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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FIDELITY NATIONAL TITLE  
INSURANCE COMPANY,

Cross-complainant and Respondent,

v.

JONATHAN COTHRAN et al.,

Cross-defendants and Appellants.

B245515

(Los Angeles County  
Super. Ct. No. BC461969)

APPEAL from an order of the Superior Court of Los Angeles County. Yvette M. Palazuelos, Judge. Affirmed.

Law Offices of Tang Kiet and Tang Kiet for Cross-defendants and Appellants.

Hershorin & Henry, Lori C. Hershorin and Claudia Mourad for Cross-complainant and Respondent.

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The trial court granted cross-defendants’ anti-SLAPP motion under Code of Civil Procedure section 425.16<sup>1</sup> as to the abuse of process cause of action in the cross-complaint, but denied it as to the malicious prosecution cause of action. Cross-defendants appeal from the order, contending the trial court should have granted their motion as to both causes of action. We affirm.

## **BACKGROUND**

### **Parties**

Teodoro Sanchez is the plaintiff in the underlying action described below and in the present action. He is not a party to this appeal.

Lawyers Title Insurance Company (Lawyers Title) is a defendant in both the underlying and present actions. At some point during the pendency of the underlying or present action, Lawyers Title merged with Fidelity National Title Insurance Company (Fidelity Title). Fidelity Title, as “successor by merger” to Lawyers Title, filed the malicious prosecution cross-complaint in the present action that is at issue on appeal. Fidelity Title is the respondent on appeal.

Appellant Quyen Kiet is an attorney who has represented plaintiff Sanchez in the underlying and present actions against Lawyers Title. Kiet is a cross-defendant in the malicious prosecution cross-complaint Fidelity Title filed in the present action.

Appellant Kiet Cothran & Zirillo, APC (KCZ) is a law firm that has represented plaintiff Sanchez in the underlying and present actions against Lawyers Title. KCZ also is a cross-defendant in the malicious prosecution cross-complaint Fidelity Title filed in the present action.

Appellant Jonathan Cothran is an attorney with KCZ who has represented plaintiff in the present action filed by Sanchez against Lawyers Title. It is not clear from the record whether Cothran represented Sanchez in the underlying action against Lawyers Title. Cothran also is a cross-defendant in the malicious prosecution cross-complaint Fidelity Title filed in the present action.

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<sup>1</sup> Further statutory references are to the Code of Civil Procedure.

### **Underlying Action (Sanchez I)**

On November 20, 2009, plaintiff Teodoro Sanchez filed the underlying action (Case No. BC426454) against defendant Lawyers Title and other defendants who are not parties to the present action. Attorney Quyen filed the underlying action on Sanchez's behalf. Sanchez asserted class action causes of action against Lawyers Title for fraud and deceit, unfair or unlawful business practices, and violation of California's Consumer Legal Remedies Act, and individual causes of action against Lawyers Title for bad faith denial of insurance claim, intentional infliction of emotional distress, and cancellation of deed of trust.

In the original complaint in the underlying action, Sanchez alleged, in or about November 2008, he discovered a man named Gilberto Lopez (a defendant in the underlying action) had stolen his identity and obtained a \$75,000 loan from lender Antalejeff, Inc. (another defendant in the underlying action). The loan, which was secured by a deed of trust against Sanchez's property, was serviced by Capital Benefit Mortgage, Inc. (a defendant in the underlying action). Shortly after learning about the fraudulent loan in his name, Sanchez contacted Capital Benefit Mortgage and Antalejeff, but neither assisted him in resolving the issue. The loan was in default and they wanted to foreclose on Sanchez's property.

Sanchez also alleged foreclosure could not proceed because the deed of trust "securing the fraudulent loan was defective" as originally recorded in that it "was missing the legal description, . . . also known as 'Exhibit A'" to the deed of trust. According to Sanchez, Lawyers Title, the title insurer for Antalejeff, "took matters into [its] own hands and unlawfully made the correction through fraudulent notarizations." Lawyers Title, through its title officer Ron Fernando, "directed its regular notary public . . . to sign and certify two blank All-Purpose Acknowledgements, without the physical presence or actual consent of the signing party [Sanchez] in violation of California Civil Code sections 1185(a) and 1189." Sanchez asserted he "is informed and believes that Class Members were similarly affected by unlawfully produced and recorded 'blank acknowledgements' by" Lawyers Title.

Sanchez further alleged, once Lawyers Title “corrected the deficiencies in the fraudulently procured Deed of Trust by directing the notary public to violate state laws,” Capital Benefit Mortgage and Antalejeff “were now free to resume [their] foreclosure efforts.” On July 22, 2009, a Notice of Default issued and foreclosure proceedings commenced. Sanchez contacted Lawyers Title, in addition to Capital Benefit Mortgage and Antalejeff, but received no assistance in resolving the matter.

In January 2010, Sanchez filed a first amended complaint in the underlying action, asserting the same causes of action he alleged in the original complaint. After Lawyers Title filed a demurrer to the first amended complaint—which was not ruled on by the trial court—Sanchez filed a second amended complaint in July 2010, dropping the class action causes of action and the allegations regarding Lawyers Title’s involvement in procuring the fraudulent notarizations, and adding an individual cause of action for negligence against Lawyers Title. Lawyers Title demurred to the second amended complaint, and the trial court sustained the demurrer without leave to amend as to the negligence cause of action and overruled the demurrer as to the cause of action for intentional infliction of emotional distress.

In November 2010, Sanchez filed a third amended complaint in the underlying action, asserting one cause of action against Lawyers Title for intentional infliction of emotional distress.<sup>2</sup> Sanchez alleged his property was sold at a trustee’s sale on or about December 8, 2009. In the cause of action for intentional infliction of emotional distress, Sanchez alleged lender Antalejeff and loan servicer Capital Benefit Mortgage advised him, when he attempted to cancel the trustee’s sale, that “the foreclosure sale was

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<sup>2</sup> Sanchez asserted causes of action against Gilberto Lopez for fraud and intentional infliction of emotional distress; causes of action against Antalejeff for intentional infliction of emotional distress, cancellation of deed of trust and trustee’s deed upon sale, and quiet title; a cause of action for intentional infliction of emotional distress against Capital Benefit Mortgage; a cause of action for negligence against Dorothea Adamson and Mayra Pineda (notaries); and causes of action against Enduravest, Inc. (the party who acquired title to Sanchez’s property at the trustee’s sale) for cancellation of deed of trust and trustee’s deed upon sale and quiet title.

proceeding at the insistence of” Lawyers Title and he should contact Lawyers Title “directly to stop the sale.” Sanchez further alleged that he contacted Lawyers Title’s managing agent/attorney, who “was unresponsive and uncooperative.” According to Sanchez, Antalejeff, Capital Benefit Mortgage and Lawyers Title “acted in concert and proceeded with the foreclosure process” even though he sent them a report by a fingerprint expert showing that the fingerprint on the notary public logbook was not Sanchez’s fingerprint. Sanchez “demanded that the lending Defendants’ loss from [Lopez’s] fraud be submitted to [Lawyers Title] for resolution rather than be resolved by trustee’s sale.” Sanchez asserted Lawyers Title’s conduct, as alleged in this cause of action, was “outrageous,” entitling him to damages including punitive damages. Sanchez did not base his intentional infliction of emotional distress cause of action in the underlying action on Lawyers Title’s involvement in creating fraudulent documents.

Lawyers Title answered the third amended complaint and then, in February 2011, filed a motion for summary judgment.<sup>3</sup> Sanchez opposed the motion. The caption page of Sanchez’s opposition indicates Sanchez was represented by attorney Quyen Kiet and law firm KCZ. As set forth in the trial court’s order granting the summary judgment motion, “Lawyers Title moved for summary judgment on the second cause of action for IIED [intentional infliction of emotional distress] on the grounds that Lawyers Title’s conduct was not outrageous under California law in advising its insured [Antalejeff] as to how to obtain policy benefits, that Lawyers Title’s actions and communications with defendant Antalejeff were privileged as they were done in conformity with its role, contractual duty, and obligation as the title insurer, there is no evidence to show that Lawyers Title intended to cause plaintiff emotional distress, and that by plaintiff’s own admission, Lawyers Title’s actions were not the cause of his emotional distress.”

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<sup>3</sup> In connection with the anti-SLAPP motion, cross-defendants presented evidence showing, on April 8, 2011, before the trial court heard Lawyers Title’s summary judgment motion in the underlying action, a criminal court in an action filed against Lopez voided the fraudulent deed of trust and restored title to Sanchez.

The trial court found the evidence submitted in connection with the motion for summary judgment established, in pertinent part: “Beginning in December 2008, Lawyers Title spoke with Antalejeff’s representatives about plaintiff’s fraud claim, provided advice to Antalejeff about losses that were indemnifiable under the title policy, and how California law requires a foreclosure sale to establish loss under the title policy since plaintiff failed to file a verified quiet title action alleging the forgery.” As Lawyers Title’s expert explained in a declaration submitted in support of the summary judgment motion, “such communications between an insured and the insurance company [are] standard practice in the industry.” On March 26, 2009, Sanchez tendered a claim to Lawyers Title for compensatory damages arising from the alleged fraudulent loan. Lawyers Title denied the claim because Sanchez was not an insured under the title policy. “Lawyers Title owed no duties to plaintiff as he was not the named insured under the policy.” At his deposition, Sanchez testified “the ‘only reason’ he is suffering pain is due to the fact that ‘someone took out a loan on the subject property’ and that ‘someone encumber[ed] [his] property with a Deed of Trust.’” Sanchez believed he still owned the property because he continued to live there, although he was “aware that title was legally transferred.”

On May 3, 2011, the trial court granted Lawyers Title’s motion for summary judgment, finding “no triable issues of material fact with respect to whether [Lawyers Title] acted outrageously, had any intent to inflict injury upon plaintiff [Sanchez], or acted with the realization that injury will result.” The court also found Sanchez’s “damages were not caused by [Lawyers Title], who did not cause plaintiff’s property to be encumbered with the deed of trust.” Judgment was entered on May 24, 2011.<sup>4</sup>

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<sup>4</sup> On August 13, 2013, after this matter was fully briefed on appeal, respondent Fidelity Title filed a motion to augment the record with documents filed in connection with Lawyers Title’s motion for summary judgment in the underlying action. Cross-defendants/appellants opposed the motion to augment the record, arguing there was no showing of good cause for the delay. We find the August 13, 2013 motion to augment the record was not timely made and deny it.

## **Present Action (Sanchez II)**

### **Complaint**

On May 20, 2011, before the judgment in the underlying action was entered, Sanchez filed the present action (Case No. BC461969) against Lawyers Title, asserting class action causes of action for slander of title and unlawful business practices and an individual cause of action for intentional infliction of emotional distress. Kiet, Cothran and KCZ are the attorneys/law firm who commenced and are prosecuting the present action. After Lawyers Title filed a demurrer to the complaint—which was not ruled on by the trial court—Sanchez filed a first amended complaint on September 13, 2011, adding an individual cause of action for slander of title against Lawyers Title.

In the first amended complaint in the present action, Sanchez alleged the underlying action against Lawyers Title “was limited in scope to only IIED [intentional infliction of emotional distress] for wrongfully advising and inducing the Lender to foreclose.” Sanchez further alleges he “files this action under a different set of facts and circumstances unrelated to [Sanchez]’s injuries in the Previous [underlying] Action. Specifically, the harm to [Sanchez] alleged herein arises from [Lawyers Title]’s separate malicious acts of July 2009: its conspiracy to commit perjury and intentional recording of fraudulent documents. Furthermore, [Sanchez] is informed and believes that [Lawyers Title] engaged in this misconduct at a scale that affected hundreds to thousands of consumers to warrant a class wide action.”

In his cause of action for intentional infliction of emotional distress in the present action, Sanchez alleged: “(1) [Lawyers Title] knowingly induced Notary Adamson to declare false acknowledgements under penalty of perjury in support of the amended Forged Trust Deed; this is criminal misconduct and outrageous on its face; (2) [Lawyers Title] then recorded the false acknowledgements as a public record. It was outrageous to publicize that [Sanchez] signed a deed of trust, when in fact he did not; (3) when notified of its misconduct, [Lawyers Title] refused to mitigate and/or cure its wrongful recording; (4) [Lawyers Title] knew that [Sanchez] suffered as a previous victim of real estate fraud

and despite this knowledge it too victimized [Sanchez] by misappropriating [Sanchez]'s identity to amend the Deed.”<sup>5</sup>

### **Demurrer**

In October 2011, Lawyers Title demurred to the first amended complaint in the present action on numerous grounds including that Sanchez's claims in the present action are barred by collateral estoppel. Sanchez opposed the demurrer. On February 2, 2012, the trial court issued an order sustaining the demurrer without leave to amend as to the cause of action for intentional infliction of emotional distress on the ground the cause of action was barred by collateral estoppel because the same “issues were actually litigated in the prior dispute and the issues were decided on the merits.” As to the class action allegations, the court sustained the demurrer with leave to amend. The court overruled the demurrer as to the individual cause of action for slander of title.

### **Cross-Complaint**

On May 22, 2012, Fidelity Title, as “successor by merger to” Lawyers Title filed a cross-complaint in the present action against attorneys Cothran and Kiet and the law firm KCZ (collectively, cross-defendants), asserting causes of action for malicious prosecution and abuse of process. Fidelity Title based the malicious prosecution action on cross-defendants' filing and continued pursuit of the underlying action, and his filing of the

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<sup>5</sup> In connection with the anti-SLAPP motion, cross-defendants presented evidence showing, on September 28, 2011, Ron Fernando, a title officer at Lawyers Title, was indicted on charges related to false acknowledgements he prepared in connection with the fraudulent deed of trust which was secured by Sanchez's property. The class action causes of action for slander of title and unlawful business practices in the present action are based on these alleged false acknowledgements. Moreover, on July 25, 2012, Sanchez filed a third action against Antalejeff, Capital Benefit Mortgage, Fernando, Enduravest and Lawyers Title for identity theft, slander of title and cancelation of cloud on title, with allegations regarding these alleged false acknowledgements (Case No. BC488560).



first amended complaint in the present action with a duplicate cause of action for intentional infliction of emotional distress.<sup>6</sup>

On July 13, 2012, cross-defendants filed a demurrer to the cross-complaint. Fidelity Title did not file its opposition to the demurrer until after the trial court ruled on the anti-SLAPP motion. The ruling on the demurrer is not at issue on appeal.

### **Anti-SLAPP Motion**

On July 16, 2012, cross-defendants filed their anti-SLAPP motion under section 425.16, asking the trial court to strike Fidelity Title's cross-complaint. Cross-defendants argued the causes of action in the cross-complaint arise from protected activity within the meaning of the anti-SLAPP statute, and Fidelity Title cannot demonstrate a probability of prevailing on either cause of action. As to the malicious prosecution cause of action, cross-defendants argued Fidelity Title cannot demonstrate a probability of prevailing on its claim because "the fact that [Lawyers Title] prevailed on [Sanchez]'s cause of action for intentional infliction of emotional distress, by way of summary judgment in the TAC [third amended complaint in the underlying action] and by way of demurrer in the FAC [first amended complaint in the present action], does not establish a lack of probable cause or the malice element on the part of [Sanchez]'s attorneys." We do not discuss cross-defendants' arguments regarding abuse of process cause of action because that cause of action is not at issue on appeal.

In its written opposition to the anti-SLAPP motion, Fidelity Title conceded the causes of action in the cross-complaint arise from protected activity but urged the trial court to deny the anti-SLAPP motion because Fidelity Title can demonstrate a probability of prevailing on its claims. Cross-defendants filed a reply brief and objections to evidence Fidelity Title submitted in support of its opposition. We address the evidentiary objections below because cross-defendants challenge the trial court's ruling on the objections.

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<sup>6</sup> We do not discuss the abuse of process cause of action in the cross-complaint because it is not pertinent to the issues on appeal.

On October 3, 2012, the trial court heard oral argument on the anti-SLAPP motion and issued an order denying it as to the cause of action for malicious prosecution and granting it as to the cause of action for abuse of process. The court granted Fidelity Title's and cross-defendants' requests for judicial notice filed in connection with the anti-SLAPP motion. The court overruled all of cross-defendants' evidentiary objections.

## **DISCUSSION**

Cross-defendants contend the trial court erred in denying the anti-SLAPP motion as to the malicious prosecution cause of action in Fidelity Title's cross-complaint.

### **Standard of Review**

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) "We consider 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3.)

### **Section 425.16**

Under section 425.16, a party may move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421.) Section 425.16 provides: "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).)

In evaluating an anti-SLAPP motion, we conduct a two-step analysis. First, we must decide whether the defendant "has made a threshold showing that the challenged

cause of action arises from protected activity.” (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 488.) For these purposes, protected activity “includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

Second, if the defendant makes this threshold showing, we decide whether the plaintiff “has demonstrated a probability of prevailing on the claim.” (*Taheri Law Group v. Evans, supra*, 160 Cal.App.4th at p. 488.) To satisfy its burden, the plaintiff ““must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”” (*Soukup, supra*, 39 Cal.4th at p. 291.) The trial court must deny an anti-SLAPP motion if “““the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff. [Citation.]””” (*Robinzine v. Vicory, supra*, 143 Cal.App.4th at p. 1421.) At this stage of the proceedings, the plaintiff “need only establish that his or her claim has ‘minimal merit.’” (*Soukup, supra*, 39 Cal.4th at p. 291.) Although ““the court does not *weigh* the credibility or comparative probative strength of competing evidence, it 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.”” (*Ibid.*)

### **Malicious Prosecution Cause of Action**

Fidelity Title does not dispute that its malicious prosecution cause of action arises from protected activity within the meaning of the anti-SLAPP statute. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736-741.) The issue on appeal is

whether Fidelity Title has demonstrated a probability of prevailing on its malicious prosecution claim.

To establish a malicious prosecution cause of action, a plaintiff or cross-complainant must demonstrate that a prior action ““(1) was commenced by or at the direction of the defendant [or cross-defendant] and was pursued to a legal termination in [its], plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].” [Citations.]” (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-872.) An attorney may be held liable on a malicious prosecution cause of action not only for commencing an action without probable cause, but also for “continuing to prosecute a lawsuit discovered to lack probable cause.” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 960.)

Cross-defendants argue Fidelity Title may not base its malicious prosecution cause of action in the present action on the filing of the intentional infliction of emotional distress cause of action in the present action, even though the trial court sustained the demurrer to that cause of action without leave to amend, because the present action has not terminated. As set forth above, a plaintiff or cross-complaint must demonstrate a prior action terminated in its favor in order to establish malicious prosecution. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 871.) We agree with cross-defendants’ argument on this point, and Fidelity Title conceded the point on appeal at oral argument.

For the reasons discussed below, however, we conclude that Fidelity Title has demonstrated a probability of prevailing on its malicious prosecution claim based on the filing and continued pursuit of the underlying action which terminated in Lawyers Title’s favor.

#### **Prior action commenced/prosecuted by cross-defendants**

Cross-defendants argue on appeal that Fidelity Title did not satisfy the first element of a malicious prosecution claim—that the prior action was commenced or prosecuted by cross-defendants. The record shows Kiet filed the underlying action against Lawyers Title on behalf of Sanchez, and continued to prosecute the action until

judgment was entered in favor of Lawyers Title. The record also shows that KCZ prosecuted the underlying action on behalf of Sanchez in that KCZ, along with Kiet, represented Sanchez in connection with Lawyers Title's successful summary judgment motion.

Although it is clear from the record that Cothran is one of the attorneys who commenced and is prosecuting the present action on behalf of Sanchez, along with Kiet and KCZ, the record does not show whether Cothran also prosecuted the underlying action on behalf of Sanchez. Below, in connection with their anti-SLAPP motion, cross-defendants did not specifically dispute that Cothran prosecuted the underlying action. In their reply brief in support of their anti-SLAPP motion, cross-defendants indicated that they were Sanchez's "attorneys of record" in both actions. Cothran is a name partner of KCZ.

Cross-defendants may not dispute for first time on appeal that they were Sanchez's attorneys of record in the underlying action and prosecuted that action on Sanchez's behalf. "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. [Citation.]' [Citations.] . . . Such arguments raised for the first time on appeal are generally deemed forfeited." (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592.)

### **Favorable termination of underlying action**

In the underlying action, the trial court entered judgment in favor of Lawyers Title after granting Lawyers Title's motion for summary judgment on the merits. Thus, Fidelity Title demonstrated the prior action was pursued to a legal termination in its favor. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 871.)

### **Lack of probable cause**

"Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. '[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal [citation], i.e., probable cause exists if "any reasonable

attorney would have thought the claim tenable.” [Citation.] 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.] Attorneys and litigants . . . “have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win. . . .” [Citation.] Only those actions that “any reasonable attorney would agree [are] totally and completely without merit” may form the basis for a malicious prosecution suit. [Citation.]’ [Citation.]” (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047-1048.)

The pleadings and evidence (to which cross-defendants did not object) filed in connection with the anti-SLAPP motion demonstrate: In or about December 2008, after Sanchez discovered Lopez had stolen his identity and obtained a loan in Sanchez’s name, Sanchez made a report of fraud to the lender, Antalejeff, and the loan servicer, Capital Benefit Mortgage. The loan was in default. Lawyers Title, the title insurer, advised its insured, Antalejeff, that Antalejeff could not obtain benefits under the title insurance policy unless it foreclosed on the property which secured the deed of trust (Sanchez’s property). During the time that Lawyers Title was advising Antalejeff about establishing a loss under the policy, Sanchez had not filed a lawsuit seeking to void the forged documents and stop the foreclosure process. Sanchez reported the alleged fraud to Lawyers Title and made a claim to Lawyers Title under the title insurance policy. Lawyers Title denied the claim because Sanchez was not an insured under the policy. Sanchez filed the underlying action on November 20, 2009. His property was sold at a trustee’s sale on December 8, 2009.

In the underlying action, Sanchez pursued two causes of action against Lawyers Title, negligence and intentional infliction of emotional distress. The trial court sustained a demurrer to the negligence cause of action without leave to amend, and granted summary judgment on the remaining cause of action for intentional infliction of emotional distress. In connection with the anti-SLAPP motion, cross-defendants have not argued there was probable cause to file and prosecute the negligence cause of action.

But they do argue there was probable cause to file and prosecute the cause of action for intentional infliction of emotional distress.

To establish a cause of action for intentional infliction of emotional distress, a plaintiff must demonstrate: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe extreme emotional distress; and (3) actual and proximate causation . . . .” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) In the underlying action, in the intentional infliction of emotional distress cause of action, Sanchez alleged Lawyers Title intentionally caused him emotional distress by advising its insured, Antalejeff, to proceed with the foreclosure sale, even though it was aware of Sanchez’s fraud claim.

Lawyers Title presented a sufficient prima facie showing of facts demonstrating the intentional infliction of emotional distress cause of action against Lawyers Title in the underlying action was filed and prosecuted without probable cause. Sanchez was not an insured under the title policy. Sanchez has not argued Lawyers Title owed any contractual duty to Sanchez. Advising its insured, Antalejeff, as to how to obtain policy benefits is not extreme and outrageous conduct. Sanchez discovered the fraudulent loan in or about November 2008, but did not file the underlying action until November 20, 2009, less than three weeks before the December 8, 2009 trustee’s sale. Thus, during the time Lawyers Title was advising its insured about obtaining policy benefits, Lawyers Title was aware of the allegation of fraud, but Sanchez had taken no legal action to void the allegedly forged documents or to stop the foreclosure process. Moreover, evidence presented in connection with the motion for summary judgment demonstrates Sanchez had not suffered emotional distress as a result of Lawyers Title’s actions at the time his attorneys filed and prosecuted the underlying action, as he was not even aware his property had been sold at a foreclosure sale.

### **Malice**

“For purposes of a malicious prosecution tort, malice relates to the subjective intent or purpose with which the defendant acted in initiating the prior action.” (*Padres*

*L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 522.) To establish malice, the plaintiff or cross-complainant must show the defendant or cross-defendant “had an improper motive in bringing the prior action[.]” (*Ibid.*) An improper motive may be shown where “the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.” [Citation.]” (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.) “Although a lack of probable cause, standing alone, does not support an inference of malice, malice may still be inferred when a party knowingly brings an action without probable cause.” (*Padres L.P. v. Henderson, supra*, 114 Cal.App.4th at p. 522.) Malice also may “be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226.)

In support of its opposition to the anti-SLAPP motion, Fidelity Title attached as exhibits to the declarations of its attorney Lori Hershorin and its Operations Manager and Assistant Vice President Glen Awerkamp settlement demand letters sent from cross-defendants Quyen Kiet and KCZ to Lawyers Title. The trial court properly overruled cross-defendants’ objections to these demand letters because settlement discussions may be used in a malicious prosecution action to show that the plaintiff had an improper motive in bringing or continuing to litigate the prior action. (See *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 219.)

Attached as Exhibit A to the Awerkamp declaration is a March 26, 2009 letter from Kiet to Lawyers Title demanding Lawyers Title pay \$275,000 plus “all outstanding charges and interest owed on the underlying trust deed and loan” to settle Sanchez’s claims. Attached as Exhibit B to the Awerkamp declaration is a June 30, 2009 letter from Kiet to Lawyers Title demanding Lawyers Title pay \$400,000 to settle Sanchez’s claims. Attached as Exhibit A to the Hershorin declaration is a January 22, 2010 letter from Kiet and KCZ to Hershorin demanding Lawyers Title pay \$5,000,000 to settle Sanchez’s claims.

As set forth above, Sanchez was not an insured under the title insurance policy and Lawyers Title owed no contractual duty to Sanchez. Lawyers Title did not assist Lopez



in obtaining the loan. A reasonable inference from these escalating settlement demands is that cross-defendants commenced and continued to prosecute this action which lacked probable cause in order to force a large settlement which bore no relation to the merits of the claims.

Malice also may be inferred from cross-defendants' filing of the present action against Lawyers Title including a cause of action for intentional infliction of emotional distress less than two weeks after the trial court granted Lawyers Title's motion for summary judgment on the intentional infliction of emotional distress cause of action.

### **Evidentiary Objections**

Cross-defendants made 23 objections to Fidelity Title's evidence submitted in opposition to the anti-SLAPP motion, 20 to the declaration of Lori Hershorin (counsel for Fidelity Title/Lawyers Title) and three to the declaration of Glen Awerkamp (Lawyers Title's Operations Manager and Assistant Vice President). The trial court overruled all of the objections for reasons not specified in its written ruling.

Cross-defendants challenge the ruling on the evidentiary objections. We need not address the issue because we have not relied on the evidence cross-defendants objected to—except the demand letters already discussed above—in concluding Fidelity Title demonstrated a probability of prevailing on its malicious prosecution claim.

For the foregoing reasons, we conclude the trial court did not err in denying cross-defendants' anti-SLAPP motion as to the malicious prosecution cause of action. Fidelity Title established its claim has the requisite minimal merit to survive cross-defendants' anti-SLAPP motion.

**DISPOSITION**

The order is affirmed. Respondent is entitled to recover costs on appeal.  
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.