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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS HOROWITZ, D.O.,

Plaintiff and Appellant,

v.

McGARRY & LAUFENBERG et al.,

Defendants and Respondents.

B275757

(Los Angeles County
Super. Ct. No. BC572002)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Buffy Lyn Roney for Plaintiff and Appellant.

Reback, McAndrews & Blessey, Robert C. Reback, David J.

Rubaum and Stephen A. Diamond for Defendants and Respondents.

Plaintiff and appellant Thomas Horowitz, D.O. (Dr. Horowitz) appeals from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer of respondents, attorneys James McGarry and Jeffrey Laufenberg, and their firm, McGarry & Laufenberg, (collectively, the McGarry firm), to Dr. Horowitz's complaint for malicious prosecution. Dr. Horowitz contends that the McGarry firm wrongfully filed and litigated a meritless unlawful detainer lawsuit against him. The court found that the action for malicious prosecution was barred by the "interim adverse judgment" rule, in view of an order in the unlawful detainer action denying a motion for summary judgment on the merits. As a result, the court found that Dr. Horowitz could not plead or prove that the McGarry firm lacked probable cause to prosecute the underlying action. Dr. Horowitz challenges the trial court's ruling on appeal contending, among other things, that summary judgment was not denied on the merits but on a procedural ground. We disagree and, finding no error, affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

The Dispute Regarding the Landlord's Right to Relocate Dr. Horowitz's Medical Practice During Construction of the Pedestrian Bridge

Dr. Horowitz leased a suite (suite 310) for his practice in a medical office building located at 1245 Wilshire Boulevard in Los Angeles (the building), from Good Samaritan Medical Office Building, Inc. (landlord). The term of Dr. Horowitz's lease, as amended, ran from mid–September 2005 to mid–January 2016.

In March 2012, a dispute arose between the landlord and Dr. Horowitz regarding the landlord's reconstruction of an elevated pedestrian walkway (bridge) in connection with construction of a new office building on the hospital campus which would adjoin the one housing Dr. Horowitz's medical practice. The landlord was required to relocate an existing bridge so as to abut Dr. Horowitz's suite, which necessitated minor structural alterations within suite 310 to, among other things, construct a shoring wall. Dr. Horowitz refused to permit the landlord to enter suite 310 to perform construction, and also refused to accede to the landlord's proposed terms for a temporary relocation of his medical practice to a nearby and purportedly substantially similar

¹ In this appeal from a dismissal following the sustaining of a demurrer without leave to amend, our factual recitation is drawn from well-pleaded allegations of the complaint, and judicially noticeable facts from exhibits submitted in connection with the demurrer. (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 671; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 (*Dinuba*).)

suite (suite 307) during construction, unless the landlord satisfied numerous preconditions.

The Underlying Unlawful Detainer Action

In July 2013, the landlord filed the first of two unlawful detainer actions (LASC Case No. 13U08634; “UD1”) against Dr. Horowitz. The McGarry firm represented the landlord in that action and two other actions against Dr. Horowitz.²

Dr. Horowitz filed a motion for summary judgment. He argued that he was entitled to judgment because the 30–day Notice to Cure was fatally defective for several reasons, including that it required him to perform actions not required by the terms of the lease, and to relinquish rights to which he was entitled under the lease.³

² In September 2012, the landlord filed an action against Dr. Horowitz for declaratory relief (LASC Case No. BC492880), which was later dismissed. On July 18, 2013 the landlord filed the underlying UD1 (LASC Case No. 13U08634), which was voluntarily dismissed in February 2014. In April 2014, the landlord filed the third suit and second unlawful detainer action against Dr. Horowitz (LASC Case No. 14U04463, “UD2”), which was resolved by settlement. The subject matter underlying this malicious prosecution action is expressly limited to the initial unlawful detainer action.

³ The landlord also moved for summary judgment, arguing that Dr. Horowitz materially breached the terms of and forfeited the lease by barring the landlord’s access to suite 310 for the necessary purpose of completing construction on the pedestrian walkway, and by refusing to relocate to a substantially similar suite during construction unless the landlord met specific extracontractual conditions.

The motion was denied in mid-January 2014, after the court found: “the operative Thirty Day Notice is premised upon [Dr. Horowitz’s] alleged refusal to allow [landlord] to enter his premises and make alterations required for the pedestrian bridge. [UD1] is based upon [landlord’s] contention that this is a violation of [specific sections] of the lease. A triable issue exists as to whether [Dr. Horowitz’s] refusal to allow access to make such alterations constituted a violation of the lease sufficient to support a forfeiture.”

In February 2014, the landlord dismissed UD1 after its summary judgment motion was denied.

Dr. Horowitz Sues the Landlord’s Counsel for Malicious Prosecution

In February 2015, Dr. Horowitz filed this malicious prosecution action against the McGarry firm. He alleged that the McGarry firm knew he had not breached his lease, yet twice caused him to be served with 30-day notices to cure, first refusing his tender of possession back under the terms of the lease, and later demanding possession under terms not contained in the lease. Dr. Horowitz claimed that the McGarry firm had filed and prosecuted that action “for the sole purpose of strong-arming [him] into giving up his rightful beneficial interest in his lease even though (1) he had committed no breach of [the] lease on

The court denied the landlord’s motion on the ground that: “[A] triable issue [remained] as to whether [Dr. Horowitz] barred [the landlord’s] access to the premises, as there is no evidence that [the landlord] . . . made an unequivocal demand for entrance which [Dr. Horowitz] refused.”

which to base said unlawful detainer action[,] and (2) [the McGarry firm] failed to comply with basic statutory requirements for an unlawful detainer action.”

The McGarry firm demurred on the ground that the complaint failed to state facts sufficient to support a viable claim for malicious prosecution. (Code Civ. Proc., § 430.10, subd. (e).) Among other things, the McGarry firm argued that Dr. Horowitz could not show that UD1 was filed or litigated without probable cause because the trial court denied his motion for summary judgment in UD1 on the merits, i.e., concluded that material factual issues remained whether any contractual breach occurred. The McGarry firm argued that, under the interim adverse judgment rule, the court’s denial of Dr. Horowitz’s summary judgment motion on the merits established the existence of probable cause to prosecute UD1, and barred this tort action.⁴ The court agreed, sustained the demurrer without leave to amend, and dismissed the action. Dr. Horowitz timely appealed.

DISCUSSION

Dr. Horowitz contends the trial court erred in sustaining the demurrer without leave to amend based on its conclusion that the interim adverse judgment rule posed a complete bar to this malicious prosecution action.

⁴ We grant the McGarry firm’s June 26, 2017 motion to augment the record with the reply brief in support of its demurrer.

1. *The Standard of Review*

The standard of review in an appeal from a dismissal following an order sustaining a demurrer without leave to amend is settled. We assess the allegations of the operative complaint de novo to determine if sufficient facts are alleged to state a claim for relief under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Gonzalez v. City of Norwalk* (2017) 17 Cal.App.5th 1295, 1305.) We may consider matters that have been judicially noticed. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We review the propriety of the court’s ruling, not its legal reasoning (*Staniforth v. Judges’ Retirement System* (2016) 245 Cal.App.4th 1442, 1449), and will affirm the judgment if it is correct on any theory. (*Ibid.*)

“We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded.” (*Dinuba, supra*, 41 Cal.4th at p. 865.) “In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer.” (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.)

2. *The Interim Adverse Judgment Rule Bars Dr. Horowitz’s Action for Malicious Prosecution*

a. *Governing Principles*

Malicious prosecution is a disfavored claim. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 872.) The law favors open access to the courts for the redress of grievances. Historically, the elements of the tort have been carefully circumscribed so litigants with potentially valid claims are not deterred from bringing their claims to court for fear of a subsequent malicious prosecution claim. (*Ibid.*; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493.)

To establish a claim for the malicious prosecution, a plaintiff must plead and prove that the underlying action was “(i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice.” (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 (*Parrish*); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 969 (*Zamos*).) Liability for malicious prosecution extends to litigation counsel as the proponent of the client’s claims. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 296; *Zamos, supra*, at p. 969 [attorney may be liable for continuing to litigate action lacking probable cause].)

At issue is whether Dr. Horowitz’s claim for malicious prosecution is barred by the interim adverse judgment rule. “The interim adverse judgment rule concerns the probable cause element of a malicious

prosecution claim.” (*Parrish, supra*, 3 Cal.5th at p. 776; *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 450 (*Antounian*).) “[T]he probable cause element calls on the trial court to make an objective determination of the “reasonableness” of the defendant’s conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,’ as opposed to whether the litigant subjectively believed the claim was tenable. [Citation.]” (*Parrish, supra*, at p. 776; *Antounian, supra*, at p. 450.) The benchmark for probable cause is whether any reasonable attorney would have thought the claim tenable. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114.) Put differently, only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution claim. (See *Parrish, supra*, at p. 776.) “This rather lenient standard for bringing a civil action reflects “the important public policy of avoiding the chilling of novel or debatable legal claims.” [Citation.]” (*Ibid.*) “The standard safeguards the right of both attorneys and their clients ““to present issues that are arguably correct, even if it is extremely unlikely that they will win.”” [Citation.]” (*Ibid.*)

A “favorable determination” does not require a judgment following trial on the merits. It is well established that certain interim rulings on the merits may provide a basis for finding probable cause to prosecute the underlying case on which a malicious prosecution action is based. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817–818

(*Wilson*); *Parrish, supra*, 3 Cal.5th at p. 776.) As explained in *Wilson*: “Denial of a defense summary judgment motion on grounds that a triable issue exists, . . . establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict. . . . [A] claimant or attorney who is in possession of such evidence has the right to bring the claim, even where it is very doubtful the claim will ultimately prevail.” (*Wilson, supra*, at p. 824.) “A trial court’s conclusion that issues of material fact remain for trial ‘necessarily impl[ies] that the judge finds at least some merit in the claim. The claimant may win, if certain material facts are decided favorably. This finding . . . compels [the] conclusion that there is probable cause, because probable cause is lacking only in the *total absence* of merit.’ [Citation.]” (*Id.* at p. 819; see *Parrish, supra*, 3 Cal.5th at pp. 771, 778–779 [reaffirming principles articulated in *Wilson*, and holding that interim adverse judgment rule applies even if court that denied summary judgment on the merits later concludes the underlying suit was brought in bad faith].)

Narrow exceptions bar operation of the interim adverse judgment rule. The denial of a summary judgment motion on procedural or technical grounds, rather than for existence of triable issues of material fact, does not establish that probable cause existed. (*Wilson, supra*, 28

Cal.4th at pp. 823–824.)⁵ A denial on procedural grounds “says nothing regarding the potential merit of the action.” (*Id.* at p. 823; see, e.g., Code Civ. Proc., § 437c, subds. (b)(1), (b)(3) [permitting denial of motion for failure to include moving or opposing separate statement of undisputed facts] & (e) [permitting denial of motion where the only proof of a material fact is the declaration of the sole witness to the fact, or a material fact regarding an individual’s state of mind is sought to be established solely by that person’s testimony]; cf., *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 456 [voluntary dismissal of claim on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity is not a favorable termination on the merits, as required to support a claim for malicious prosecution, because it does not reflect on the substantive merits of the underlying claim].)

b. *Dr. Horowitz Cannot Plead a Viable Claim for Malicious Prosecution*

Dr. Horowitz argues that the interim adverse judgment rule does not apply because the court’s denial of his motion was not directed at the merits of the action, but was based solely on a procedural question, i.e., the legal sufficiency of the 30–day notice.

⁵ Probable cause also cannot be established if the interim ruling was obtained by fraud or perjury. (*Wilson, supra*, 28 Cal.4th at pp. 817, 820.)

This argument fails. This malicious prosecution action is premised broadly on allegations that UD1 was improperly filed and pursued. (See *Dinuba, supra*, 41 Cal.4th at p. 865 [appellate court must give the complaint a reasonable interpretation, reading the action as a whole].) Dr. Horowitz’s motion for summary judgment was not a solely “procedural” challenge. The motion was intended to obtain a dispositive ruling on the merits of the landlord’s assertion of forfeiture. To that end, Dr. Horowitz squarely attacked the validity of the unlawful detainer action, and his motion was intended to obtain a determination that the landlord’s stated grounds for asserting forfeiture of his leasehold had no merit. The court specifically premised its denial of Dr. Horowitz’s motion on a finding that a “triable issue exist[ed] as to whether [Dr. Horowitz’s] refusal to allow access to make . . . alterations constituted a violation of the lease sufficient to support a forfeiture.” The court’s denial was not premised on technical or procedural grounds. Rather, its ruling constituted an acknowledgment that the landlord’s claim had at least conceivable merit. (*Wilson, supra*, 28 Cal.4th at p. 823.)

Ultimately, the question is whether Dr. Horowitz sufficiently alleged that the McGarry firm knew or discovered there was no legally tenable basis to proceed with the UD1 on the ground of forfeiture, and that any reasonable attorney would agree that unlawful detainer action lacked merit. (*Wilson, supra*, 28 Cal.4th at p. 817.) By its demurrer the McGarry firm proved that the UD1 action was not completely without merit, and it had proceeded with an indication that the lawsuit was

legally tenable. The court's ruling denying summary judgment constitutes a determination that the landlord might have been able to substantiate its claim against Dr. Horowitz. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383.) The demurrer was properly sustained without leave to amend.⁶

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

⁶ Because we conclude that the trial court's conclusions as to the motions for summary judgment established probable cause to file and prosecute UD1, and preclude a suit for malicious prosecution, we do not address the parties' arguments whether the court was correct in also finding the malicious prosecution action barred as an unreserved claim under the settlement in UD2.

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