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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WILLIAM MANDRICK,  
  
Plaintiff and Appellant,

v.

ALLEN HYMAN,  
  
Defendant and Respondent.

2d Civil No. B268940  
(Super. Ct. No. 56-2015-  
00465734-CU-PN-VTA)  
(Ventura County)

After prevailing in a civil lawsuit, William Mandrick brought a malicious prosecution action against the parties who unsuccessfully sued him and their attorney, Allen Hyman. The trial court granted Hyman's motion to strike the action under the anti-strategic lawsuit against public participation (anti-SLAPP) statute. (Code Civ. Proc., § 425.16.)<sup>1</sup> Mandrick appeals the order granting the anti-SLAPP motion. We affirm.

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

## BACKGROUND

### *Lawsuit*

Hooman and Hootan Davoodi sued Mandrick for breach of contract, money lent, and fraud. The Davoodis alleged that from 2006 through 2010, they loaned Mandrick approximately \$350,000 to be repaid “upon demand by [the Davoodis].”

Mandrick demurred to their complaint, arguing, in part, that the oral contract and money lent causes of action were barred by the statute of limitations. (§ 339.) Prior to the hearing on the demurrer, the Davoodis filed a first amended complaint. The amended complaint alleged that repayment was due “when [Mandrick] could afford to pay back the money loaned.” It further alleged that Mandrick inherited several million dollars in 2010, and the Davoodis demanded repayment, but Mandrick refused to pay.

The court sustained Mandrick’s demurrer to the Davoodis’ first amended complaint with leave to amend. The court ruled that “[s]imply stating that \$350,000 was loaned over a four-year period is completely vague, particularly in light of . . . the statute of limitations argument.”

The Davoodis filed a second amended complaint which included the specific dates and amounts of money they transferred to Mandrick. Mandrick demurred to their second amended complaint. The court sustained the demurrer to the oral contract and money lent causes of action without leave to amend based on the statute of limitations. The court also based its decision on the “sham pleading doctrine,” finding the Davoodis attempted to avoid the statute of limitations by newly alleging that the loan was repayable when Mandrick could afford to pay

back the loan. The court overruled the demurrer to the fraud causes of action and ordered Mandrick to file an answer.

After Mandrick filed an answer to the Davoodis' second amended complaint, Hyman substituted in as the Davoodis' counsel. The case proceeded to a jury trial on the fraud claims. The jury found that Mandrick did not make a promise to the Davoodis "directly, and/or indirectly through Helen Mandrick and/or through Robabbeh Davoodi that was important to the transaction."

### *Appeal*

The Davoodis, through Hyman, appealed the judgment against them. They filed an opening brief challenging the order sustaining the demurrer to the second amended complaint. Shortly after filing the opening brief, Hyman advised Mandrick's attorney of their intention to dismiss the appeal, and they voluntarily dismissed the appeal less than three weeks later.

### *Malicious Prosecution/Anti-SLAPP*

Mandrick sued Hyman, the Davoodis, and the Davoodis' prior counsel for maliciously prosecuting the underlying lawsuit and the related appeal. Each of these defendants filed an anti-SLAPP motion separately.

In support of his anti-SLAPP motion, Hyman included a declaration in which he detailed his investigation of the case before substituting in as counsel. He declared that the underlying appeal "was not dismissed because I thought the arguments therein lacked merit." The Davoodis declared that they requested Hyman to dismiss the appeal "purely for economic reasons," and not because they believed the appeal lacked merit.

The trial court granted Hyman’s anti-SLAPP motion, finding that Mandrick failed to demonstrate a probability of prevailing because he did not show Hyman acted with malice. The court stated, “What I can’t put my finger on . . . is the evidence of the malice on the part of Mr. Hyman. Mr. Hyman was an advocate. Clients chose him. He saw a mountain of evidence with a family that had unusual management practices. [¶] . . . [¶] I’m not sure, though, that I can go the additional step now and say for you, Mr. Hyman, you did this, and you were malicious. Perhaps [Hyman] could have used different judgment in assessing the strength to his client, but that’s where I’m struggling with.”

#### DISCUSSION

The anti-SLAPP statute was enacted to screen out meritless cases at an early stage. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 718.) In applying the statute, the court engages in a two-step process. (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 702 (*Lefebvre*).) The court first determines whether the defendant made a threshold showing that the challenged cause of action arises from protected activity. (*Ibid.*) If the defendant made such a showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Ibid.*) The court “does not weigh credibility or compare the weight of the evidence,” and it “merely determines whether a prima facie showing” has been made. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) Our review of the trial court’s order is de novo. (*Lefebvre*, at p. 703.)

The parties agree that malicious prosecution is a cause of action arising from protected activity. (*Jarrow*

*Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 (*Jarrow Formulas*); *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220.) The question here is whether Mandrick satisfied his burden to show a “probability of prevailing.” To satisfy this burden, Mandrick must show that his malicious prosecution claim is legally sufficient and supported by a prima facie showing of facts sufficient to sustain a favorable judgment. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded by statute on other grounds by *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547.)

To make a prima facie malicious prosecution case, the plaintiff must show that the underlying action (1) was commenced by or at the direction of the defendant and was terminated in favor of plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon*).) Because the trial court based its ruling on the lack of showing malice, we focus on that element.

The malice element of a malicious prosecution claim relates to the defendant’s subjective intent or purpose in initiating the prior action. (*Sheldon, supra*, 47 Cal.3d at p. 874.) “The motive of the defendant must have been something other than that of . . . 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.” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224 (*Daniels*).) Malice is usually proven by circumstantial evidence. (*Ibid.*)

Proof of malice can consist of “evidence a party *knowingly* brings an action without probable cause.” (*Daniels, supra*, 182 Cal.App.4th at p. 226.) For example, in *Zamos v.*

*Stroud* (2004) 32 Cal.4th 958, 971 (*Zamos*), evidence that attorney defendants continued to pursue a fraud action to trial despite receiving hearing transcripts containing their own client's statements contradicting the fraud allegation was sufficient to support a prima facie case for malicious prosecution. In contrast, malice cannot be inferred merely from an attorney's filing and continued litigation of a case in which there was no evidentiary support for the factual allegations. (*Daniels*, at p. 227 [recognizing that *Zamos* was distinguishable because there the factual allegations were "explicitly disproved" by prior sworn testimony]; see also *Jarrow Formulas*, *supra*, 31 Cal.4th at p. 743 [even if there was no competent evidence adduced from discovery to support claims in an underlying action, this alone is insufficient to show malice].)

"The lack of probable cause is one factor in determining the presence of malice, but alone it is insufficient. [Citation.] 'Merely because the prior action lacked legal tenability, as measured objectively . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence.' [Citation.]" (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1543; *Jarrow Formulas*, *supra*, 31 Cal.4th at p. 743.)

Mandrick claims that malice "may be inferred from the lack . . . of probable cause" and that Hyman pursued the case despite "recogniz[ing] it lacked merit." This claim rests on two assertions: (1) that a reasonable attorney would not have pursued the case after the breach of contract and money lent claims were dismissed based on the statute of limitations, and (2)

that these claims were meritless in light of the jury's finding on the fraud claims. But he fails to provide any meaningful analysis to support these assertions. For instance, he claims that a reasonable attorney would have known the lawsuit was meritless after the court dismissed the first two causes of action (on statute of limitations grounds), but he discounts the trial court's reference to the "mountain of evidence" Hyman reviewed in support of the Davoodis' case. He also presumes, without any substantive discussion, that the jury's finding on the fraud claims (i.e., that he did not make a promise to the Davoodis that was important to the transaction) precluded the contract and money lent claims.

Even if we assume the underlying lawsuit and appeal was not brought with probable cause (a conclusion that we do not reach), there is no evidence that Hyman had ill will or improper motive. Nor is there evidence that he knowingly brought the case without probable cause or that his actions were clearly unreasonable. (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1466 [an attorney's action must be "clearly unreasonable" to infer malice].) Rather, Hyman's declaration supports his claim that he investigated the case before substituting in as counsel and that he filed the appeal believing it had merit. Moreover, that he dismissed the appeal shortly after filing the opening brief and advised opposing counsel of his intention to do so shows that he had no improper motive. (See *id.* at p. 1467 [dismissal of the underlying action almost immediately after reading depositions that refuted the allegations shows there was no ulterior motive in filing the lawsuit].) Mandrick did not meet his burden to make a prima facie showing of malice. Thus, the trial court properly granted Hyman's anti-SLAPP motion.

DISPOSITION

The judgment is affirmed. Hyman shall recover his costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.



Kent M. Kellegrew, Judge  
Superior Court County of Ventura

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Edward M. Bialack, for Plaintiff and Appellant.

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