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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MOYSEY CHERNYAVSKY,

Plaintiff and Respondent,

v.

MICHAEL DEKHTYAR,

Defendant and Appellant.

B271222

(Los Angeles County
Super. Ct. No. TC027484)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Michael Dekhtyar, in pro. per., Defendant and Appellant.

Law Offices of Douglas Vincent Melson and Douglas Vincent Melson, for Plaintiff and Respondent.

Plaintiff Moysey Chernyavsky filed a malicious prosecution action against Michael Dekhtyar. Following a bench trial, the court found in favor of Chernyavsky, and entered a judgment awarding him \$25,500 in damages. Dekhtyar appeals, arguing that there was insufficient evidence to support the court's finding that he lacked probable cause to pursue his claims, and that he acted with malice. We affirm.

FACTUAL BACKGROUND

A. Summary of the Underlying Litigation

1. Chernyavsky's breach of contract action

On June 21, 2010, plaintiff Moysey Chernyavsky filed a breach of contract action alleging that defendant Michael Dekhtyar had failed to repay a promissory note, and defaulted on a Small Business Administration (SBA) loan that Chernyavsky had guaranteed. The complaint further alleged that as a result of the default, Chernyavsky was contractually entitled to Dekhtyar's ownership interest in Verax Restaurant Group, a corporate entity that owned a Denny's Restaurant located in Los Angeles, California.

The complaint attached as exhibits a copy of the promissory note, which the parties had signed in July of 2009, and four additional agreements the parties had entered into in September of 2009: (1) an amendment to the promissory note; (2) an assignment agreement; (3) an indemnification agreement; and (4) a pledge agreement.

The promissory note stated that Dekhtyar agreed to repay Chernyavsky \$436,950, plus interest, in three annual installments, with the first installment due on July 21, 2010.

The amendment to the promissory note changed the period of repayment. Under the amended terms, Dekhtyar was required to pay Chernyavsky \$50,000 on April 1, 2010, and then pay additional \$50,000 installments every six months until the note was satisfied.

The assignment agreement provided that Dekhtyar had agreed to transfer his 83 percent ownership interest in Verax to Chernyavsky in exchange for Chernyavsky “personally guaranteeing SBA loan number PLP 35706650-07 in the amount of \$677,000 between Verax . . . and East West Bank, and providing collateral for said loan.” The assignment agreement further provided that Chernyavsky would assign the interest in Verax back to Dekhtyar “upon termination of all the conditions that can trigger a default as defined in the indemnification agreement.”

The indemnification agreement, in turn, identified several “default” events, which included Dekhtyar’s failure to repay the SBA loan or the promissory note. The indemnification agreement further provided that upon default, Dekhtyar would “[i]mmediately . . . transfer any and all rights to profits and interests in Verax . . . to [Chernyavsky] and resign from any . . . position[] . . . [Dekhtyar was] holding in said corporation at the time of default.” The parties’ pledge agreement provided Chernyavsky a security interest in Dekhtyar’s “real and personal property” as additional collateral for the SBA loan and the promissory note.

The complaint alleged that after Dekhtyar defaulted on the promissory note and the SBA loan, Verax’s shareholders voted to remove him from his position in the corporation, and appointed Chernyavsky as the president. In his prayer for relief,

Chernyavsky sought repayment of the amount due under the promissory note, and a declaration of the parties' respective rights to Dekhtyar's ownership interest in Verax.

2. Dekhtyar's cross-complaint

In August of 2010, Dekhtyar filed a cross-complaint against Chernyavsky alleging breach of oral contract, fraud, negligence and various other torts arising out of his removal from Verax. The cross-complaint alleged that in June of 2006, Chernyavsky had approached Dekhtyar with a "sure thing investment opportunity" regarding a restaurant. Chernyavsky informed Dekhtyar he had a "complete business plan" for the restaurant, and was willing to "co-sign" a business loan "in exchange for Dekhtyar's foregoing other funds owed by [Chernyavsky] in the approximate amount of \$3,000,000." The cross-complaint further alleged that Chernyavsky had represented that he was an "expert[] in the restaurant business and had the ability to open and operate a restaurant franchise operation." Under their agreement, Dekhtyar was supposed to be repaid any capital he expended on the restaurant from the profits of the business.

The cross-complaint alleged, however, that when "the restaurant opened" in 2010, Chernyavsky began "staffing [the business] with incompetent and traitorous employees with the specific intent of preventing the operation from being successful in the near term." Chernyavsky had allegedly engaged in these acts so that he could "exercise a fraudulent pledge agreement for [Dekhtyar's] shares of the restaurant," and "steal [Dekhtyar's] funds and hard work."

In November of 2010, Dekhtyar filed an amended cross-complaint alleging additional facts regarding his business dealings with Chernyavsky. The amended cross-complaint

asserted that in June of 2009, Chernyavsky had approached Dekhtyar “for the purpose of investing in Verax Restaurant Group and a Denny’s franchise.” Dekhtyar contended that Chernyavsky “wanted to settle a past debt and assured [him] that [he] would guarantee an SBA loan on the Denny’s restaurant franchise.” According to the amended cross-complaint, this “past debt” consisted of “approximately \$2,000,000 [that] . . . Dekhtyar [had previously invested] in a [barbeque] restaurant venture. . . .”

The pleading asserted that, under the parties’ agreements, Dekhtyar had promised to “provide his time as an operations manager and his funds and funding sources to Verax . . . and the Denny’s restaurant in exchange for [Chernyavsky’s] assurances” that: (1) he “had a business plan,” and “the ability to open and operate a restaurant and franchise operation”; and (2) he would “co-sign the loan documents” enabling the restaurant to be built “in exchange for [Dekhtyar] foregoing other funds owed . . . in the approximate amount of \$2,000,000.”

The amended cross-complaint further alleged that, contrary to these promises, Chernyavsky had no plan other than to “abscond with [Dekhtyar’s] labor and funds invested.” In furtherance of this plan, Chernyavsky refused to guarantee the SBA “at the last minute,” and “instead demanded that [Dekhtyar] assign his shares [in Verax] to Chernyavsky . . . in exchange for his signing the guarantee on the SBA loan.” Chernyavsky thereafter “staffed and controlled the restaurant in a manner” that prevented its success, thus forcing Dekhtyar to forfeit his ownership interest in Verax.

3. Trial court proceedings in the underlying litigation

Chernyavsky filed a demurrer to Dekhtyar's amended cross-complaint. The court sustained the demurrer with leave to amend, and provided Dekhtyar 15 days to file an amended pleading. Dekhtyar did not file an amended cross-complaint within that time period. Chernyavsky subsequently filed a motion for summary judgment on his breach of contract claims. Dekhtyar did not file an opposition, and the court granted the motion.

On February 6, 2013, the court entered a judgment awarding Chernyavsky \$443,018.49, which represented the amount due under the promissory note, and assigning him Dekhtyar's ownership interest in Verax. The judgment also dismissed Dekhtyar's cross-complaint "with prejudice" based on his failure to file a "Second Amended Cross-Complaint . . . within [15] days of the Court sustaining a Demurrer . . . to the First Amended Complaint." (See Code Civ. Proc., §581, subd. (f)(2) [court may "dismiss the complaint" when, "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal"].)

B. Chernyavsky's Malicious Prosecution Action

1. Summary of Chernyavsky's complaint

In July of 2014, Chernyavsky filed a malicious prosecution action against Dekhtyar based on the cross-complaint he had filed in the prior litigation. The complaint alleged that between 2004 and 2009, Chernyavsky and Dekhtyar were joint shareholders in the Huntington Restaurant Group (Huntington), a corporate entity that owned and operated a Denny's restaurant

located in Carson, California. Dekhtyar had served as the president of Huntington, and Chernyavsky had served as the secretary. The complaint further alleged that Chernyavsky and Huntington's other shareholders had expelled Dekhtyar from the company after an "audit" revealed that he had "unlawfully" withdrawn more than \$300,000 from the company's bank account.

The complaint also alleged that in 2009, Chernyavsky had tried "to help" Dekhtyar by loaning him money to "secur[e] and operat[e] a new Denny's in [Los Angeles]." According to the complaint, the Denny's was to be "run and operated by Verax," a corporate entity "of which [Dekhtyar] was a major shareholder." Chernyavsky alleged that at the time of Verax's formation, he had no financial or administrative interest in the company, nor did he have any interest in the Denny's restaurant that Verax owned. After Dekhtyar failed to repay the loan, Chernyavsky filed the underlying breach of contract claim. The complaint alleged that Dekhtyar then "retaliat[ed]" by filing a frivolous cross-complaint that was eventually "dismissed with prejudice."¹

The complaint asserted that Dekhtyar's "[p]rimary motivating reason for alleging these . . . malicious claims was because [he had] lost ownership and possession of the [Los

¹ Chernyavsky's complaint alleged Dekhtyar had filed two other frivolous actions against him in retaliation for the breach of contract complaint. During the trial court proceedings, however, the court ruled that Chernyavsky had failed to establish either of those cases were legally terminated in his favor. Chernyavsky has not challenged that finding on appeal. We therefore confine our discussion and review to the claims set forth in the cross-complaint Dekhtyar filed against Chernyavsky in the underlying breach of contract action.

Angeles] Denny's, and because he was [previously] expelled from [Huntington] after it [was] discovered that he misappropriated over \$300,000 of corporate funds." Chernyavsky further asserted that he been forced to expend substantial sums in defending himself against the meritless claims.

The complaint pleaded additional claims that were also based on Dekhtyar's filing of the cross-complaint, which included negligent infliction of emotional abuse, intentional infliction of emotional distress and elder abuse.

2. Dekhtyar's motion for summary judgment

On August 14, 2015, Dekhtyar filed a motion for summary judgment seeking dismissal of Chernyavsky's claims. The motion contained a detailed factual summary of the parties' prior business dealings. The summary was based on statements Dekhtyar had made in an accompanying declaration.

Dekhtyar's motion asserted that he and Chernyavsky had formed Verax Restaurant Group in 2001 to "own and operate one or more Denny's franchises." Between 2002 and 2007, Dekhtyar and Chernyavsky jointly purchased a Denny's restaurant located in Carson, California, and a second Denny's located in Commerce, California. In 2003, Chernyavsky introduced Dekhtyar to Herman Cothran, "an inventor and owner of a patent of a unique . . . smoker device used" to barbeque meat. Chernyavsky and Cothran encouraged Dekhtyar to invest in the smoker device, and start a "fast food BBQ restaurant" franchise under the name "Hermans." The three men formed "Microfoodery, Inc." to fund the smoker device business, and Dekhtyar personally invested \$460,000 to capitalize the venture. The three men also formed Pomona Restaurant Group (PRG), which leased a restaurant space for their first Hermans restaurant location. The restaurant

opened in 2006, but did not fare well. Microfoodery and PRG eventually went out of business, causing Dekhtyar to lose in excess of \$1,000,000 on his investments. Cothran later stole proprietary information regarding the smoker device, and fled the country.

Dekhtyar's motion further asserted that in March of 2008, he "came across an opportunity to build a new Denny's restaurant in . . . Los Angeles." Verax, which he owned with Chernyavsky, leased space for the new Denny's. Dekhtyar then attempted to get an SBA loan to construct the restaurant, but could not "guarantee the loan because he was overleveraged due to the failure of PRG and the investments he had made into Microfoodery." Dekhtyar asked Chernyavsky "to guarantee the SBA loan . . . in exchange for which [he] would not hold Chernyavsky responsible for the money lost in PRG and Microfoodery." Chernyavsky, however, "claim[ed] that Dekhtyar owed him \$436,000, and [refused to guarantee] the SBA loan unless he would sign [a] promissory note" regarding this alleged debt. Dekhtyar agreed to sign the promissory note because the "Denny's was going to be [his] only source of income."

Dekhtyar claimed that when the SBA loan was "ready to fund" in September of 2009, Chernyavsky refused to sign as a guarantor unless Dekhtyar agreed to amend the terms of the promissory note, and sign additional agreements that secured the SBA loan with Dekhtyar's ownership interest in Verax. Dekhtyar asserted that "with the closing date of the SBA loan to take place in approximately one week . . . [he] had no choice but to sign all the new agreements under economic duress."

The Denny's finally opened in February of 2010, but lacked "sufficient capital to operate." As a result, Dekhtyar was forced

to obtain a “hard money loan.” Shortly after he obtained the loan, Chernyavsky sought payment of the first installment due under the promissory note. When Dekhtyar failed to make the payment, Chernyavsky claimed he was the rightful owner of Verax, and initiated a shareholder meeting where he and the other shareholders voted to remove Dekhtyar from his position in the company. Chernyavsky then filed his breach of contract claim.

Dekhtyar argued that the facts set forth in his motion and declaration showed he had filed a “proper and legitimate cross-complaint” that was based on the “economic duress” Chernyavsky had imposed upon him. He also claimed that his cross-complaint had properly sought to recover the money he lost in his past business dealings with Cothran and Chernyavsky.

The only evidence Dekhtyar filed in support of the motion for summary judgment consisted of the pleadings and the judgment in the underlying breach of contract action; his declaration; and various discovery materials showing that Chernyavsky had not invested any of his own money into Microfoodery or the barbeque restaurant venture.²

On October 29, 2015, the court denied Dekhtyar’s motion for summary judgment with respect to the malicious prosecution claim, but granted summary adjudication of Chernyavsky’s remaining claims for infliction of emotional distress and elder

² Dekhtyar submitted additional discovery responses and documents in support of the motion that are not relevant to this appeal.

abuse.³ The parties agreed to try the remaining claim to the court.

3. Trial testimony

Chernyavsky, Dekhtyar and Vadi Gershkovitch, a certified public accountant, were the only witnesses who testified at trial.

a. Summary of Gershkovitch's testimony

Gershkovitch testified that he had provided tax preparation services to the Huntington Restaurant Group, which owned the Denny's restaurant located in Carson, California. At the time Gershkovitch provided the services, Dekhtyar was serving as the president of the company. Gershkovitch clarified that the work he had performed for Huntington did not qualify as an audit of the company. Instead, he had compiled the company's financial statements, and then used those statements to prepare the company's tax returns.

Gershkovitch testified that in the course of his work, he noticed that a substantial amount of money had been transferred out of Huntington's bank account to an unknown location. Gershkovitch testified that although Dekhtyar appeared to have authorized the transfers, he could not determine where the money had gone, or whether the transfers were improper. He concluded, however, that the transfers did not qualify as either a business expense or a capitalization payment.

³ The only information in the record concerning the court's ruling on Dekhtyar's motion for summary judgment consists of a docket entry stating that the motion was denied with respect to the malicious prosecution claim, and granted as to the remaining claims.

b. Summary of Chernyavsky's testimony

Chernyavsky testified that when Dekhtyar had served as president of Huntington, he and Dekhtyar were the only individuals who had authority to access the company's bank account. Chernyavsky stated that at some point in 2008, he discovered that approximately \$300,000 was missing from Huntington's bank account. During a meeting held on June 9, 2008, Chernyavsky and other Huntington shareholders concluded Dekhtyar had improperly withdrawn the missing amounts from the company's bank, and voted to remove him as president. Chernyavsky admitted that he did not know where the missing money had gone, and had found no evidence that conclusively demonstrated Dekhtyar was the person who had authorized the transfers. Chernyavsky noted, however, that Dekhtyar was the only other person who had access to the company's bank account, and that the company did not experience any similar problems after Dekhtyar was removed from his position.

Chernyavsky further testified that Dekhtyar established Verax in 2010 to own and operate a Denny's located in Los Angeles. Chernyavsky asserted that he was not involved in forming Verax, and did not own any part of the company until he acquired Dekhtyar's interest as a result of the default on the SBA loan. He further asserted that, apart from guaranteeing the SBA loan, he had no involvement in forming, staffing, operating or managing the Los Angeles Denny's. Chernyavsky stated that at some point after Dekhtyar had defaulted on the SBA loan, a receiver had taken control of the restaurant, and Verax was eventually forced into bankruptcy.

Chernyavsky also testified that the \$436,950 debt described in the promissory note consisted of various amounts he had

loaned to Dekhtyar over the prior four or five-year period. Chernyavsky explained that he had amended the terms of the promissory note at the request of Dekhtyar, which had allowed Dekhtyar to repay the money in \$50,000 installments over a four-and-a-half year period, rather than in three larger installments over a three year period. Chernyavsky stated that after Dekhtyar failed to make the first payment, he waited several months before initiating his breach of contract suit. Chernyavsky asserted that shortly after he filed suit, Dekhtyar threatened him with bodily injury, stating that he was “going to put [him] in a wheel chair.”

Chernyavsky testified that he had agreed to guarantee the SBA loan in exchange for Dekhtyar’s agreement to sign the promissory note. Chernyavsky explained that the promissory note was necessary to ensure Dekhtyar would repay his debt, which he had previously failed to do. Chernyavsky specifically denied that he had agreed to guarantee the SBA loan in exchange for Dekhtyar’s assurance that he would not seek repayment of the losses incurred in the barbeque restaurant venture. Chernyavsky also denied that he owed Dekhtyar any money in relation to that business venture. Although Chernyavsky acknowledged he had formed Microfoodery with Cothran and Dekhtyar in 2003, he stated that his only contribution to the company was signing a loan, and denied that he had ever received any proceeds from the company.

c. Summary of Dekhtyar’s testimony

Dekhtyar testified that he had never received any of the money described in the promissory note. He claimed that he had agreed to sign the note in exchange for Chernyavsky’s assurance that he would assist in “finding the employees [for the Denny’s],

training the employees and getting the restaurant to open.” Dekhtyar also asserted, as he had in his cross-complaint, that Chernyavsky agreed to guarantee the SBA loan in exchange for Dekhtyar forgiving a \$2,000,000 debt related to the failed barbeque restaurant venture. When opposing counsel asked Dekhtyar why he had filed the cross-complaint in the underlying litigation, he stated that he believed Chernyavsky had wrongfully accused him of fraud and embezzlement.

Dekhtyar was unable to explain various inconsistencies between the factual allegations pleaded in his original cross-complaint and his first amended cross-complaint, asserting that his attorney had drafted the pleading. He acknowledged that the original cross-complaint did not refer to the SBA loan, or allege that he had signed the indemnification agreement under duress, but asserted that his lawyer had advised him to omit those allegations. Acting at the request of opposing counsel, Dekhtyar read aloud a portion of his deposition transcript in which he had admitted that the factual allegations set forth in his pleadings were based on information he had provided to his attorney.

After being examined by opposing counsel, Dekhtyar, who was self-represented in the proceedings, made a statement on his own behalf claiming that he had signed the amendment to the promissory note and the indemnification agreement “under duress by Chernyavsky . . . as a condition to signing the SBA loan.” Dekhtyar asserted that he had received no benefit for signing those documents, and that Chernyavsky had intentionally caused the Denny’s to fail so that he could seize control of the restaurant.

4. The trial court's ruling

On January 12, 2016, the court issued a statement of decision finding Dekhtyar liable for malicious prosecution. The court concluded that the dismissal of Dekhtyar's cross-complaint in the underlying litigation, which was based on his failure to file an amended pleading following the grant of a demurrer with leave to amend, qualified as a "favorable outcome for [Chernyavsky] on the merits of the . . . cross action."

The court also concluded that the evidence showed Dekhtyar lacked probable cause to pursue the claims in his cross-complaint. The court noted that the factual allegations pleaded in Dekhtyar's original cross-complaint differed from the allegations in his amended cross-complaint in several material ways. The court explained, for example, that the original cross-complaint did not reference the SBA loan guarantee, and did not allege that Chernyavsky had coerced Dekhtyar into signing the promissory note amendment and indemnification agreement by threatening to withhold his signature from the SBA loan guarantee.

The court also found that while the parties had provided contradictory descriptions of the events that "g[ave] rise to [Chernyavsky's] lawsuit," Chernyavsky's testimony was "more credible." The court further concluded that Dekhtyar had not established an "advice of counsel . . . defense" because he had failed to present any evidence regarding the nature of the "counsel that he received." The court also noted that whatever advice Dekhtyar may have received was "flawed by [Dekhtyar's] view of the facts, which are completely self-serving."

The court further noted that during the underlying litigation, Dekhtyar had provided no "evidence in opposition" to

Chernyavsky's motion for summary judgment of the breach of contract claims, and then abandoned his cross-complaint.

The court concluded that Dekhtyar had pursued the claims in the cross-complaint not because he believed they had merit, but rather "to obtain an offset against the losses he had incurred due to failed investments he had with Herman Cothran, which [Chernyavsky] had no part in causing, or to delay and impede [Chernyavsky's] right to recover on the [Promissory] Note by raising claims that had no basis in fact." The court awarded Chernyavsky \$25,500 in damages.

DISCUSSION

A. Summary of Applicable Legal Standards

Dekhtyar argues that the evidence presented at trial was insufficient to support several of the factual findings underlying the court's verdict. "The substantial evidence standard applies to express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial."⁴

⁴ Under the doctrine of implied findings, a "party must state any objection to the statement [of decision] in order to avoid an implied finding on appeal in favor of the prevailing party. . . . [I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient . . . and hence the appellate court will imply findings to support the judgment." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462 (*SFPP*)). Dekhtyar did not object to the court's statement of decision. Accordingly, we must "presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings." (*Ibid.*)

(*SFPP*, *supra*, 121 Cal.App.4th at p. 462; *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 500-501 (*Ermoian*) [“In both jury and nonjury trials, factual findings made by the trier of fact are generally reviewed for substantial evidence”].)

“Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court’s factual determinations. [Citation.]” (*Ermoian*, *supra*, 152 Cal.App.4th at p. 501.) “When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.’ [Citation.]” (*Western States Petro. v. Superior Court* (1995) 9 Cal.4th 559, 571.) “[N]either conflicts in the evidence nor “testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” [Citations.]” (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) “[T]he testimony of a single witness, even a party,” may be sufficient to satisfy the substantial evidence test. (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 171; see also *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [“The testimony of a witness, even the party himself, may be sufficient”]; *Mickelson Concrete Co. v. Contractors’ State License Bd.* (1979) 95 Cal.App.3d 631, 634 [“A single witness’s testimony may be sufficient to satisfy the substantial evidence test”].)

“[A] reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.’ [Citation.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d

875, 881 (*Foreman*).) “It is the appellant’s burden, not the court’s, to identify and establish deficiencies in the evidence. [Citation.] This burden is a ‘daunting’ one. [Citation.] ‘A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. [Citation.]’ [Citation.] ‘[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.’ [Citation.]” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409; see also *Foreman, supra*, 3 Cal.3d at pp. 881-882.)

B. Substantial Evidence Supports the Trial Court’s Factual Findings

“To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff’s favor; (2) was brought without probable cause; and (3) was initiated with malice.” (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740 (*Siebel*).)⁵

⁵ Our Supreme Court has clarified that although “[m]alicious prosecution actions have traditionally been disfavored as potentially chilling the right to pursue legal redress . . . [,] . . . this principle “should not be employed to defeat a legitimate cause of action” or to “invent [] new limitations on the substantive right, which are without support in principle or

Dekhtyar has not challenged the court’s finding that the cross-complaint he filed in the underlying litigation was legally terminated in Chernyavsky’s favor. He contends, however, that there was insufficient evidence to support the court’s findings that he lacked probable cause to pursue his claims, and that he acted with malice. He further contends that his testimony at trial showed he filed the cross-complaint based on the advice of his attorney, which provides a complete defense to Chernyavsky’s claim. (See *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 876 (*Nunez*) [“Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim”].)

1. Dekhtyar has failed to provide a fair summary of the evidence

As noted above, an appellant who challenges a finding of fact based on insufficiency of the evidence has a duty to provide a fair and adequate summary of the evidence, favorable and unfavorable, that was presented on that point. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658.) The factual summary set forth in Dekhtyar’s appellate brief, however, is

authority.” [Citations.]’ “The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. . . . [¶] ‘[W]hen the litigation is groundless and motivated by malice the balance tips in favor of the policy of redressing the individual harm inflicted by that litigation.’ [Citation.]” (*Siebel, supra*, 41 Cal.4th at pp. 740-741.)

based almost entirely on evidence that favors his position, and ignores evidence that conflicts with his theory of the case.⁶

Most notably, his briefing fails to address Chernyavsky's trial testimony, which directly contradicts a substantial portion of Dekhtyar's purported factual summary, and the allegations set forth in his cross-complaint. Rather than address this conflicting evidence, Dekhtyar essentially summarizes evidence that, in his view, would have supported a verdict in his favor. Even if Dekhtyar is correct that the trial court could have reasonably found Chernyavsky failed to establish his malicious prosecution claim, "we . . . have no power to reject the contrary inferences drawn by the [trier of fact], if they are reasonable as well. [Citation.] . . . [A] recitation solely of [his] own evidence is not a fair summary for purposes of determining whether any inferences drawn by the [trier of fact] are reasonable and supported by substantial evidence." (*Boeken, supra*, 127 Cal.App.4th at p. 1658.)

We may properly deem Dekhtyar's failure to provide a fair summary of the facts as a forfeiture of his insufficiency of the evidence claims. (See *Foreman, supra*, 3 Cal.3d at p. 881 [when appellant "contend[s] 'some particular issue of fact is not sustained, they are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done the error is deemed to be waived'"]; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 ["Where a party presents only facts and inferences

⁶ A review of the record shows that large portions of Dekhtyar's factual summary merely repeat statements that appear in the declaration he filed in support of his motion for summary judgment.

favorable to his or her position, ‘the contention that the findings are not supported by substantial evidence may be deemed waived’”]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 [plaintiff’s failure to set forth unfavorable evidence constituted waiver of insufficiency of the evidence claim].)

However, as explained in more detail below, even if we were to exercise our discretion to excuse Dekhtyar’s failure to set forth an adequate summary of the facts, our independent review of the record shows that the court’s challenged factual findings are supported by substantial evidence. (See *Boeken, supra*, 127 Cal.App.4th at p. 1659 [explaining that although the court could deem appellant’s failure to set out unfavorable facts as a forfeiture of his insufficiency of the evidence claim, it had nonetheless reviewed the record and found that substantial evidence supported the trial court’s findings].)

2. Substantial evidence supports the court’s findings on lack of probable cause

Dekhtyar argues there was insufficient evidence to support the court’s finding that he lacked probable cause to pursue the claims set forth in his cross-complaint. “The question of probable cause is “whether, as an objective matter, the prior action was legally tenable or not.” [Citation.]’ [Citation.] . . . [¶] . . . [¶] To [prove] lack of probable cause. . . , [the plaintiff] must [establish that] no reasonable attorney would have thought the [prior] action was tenable in light of the facts known . . . at the time the suit was filed [citations], or that [the plaintiff] continued pursuing the lawsuit after [he] had discovered the action lacked probable cause.” (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th

1430, 1449.) “A litigant lacks probable cause “if he [or she] relies upon facts which he [or she] has no reasonable cause to believe to be true, or if he [or she] seeks recovery upon a legal theory which is untenable under the facts known to him [or her].” [Citation.]” (*Nunez, supra*, 241 Cal.App.4th at p. 877.)

In this case, the court concluded Dekhtyar lacked probable cause because the evidence showed he had no basis to believe that the factual allegations pleaded in support of his cross-complaint were true. Several categories of evidence support this finding.

First, as noted above, Chernyavsky’s testimony at trial directly contradicted many of the allegations in the cross-complaint. Chernyavsky testified, for example, that he had not guaranteed the SBA loan in exchange for Dekhtyar’s assurance that he would forgive a debt related to the failed barbeque restaurant venture. Rather, according to Chernyavsky, he had provided the loan guarantee in exchange for Dekhtyar’s agreement to sign the promissory note. Chernyavsky explained that he believed the promissory note was necessary to ensure Dekhtyar would repay money that Chernyavsky had previously lent to him.

Chernyavsky further testified that, contrary to the allegations in the cross-complaint, he had not approached Dekhtyar about opening the Denny’s restaurant in Los Angeles, he had not represented that he had a business plan for the restaurant and had not promised Dekhtyar he would help staff or manage the restaurant. Chernyavsky asserted that his only role in forming the Denny’s was guaranteeing the SBA loan, and that he only became involved in the restaurant’s operations after Dekhtyar was removed from the company.

Second, as the court noted in its ruling, the pleadings and other materials Dekhtyar filed in the underlying litigation contained factual discrepancies. The original cross-complaint, for example, did not specifically refer to the SBA loan, and failed to allege that Chernyavsky had coerced Dekhtyar into signing the indemnification agreement by threatening to withdraw as the guarantor. Those factual allegations appeared for the first time in the amended cross-complaint.

There were also substantial discrepancies between the first amended cross-complaint and the declaration that Dekhtyar filed in support of his motion for summary judgment. In the cross-complaint, Dekhtyar asserted that Chernyavsky had proposed the Los Angeles Denny's project, and then agreed to help Dekhtyar operate and manage the restaurant. The cross-complaint further alleged that Chernyavsky subsequently discharged his management duties in a manner that was intended to prevent the restaurant from succeeding, allowing him to seize control of Verax. None of those allegations appear in Dekhtyar's declaration. Although the declaration contains a detailed description of Dekhtyar's past business dealings with Chernyavsky, as well as the events surrounding the formation and failure of the Los Angeles Denny's, the declaration does not assert Chernyavsky proposed the restaurant, that he participated in the restaurant's operations or that he intentionally caused the restaurant to fail.

Third, the trial court found that Dekhtyar's testimony at trial was not credible. During his testimony, Dekhtyar made several statements regarding the parties' business dealings that directly conflicted with Chernyavsky's testimony. Dekhtyar asserted, for example, that he and Chernyavsky formed Verax

together, that Chernyavsky never gave him any of the money described in the promissory note and that Chernyavsky had coerced him into signing the amendment to the promissory note by threatening to withhold his signature from the SBA. Chernyavsky denied each of these claims, testifying that he had played no role in forming Verax; that he had in fact loaned Dekhtyar the amounts set forth in the promissory note; and that he had amended the promissory note at the request of Dekhtyar because Dekhtyar was unable to comply with the original schedule of repayment. The court found Chernyavsky's "testimony was more credible," and we have no authority to reweigh that determination. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518 [under substantial evidence review "we have no power to . . . consider the credibility of the witnesses"]; *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1155 ""It is the exclusive province of the [trier of fact] to determine the credibility of a witness""].)

Finally, as the trial court noted, in the underlying litigation, Dekhtyar failed to submit any evidence in opposition to Chernyavsky's motion for summary judgment on his breach of contract claim, and then abandoned the claims set forth in his cross-complaint.

Considered in its entirety, the evidence summarized above is sufficient to support the court's finding that Dekhtyar lacked probable cause because he knew that the factual allegations underlying his cross-complaint were false.

3. *Substantial evidence supports the court's findings on malice*

Dekhtyar also contends there was insufficient evidence to support the trial court's finding that he acted with malice. "In the context of the tort of malicious prosecution, malice 'refers to an improper motive for bringing the prior action.' [Citation.] . . . [M]alice [is] present when a suit is actuated by hostility[,] . . . ill will, or for some purpose other than to secure relief' or where a plaintiff 'asserts a claim with knowledge of its falsity.' [Citation.]" (*Nunez, supra*, 241 Cal.App.4th at p. 877.) "Although lack of probable cause alone does not automatically equate to a finding of malice, it is a factor that may be considered. [Citation.]" (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 204; see also *Nunez, supra*, 241 Cal.App.4th at p. 877 ["Lack of probable cause, while not sufficient by itself to prove malice, supports an inference of malice"].)

As explained at length in the preceding section, there was sufficient evidence to support the court's finding that the factual allegations underlying Dekhtyar's cross-complaint were false, and that he knew they were false. It is well-established that "[m]alice [can] be inferred from [the plaintiff's] knowingly false allegations." (*Nunez, supra*, 241 Cal.App.4th at p. 878.) As explained by our Supreme Court, "Clearly a person who attempts to establish a claim . . . knowing of its falsity can only be motivated by an improper purpose." (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383; see also *Ross, supra*, 145 Cal.App.4th at p. 204 ["[M]alice may . . . be inferred when a party knowingly brings an action without probable cause"].)

The trial court could also reasonably infer malice based on Dekhtyar's testimony explaining why he filed the cross-

complaint. At trial, Dekhtyar asserted that he filed the cross-complaint because he believed Chernyavsky had wrongfully accused him of committing fraud and embezzlement. Presumably, Dekhtyar was referring to his prior ouster from the Huntington Restaurant Group, which occurred after Chernyavsky and other Huntington board members concluded that he had misappropriated over \$300,000 in corporate funds.

The claims that Dekhtyar alleged in his cross-complaint, however, have no relation to Chernyavsky's embezzlement accusation, or any other act related to the Huntington Restaurant Group. Instead, his claims assert that Chernyavsky had induced Dekhtyar to waive any debt claims related to a failed barbecue restaurant venture, breached his promises to help operate the Los Angeles Denny's, coerced Dekhtyar into signing the indemnification agreement and engaged in a fraudulent scheme to cause the Los Angeles Denny's to fail. Given Dekhtyar's admission that he had filed the cross-complaint in response to the embezzlement accusation, the court could reasonably infer that his cross-complaint was actuated by hostility, rather than to secure relief for the claims he actually asserted.

The record also contains a significant amount of evidence that Dekhtyar felt animosity toward Chernyavsky based on their prior business dealings, which provided a motive to engage in malicious, retaliatory conduct. First, as noted, Chernyavsky had previously voted to remove Dekhtyar from his position as president of the Huntington Restaurant Group after concluding that he had improperly withdrawn funds from the company. Dekhtyar denied those claims at trial, and contended he should not have been removed from his position at Huntington. Second,

Dekhtyar's declaration and trial testimony make clear that he held Chernyavsky responsible for the losses he incurred in the failed barbeque restaurant venture. His declaration asserts that Chernyavsky had encouraged him to invest in Herman Cothran's smoker technology, and then declined to assist him when the Hermans restaurant began failing. Third, the evidence showed Chernyavsky had seized control of Dekhtyar's ownership interest in Verax after he defaulted on the SBA loan and the promissory note. In his declaration, Dekhtyar contended that Chernyavsky had "forced [him] out" of Verax, which was his "last hope to maintain a source of income." Finally, in June of 2010, Chernyavsky filed his breach of contract claims against Dekhtyar seeking repayment of the promissory note. Chernyavsky testified that shortly after he filed his complaint, Dekhtyar had physically threatened him, telling him that he would "put him in a wheelchair." The court could reasonably infer from this evidence that Dekhtyar was extremely hostile toward Chernyavsky as a result of their past business dealings, and that he had filed the cross-claims as a retaliatory measure.

4. The trial court did not err in rejecting the advice-of-counsel defense

Dekhtyar argues that he cannot be held liable for malicious prosecution because the evidence at trial showed he filed his cross-complaint based on the advice of his attorney. "Reliance on advice of counsel in good faith is a defense to an action for malicious prosecution, inasmuch as such defense shows probable cause. [Citation]. But in order to avail himself of such defense [the defendant] must have disclosed to his attorney all of the pertinent facts within his knowledge. [Citations.]" (*Albertson v.*

Raboff (1960) 185 Cal.App.2d 372, 386.) Thus, the defense requires “truthful disclosure of all the relevant facts.” (*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1544; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54 (*Bertero*) “[I]f the initiator . . . withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, that defense fails”].) “Whether a full and fair disclosure of all of the facts was made to the [attorney] . . . is a question of fact, as is the question whether [the defendant] acted on the advice of counsel.” (*Weber v. Leuschner* (1966) 240 Cal.App.2d 829, 838.) “The burden of proving this affirmative defense is, of course, on the party seeking to benefit by it.” (*Bertero, supra*, 13 Cal.3d at p. 54.)

As discussed above, there was sufficient evidence for the court to conclude Dekhtyar knew the factual allegations in his cross-complaint were not true. During his deposition testimony, which was read into the record at trial, Dekhtyar admitted the allegations that appeared in his pleading were based on information he had relayed to his attorney. The court could therefore reasonably infer that Dekhtyar failed to make a full disclosure to his attorney, precluding application of the advice-of-counsel defense.

DISPOSITION

The trial court's judgment is affirmed. Chernyavsky shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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