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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ARMAN MOMJIAN, Plaintiff and Respondent, v. HAMID REZA MEHRVAK et al., Defendants and Appellants.	B247341 (Los Angeles County Super. Ct. No. BC450635)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara Scheper, Judge. Affirmed.

Law Office of Jay R. Saltsman and Jay R. Saltsman for Defendants and Appellants.

Law Offices of Vip Bhola and Vip Bhola for Plaintiff and Respondent.

This action for malicious prosecution is before us for a second time. Plaintiff and respondent is Arman Momjian (Momjian). Defendants and appellants are Hamid and Sherri Mehrvak and their attorney, Jay R. Saltzman (collectively the Mehrvaks). Previously, we affirmed an order denying the Mehrvaks' anti-SLAPP motion (Code Civ. Proc., § 425.16) to strike Momjian's original complaint (case No. B234172) (the prior opinion).[1] In this second appeal, the Mehrvaks challenge denial of an anti-SLAPP motion which sought dismissal of a purported first amended complaint (the second anti-SLAPP motion). We once again affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We explained the somewhat convoluted procedural history in this case in the prior opinion:

> "*Case No. BC340573: Original Declaratory Relief Action Filed by O.P.M. Holdings Inc. (Momjian)*
>
> Momjian was an officer and director of O.P.M. Holdings Inc. (OPM). On behalf of the corporation, Momjian executed a promissory note in favor of the Mehrvaks. In 2005, OPM brought a declaratory relief action against the Mehrvaks seeking to establish the parties' relative obligations under the note. Momjian was not a party to the declaratory relief action in his individual capacity. The Mehrvaks prevailed and were awarded nearly $50,000 in principal, interest, costs, and attorney's fees.
>
> *Case No. BC394701: First Malicious Prosecution Action Filed by the Mehrvaks*
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> In July 2008, buoyed by their success in the first lawsuit, the Mehrvaks filed a malicious prosecution action against Momjian, OPM and OPM's attorney in the declaratory relief action. Attorney Saltzman, also an appellant in the present appeal, filed the lawsuit on behalf of the Mehrvaks, his clients. The trial court denied a motion to dismiss the second lawsuit as a SLAPP, and the matter was set for trial. In March 2010, the Mehrvaks dismissed the lawsuit. No trial took place.
>
> *[Case No.] BC450635: The Present Case For Malicious Prosecution Filed by Momjian*
>
> Now it was Momjian's turn to reenter the litigation waters, and on December 3, 2010, he filed his own malicious prosecution action predicated on the Mehrvaks' previous dismissal of their malicious prosecution lawsuit. The

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1 All future undesignated statutory references are to the Code of Civil Procedure.

Mehrvaks countered by filing [the first] anti-SLAPP motion to strike Momjian's complaint."

On February 22, 2011, a few days before the first of several continued hearings on the Mehrvaks' first anti-SLAPP motion, Momjian simultaneously filed (1) a "First Amended Complaint For Malicious Prosecution And Damages", which the trial court characterized as a "proposed amended complaint," and (2) a "Sur Reply to Defendants Reply To Plaintiff's Opposition to Defendant's Special Motion To Strike . . . ," to which a copy of the first amended complaint was attached as Exhibit E. The proposed amended complaint was in all material respects identical to the original complaint except for the addition of the following sentence as paragraph 13: "All of the defendants in case BC 394701 were ultimately dismissed without any finding against any of them."[2] At the February 28, 2011 hearing, the trial court stated that the sur reply and proposed amended complaint were both procedurally improper. Regarding the proposed amended complaint, the trial court cited *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055, which held that, notwithstanding Code of Civil Procedure section 472, an amended complaint cannot be brought after an anti-SLAPP motion has been filed and before the hearing on that motion. The only reasonable interpretation of the trial court's comments is that it was striking Momjian's proposed amended complaint. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1294 (*Salma*) [amended complaint filed while anti-SLAPP motion is pending is automatically dismissed].) Following a hearing on May 11, 2011, the trial court denied the Mehrvaks' anti-SLAPP motion to the original complaint. We affirmed that order in an opinion filed on August 1, 2012; remittitur issued on October 9, 2012.

Disregarding the fact that the trial court *denied* Momjian's request to file an amended complaint, on November 30, 2012, the Mehrvaks filed the second anti-SLAPP motion directed at the proposed amended complaint. While the first anti-SLAPP motion

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[2] The addition was intended to strengthen the allegation of lack of probable cause, but in our prior opinion, we affirmed the trial court's finding that lack of probable cause was sufficiently alleged in the original complaint.

focused on flaws in the original complaint's pleading, the focus of the second anti-SLAPP motion was on Momjian's inability to prove the element of favorable termination.[3] In their respective declarations, Saltzman, Hamid and Sherri Mehrvak explained that the malicious prosecution case against Momjian was dismissed not on its merits, but because the Mehrvaks were involved in a difficult divorce and could not cooperate with each other or Saltzman to prepare for the trial of that case, and could not pay expenses related to maintaining that action.

Apparently accepting the Mehrvaks' premise that the first amended complaint was the operative pleading, Momjian's opposition to the second anti-SLAPP motion argues that the motion (1) was untimely in that it was filed more than 60 days after the amended complaint was filed (see § 425.16, subd. (f)); and (2) Momjian established a probability of prevailing on the merits on the favorable termination element of his malicious prosecution claim. Regarding timeliness, the Mehrvaks countered that the 60-day period began to run on October 9, 2012, the day remittitur issued on the appeal from the first anti-SLAPP motion. They did not explain why the months between when Momjian filed the proposed amended complaint (February 22, 2011) and when the Mehrvaks filed their notice of appeal from the denial of their first anti-SLAPP motion (July 1, 2011), should not be included in the calculation of the 60-day period.

The trial court's comments at the February 20, 2013 hearing were ambiguous as to whether the original complaint was the operative pleading:

> "I'm having a hard time understanding how this is anything other than frivolous. There was a full briefing and hearing regarding the initial motion that was related to the [original] complaint.
>
> "Even if I set aside the timeliness of the motion – which I'm having a hard time doing, but even if I concur with your view, which isn't really supported by any authority, that you had another 60 days from the point remittitur was issued in which the Court of Appeal affirmed the first ruling, if they found the initial

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[3] In their first anti-SLAPP motion, the Mehrvaks argued that the original complaint in this case did not adequately allege the lack of probable cause element of a malicious prosecution action.

> complaint sufficient, how could I – I can't see how the first amended complaint suddenly became insufficient.
>
> "And what it looks like to me is you're making the same argument; you've just now tried to support it with evidence that the Court of Appeal pointed out was lacking in the first SLAPP motion, which is [a] motion for reconsideration, for all intents and purposes."

The Mehrvaks argued that by filing an amended complaint, Momjian opened the door for a new anti-SLAPP motion and that the motion filed by the Mehrvaks filled any gaps this court found in the first anti-SLAPP motion. Unpersuaded, the trial court denied the motion on its merits. It awarded sanctions to Momjian in the amount of $4,000 pursuant to Code of Civil Procedure section 425.16, subdivision (c) ["If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."]. The Mehrvaks timely appealed.[4]

DISCUSSION

A. SLAPP and the Standard of Review

Known as the anti-SLAPP statute, section 425.16 provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Ruling on an anti-SLAPP

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[4] The trial court announced its ruling at the February 20 hearing, and directed Momjian to prepare a written order. Momjian served a proposed order on February 22, but the signed order was not filed until March 12. On March 6, before the signed order was filed, the Mehrvaks filed a notice of appeal from the order. "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(1).)

motion is a two-step process. First, the trial court must determine whether the defendant has made a prima facie showing that the challenged cause of action arises from protected activity. (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822.) If, and only if, the defendant makes that showing must the trial court proceed to the second step—determination of whether the plaintiff has shown a probability of prevailing on the claim. (*Ibid*.) The appellate court reviews a ruling on an anti-SLAPP motion de novo, using the same two step process. (*Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387 (*Coretronic*); *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 478.) Momjian does not contest that the amended complaint arises from the exercise of the protected right to petition; he therefore has the burden of demonstrating a probability of success on the merits of his claims.

B. *The Second Anti-SLAPP Motion is an Improper Motion for Reconsideration*

At the hearing, the trial court observed that the Mehrvaks' second anti-SLAPP motion purportedly directed at the amended complaint was for all intents and purposes a motion for reconsideration of their first anti-SLAPP motion. (See § 1008.) We agree and conclude that it does not satisfy the requirements of such a motion.

"The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under Code of Civil Procedure section 1008." (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577.) A section 1008 motion for reconsideration is permitted in the context of anti-SLAPP motions but it must "take into account the timeliness provision of the anti-SLAPP statute itself, and meet the requirements of both statutes." (*Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543.)[5] Thus, a moving

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[5] Regarding timeliness, there is no specified time limit when a renewal of a previous motion pursuant to section 1008, subdivision (b) must be filed. (*Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 816.) But an anti-SLAPP motion "may be filed within 60 days of the service of the [amended complaint] or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f); *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314 [60-day period runs from service of the

party making subsequent application for the same order under section 1008, subdivision (b), must file an affidavit setting forth "what new or different facts, circumstances, or law are claimed to be shown." (§ 1008, subd. (b).) Facts of which the party seeking reconsideration was aware at the time of the original ruling do not satisfy the requirement of "new or different facts." (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468) Compliance with section 1008 is jurisdictional. (§ 1008, subd. (e).)

Here, the second anti-SLAPP motion does not meet the requirements of section 1008, subdivision (b) because it does not set forth any new or different facts that could not have been included in the first anti-SLAPP motion. The Mehrvaks knew, when they filed the first anti-SLAPP motion, that they dismissed their malicious prosecution action against Momjian because Hamid and Sherri Mehrvak were involved in a divorce which made cooperation with each other and their lawyer difficult, and because they did not have the necessary funds to maintain the action. Thus, these facts were not sufficient to support a motion for reconsideration.

The fact that the second anti-SLAPP motion was purportedly directed at the proposed amended complaint does not compel a contrary result. The Mehrvaks are correct that, generally, an amended complaint supersedes the original complaint, which ceases to perform any function as a pleading. (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477.) Also, each successive pleading gives rise to a new and independent right in the defendants to file an anti-SLAPP motion as to that pleading. (*Yu v. Signet Bank/Virginia*, *supra*, 103 Cal.App.4th at pp. 314-315.) But the Mehrvaks fail to take into account the exception to that rule: "[A] plaintiff or cross-complainant may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint or cross-complaint in response to the motion. [Citations.]" (*JKC3H8* at p. 477.) The amended claims are automatically dismissed. (*Salma, supra,*

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most recent amended complaint].) Here, Momjian objected to the timeliness of the second anti-SLAPP motion vis a vis the amended complaint and the trial court questioned its timeliness of the motion at the hearing. However, implicit in the trial court's decision on the merits is an exercise of discretion allowing the Mehrvaks to file the second anti-SLAPP motion more than 60 days after the amended complaint was filed.

161 Cal.App.4th at p. 1294.) Here, the trial court properly denied Momjian's request to file the proposed amended complaint while the first anti-SLAPP motion was pending. Under *Salma, supra*, the proposed amended complaint was automatically dismissed. Nothing in the record indicates Momjian re-filed the amended complaint after the first anti-SLAPP motion was denied. Thus, the proposed amended complaint was a nullity, the original complaint was the operative pleading and the second anti-SLAPP motion was a veiled motion for reconsideration of the first anti-SLAPP motion which did not meet the requirements of such a motion.

C. *Momjian Made A Prima Facie Showing Sufficient to Support a Judgment For Malicious Prosecution*

Even assuming for the sake of argument that the amended complaint was the operative pleading, we find no error in the trial court's denial of the second anti-SLAPP motion on its merits. The Mehrvaks contend that the second anti-SLAPP motion established that Momjian could not prevail on the merits of his action for malicious prosecution. They argue that this is because their assertions that they dismissed their malicious prosecution action against Momjian for personal reasons, including an inability to raise the funds to maintain the action, and not because their claims lacked merit, conclusively disprove the underlying action was terminated in Momjian's favor. (See *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344 [dismissal to avoid the costs of litigation is not a dismissal on the merits].) We disagree.

The second prong of anti-SLAPP analysis is met by "prima facie showing of facts which, if accepted by the trier of fact, would negate" the defendant's proposed defense. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285-286.) Only a minimal showing of merit is required to overcome the defendant's prima facie showing. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400 (*Sycamore*).) In deciding the question of merit, the court does not weigh the credibility or comparative probative strength of competing evidence. " ' "[A] plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary

judgment. [Citation.]" ' [Citation.]" (*DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 352.)

To allege a cause of action for malicious prosecution, a plaintiff must plead that the prior action (1) was commenced by or at the direction of the defendant; (2) was pursued to a legal termination in the plaintiff's favor; (3) was brought without probable cause; and (4) was initiated with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.) "A voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury. [Citations.]" (*Sycamore, supra,* 157 Cal.App.4th at p. 1400.) This presumption "arises from the natural assumption that one does not simply abandon a meritorious action once instituted." (*Ibid*., internal quotations omitted.)

Sycamore is instructive. In that case, Shirley Powell, a tenant in an apartment building owned by Sycamore, was among 45 tenants upon whose behalf a lawsuit was filed against Sycamore. After Powell voluntarily dismissed her potion of the lawsuit, Sycamore filed a malicious prosecution action against Powell. The trial court denied Powell's anti-SLAPP motion. The appellate court affirmed, reasoning that, although Powell put forth evidence that she dismissed the underlying action because of her advanced age and ailing health and not because her claims lacked merit, it could reasonably be inferred from other evidence put forth by Sycamore, including Powell's failure to appear at depositions, that she dismissed the action because it lacked merit. The appellate court observed, " 'Should a conflict arise as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. [Citation.]' [Citation.]"] (*Sycamore, supra,* 157 Cal.App.4th at p. 1399.)

Here, like the plaintiff in *Sycamore,* Momjian has set forth contrary facts to those set forth by the Mehrvaks which, if accepted by the trier of fact, make a prima facie showing which would negate the Mehrvaks' defense. These facts include that the Mehrvaks "attempted to exhort money from [Momjian], refused to provide any evidence of any costs supposedly incurred in the [declaratory relief] action which were not awarded by the court, and only dismissed [their malicious prosecution] case after [Momjian] prepared for trial and after the initial Final Status Conference." The

Mehrvaks' declarations establish a question of fact as to whether they dismissed the underlying action for the reasons they now profess, or because they believed their claims lacked merit. It is for the trier of fact to resolve this question, not the courts in the context of an anti-SLAPP motion.

DISPOSITION

The order is affirmed. Respondent shall recover his costs on appeal. The court does not award any sanctions.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.