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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLARA MINSHIN KONG,

Plaintiff and Appellant,

v.

YJ WEST CORP.,

Defendant and Respondent.

B232874

(Los Angeles County  
Super. Ct. No. BC444042)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller,  
Judge. Affirmed.

Park & Lim, S. Young Lim and Steve J. Kim for Appellant.

Kim, Shapiro, Park, Lee & Ryu and Thomas J. Ryu for Respondent.

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## INTRODUCTION

Appellant and plaintiff Clara Minshin Kong (Clara or appellant) sued defendant and respondent YJ West Corp. (YJ West) and others for malicious prosecution and other alleged torts. The trial court granted YJ West's special motion to strike Clara's complaint pursuant to Code of Civil Procedure section 425.16 (section 425.16), the anti-SLAPP statute.<sup>1</sup> We affirm the order granting the motion.

## FACTS

### 1. *The Underlying Action*

#### a. *The Complaint*

On December 4, 2008, YJ West and Yang Jin Co., Ltd. (Yang Jin) filed a complaint in Los Angeles County Superior Court, Case No. BC403206 (the underlying action) against Clara, her husband Young Won Kong (Young), Soon Olk Kong (Soon), a relative of Young and/or Clara, Royal Liquor, LLC (Royal Liquor),<sup>2</sup> Greenwest, LLC (Greenwest), Greenwest Activewear, Inc. (Greenwest Activewear) and other defendants. The complaint alleged the following.

In 2006, Young solicited Yang Jin, a Korean corporation, to make a number of investments and to enter into a joint venture involving the textile dyeing business. Yang Jin made investments totaling several million dollars in companies established by Young, including Greenwest, a California limited liability company, LA Guatemala Partnership, LLC (LAG LLC), a California corporation, and LA USA Dye & Finishing S.A. (D&F), a Guatemalan corporation and wholly owned subsidiary of LAG LLC.

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<sup>1</sup> SLAPP is an acronym for strategic lawsuit against public participation.

<sup>2</sup> Clara was a principal of Royal Liquor.

Yang Jin established YJ West, a California corporation and its wholly owned subsidiary, “through which it made the US \$1,000,000.00 cash investment in [Greenwest].” In consideration for this investment, YJ West acquired non-voting redeemable ownership units in Greenwest.

Before Yang Jin made its investments, Young made numerous false and fraudulent statements to Yang Jin. For example, Young falsely stated that he or his company Greenwest would invest \$2 million toward capitalizing LAG LLC. After Yang Jin made its investments, Young masterminded a scheme to misappropriate corporate funds.

Young, Clara and Soon “did fraudulently transfer, conceal and dissipate the converted assets and monies belonging to Plaintiffs, LAG LLC and D&F by use of their entities or other businesses controlled and/or owned by them, to shield it from Plaintiffs and other creditors.” Specifically, Young, Clara and Soon “and their entities [Greenwest, Greenwest Activewear, Royal Liquor and other defendants] were, and are, being used to dissipate and conceal the monies and assets converted from Plaintiffs, LAG LLC and D&F.”

The complaint set forth 12 causes of action. The only causes of action asserted against Clara were for conversion, unjust enrichment, claim and delivery, and unfair competition.

b. *Motion for Judgment on the Pleadings*

On November 3, 2009, Clara and the other defendants filed a motion for judgment on the pleadings. The motion alleged, inter alia, that YJ West must be dismissed from the complaint because the complaint failed to allege any involvement by YJ West in any of the facts.

On December 30, 2009, a hearing was held on the motion. In its tentative ruling, the court stated “. . . the motion is GRANTED in its entirety with leave to amend as to Plaintiff YJ West because there are no allegations of YJ West’s involvement in any of the facts.” The record does not clearly indicate whether this tentative ruling became the final ruling of the court.

c. *First Amended Complaint*

On January 29, 2010, Yang Jin filed a first amended complaint against Clara and other defendants. YJ West was not a plaintiff in this pleading and there is no record of YJ West filing an amended pleading in the underlying action. By not filing an amended complaint, YJ West effectively dismissed its action against Clara and the other defendants.

d. *Dismissals by YJ West and Yang Jin*

On June 2, 2010, YJ West filed a request for dismissal of the complaint without prejudice. The record does not indicate whether this request was granted.

On June 18, 2010, Yang Jin filed a request for dismissal without prejudice of the complaint against Clara and other defendants. The record does not indicate whether this request was granted.

2. *Other Lawsuits Involving Affiliated Parties*

In addition to the underlying action, there were a number of lawsuits among parties affiliated with Young and Yang Jin.

a. *The Federal Action*

On August 13, 2009, D&F filed a complaint against Young, Clara, Greenwest, Greenwest Activewear and other defendants in United States District Court for the Central District of California (the federal action). The federal action arose from many of the same transactions which gave rise to the underlying action. For example, in the complaint in the federal action, D&F alleged that Young agreed to invest \$2 million of “his own money into D&F through [Greenwest]”, but failed to do so. YJ West was *not* a plaintiff in the federal action.

b. *The Korean Action*

On April 8, 2009, D&F and LAG LLC filed a complaint in the Seoul Central Court in South Korea against Clara and another defendant (the Korean action). According to the Korean lawyer who initiated the Korean action, this lawsuit was brought “solely to levy a real property asset held by [Clara] on behalf of her husband, [Young],

and no lawsuit was filed directly against [Clara].” YJ West was *not* a plaintiff in the Korean action.

c. *The YJ West State Court Action*

On June 16, 2009—about two weeks after YJ West requested to dismiss Clara from the underlying action—YJ West filed an action in Los Angeles County Superior Court, Case No. BC415942 (YJ West state court action) against Young, Greenwest and Greenwest Activewear. Clara was *not* a defendant.

3. *The Malicious Prosecution Action*

On August 19, 2010, Clara commenced this action by filing a complaint in Los Angeles County Superior Court against YJ West and other defendants. The complaint set forth causes of action for (1) malicious prosecution, (2) abuse of process, (3) intentional infliction of emotional distress, (4) negligent infliction of emotional distress and (5) intentional interference with contractual relations. Each of these causes of action against YJ West ostensibly arises from YJ West’s commencement and prosecution of the underlying action.<sup>3</sup>

On November 2, 2010, YJ West filed a motion to strike the complaint pursuant to the anti-SLAPP statute. The motion was granted on February 28, 2011. Clara filed a timely appeal of the order granting the motion.

## **DISCUSSION**

1. *Standard of Review*

“We review the trial court’s rulings on an anti-SLAPP motion de novo, conducting an independent review of the entire record.” (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 (*HMS Capital*).)

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<sup>3</sup> Appellant did not include a copy of the complaint in the record. We could determine the general nature of the five causes of action by reviewing the documents relating to the anti-SLAPP motion, which are in the record.

## 2. *The Anti-SLAPP Statute*

“The anti-SLAPP statute is designed to nip SLAPP litigation in the bud by striking offending causes of action which ‘chill the valid exercise of the constitutional rights of freedom of speech and petition . . . .’ (§ 425.16., subd. (a).) Finding a ‘disturbing increase’ in such lawsuits, the Legislature has declared it in the public interest ‘to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.’ (*Ibid.*)” (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042.)

Under the anti-SLAPP statute, a party can file a special motion to strike causes of action falling within the scope of the statute. Section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” To accomplish its purposes, the anti-SLAPP statute must be “construed broadly.” (§ 425.16, subd. (a).)

In determining whether to grant an anti-SLAPP special motion to strike, the trial court engages in a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) “Second, if the court so finds, it then decides whether the plaintiff has established a probability of prevailing on the merits of the claim.” (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1084.)

## 3. *Appellant Forfeited Any Claim of Error with Respect to Her Causes of Action for Abuse of Process, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress and Intentional Interference with Contractual Relations*

In her briefs Clara only discussed her malicious prosecution cause of action. She did not assert any arguments or cite any legal authority relating to her causes of action for

abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress or intentional interference with contractual relations. Accordingly, Clara forfeited any claim of error with respect to these causes of action. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived”]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215 [“Contentions are waived when a party fails to support them with reasoned argument and citations to authority”]; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [same].)

4. *The Malicious Prosecution Cause of Action Arises from Activity Protected by the Anti-SLAPP Statute*

The first main issue on appeal is whether Clara’s malicious prosecution cause of action arises from activity protected by the anti-SLAPP statute. Clara concedes that it does. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735; *HMS Capital, supra*, 118 Cal.App.4th at p. 213.)

5. *Appellant Did Not Meet Her Burden of Showing a Probability of Prevailing on the Merits of Her Malicious Prosecution Cause of Action Against YJ West*

“To establish a probability of prevailing, the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ ” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*)). Clara has not established that the complaint is “legally sufficient” because she did not include a copy of the complaint in the record and does not describe its contents in her briefs.<sup>4</sup>

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<sup>4</sup> “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.” (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

Moreover, Clara failed to provide sufficient *evidence* showing a probability of prevailing on the merits. In order to prevail on a malicious prosecution cause of action, the plaintiff must prove (1) the underlying action brought against the plaintiff was determined on the merits in favor of the plaintiff; (2) the defendant brought or maintained the underlying action without probable cause; and (3) the defendant brought or maintained the underlying action with malice. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871.) We shall conclude that Clara did not meet her evidentiary burden with respect to the third element of malice. In light of this conclusion, we do not reach the issues of whether she met her burden with respect to the first two elements.

The element of malice relates to the subjective intent and motive of the defendant in initiating or maintaining the underlying action. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494 (*Downey Venture*).) “The plaintiff must plead and prove actual ill will or some improper ulterior motive.” (*Id.* at p. 494, italics omitted.) In other words, the plaintiff must show the defendant acted with an “intentionally wrongful purpose of injuring” the plaintiff. (*Id.* at p. 499.)

“Improper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim.” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224.)

Here, Clara failed to present any evidence that YJ West initiated or maintained the underlying action against her for an improper purpose. Clara therefore failed to meet her burden of showing a probability of proving the element of malice and prevailing on the merits of her malicious prosecution cause of action.



Clara argues that YJ West's malice can be inferred "by the fact that (1) the underlying action was filed with no probable cause, and (2) [YJ West], and its affiliated companies, filed multiple lawsuits in four different jurisdictions relating to one failed business transaction involving [Clara's] husband."

Assuming, arguendo, that YJ West did not have probable cause to initiate or maintain the underlying action against Clara, Clara must still present additional evidence to prove malice. A lack of probable cause, "*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." (*Downey Venture, supra*, 66 Cal.App.4th at p. 498.) Although a lack of probable cause can be "considered" in determining the element of malice (*HMS Capital, supra*, 118 Cal.App.4th at p. 218), "the presence of malice must be established by other, additional evidence." (*Downey Venture*, at p. 498; accord *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 819-820 [quoting *Downey Venture*].)

Clara did not file any other, additional evidence regarding YJ West's alleged malice. Her discussion of the federal action, the Korean action, and the YJ West state court action is unpersuasive. Clara did not present evidence that any of those actions were unmeritorious or brought for an improper purpose. Moreover, none of those actions involved both YJ West and Clara. The underlying action is the *only* action YJ West brought against Clara. Merely because entities and individuals affiliated with YJ West and Clara have been involved in other litigation does not support an inference that YJ West initiated or maintained the underlying action against Clara with malice.

Clara also contends that YJ West propounded "excessive written discovery" on her, and that this "fishing expedition" for facts "compounded" YJ West's malice. The record indicates that YJ West propounded 78 interrogatories on Clara. It also indicates that YJ West and Yang Jin served a deposition subpoena on one of Clara's

banks.<sup>5</sup> There is no evidence that this discovery was excessive or abusive, or was propounded in bad faith or for improper purposes. The mere fact that YJ West propounded discovery on Clara does not support the inference of malice.

It is worth noting that Clara provided no evidence or argument regarding the officers, directors or other agents of YJ West. YJ West, like all corporations, is an artificial person that can act only through its employees. (*AvalonBay Communities, Inc. v. County of Los Angeles* (2011) 197 Cal.App.4th 890, 903.) Clara did not identify any employees of YJ West, nor did she provide any evidence of conduct by specific employees.

We recognize that in order to survive an anti-SLAPP motion the plaintiff “need only establish that his or her claim has ‘minimal merit[.]’ ” (*Soukup, supra*, 39 Cal.4th at p. 291.) Clara, however, did not meet this threshold. She did not present a scintilla of evidence that YJ West initiated or maintained the underlying action with malice. The trial court therefore correctly granted YJ West’s anti-SLAPP motion.

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<sup>5</sup> In addition to discovery propounded by YJ West on Clara, Clara cites to evidence of discovery propounded by Yang Jin and discovery YJ West propounded on Royal Liquor. The fact that other parties were involved in the discovery process in the underlying action does not show that YJ West acted with malice towards Clara.

### **DISPOSITION**

The order dated February 28, 2011, granting YJ West's motion to strike pursuant to section 425.16 is affirmed. YJ West is awarded costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.