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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.

B234172

(Los Angeles County
Super. Ct. No. BC450635)

APPEAL from an order of the Superior Court of Los Angeles County. Barbara Scheper, Judge. Affirmed.

Law Office of Jay R. Saltsman for Defendants and Appellants Hamid Reza Mehrvak, Sherri Mehrvak and Jay R. Saltsman.

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

Defendants and appellants Hamid and Sherri Mehrvak and their attorney Jay R. Saltsman (collectively the Mehrvaks) appeal from an order denying their anti-SLAPP motion. (Code Civ. Proc., § 425.16.) Respondent Arman Momjian (Momjian) was the plaintiff below. We conclude the trial court correctly denied the motion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of this case and its companion litigation is not lengthy but it is convoluted. In summary: One side filed a declaratory relief action; that case went to judgment. The other side then filed a malicious prosecution action, but then dismissed its complaint. The first side then filed its own malicious prosecution based on the dismissal of the second lawsuit. The second side then filed an anti-SLAPP motion in the third lawsuit, a motion the trial court denied. The second side appealed.

The details follow:

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 attorneys fees.

Case No. BC394701: First Malicious Prosecution Action Filed by the Mehrvaks

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 Saltsman, 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.

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 Mehrvaks countered by filing an anti-SLAPP motion to strike Momjian's complaint.

As is well reported in the appellate authorities, there are two components to an anti-SLAPP motion. First, the defendant must make a threshold showing that the challenged cause of action arises out of protected activity. Second, if that showing is made, the plaintiff must demonstrate the probability of prevailing on the claim. (Code Civ. Proc., § 425.16; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) In the trial court, the parties essentially agreed a malicious prosecution action involves protected activity. (See *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 448.) As to the second prong, and in anticipation of Momjian's argument that he was likely to prevail in his malicious prosecution action, the Mehrvaks argued in the trial court: (1) Momjian was a proper defendant in the first malicious prosecution action because although not a party to the declaratory relief action, Momjian initiated or directed the litigation as OPM's managing agent; and (2) the complaint in the current lawsuit did not even allege lack of probable cause, one of the four elements of a malicious prosecution claim. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740 (*Siebel*).) These facts, argued the Mehrvaks, showed that Momjian could not prevail in the present malicious prosecution action as a matter of law. Momjian's opposition asserted that all corporations necessarily act through their officers and directors and the rule that the Mehrvaks were proposing would make all officers and directors potentially personally liable whenever a

corporation might have filed a lawsuit maliciously. In response to the Mehrvaks second point, Momjian argued that lack of probable cause was at least implicit in the complaint.¹

In supplemental trial papers, both parties relied on *Wyatt v. Union Mortgage Company* (1979) 24 Cal.3d 773, 784-785 (*Wyatt*). Appellants reiterated that Momjian was personally liable for OPM prosecuting the declaratory relief action because he specifically directed and authorized that litigation. Momjian countered that the mere fact he was an officer or director of OPM and attended court proceedings was insufficient to make him personally liable for the corporation's alleged wrongdoing. The trial court denied the anti-SLAPP motion.

Appellants filed a timely notice of appeal.

DISCUSSION

A. *Standard of Review*

As we have observed, the parties essentially agree that the first prong of the anti-SLAPP motion has been satisfied. Thus the trial court was presented only with whether Momjian had demonstrated a likelihood he would succeed on his malicious prosecution claim. In that setting, the burden shifts to the plaintiff to demonstrate a probability of prevailing. To do so, the plaintiff must show that (1) the complaint is legally sufficient and (2) it is supported by a sufficient prima facie showing of facts to sustain a judgment. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180.) On appeal, we independently review the trial court's ruling on an anti-SLAPP motion, considering the pleadings and the supporting and opposing affidavits filed by the parties. We accept as true the evidence favorable to the plaintiff and evaluate the defendant's counter evidence only to determine whether it has defeated the evidence submitted by the plaintiff as a matter of

¹ Momjian sought leave to file an amended complaint adding the omitted probable cause language, but the trial court denied that request.

law. We do not weigh the credibility or comparative probative strength of competing evidence. (*Ibid.*)

B. *The Complaint Is Legally Sufficient*

On appeal, the Mehrvaks contend the trial court erred in denying their anti-SLAPP motion because the complaint was legally insufficient.

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, supra*, 41 Cal.4th at p. 740.) The Mehrvaks argue that the complaint does not adequately allege two of the elements: (1) favorable termination and (2) lack of probable cause. We disagree.

A voluntary dismissal is generally viewed as a favorable termination to the defendant because it implies that the dismissing party cannot maintain the action. (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 (*JSJ*).) Appellants have cited no authority, and our independent research has found none, that requires the exact words "favorable termination" to be included in a complaint for malicious prosecution. We conclude that no magic words are required to allege that element and the complaint in this case adequately does so. Paragraph 11 states that case No. BC394701 (the second lawsuit) was "dismissed without a waiver, mediation, trial or judgment." These words are sufficient to plead favorable termination.

"Probable cause" is an honest and reasonable belief in the truth of the allegations. (*JSJ, supra*, 205 Cal.App.4th at p. 1526.) It is unreasonable to prosecute a claim in the complete absence of supporting evidence. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 222-221.) "Only those actions that 'any reasonable attorney would agree [are] totally and completely without merit' may form the basis for a malicious prosecution suit." (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) No magic words are required to allege probable cause either. Paragraph 12 of the complaint alleges that appellants "acted maliciously in bringing and maintaining [case No. BC394701

against Momjian] in that [appellants'] purpose was to try to force [Momjian] to pay money for prior litigation to which he was not a party. [Appellants'] intent was to harass, embarrass and frustrate [Momjian] with defending this *warrantless lawsuit*.” (Italics added.) Although the separate elements of lack of probable cause and malice are interspersed in the paragraph, the characterization of case No. BC394701 as a “warrantless lawsuit” is sufficient to plead lack of probable cause.

C. Momjian Made a Prima Facie Factual Showing Sufficient to Support a Judgment for Malicious Prosecution

The Mehrvaks also contend the trial court erred in denying their anti-SLAPP motion because Momjian failed to establish factually a probability of prevailing on the merits. They argue that Momjian’s position as an officer and director of OPM establishes probable cause to prosecute him personally for malicious prosecution of the declaratory relief action, and that the voluntary dismissal of case No. BC394701 was unrelated to the merits. We find no error.

First, we address the favorable termination element. The undisputed fact is that appellants dismissed case No. 394701 with prejudice close to the trial date. A reasonable inference from that conduct was that the lawsuit was dismissed because the Mehrvaks believed they could not prevail on the merits. While a termination only to avoid the cost of litigation is not a favorable termination (*JSJ, supra*, 205 Cal.App.4th at p. 1525), attorney Saltsman’s unsworn statement about why case No. BC394701 was dismissed fell far short of establishing a termination unrelated to the merits. He made only vague references to the Mehrvaks having some personal problems and that the decision to dismiss was difficult. The trial court correctly found that this proof was insufficient to establish as a matter of law that the voluntary dismissal did not reflect on the merits.

As to the probable cause element, the Mehrvaks’ argument focuses not so much on the merits of the second lawsuit as on the fact that, in their view, it was proper to include Momjian as a defendant in the second lawsuit. Their argument continues that since Momjian directed the first lawsuit, it was reasonable to name him as a party defendant in

the Mehrvaks' malicious prosecution lawsuit (the second lawsuit). If this is so, then Momjian himself had no probable cause to file the present malicious prosecution lawsuit against anyone. The gist of Momjian's counter-argument is that no reasonable attorney would have prosecuted a claim for malicious prosecution (the second lawsuit) against him because he had not initiated or directed the commencement of the original declaratory relief litigation.

In *Wyatt, supra*, 24 Cal.3d at page 785, our Supreme Court reiterated the long-standing rule that "[d]irectors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct." To maintain a tort claim against a director in his or her personal capacity, the plaintiff must "allege and prove that an ordinary prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1380.)

Here, the undisputed fact that Momjian was not a party to the declaratory relief action is sufficient to establish a prima facie case that appellants lacked reason to believe Momjian initiated or directed the commencement of the declaratory relief action. Appellants' counter evidence, that Momjian was an officer and director of OPM and attended all of the hearings in the declaratory relief action, was not sufficient to defeat as a matter of law Momjian's prima facie showing that he was not personally responsible for initiating the first lawsuit.

DISPOSITION

The order denying appellants' anti-SLAPP motion is affirmed. Respondent shall recover his costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.