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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAVID SANDOVAL et al.,

Cross-Defendants and
Respondents,

v.

CECIL MARTINEZ,

Cross-Complainant and
Appellant.

2d Civil No. B282053
(Super. Ct. No. 15CVP0078)
(San Luis Obispo County)

Cecil Martinez appeals an order granting cross-defendants', David Sandoval, Allison Sandoval, Matthew M. Loker, and the Kazerouni Law Group, APC, anti-SLAPP motion to strike the malicious prosecution and abuse of process causes of action in Martinez's second amended cross-complaint. (Code Civ.

Proc., § 425.16.)¹ The trial court found that Martinez failed to demonstrate a probability of prevailing on the claims. (§ 425.16, subd. (b)(1).) We affirm.

Facts and Procedural History

This appeal arises out of an unpaid \$595.50 bill for livestock feed. In 2014, KC Feed and Cubes dba KC Feeds sold the Sandovals 15 tons of feed for approximately \$4,000. The Sandovals wrote several checks, two of which bounced, leaving a \$595.50 balance. Cecil Martinez, the managing partner of KC Feed, sent a Facebook message threatening to sue the Sandovals for \$1,000 and lien their property and garnish their wages. Martinez also left a voicemail on Allison Sandoval's phone that writing a bad check for more than \$500 was a felony. "[Y]ou're leaving me no other choice but to throw you under the bus and turn you in You're a big girl, pay your fuckin' bill." In a second voicemail, Martinez said "don't be a fuckin loser. Pay your fuckin' bill."

The Sandovals retained attorney Matthew M. Loker of the Kazerouni Law Group, APC, and sued for violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act; Civ. Code, § 1788 et seq.). The complaint prayed for actual and punitive damages, plus \$1,000 statutory damages. (Civ. Code, § 1788.30, subd. (b).) Martinez filed an answer and a cross-complaint for conversion, unjust enrichment, breach of contract, trespass to chattels, fraud, and intentional interference with prospective economic advantage. The Sandovals attempted to negotiate a settlement and then dismissed the complaint without prejudice on February 16, 2016. Before the action was dismissed,

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

Martinez sent a letter to Sandoval's counsel stating that the feed bill was not a consumer debt or subject to the Rosenthal Act. The letter included a motion for sanctions (§ 128.7) and demanded that the Sandovals dismiss the complaint within 21 days, which they did.

After Sandoval's complaint was dismissed, Martinez amended the cross-complaint to allege new causes of action for malicious prosecution and abuse against the Sandovals and their attorney (collectively referred to as Sandoval). Sandoval filed a special motion to strike. Martinez opposed the motion on the ground that Sandoval lacked probable cause to file the complaint and acted with malice.

The trial court found that Martinez made an adequate showing that the acts complained of were not subject to the Rosenthal Act but failed to demonstrate a reasonable probability of prevailing on the malice element of malicious prosecution. With respect to the abuse of process cause of action, the trial court found it was barred by the litigation privilege. (Civ. Code, § 47, subd. (b).) Attached to the notice of ruling is a file stamped copy of the trial court's seven-page memorandum. The memorandum has no case caption or title to indicate that it is an order or judgment.

Under California Rules of Court, rule 8.104(a) the time for notice of appeal runs from the clerk's mailing of either a "Notice of Entry" of judgment or a file-stamped copy of the judgment. Serving a notice of ruling is not the same as serving a notice of entry of judgment. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399; *20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 672 [a "notice of ruling" is not a "notice of entry"].) In *Sunset Millennium Associates, LLC v. Le*

Songe, LLC (2006) 138 Cal.App.4th 256 (*Sunset Millennium*), the trial court granted a special motion to strike and the clerk mailed a 14-page minute order. (*Id.* at p. 257.) Defense counsel submitted a proposed judgment that was signed by the trial court on December 9, 2005 and mailed to the parties. (*Id.* at p. 258.) The Court of Appeal held that that the 60-day deadline for filing a notice of appeal was triggered by the December 9 mailing of the “judgment” because the mailing was titled “NOTICE OF ENTRY OF JUDGMENT,” whereas the previous notice lacked such a title. (*Id.* at p. 259.)

That is the case here. No notice of entry was served to trigger the 60-day time period to appeal. (*Sunset Millennium, supra*, 138 Cal.App.4th at pp. 259-260; *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 [only document entitled notice of entry or file-stamped copy of judgment or appealable order satisfies Cal. Rules of Court, rule 8.104(a)(1)].) Because a notice of entry of order was not served on the parties, Martinez had 180 days to file the notice of appeal. (Cal. Rules of Court, rule 8.104(c).) The notice of appeal was filed April 11, 2017, well before the 180 days elapsed. We accordingly deny the motion to dismiss the appeal.

Anti-SLAPP Motion

The order granting Sandoval’s anti-SLAPP motion is subject to de novo review on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) Section 425.16 “provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the

required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described the second step as a ‘summary-judgment-like procedure.’ [Citation.]” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, fn. omitted.)

With respect to step one, Martinez does not dispute that the act or acts of which he complains (Sandoval’s complaint for violation of the Rosenthal Act) was a protected activity taken in furtherance of Sandoval’s right of petition or free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The anti-SLAPP statute encompasses claims for malicious prosecution where, as here, the claim arises out of written and oral statements in a judicial proceeding. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) The same is true for the abuse of process claim. (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370-1371.)

Step Two: Probability of Success

Because step one of the anti-SLAPP statute was satisfied, the burden shifts to Martinez to show there is a probability he will prevail on his new claims. (§ 425.16, subd. (b)(1).) To prevail on the malicious prosecution cause of action, Martinez must plead and provide evidence (1) that Sandoval’s complaint was commenced by or at the direction of the Sandovals and there was a legal termination in Martinez’s favor, (2) that the complaint was filed without probable cause, and (3) that it was initiated with malice. (*Crowley v. Kattelman* (1994) 8 Cal.4th 666, 676.)

Martinez argues that Sandoval voluntarily dismissed the complaint because of the looming threat of sanctions and pending discovery motions. A voluntary dismissal, even a

dismissal without prejudice, is presumed to be a favorable termination. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1540.)

Martinez further argues that Sandoval's complaint was filed without probable cause because the Rosenthal Act only applies to debt collectors attempting to collect a debt arising from a consumer credit transaction. (See Civ. Code, §§ 1788.2, subd. (e) & (f); 1788.13; Ahart, Cal. Practice Guide: Enforcing Judgments & Debts (The Rutter Group 2017) [¶] 2:169.1, p. 2-151.) "The term 'consumer credit transaction' means a transaction . . . in which property, services or money is acquired on credit . . . *primarily for personal, family, or household purposes.*" (Civ. Code, § 1788.2, subd. (e), italics added.) The Rosenthal Act is modeled after the Federal Fair Debt Collection Practices Act (FDCPA; 15 U.S.C. §§ 1692 - 1692p) which is also limited to consumer debts. (See 15 U.S.C. § 1692a(5); *Bloom v. I.C. Sys., Inc.* (9th Cir. 1992) 972 F.2d 1067, 1068-1069 [FDCPA applies to debts incurred for personal rather than commercial reasons]; Ahart, Cal. Practice Guide, *supra*, [¶][¶] 2:5 & 2:8, pp. 2-2 to 2-3 [federal and state debt collection legislation applies to consumer debts].)

Sandoval used a business check to pay for the feed and certified that the sale was exempt from sales tax. Martinez argues that the quantity of feed (15.85 tons purchased over a four-month period at a cost of about \$4,000) was too excessive to be for personal use. The Sandovals counter that they had a good faith belief that it was a consumer transaction and that federal cases supported the action, but the question of probable cause is an objective one. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 971.) Sandoval's subjective belief is not relevant. The opposition

papers make an adequate showing that Sandoval's complaint for violation of the Rosenthal Act was initiated without probable cause.

Malice

The trial court granted the anti-SLAPP motion because the opposition papers failed to show that Martinez will probably prevail on the malice element of malicious prosecution. It did not err. Malice goes to the issue of Sandoval's subjective intent or purpose in initiating the prior action. (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 522.) In *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260 (*Soukup*), our Supreme Court held that "[t]he motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some *improper* ulterior motive.' [Citations.]" (*Id.* at p. 292.)

The trial court found that Sandoval filed the complaint within six weeks of Martinez's "Facebook rant" and did so without malice. Martinez threatened to sue Sandoval for \$1,000 and turn the matter over to the district attorney for criminal prosecution. In a voicemail, Martinez told Allison Sandoval "don't be a fuckin' loser. Pay your fuckin' bill. You're a loser right now for now paying your bill." Sandoval felt harmed and sought redress, as would any reasonable person. The Sandovals believed Martinez was violating federal and state debt collection laws (15 U.S.C. § 1692d; Civ. Code, §§ 1788.10(e) [threatening garnishment or attachment]; § 1788.11, subd. (a) using obscene or profane language]), and filed suit to stop it. The Sandovals may have been wrong on whether it was a

consumer debt, but the trial court found that they dismissed their complaint “in the midst of KC Feed’s aggressive . . . pursuit of discovery [which] supports only an inference that they were tired of the litigation.” The Sandovals tried to negotiate a “a mutual walkaway - waiver of the debt,” but the settlement got “hung” up on a waiver of costs.² Upon learning that the litigation costs could put Martinez out of business, the Sandovals filed the dismissal to facilitate a settlement.

Martinez has not made the requisite showing that the Sandovals filed the complaint with malice or instituted the action primarily for an improper ulterior purpose. (*Soukup, supra*, 39 Cal.4th at p. 292.) As an element of malicious prosecution, malice “reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement.” (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 452.) Although lack of probable cause is a factor that may be considered in determining whether the action was prosecuted with malice, the lack of probable cause must be supplemented by other additional evidence, which is lacking here. (See, e.g., *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498, fn. 29.) This is not a case in which the evidence shows that defendant knowingly brought the prior action without probable cause (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383) or subjectively believed the action was

² Martinez’s attorney wrote: “[Martinez] has no assets, living at his parents [sic] house selling hay for a living with \$150k in student loan debt. [A]s stated before he’s judgment proof.”

untenable. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1407 [“malice is present when proceedings are instituted primarily for an improper purpose”]; *Albertson v. Raboff, supra*, at p. 383 [malice present where proceedings initiated solely for forcing a settlement that has no relation to the merits of the claim].) Martinez has not shown a probability of prevailing on the malice element of his malicious prosecution action.

Abuse of Process

On the cause of action for abuse of process, the trial court found that the action was barred by the litigation privilege which applies to all torts except malicious prosecution. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)³ Martinez does not challenge the ruling on appeal, nor can he. “The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] Put another way, application of the privilege does not depend on the publisher’s ‘motives, morals, ethics or intent.’ [Citation.]” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.)

Disposition

The judgment (order granting anti-SLAPP motion on the malicious prosecution and abuse of process causes of action in

³ The litigation privilege applies to any communication (1) made in a judicial or quasi-judicial proceeding; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. (Civ. Code, § 47, subd. (b); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

the Second Amended Cross-Complaint) is affirmed. The Sandovals are awarded costs and reasonable attorney's fees on appeal, in an amount to be determined by the trial court. (§ 425.16, subd. (c)(1).)

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Donald G. Umhofer, Judge^{*}

Superior Court County of San Luis Obispo

Jeffrey Lewis, for Cross-Complainant and Appellant.
BLC Law Center and Ahren A. Tiller; Kazerouni Law
Group and Matthew M. Loker, for Cross-Defendants and
Respondents.

^{*} (Retired Judge of the San Luis Obispo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)