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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

MARY A. FLOWERS, Plaintiff and Appellant, v. JENNIFER HUDSON et al., Defendants and Respondents.	B277687, B281706 (Los Angeles County Super. Ct. No. BC592808)

APPEAL from orders of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Mary A. Flowers, in pro. per., for Plaintiff and Appellant.

Murchison & Cumming, Edmund G. Farrell and Gina E. Och for Defendants and Respondents.

Mary A. Flowers (Flowers) sued George W. Hightower (Hightower) and his attorneys and their firm—Jennifer Hudson (Hudson), Kenneth W. Petrulis (Petrulis), and Goodson, Wachtel and Petrulis (collectively, the Attorneys)—for malicious prosecution and fraud. In response, the Attorneys, pursuant to section 425.16 of the Code of Civil Procedure,[1] filed a special motion to strike Flowers's lawsuit—a so-called anti-SLAPP motion.[2] The trial court granted the Attorneys' motion, finding that Flowers had failed to demonstrate a probability of success on her claims. As part of its ruling, the trial court sustained the Attorneys' evidentiary objections to the entirety of Flowers's declaration and all of the exhibits attached thereto. Flowers appealed, challenging both the trial court's evidentiary ruling and its substantive finding. The Attorneys, pursuant to section 425.19, subdivision (c)(1), subsequently moved for an award of their attorney fees. The trial court, in principal part, granted the motion and Flowers appealed. We consolidated the two appeals for the purpose of oral argument and decision. As discussed below, we affirm both orders.

BACKGROUND

In 1986, although Hightower was married to someone else, he and Flowers purchased a house together and took title to the property as tenants in common. In 1987, Flowers and Hightower had an argument, which led to Flowers effectively denying him

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

access to the property. From 1989 onward, Flowers made all mortgage payments, paid all the property taxes and maintenance costs and managed rentals of the property. Flowers did not share any revenue from the property with Hightower.

I. The underlying litigation

In 2011, Flowers sued Hightower for partition of the property and an accounting of what he owed her for the mortgage, tax and upkeep payments on the property for the 24 years since she took possession (the underlying litigation). Hightower cross-complained, ultimately seeking both partition and an accounting of her profits on the property, based on the fact that her conduct in 1987 and subsequent exclusive possession of the property "ousted" him and entitled him to payments on the property.

As the litigation progressed, Flowers sought to change her litigation theory. Rather than treat Hightower as a cotenant who owed her money, she sought to quiet title to the property by adverse possession. However, the trial court did not allow her to amend her complaint to assert this new theory. Flowers eventually dismissed her original complaint. Hightower continued to litigate his cross-complaint.

The trial court granted Flowers's motion for judgment on the pleadings as to Hightower's ouster-based claim for an accounting, finding that the claim was barred by the statute of limitations. The parties proceeded to a bench trial on Hightower's partition claim, and Flowers was permitted to raise adverse possession as an affirmative defense. The trial court concluded that Flowers had acquired title by adverse possession and consequently denied relief to Hightower on his partition claim. Hightower appealed and we affirmed the trial court's

decision. (*Hightower v. Flowers* (May 22, 2015, B253697) [nonpub. opn.].)

II. The malicious prosecution litigation

In August 2015, Flowers sued Hightower and the Attorneys for malicious prosecution and fraud. In her verified complaint, Flowers alleged, among other things, that Hightower and the Attorneys lacked probable cause to file the cross-complaint because they "knew that the statute of limitations had long since run." She alleged further that Hightower and the Attorneys lacked probable cause to continue the underlying litigation after Hightower's ouster claim was dismissed on statute of limitation grounds. With regard to her fraud claim, Flowers alleged that Hightower forged a deed and that the Attorneys "altered" a police report that was presented to Flowers "during a deposition." By her complaint, Flowers sought $360,000 in compensatory damages plus punitive damages.

A. THE ATTORNEYS' ANTI-SLAPP MOTION

In October 2015, the Attorneys moved to strike the entire complaint via their anti-SLAPP motion. In the motion, the Attorneys argued that Flowers could not show a probability of prevailing with regard to her malicious prosecution claim because she could not show any of the following: (a) a favorable termination on the merits in the underlying litigation; (b) a lack of probable cause; or (c) any malice by the Attorneys toward her that was independent of any malice demonstrated by Hightower. As for the fraud claim, the Attorneys argued that Flowers could not show a probability of prevailing due to the litigation privilege and that, even if the litigation privilege was inapplicable, she had failed to allege in her complaint the facts necessary to sustain such a claim against the Attorneys. The Attorneys supported

their anti-SLAPP motion through declarations by Hudson and Petrulis regarding the conduct of the underlying litigation and by a request that the trial court take judicial notice of certain documents from the underlying litigation.

B. FLOWERS'S OPPOSITION

In July 2016, Flowers opposed the Attorneys' anti-SLAPP motion by making two related arguments. First, she argued that the Attorneys' conduct was not protected by section 425.16, because that statute "does not apply to moving parties' illegal acts of collusion, fraud and extortion." Second, she maintained that the litigation privilege is "not without its limits" and that it does not apply to "criminal prosecution under Business and Professions Code section 6128."[3] In her opposition, Flowers also seemingly asserted a new extortion-based claim or theory of liability against the Attorneys. With regard to the evidence supporting her claims, Flowers stated in her opposition that she "will be able to subpoena the original police report to substantiate that the police report used during the deposition was not the authentic one and will be able to subpoena Hightower's daughter['s] . . . notary stamp history and show that the deeds supplied by Hightower actually differ[ed] from the authentic copy held by Flowers." Flowers also attempted to support her opposition with (a) a request that the trial court take judicial notice of more than two dozen documents from the underlying litigation and related proceedings and (b) a declaration by her

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[3] Business and Professions Code section 6128, in pertinent part, provides as follows: "Every attorney is guilty of a misdemeanor who . . . (a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

discussing the underlying litigation, including the use of a police report at her deposition, and the alleged effects that the litigation had on her health and finances. Attached to her declaration were more than a dozen exhibits from the underlying litigation, including the police report that was used as an exhibit at her deposition.

C. THE ATTORNEYS' REPLY

The Attorney's responded to Flowers's opposition by requesting that the court also take judicial notice of a docket sheet for the underlying litigation. In addition, the Attorneys objected to the evidence Flowers submitted in support of her opposition. The Attorneys, inter alia, objected generally to (a) Flowers's declaration on the ground that it did not comply with section 2015.5[4] and (b) the exhibits attached to the declaration on the ground that they were not properly authenticated.

D. THE TRIAL COURT'S RULINGS

1. The Anti-SLAPP motion

On August 4, 2016, after hearing oral argument, the trial court adopted its tentative ruling, which granted the Attorneys' requests for judicial notice, denied Flowers's request for judicial notice,[5] sustained the evidentiary objections to Flowers's declaration and exhibits; and granted the anti-SLAPP motion.

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[4] As discussed in more detail below, section 2015.5 requires that the contents of a declaration be certified as true under penalty of perjury under the laws of the State of California. Flowers's declaration was certified under penalty of perjury, but not under California law.

[5] On appeal, Flowers does not challenge trial court's denial of her request for judicial notice.

With regard to the anti-SLAPP motion, the trial court found that both the malicious prosecution and fraud actions were protected by the anti-SLAPP statute because both arose directly out of the Attorneys' activities in connection with the underlying litigation. The trial court found further that "[g]iven the Court's evidentiary rulings, Plaintiff has entirely failed to present any admissible evidence in support of either of her claims." The trial court also found that the Attorneys were "entitled to recover their reasonable attorney's fees and costs." On August 24, 2016, the trial court entered an order dismissing the Attorneys from the action. Flowers timely appealed.

2. The attorney fees award

On September 27, 2016, the Attorneys filed a motion seeking to recover their attorney fees ($23,425.00) (the fee motion). On March 22, 2017, the trial court granted the fee motion, but reduced it by $250 to $23,175.00. Flowers timely appealed.

DISCUSSION

I. The anti-SLAPP statute

A. SECTION 425.16

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384).) The statute applies to "cause[s] 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." (§ 425.16, subd. (b)(1), italics added.) As used in the statutory scheme, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in

connection with a public issue' includes: . . . any written or oral statement or writing made before a legislative, executive, or *judicial proceeding*, or any other official proceeding authorized by law." (§ 425.16, subd. (e), italics added.)

B. EVALUATING ANTI-SLAPP MOTIONS

In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process. "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." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.)

1. *Step one: "arising from" protected activity*

The moving party's burden at step one is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) A defendant's burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights. (See *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

2. *Step two: probability of prevailing*

"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." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) The plaintiff must do so with admissible evidence. (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831.) "We decide this step of the analysis 'on consideration of "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16,

subd. (b)[(2)].) Looking at those affidavits, "[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff." ' " (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 379–379, disapproved in part in *Baral*, at p. 396, fn. 11.) This second step has been described as a " 'summary-judgment-like procedure.' " (*Baral*, at p. 384.)

C. STANDARD OF REVIEW

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.) We review the trial court's evidentiary rulings regarding the anti-SLAPP motion for an abuse of discretion. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.)

II. Flowers's claims arise out of protected activity

On appeal, Flowers concedes that the Attorneys met their burden with respect to her malicious prosecution claim, noting that our Supreme Court has stated that a malicious prosecution claim "[b]y definition" implicates the constitutionally protected right to petition. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735.)

Flowers, however, disputes that her fraud claim falls within the purview of the anti-SLAPP statute. Specifically, she argues that the anti-SLAPP statute does not extend its protection to illegal activity and in her complaint she alleged that the Attorneys "alter[ed] Police reports to intimidate and humiliate [her] and bolster their time[-]barred OUSTER allegations." For

legal support, Flowers relies on *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*). Flowers's argument is not persuasive.

Courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) " 'Under the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, *all* communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute.' " (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210, italics added.)

However, "conduct is not automatically protected merely because it is related to pending litigation; the conduct must *arise from* the litigation." (*Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1400, italics added; see *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 867 [conduct " 'in connection with' a[ ] . . . proceeding" was not "[in] connection with an issue under review in that proceeding," and therefore not protected activity].) Here, the allegedly fraudulent conduct by the Attorneys arose directly out of the underlying litigation. According to the express allegations of her complaint the allegedly false police report was presented to Flowers "during a deposition."

In addition, Flowers's reliance on *Flatley*, *supra*, 39 Cal.4th 299, is misplaced. In that case, the defendant lawyer admitted writing letters and making calls to the plaintiff and his attorneys that, when taken together, threatened to accuse the plaintiff of a variety of crimes and disgrace him in the public media unless he paid a large sum of money. (*Id.* at pp. 306–307, fn. 4, 328–329.) In her complaint, Flowers did not allege similar misconduct by

the Attorneys. Moreover, a long line of cases have concluded in the wake of *Flatley* that its exception for illegal conduct is a "very narrow" one, one that applies "only 'where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence.' " (*Finton Construction, Inc. v. Bidna & Keys, APLC*, *supra*, 238 Cal.App.4th at p. 210.) Here, in contrast to *Flatley*, the Attorneys have not conceded that any of their actions were illegal. Moreover, the evidence presented in connection with the anti-SLAPP motion does not conclusively establish that the Attorneys' alleged conduct was illegal as a matter of law. Accordingly, *Flatley* does not put Flowers's fraud cause of action beyond the reach of the Attorneys' anti-SLAPP motion.

In short, the Attorneys met their burden with respect to step one of the anti-SLAPP analysis.

III. Flowers's declaration was inadmissible

In order to properly assess whether Flowers met her evidentiary burden in step two of the anti-SLAPP analysis, we must first consider whether the trial court abused its discretion in sustaining the Attorneys' objection to the entirety of Flowers's declaration and the exhibits attached thereto.

Section 2015.5 permits a person to prove a matter "by the unsworn . . . declaration . . . in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and . . . if executed within this state, states the date and place of execution, or . . . if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California." Under California law, a declaration "not signed under penalty of perjury under the laws

of the State of California" fails to comply with section 2015.5 and, as a result, it has "no evidentiary value." (*ViaView, Inc. Retzlaff* (2016) 1 Cal.App.5th 198, 206, 217.)

In her declaration, Flowers stated that the statements contained therein were true and accurate and made under penalty of perjury generally and pursuant to section 1621 of title 18 of the United States Code.[6] In addition, although Flowers dated her declaration, she did not expressly state in her declaration where she executed it. In short, Flowers's declaration failed to comply with section 2015.5.

On appeal, Flowers argues that the trial court abused its discretion because the declaration substantially complied with section 2015.5—the declaration stated that it was made under the penalty of perjury and her address is on the declaration's caption page. Flowers supports her argument by citing to *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10. In that case, our Supreme Court found that a declaration "substantially complie[d]" with section 2015.5 because although it did not expressly state where the declaration had been executed, the declarant's address was "immediately below her signature" and the declarant stated that her statements were made under penalty of perjury. (*Id.* at p. 21, fn. 11.)

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[6] Title 18, section 1621 is one of three general federal perjury laws. Section 1621 outlaws presenting materially false statements under oath in federal official proceedings. The second statute, section 1623, bars presenting materially false statements under oath before or ancillary to federal court or grand jury proceedings. The third statute, section 1622, prohibits inducing or procuring another to commit perjury in violation of either section 1621 or section 1623.

Flowers's argument is unpersuasive. In a more recent decision, *Kulshrestha v. First Union Commercial Corp*. (2004) 33 Cal.4th 601 (*Kulshrestha*), our Supreme Court clarified that substantial compliance with section 2015.5 requires full compliance with that statute's provisions, not partial compliance. In that case, the declarant/petitioner, who executed his declaration in Ohio, failed to expressly invoke the perjury laws of the State of California; instead, the declarant simply stated that his declaration was made under penalty of perjury. (*Id*. at p. 607.) The trial court sustained the defendant's objection to the declaration and our Supreme Court affirmed. *Kulshrestha* rejected the declarant's substantial compliance argument, stating that "a declaration is defective under section 2015.5 absent an *express facial link to California or its perjury laws*. . . . Contrary to what petitioner implies, courts do not find compliance with section 2015.5 to be both substantial and sufficient unless *all* statutory conditions appear on the face of the declaration in some form." (*Kulshrestha*, at p. 612, italics added.) In reaching its decision, *Kulshrestha* noted with approval that "[c]ommentators stress that declarations must 'conform strictly' to section 2015.5 [citation] and must use all 'essential' statutory language." (*Id*. at p. 612, fn. 6.)

Here, although Flowers arguably indicated that her declaration was made in California by the address and venue information that appeared on the declaration's caption page (see *McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 564–565 [case caption sufficient to indicate declaration's place of execution]; *Hirschman v. Saxon* (1966) 246 Cal.App.2d 589, 593 [same]), she expressly invoked perjury laws *other* than those of

California, rendering her declaration patently defective under the teaching of *Kulshrestha*, *supra*, 33 Cal.4th 601.[7]

Although the trial court properly sustained the Attorneys' objection to Flowers's declaration and the exhibits attached thereto, that ruling was not necessarily fatal to Flowers's opposition to the anti-SLAPP motion. The factual allegations of her complaint were verified as true and correct "under penalty of perjury under the laws of the State of California." Under California law, "a properly verified complaint . . . may be treated as a declaration or affidavit." (*ViaView, Inc. Retzlaff*, *supra*, 1 Cal.App.5th at p. 217; *Atkins, Kroll & Co. v. Broadway Lbr. Co.* (1963) 222 Cal.App.2d 646, 654 ["A verified pleading is itself an affidavit and may be considered as such"].) As a result, some courts have held that "verified allegations based on the personal knowledge of the pleader may be considered in deciding a section 425.16 motion." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1290.)[8] In addition, we will also consider whether in the evidence

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[7] Flowers tries to escape the penumbra of *Kulshrestha*, *supra*, 33 Cal.4th 601, by arguing that that decision has "no application" because it "concerned an out of state declaration." Flowers's argument is without merit because our Supreme Court found support for its holding in *Kulshrestha* by examining "section 2015.5's description of declarations 'executed *within* this state.' " (*Id*. at p. 611.)

[8] It should be noted that not all California appellate courts agree that a plaintiff may rely on verified pleadings to demonstrate a probability of success. (See, e.g., *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 354 [verified pleadings "do not constitute evidence"].) Other courts have taken a third position—that is, while pleadings should be used in the anti-SLAPP analysis for the first step (e.g., to determine the nature of

submitted by the Attorneys there are facts that would support a prima facie case for malicious prosecution and fraud. (§ 425.16, subd. (b); *Salma*, at p. 1289 [gaps in plaintiff's showing may be filled by defendant's evidence].)

IV. Flowers failed to show a probability of success on her malicious prosecution claim

A. ELEMENTS OF MALICIOUS PROSECUTION

As our Supreme Court has recently restated, the tort of malicious prosecution "consists of three elements. The underlying action must have been: (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, italics added.) Since the "plaintiff in a malicious prosecution action must prove each of the necessary elements of the tort" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164), a failure to establish one element is necessarily fatal.

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plaintiff's cause of action and whether the stature applies), declarations stating evidentiary facts should be required to oppose the motion since pleadings only state ultimate facts. (See, e.g., *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351 & fn. 7.) Since Flowers, unlike other anti-SLAPP plaintiffs (see, e.g., *Karnazes*, at p. 354), did not attempt to rely solely on the allegations of her complaint, but attempted to provide evidentiary facts through her declaration, we will follow for the purposes of this case the approach adopted in *Salma v. Capon*, *supra*, 161 Cal.App.4th 1275.

B. FLOWERS FAILED TO ESTABLISH A LACK OF PROBABLE CAUSE

Under California law, a person may be liable for malicious prosecution for instituting and/or continuing an action after learning that one, some, or all of their claims may lack probable cause. (See *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.)

As explained by our highest court, "the existence of probable cause is a question of law to be determined as an objective matter. [Citation.] '[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.] A claim is unsupported by probable cause *only* if ' " 'any reasonable attorney would agree [that it is] *totally and completely without merit*.' " ' [Citations.] '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.] 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.' " ' " (*Parrish v. Latham & Watkins*, *supra*, 3 Cal.5th at p. 776, italics added.)

In other words, the probable cause standard is a demanding one for any malicious prosecution plaintiff: " 'Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only

marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. *Only* this subgroup of meritless suits present[s] no probable cause.' " (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743, fn. 13, second italics added.)

1. Lack of probable cause for accounting/ouster claim?

In her complaint, Flowers alleged that there was no probable cause for Hightower and the Attorneys to pursue his accounting/ouster claim more than 26 years after the alleged ouster, because any such claim was barred by the five-year statute of limitations. Although the complaint does not expressly mention that Hightower's accounting/ouster claim was dismissed from the underlying litigation after the trial court granted Flowers's motion for judgment on the pleadings, that fact is affirmed by documents of which the trial court took judicial notice, including the transcript of the hearing on her motion.

The transcript of that hearing reveals that the trial court regarded Flowers's motion for judgment on the pleadings as highly meritorious: "It clearly is a five-year statute and th[e alleged ouster] happened 26 years ago. So, you know, I think it's a fairly slam dunk motion." However, argument by the Attorneys moderated the trial court's views. The Attorneys argued that the issue was actually more complicated than it appeared at first glance due to the fact that ouster "is a continuous event. When it was a legally recognizable ouster is an evidentiary issue." The Attorneys argued that while it was possible the ouster was legally cognizable in 1987, it was also possible that the claim may not have become legally cognizable

until after Flowers filed suit and attempted to allege that she was the sole owner of the property.

The Attorneys' legal argument influenced the trial court's thinking—instead of dismissing the accounting/ouster claim with prejudice, the trial court granted the motion with leave to amend: "I'm going to grant the judgment of pleading with leave to amend. You can amend [to add] the tolling . . . . [¶] I just think there's more going on in this case factually than I read. I read the moving papers, and I kept looking for what was going on for the past 26 years. [¶] It's as if they had no communication for 26 years. . . . But if there were communications, I would like to know what the communications were. [¶] . . . [T]here was some allusion to a renter for five years or four years. Who was the renter? Who signed the leases? . . . I just feel that there's a lot more going on."

In short, while the accounting/ouster claim may have been problematic in certain respects, the evidence before us indicates that it was not " ' " 'totally and completely without merit.' " ' " (*Parrish v. Latham & Watkins*, *supra*, 3 Cal.5th at p. 776.) Since the malicious prosecution 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' " ' " (*ibid.*), we hold that Flowers failed to meet her burden with respect to the accounting/ouster claim.

2. Lack of probable cause for partition claim?

In her complaint, Flowers also contests the probable cause for Hightower's partition claim, but she does so in a wholly conclusory manner: "Hightower had no probable cause to file a [cross-]complaint for partition once Plaintiff had dismissed her partition action."

In support of their motion, the Attorneys presented evidence that the trial court in the underlying litigation, far from regarding Hightower's partition claim as totally and completely lacking merit, regarded it as meritorious. In its statement of decision, the trial court began by noting that it was a "very unusual case with unusual fact pattern with *equities on both sides*." (Italics added.) The trial court further noted that, after considering Flowers's testimony at her deposition and at trial, it found her to be "evasive and unconvincing and inconsistent . . . . I just don't find her a credible witness." In contrast, the trial court found Hightower to be not only a "a credible witness," but one whose version of events is supported by facts "independent of his testimony." In fact, the trial court confessed that when it began writing the statement of decision, it intended to find Hightower to be the prevailing party. In light of these facts and in light of the absence of any countervailing facts, we hold that Flowers failed to meet her burden with respect to the partition claim's purported lack of probable cause.

Since Flowers failed completely to meet her burden with respect to the lack of probable cause element of her malicious prosecution claim, we need not consider whether she met her burden with respect to the other two elements. (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 164; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875.)

V. Flowers failed to show a probability of success on her fraud claim

"The elements of fraud that will give rise to a tort action for deceit are: ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance;

(d) justifiable reliance; and (e) resulting damage." ' " (*Engalla v. Permanete Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.)

In her complaint, Flowers alleged that the Attorneys knowingly used a false or altered police report as an exhibit at her deposition. However, in her opposition to the anti-SLAPP motion, Flowers effectively conceded that she did not yet have any evidence that the police report used at her deposition was in fact fraudulent; in her opposition she stated that she "*will* be able to subpoena the original police report to substantiate that the police report used during the deposition was not the authentic one." (Italics added.) In addition, Flowers did not assert in her complaint that she ever relied in any way—justifiably or not—on the purportedly falsified copy of the police report. Moreover, Hudson and Petrulis submitted declarations affirmatively stating that they did not alter the police report and that the exhibit used at Flowers's deposition was a certified copy obtained from the police department. In light of both Flowers's concession and the Attorneys' evidence, we hold that, because Flowers failed to submit evidence supporting essential elements (false representation and justifiable reliance), she did not meet her evidentiary burden on her fraud claim.

VI. The attorney fees award

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney[ ] fees and costs." (§ 425.16, subd. (c).) By the terms of the statute, this award of attorney fees "is not discretionary but mandatory." (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215.) However, because any such fee award is limited to reasonable fees only (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 620), the trial court retains some discretion in evaluating the value of

the services rendered by attorneys appearing before it. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) Since the size of the award lies within the discretion of the trial court, we review the record to determine if the trial court abused its discretion. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340, 342–346.)

The record before us is incomplete in a number of respects. The fee order (prepared by counsel for Attorneys) indicates that the trial court's ruling was based on a consideration of the "moving, opposition, and reply papers, and oral argument of the parties." However, the record before us contains only the Attorneys' moving papers. Critically, the record does not include the hearing transcript or a subsequent minute order.[9] Without those documents, it is impossible to determine if the trial court exceeded the bounds of reason in granting the fee motion. (See *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th

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[9] Flowers contends that there was no transcript included in the record on appeal because the trial court purportedly "declined to hold a hearing on the requested fees" even though Flowers allegedly "requested" one. However, Flowers does not direct us to any segment of the record supporting her assertions. Indeed, her assertion that there was no hearing on the attorney fees motion is directly contradicted by the fee order and the notice of ruling, both of which expressly state that there was a hearing on March 9, 2017, at which Flowers herself appeared. In addition, the notice of ruling asserts that at the hearing the trial court stated on the record that the hourly rate of defense counsel and the hours it spent on the anti-SLAPP motion were reasonable and not unusual. Moreover, there is nothing in the record before us indicating that in the trial court Flowers ever objected to the order or the notice of ruling as being inaccurate.

611, 633 [absence of moving papers, transcript and minute order precluded review of anti-SLAPP attorney fee award]; see also *In Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [appellate review of fee award requires transcript or settled statement].)

As the party challenging the attorney fees award, the burden was on Flowers to provide an adequate record from which we can determine whether the trial court abused its discretion. (*Vo v. Las Virgenes Municipal Water Dist*. (2000) 79 Cal.App.4th 440, 447; *Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1140–1141.) "The absence of a record concerning what actually occurred at the [hearing] precludes a determination that the trial court abused its discretion. It is not possible to judicially and appropriately determine from the inadequate record provided by [Flowers] that the trial court abused its discretion in its conclusion that [$23,175.00] was a reasonable award." (*Vo,* at p. 448.) Accordingly, we affirm the attorney fee award.

DISPOSITION

The orders are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.