute" (*id.* at p. 784), which, the court pointed out, "could apply to *any* late filing" (*ibid.*). The court concluded that "one of the basic purposes of the anti-SLAPP statute—to allow for the prompt resolution of disputes before significant pretrial discovery expenses are incurred—could not be met in this case. In fact, allowing the late filing *undermined* this goal, in that the trial court continued the

trial date, at [the defendant's] request, after the hearing on the anti-SLAPP motion." (*Id.* at p. 784.) The court held that, "[w]hile a trial court enjoys considerable discretion regarding whether to allow the late filing of an anti-SLAPP motion, in this case, the delay was extreme, the reasons [the defendant] offered in his application for the delay in filing the motion were weak, the court's reasons for granting the application were unrelated to the purpose of the SLAPP statute, and the potential prejudice to [the plaintiff], given the lengthy delay occasioned by the appeal, is great. Rather than advancing the anti-SLAPP statute's purpose of promptly resolving SLAPP suits, the trial court's ruling had the effect of undermining that statute . . . ." (*Id.* at p. 787, fn. omitted.)

Ward's net delay was not nearly as long as the delay by the defendant in *Platypus Wear*. In addition, there was no discovery between La Grange and Ward, no trial date in the case, no active motion practice (other than a demurrer that was never heard). (Cf. *Hewlett-Packard Company v. Oracle Corporation*, *supra*, 239 Cal.App.4th at p. 1190 ["an anti-SLAPP motion cannot fulfill the statutory purpose, and may indeed subvert that purpose, if the parties have already incurred substantial expense preparing the case for a more conventional disposition"].) And, unlike the defendant in *Platypus Wear*, Ward had a very good reason for not filing his motion until after this court issued its remittitur in 2016: The court, at the request of the parties, had stayed the entire action. Ward could not have filed a motion while the case was stayed from May 2015 to January 2016 even if he had wanted to, and, even using the remittitur's date of issue rather than date of receipt, Ward didn't miss by much. As the trial court noted, after recognizing some of the delay was attributable to

Ward, "the last three hundred days, more or less, are the consequence of the stay, which was the choice of the parties." Most important, Ward filed his special motion to strike early in the proceedings as to him, and the motion did not cause any delay, expense, or prejudice to La Grange. The trial court's decision to hear it was entirely consistent with the purposes of section 425.16.

In *San Diegans*, *supra*, 240 Cal.App.4th 611 the court held a special motion to strike was untimely where the defendant filed it 16 months after the filing of a first amended complaint, during which time "the parties appeared before the court on various motions, and [the defendant] served written discovery requests to which [the plaintiff] had responded." (*Id.* at p. 624.) The court explained: "An anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit. When a case has been pending long after the 60-day period, the parties have presumably engaged in pretrial litigation and the purposes of an anti-SLAPP motion are no longer applicable. In this case, [the defendant] served written discovery requests, and [the plaintiff] had responded to those requests, and the parties appeared before the court on various motions, including a demurrer and a motion to strike . . . ." (*Id.* at pp. 625-626.) There was none of that here: no discovery requests, no court appearances, no pretrial activity of any kind. The only court date (the hearing on Ward's demurrer) was vacated pursuant to the stipulation and order staying the case. La Grange and Ward were not in "the middle of litigation"; they had not yet begun to litigate. (Cf. *Hewlett-Packard Company v. Oracle Corporation*,

supra, 239 Cal.App.4th at p. 1188 ["[a] late anti-SLAPP motion cannot fulfill the statutory purpose if it is not brought until after the parties have incurred substantial expense"].)

La Grange argues the stipulation and order staying the case did not apply to Ward, from which La Grange asserts Ward "was specifically carved-out." La Grange states, "Importantly, the Stipulation stated that it did not apply to Ward" and "the Stipulation did not apply to Defendant Ward who was specifically excluded from the Stipulation." La Grange must be referring to a different stipulation. The stipulation in this case did not specifically carve out Ward; it specifically included him. The parties recognized section 916 did not stay the proceedings against Ward because Ward was "unaffected by the order" Tran had appealed in *La Grange I*, which is why the parties needed and entered into a stipulation to stay the action against him. The use of the word "unaffected" does not mean the stay did not affect Ward; it meant the order on the motion to strike La Grange's action against Tran did not affect Ward. It took the stipulation between La Grange and Ward to stay the action against Ward, which the court ordered when it approved the stipulation. As the trial court correctly recognized, "While this language might clarify that . . . section 916 does not, by itself, stay the proceedings against Ward, it also makes clear that even so, the parties agreed to stay the proceedings against Ward 'as a matter of judicial efficiency.' Thus, by itself . . . section 916 would not stay the action against Ward, but the stipulation, and following order, provided for a broader stay, as the language in the stipulation referred to above makes clear." (Fn. omitted.)

C. *The Trial Court Did Not Err in Granting Ward's Special Motion To Strike*

Ward argued La Grange could not meet her burden of showing a probability of prevailing on the merits because the statute of limitations barred her malicious prosecution action against him. Ward argued, among other things, the statute of limitations accrued on September 28, 2011, the date the court entered judgment in the underlying action, and La Grange filed this action more than one year after the applicable statute of limitations period expired. He also argued the amendment substituting him as a Doe defendant did not relate back to the original complaint because "La Grange's knowledge of the identity of Ward and his involvement as counsel for Tran in the [underlying action] at the time she filed this . . . lawsuit is indisputable."[3]

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[3] "There is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion. Some cases state that 'although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 683.) Other cases suggest that an affirmative defense is "'"a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing."'" (*Ibid.*) We do not need to weigh in on this issue in this case because for his statute of limitations argument Ward relied on undisputed facts such as when the court entered judgment in the underlying action, when La Grange filed this action, and when La Grange added Ward as a defendant and served him. (See *ibid.* ["[w]hat is important is that, regardless of the burden of proof, the court must determine whether the plaintiff can establish a prima facie case of prevailing, or whether

1. *Even if the Applicable Statute of Limitations Is Two Years, La Grange's Action Against Ward Was Untimely*

The parties dispute the applicable statute of limitations. Ward argues the one-year statute of limitations in section 340.6, subdivision (a) (section 340.6(a)), applies. La Grange argues the two-year statute of limitations in section 335.1 applies. Court of Appeal decisions on this issue are split. (Compare *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 194 ["one-year statute of limitations set forth in section 340.6, subdivision (a) applies to a claim for malicious prosecution brought against an attorney that is based on that attorney's participation in the litigation that forms the basis of the malicious prosecution claim"] and *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880 ["the one-year limitations period under section 340.6 applies to an action for malicious prosecution against an attorney rather than the two-year limitations period which applies to malicious prosecution actions generally"] with *Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 668 ["the applicable statute of limitations for malicious prosecution is [two years], irrespective of whether the party being sued for malicious prosecution is the former adversary . . . or the adversary's attorneys"], disapproved on another ground in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239, and *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197 ["the Legislature intended . . . the two-year limitations period set forth in section 335.1 to apply to malicious prosecution actions"]; see also *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 819 ["while there is a split of

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the defendant has defeated the plaintiff's evidence as a matter of law"].)

authority, two courts, including this court, have held that section 340.6 is not confined to malpractice actions by a plaintiff against his own attorney, but also applies to malicious prosecution claims by a third party against an attorney"].) In *Lee v. Hanley*, *supra*, 61 Cal.4th 1225 the Supreme Court held that "section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services" (*Lee v. Hanley*, at pp. 1236-1237) and suggested that this rule may apply to malicious prosecution causes of action (see *id.* at p. 1236).[4] The Supreme Court has not resolved the issue, although it came close in *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767. (See *id.* at pp. 774-775 [recognizing but not reaching the issue].)

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[4] The Supreme Court explained: ""In this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the Rules of Professional Conduct. By contrast . . . section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs. Section 340.6(a) also does not bar a claim arising from an attorney's performance of services that are not 'professional services,' meaning 'services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys.'" (*Lee v. Hanley*, *supra*, 61 Cal.4th at p. 1237.) Ward and La Grange disagree whether La Grange's malicious prosecution cause of action depends on proof that Ward violated a professional obligation.

We do not need to resolve this issue here because even assuming, as La Grange argues, the applicable statute of limitations is two years, La Grange's complaint against Ward is untimely. Although La Grange filed this action on September 27, 2013, she did not sue Ward until January 20, 2015, more than two years after her malicious prosecution cause of action accrued on September 28, 2011, when the court entered judgment in the underlying action. (See *Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1356 ["'a cause of action for malicious prosecution *accrues* upon entry of judgment in the underlying action'"]; *Stavropoulos v. Superior Court*, *supra*, 141 Cal.App.4th at p. 197 [a "'cause of action [for malicious prosecution] accrues at the time of entry of judgment in the underlying action in the trial court'"].)

Recognizing the implication of this chronology, La Grange argues her action against Ward is not barred for two reasons. First, she argues the discovery rule applies to her action against Ward. La Grange contends she did not discover her claims against Ward until January 2014, when La Grange received Tran's declaration in support of Tran's special motion to strike, which stated Tran had disclosed all the facts to Ward. Second, she argues that under the relation back doctrine her action against Ward relates back to the filing of her action against Tran, which La Grange filed within two years of the accrual of her malicious prosecution cause of action against Tran. Neither argument saves her action against Ward.

2. *The Discovery Rule Does Not Apply*

La Grange argues that she "did not have knowledge of sufficient facts to file a malicious prosecution action against

Defendant Ward until such time as Defendant Tran maintained that she had in fact disclosed all facts to Defendant Ward and that Defendant Ward had nonetheless advised her to proceed with suing La Grange" in the underlying action. La Grange argues she gained this knowledge in January 2014 when Tran filed her declaration in support of her special motion to strike.

"The delayed discovery rule "'postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.'"' (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 918; see *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73.) "'Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.' [Citation.] 'A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.'" (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 192.)

In general, the discovery rule does not apply to a malicious prosecution action. "The discovery rule applies when it is difficult for a plaintiff to observe or understand the nature of a defendant's wrongful act, or when an injury or its cause is hidden or beyond that which an ordinarily reasonable person could be expected to understand. [Citation.] That rule simply makes no sense in the context of . . . litigation-related causes of action" like malicious prosecution because the theory of such a cause of action

is that the plaintiff "knew about the existence of the underlying litigation . . . ." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 448.) La Grange does not cite any cases applying the discovery rule to malicious prosecution, which is understandable because such causes of action generally do not involve "difficult-to-detect injuries or the breach of a fiduciary relationship." (*Royal Thrift and Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, 43.)

As with most malicious prosecution plaintiffs, La Grange's injuries were not difficult to detect: She experienced them as the underlying action proceeded to and through trial. Nor was it difficult for La Grange to observe and understand Ward's allegedly wrongful conduct: She saw his name on every pleading he filed, she experienced or knew about every deposition he took, and she witnessed every question he asked at trial. When the court entered judgment in the underlying action in September 2011, La Grange knew she had been injured by Tran and Ward because she was aware of the attorneys' fees and costs she had incurred in successfully defending the underlying action.

Moreover, La Grange submitted evidence showing she suspected or reasonably should have suspected she had a malicious prosecution cause of action against Ward no later than September 2011. La Grange stated both in her March 2014 declaration in opposition to Tran's special motion to strike and in her May 2016 declaration in opposition to Ward's special motion to strike: "While I believed that Tran's allegations against my husband were false, I ***knew*** that her allegations against me had no factual basis. I believe that Tran and Ward added me as a defendant . . . as a tactic to—*inter alia*— embarrass and discredit me and cause pain in my marriage. I also believe that Tran and

Ward added me as a defendant for leverage, thinking that if I was a defendant and was forced to confront her allegations against my husband on a regular basis, that I would pressure my husband to enter into a cash settlement to avoid the embarrassment and anguish of dealing first-hand with the sexual harassment lawsuit and the false accusations about me." These declarations show La Grange had the same knowledge and suspicions about her malicious prosecution action against Ward that she had about her malicious prosecution action against Tran, including knowledge of the facts we noted in *La Grange I* supported an inference of malice; namely, that Tran sued La Grange "for the hostile and improper purpose of disrupting the marriage and creating additional pressure to settle the case on more favorable terms." (*La Grange I*, *supra*, B255835, at p. 14.)

Thus, even accepting as true the statement in La Grange's declaration that she learned in January 2014 Tran had disclosed all of the facts to Ward, the evidence "defeats [her] claim as a matter of law." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385; see *J-M Manufacturing Company, Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 96 ["the court should grant the motion '"if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim"'"]; see also *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 [application of the discovery rule is a question of law "where the uncontradicted facts . . . are susceptible of only one legitimate inference"]; *Stella v. Asset Management Consultants, Inc.*, *supra*, 8 Cal.App.5th at p. 193 [although "[w]hen a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact," it is a

question of law "if the evidence . . . can support only one reasonable conclusion"]; *M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1531 ["[a]lthough resolution of a statute of limitations defense typically is a question of fact, when the facts are susceptible of only one legitimate inference a reviewing court may determine the issue as a matter of law"].)

La Grange quotes the following sentence from our opinion in *La Grange I* rejecting Tran's argument that the advice of counsel defense barred La Grange's malicious prosecution action as a matter of law: "Tran's testimony in the underlying action that La Grange was not involved in the conduct that gave rise to Tran's claims, and the court's findings in the underlying action that Tran had no basis for asserting any of her causes of action against La Grange, strongly suggest that Tran did not make a full and fair disclosure to her attorney." (*La Grange I*, *supra*, B255835, at p. 17.) And, as noted, we stated that whether Tran's disclosure to Ward was sufficient to prove Tran's advice of counsel defense is a factual issue to be resolved at trial. (*Ibid.*) But those observations on the advice of counsel defense, and what Tran discussed with her attorney, do not change the fact that La Grange, at a minimum, had a suspicion of Ward's alleged wrongdoing long before Tran filed her declaration in January 2014. (See *Stella v. Asset Management Consultants, Inc.*, *supra*, 8 Cal.App.5th at p. 192.)

3. *Nor Does the Relation Back Doctrine*

The relation back doctrine does not apply to La Grange's malicious prosecution cause of action either. "As a general rule, 'an amended complaint that adds a new defendant does *not* relate

back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed.' [Citation.] But where an amendment does not add a 'new' defendant, but simply corrects a misnomer by which an 'old' defendant was sued, case law recognizes an exception to the general rule of no relation back." (*Hawkins v. Pacific Coast Bldg. Products, Inc.* (2004) 124 Cal.App.4th 1497, 1503.)

"Section 474 allows a plaintiff who is ignorant of a defendant's identity to designate the defendant in a complaint by a fictitious name (typically, as a 'Doe'), and to amend the pleading to state the defendant's true name when the plaintiff subsequently discovers it. When a defendant is properly named under section 474, the amendment relates back to the filing date of the original complaint. [Citation.] Section 474 provides a method for adding defendants after the statute of limitations has expired, but this procedure is available only when the plaintiff is actually ignorant of the facts establishing a cause of action against the party to be substituted for a Doe defendant. [Citation.] 'The question is whether [the plaintiff] knew or reasonably should have known that he had a cause of action against [the defendant].'" (*McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371-372, fn. omitted.) The plaintiff must have been "genuinely ignorant" of the fictitiously sued defendant at the time he or she filed the complaint. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 177; see *Wallis v. Southern Pac. Transportation Co.* (1976) 61 Cal.App.3d 782, 786 ["the plaintiff's ignorance, whether of the defendant's true identity or of the facts giving rise to a cause of action, must be real and not feigned"].) "'Ignorance of the *facts* giving rise to a

cause of action is the "ignorance" required by *section 474*, and the pivotal question is, "'did plaintiff know *facts*?' not 'did plaintiff know or believe that [he] had a cause of action based on those facts?'"'" (*McClatchy*, at p. 372.)

La Grange knew the facts. She knew who Ward was (Tran's attorney of record in the underlying action) and what he did (file the underlying action against La Grange, allegedly without probable cause and for the improper purpose of disrupting a marriage and leveraging a settlement) at the time she filed the malicious prosecution action, if not long before. La Grange even concedes (although in a different context) that the special motions to strike by Tran and Ward involved "the same case and [were] based on the same plead[ed] facts and allegations" and that there were "no substantive changes to the pleading—in fact no changes at all."[5] As the trial court aptly observed, because "[t]he same knowledge would apply to both Tran and . . . Ward, as potential defendants in a malicious prosecution action," La Grange's declaration "demonstrates that she knew of Ward's relationship to the injuries on which this action is based by the time she filed suit against Tran." The relation back doctrine does not apply in these circumstances.

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[5] La Grange was arguing the trial court's abuse of discretion in hearing Ward's untimely motion prejudiced her because it forced her to oppose a second special motion to strike raising similar issues.

DISPOSITION

The order is affirmed. Ward is to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

BENSINGER, J.*

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