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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

MATTHEW KATZ, Plaintiff, v. SAM BIRENBAUM, NIDIA BIRENBAUM Defendants and Appellants.	B230599 (Los Angeles County Super. Ct. No. SC079729)
SAM BIRENBAUM, NIDIA BIRENBAUM Plaintiffs and Appellants v. ARTHUR GREBOW et al., Defendants and Respondents.	(Los Angeles County Super. Ct. No. SC092319)

APPEAL from an order of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Sam Birenbaum and Nidia Birenbaum, in pro. per. for appellants Sam Birenbaum and Nidia Birenbaum.

Gladstone Michel Weisberg Willner & Sloane and Allen L. Michel for Defendants and Respondents Arthur Grebow et al.

INTRODUCTION

Appellants Sam and Nidia Birenbaum sued Mathew Katz, Katz's lawyers (Attorney Defendants)[1] and others for malicious prosecution and other alleged torts. The trial court granted the Attorney Defendants' motion to strike the malicious prosecution cause of action pursuant to Code of Civil Procedure section 425.16 (section 425.16), the anti-SLAPP statute.[2] On appeal the Birenbaums challenge the order granting the anti-SLAPP motion on two grounds. First, they contend the anti-SLAPP statute does not apply to the underlying lawsuit maintained by the Attorney Defendants on behalf of Katz. Second, they contend they met their burden of showing a probability of prevailing on their malicious prosecution cause of action. We reject both arguments and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Birenbaums Occupancy of a House Owned by Katz*

In August 2003, Sam and Nidia Birenbaum, a married couple, were forced to abandon their home because they did not make certain repairs to comply with the building code. The Birenbaums approached Katz and asked if they could stay in a house he owned in Malibu (the house). The Birenbaums and Katz were friends and Mr. Birenbaum had previously represented Katz as an attorney.[3] About 14 months earlier, in June 2002, Katz had loaned the Birenbaums money.

It is undisputed that Katz allowed the Birenbaums to stay in the house, and that Katz gave the Birenbaums a key to the premises. The nature of the occupancy, however, is disputed. The Birenbaums claim that they and Katz entered into a "lease." They

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[1] The Attorney Defendants consist of two law firms and two lawyers. The firms are Gladstone Michel Weisberg Willner & Sloane (Gladstone Michel) and Berger Kahn. The lawyers are Arthur Grebow and Julie H. Rubin.

[2] SLAPP is an acronym for strategic lawsuit against public participation.

[3] Prior to August 2003, Sam Birenbaum was convicted of a felony involving moral turpitude and resigned from the state bar while charges were pending.

further contend that in lieu of rent, they provided services to Katz. Katz denies there was any type of lease and contends that he simply allowed the Birenbaums to stay as "guests."

The Birenbaums lived in the house without incident from August 22 to September 28, 2003. On September 29, 2003, however, a dispute arose between the parties when Katz asked the Birenbaums to leave the house that day so he could rent it to other people. The Birenbaums stated that they needed more time. On October 8, 2003, Katz served the Birenbaums with a 30-day notice to leave the house.

According to the Birenbaums, Katz hired two agents to intimidate and abuse them for the purpose of pressuring them to leave the house as soon as possible. On October 26, 2003, the Birenbaums left the house.

2. *The Pleadings in the Underlying Action*

On November 13, 2003, Katz filed a complaint against Sam and Nidia Birenbaum. Katz was in propria persona (pro. per.). This lawsuit (the underlying action) was assigned Case No. SC079729.

The complaint in the underlying action set forth causes of action for (1) trespass to land, (2) trespass to chattels, (3) debt on a contract, (4) interference with contract, (5) interference with prospective economic advantage, (6) "theft," (7) battery, (8) fraud, (9) civil conspiracy, and (10) defamation. Katz filed a declaration under penalty of perjury stating that the facts and allegations in the complaint were true. In May 2004, Katz filed a first amended complaint and then in August 2004, he filed a second amended complaint, the operative pleading. The record does not indicate whether the amended complaints were verified. The second amended complaint stated causes of action for (1) trespass to land, (2) trespass to chattels, (3) money had and received, (4) interference with contract, (5) interference with prospective economic advantage, (6) battery, (7) fraud, and (8) defamation.

In January 2005, the Birenbaums filed a cross-complaint against Katz for (1) fraud, (2) breach of contract, (3) trespass, (4) assault and battery, (5) constructive eviction, (6) forcible entry and detainer, (7) harassment, (8) intentional infliction of emotional distress, (9) quantum meruit, (10) conversion, and (11) vandalism.

3. *The Trial and Judgment in the Underlying Action*

On October 26, 2006, a bench trial commenced. Katz represented himself. After Katz's opening statement, the court granted the Birenbaums' motion for a nonsuit with respect to all of Katz's causes of action. The Birenbaums then presented argument and evidence in support of their cross-complaint.

On November 15, 2006, the court issued a minute order announcing its ruling. The court ruled in favor of the Birenbaums and against Katz with respect to the Birenbaums' trespass, constructive eviction, forcible entry and detainer, and intentional infliction of emotional distress causes of action, awarding the Birenbaums $220,000 in compensatory damages, and $300,000 in punitive damages.

On January 9, 2007, judgment was entered in favor of the Birenbaums and against Katz. Katz filed a timely appeal of that judgment.

4. *Commencement of the Malicious Prosecution Action*

On January 5, 2007, before judgment was entered in the underlying action, the Birenbaums filed a complaint against Katz and 10 "Doe" defendants for (1) malicious prosecution, (2) abuse of process, (3) intentional infliction of emotional distress, (4) defamation, and (5) assault. The first cause of action for malicious prosecution was based on Katz's commencement and prosecution of the underlying action.

This lawsuit (the malicious prosecution action) was assigned Case No. SC092319. At some point the underlying action and the malicious prosecution action were consolidated by the trial court.

5. *The Attorney Defendants Become Katz's Counsel*

On February 22, 2007, while the appeal was pending, the law firm of Berger Kahn became Katz's counsel. Respondents Arthur Grebow and Julie H. Rubin were the attorneys who worked on the appeal.

In August 2009, Grebow and Rubin began working as lawyers for the law firm of Gladstone Michel. On August 20, 2009, Gladstone Michel replaced Berger Kahn as Katz's counsel in the underlying action.

6. *Katz I*

On June 18, 2009, in an unpublished opinion *Katz v. Birenbaum et al.* (B196837) (*Katz I*), we reversed the January 9, 2007, judgment in the underlying action. In that opinion, we concluded Katz was deprived of his constitutional right to a jury trial, and remanded the case for a new trial on Katz's second amended complaint and the Birenbaums' cross-complaint.

On September 22, 2009, we issued a remittitur.

7. *Nidia Birenbaum's Bankruptcy Petition*

On March 17, 2009, while Katz's appeal was pending, Nidia Birenbaum filed a petition for bankruptcy. On September 27, 2009—a week after the remittitur issued—Nidia Birenbaum filed a letter with this court informing us for the first time of the bankruptcy petition. She argued in that letter that our opinion in *Katz I* and the remittitur were void because they violated the automatic stay imposed by the bankruptcy court. Ms. Birenbaum also requested that this court revoke the remittitur and withdraw its opinion.

On October 1, 2009, Arthur Grebow of Gladstone Michel filed a letter in response to Nidia Birenbaum's letter.

On October 7, 2009, this court denied Nidia Birenbaum's request to revoke the remittitur.[4]

8. *Katz's Dismissal of Nidia Birenbaum from the Underlying Action*

On October 1, 2009, Katz filed a request for dismissal with prejudice of his complaint in the underlying action against Nidia Birenbaum. The request was granted by the trial court.

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[4] On October 9, 2009, the bankruptcy court granted Katz's motion for relief from the automotive stay. The order granting the motion stated that as to Katz, the automatic stay was annulled retroactively to the date of the bankruptcy petition filing.

9. *In the Malicious Prosecution Action, the Trial Court Dismisses the First Cause of Action for Malicious Prosecution as "Moot"*

In light of the remittitur and the revival of Katz's causes of action against Sam Birenbaum in the underlying action, the trial court issued an Order to Show Cause as to why the first cause of action for malicious prosecution in the malicious prosecution action should not be dismissed. On October 7, 2009, the trial court issued an order (Dismissal Order) dismissing the malicious prosecution action as "moot."

10. *Litigation in the Underlying Action Before the Status Conference in April 2010*

Respondent Grebow stated in his declaration supporting the Attorney Defendants' anti-SLAPP motion that between the Dismissal Order "and the following April, there was no activity (such as depositions, etc.) in connection with or supporting Katz's affirmative claims" against Sam Birenbaum. The Birenbaums dispute this statement. As evidence, they filed in the trial court a Demand for Exchange of Information Pertaining to Expert Trial Witnesses propounded by Grebow and Rubin of Gladstone Michel on behalf of Katz in the underlying action in March 2010. The demand, however, did not expressly indicate whether it pertained to the Birenbaums' cross-complaint against Katz, Katz's affirmative claims against Sam Birenbaum, or both.

11. *Katz's Dismissal of Sam Birenbaum at the April 23, 2010, Status Conference*

On or about April 21, 2010, Grebow and Rubin of Gladstone Michel filed a status conference report on behalf of Katz in the underlying action. The report stated: "Following reversal of the [January 9, 2007, judgment], Katz dismissed his Complaint. Consequently, the only relevant pleading is the Cross-Complaint filed by the Birenbaums." This statement was erroneous because at the time, Katz had only dismissed Nidia Birenbaum and had not yet dismissed Sam Birenbaum.

The status conference was held on April 23, 2010. At the beginning of the conference, San Birenbaum pointed out that, contrary to Katz's status conference report, Sam Birenbaum had not been dismissed as a defendant. After the court confirmed that

Sam Birenbaum had not been dismissed, Grebow orally moved to dismiss him. This oral motion was granted.

12. *June 24, 2010, Order Reinstating the Malicious Prosecution Cause of Action and Denying Katz's Motion for Relief from Dismissal*

On May 5, 2010, Katz filed a motion for relief from his dismissal of Sam Birenbaum in the underlying action. The motion was based on the ground that Grebow incorrectly and mistakenly dismissed Mr. Birenbaum at the status conference.

On June 1, 2010, the Birenbaums moved for leave to file a first amended complaint in the malicious prosecution action that reinstated their malicious prosecution cause of action.

On June 24, 2010, the trial court denied Katz's motion for relief and granted the Birenbaums' motion to file a first amended complaint.

13. *First Amended Complaint in the Malicious Prosecution Action*

On July 23, 2010, the Birenbaums filed a first amended complaint in the malicious prosecution action.[5] The Attorney Defendants were named as "Doe" defendants for the first time. The first cause of action in this amended complaint was for malicious prosecution. This cause of action was based on the prosecution of the underlying action by Katz and the Attorney Defendants.

The first amended complaint set forth five causes of action. The first cause of action for malicious prosecution was against Katz and the Attorney Defendants, and the remaining causes of action were against Katz alone.

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[5] The Attorney Defendants contend this pleading is a "supplemental" complaint because it refers to facts which occurred after the filing of the original complaint in the malicious prosecution action.

14. *The Anti-SLAPP Motion to Strike*

On September 14, 2010, the Attorney Defendants filed a motion to strike the first cause of action in the malicious prosecution action pursuant to section 425.16. The trial court entered a minute order granting this motion on November 3, 2010. On November 30, 2010, the trial court entered another order granting the motion. The Birenbaums filed a timely appeal of the November 30, 2010, order.

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*).)

2. *The Anti-SLAPP Statute*

"The anti-SLAPP statute is designed to nip SLAPP litigation in the bud by striking offending causes of actions 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. *The Malicious Prosecution Cause of Action Arises From Activity Protected by the Anti-SLAPP Statute*

The first main issue on appeal is whether the Birenbaums' malicious prosecution cause of action arises from activity protected by the anti-SLAPP statute. We conclude that it does.

An act in furtherance of a person's constitutional right to petition in connection with a public issue includes "any written or oral statement or writing made before a . . . judicial proceeding" and "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body[.]" (§ 425.16, subd. (e).) The acts of filing and maintaining a lawsuit fit squarely within these definitions.

Moreover, "a malicious prosecution cause of action arises from the right to petition as it 'arises from an underlying lawsuit, or petition to the judicial branch. By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. [Citation.]' " (*HMS Capital, supra*, 118 Cal.App.4th at p. 213, quoting *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 (*Jarrow*).) Therefore "malicious prosecution causes of action fall within the purview of the anti-SLAPP statute." (*Jarrow*, at p. 735; accord *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1397-1398 (*Sycamore*) ["Filing a lawsuit is an exercise of a party's constitutional right of petition [Citation], and claims for malicious prosecution may thus be subject to the anti-SLAPP statute"].)

Here, the malicious prosecution cause of action against the Attorney Defendants is based on their representation of Katz in the underlying action. The Attorney Defendants' alleged conduct was in furtherance of Katz's right to petition a judicial body. The Birenbaums' malicious prosecution cause of action thus arose from activity protected by the anti-SLAPP statute.

The Birenbaums argue that the anti-SLAPP statute does not apply because Katz's petitioning activity was "illegal" as a matter of law. They claim that Katz "committed perjury as a matter of law" in connection with certain statements he made in the verified complaint.[6] Thus, they argue, the Attorney Defendants' representation of Katz on appeal in *Katz I* and in the trial court after the remittitur did not constitute protected activity within the scope of the anti-SLAPP statute. We reject this argument.

Whether Katz committed perjury by making certain false statements *in the complaint* he filed in pro. per. is irrelevant to whether the Attorney Defendants engaged in protected activity. Long before the Attorney Defendants became involved in the underlying action, the complaint was superseded by the first amended complaint and then the second amended complaint, and Katz's action against the Birenbaums was tried based on the allegations in the second amended complaint. The Attorney Defendants' prosecution of Katz's action against the Birenbaums was limited to the claims asserted in the second amended complaint.

The Birenbaums presented no evidence that the second amended complaint contained false statements of fact, that this pleading was verified, or that Katz committed perjury by filing it. They also presented no evidence that the Attorney Defendants were

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[6] For example, in the sixth cause of action for "theft," the complaint alleges that Sam Birenbaum was paid $10,000 for legal services, and that this fee was "exorbitant" in light of the limited legal work performed by Mr. Birenbaum. The complaint further alleges Sam Birenbaum negotiated a settlement on Katz's behalf without Katz's authorization. The Birenbaums contend this allegation was untrue because Katz actually approved of the settlement in open court.

aware of any "illegal" activity by Katz when they filed an appeal on his behalf, or at any time before the dismissal of the Birenbaums.

Katz's reliance on *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*) is misplaced. There, the court held that an attorney's written and oral communications with the plaintiff "constituted criminal extortion as a matter of law and, as such, were unprotected by constitutional guarantees of free speech or petition." (*Id.* at p. 305.) In this case, by contrast, the Birenbaums have not shown that the Attorney Defendants engaged in criminal conduct as a matter of law. *Flatley* is thus distinguishable.

4. *The Birenbaums Did Not Meet Their Burden of Showing a Probability of Prevailing on the Merits of Their Malicious Prosecution Action Against the Attorney Defendants*

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 & Oliker* (1989) 47 Cal.3d 863, 871.) The Birenbaums failed to show a probability that they could establish all three elements.

a. *The Birenbaums Did Not Establish a Prima Facie Showing That the Underlying Action Was Terminated on the Merits in Their Favor*

The Birenbaums contend they made a prima facie showing that Katz's voluntary dismissal of the second amended complaint was a favorable termination on the merits. We disagree.

A voluntary dismissal is not considered to be a termination on the merits if it " 'simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt.' " (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056-1057 (*Contemporary Services*).) Because parties do not ordinarily voluntarily dismiss meritorious claims, there is a rebuttable presumption that such a dismissal was a favorable termination on the merits. (*Sycamore*, *supra*, 157 Cal.App.4th at p. 1400).

In *Contemporary Services*, the record indicated that defendants dismissed the underlying action because they could not afford to pursue it, not because they lost faith in the merits of their claims. (*Contemporary Services*, *supra*, 152 Cal.App.4th at p. 1057.) The court held plaintiffs failed to show a favorable termination of the underlying action on the merits, and thus failed to show a probability of prevailing on their malicious prosecution cause of action for purposes of surviving an anti-SLAPP motion. (*Id.* at p. 1058.)

Similarly, in *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337 (*Oprian*), the court held that the voluntary dismissal of a complaint for the purpose of avoiding court costs and the inconvenience of a second trial was not a favorable termination on the merits for purposes of a malicious prosecution cause of action. (*Id.* at p. 345.) In so holding, the court stated: "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action. It is common knowledge that costs of litigation, such as attorney's fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes. 'This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action.' " (*Id.* at pp. 344-345.)

Here, like the defendants in *Contemporary Services* and *Oprian*, the Attorney Defendants presented evidence rebutting the presumption that their voluntary dismissal of the underlying action was a favorable termination on the merits. The record indicates that the Attorney Defendants dismissed the underlying action on Katz's behalf in order to save costs and other reasons that had nothing to do with the merits of Katz's claims against the Birenbaums.

At the time of the dismissals, the Birenbaums had not obtained any favorable rulings and there were no dispositive motions pending. We cannot, as the Birenbaums urge, consider the trial court's rulings regarding the merits of Katz's claims before *Katz I*, because judgment embodying those rulings was reversed. After the remittitur the trial

court was required to adjudicate Katz's claims anew. (*Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896 [when the judgment was reversed "the effect was the same as if it had never been entered"]; *Barron v. Superior Court* (2009) 173 Cal.App.4th 293, 300 ["Our unqualified reversal automatically remands the matter for renewed proceedings and places the parties in the same position as if the matter had never been heard"].)

The record further indicates that after the remittitur the Attorney Defendants determined, based on Nidia Birenbaum's bankruptcy papers and other evidence, that the Birenbaums were essentially "judgment proof." They decided that the cost of pursuing a lawsuit against the Birenbaums would greatly exceed any possible benefit to Katz that could be derived from a successful outcome. In sworn declarations, the Attorney Defendants stated that they dismissed the second amended complaint on Katz's behalf for this reason and not because of any assessment of the merits of Katz's claims.[7]

The Birenbaums did not cite any evidence in the record that indicates Katz dismissed the second amended complaint because it lacked merit, and we have found none. Accordingly, the Birenbaums did not meet their burden of establishing a prima facie showing that Katz's second amended complaint was terminated on the merits.

b. *The Birenbaums Did Not Establish a Prima Facie Showing That the Attorney Defendants Acted with Malice*

The third element of malicious prosecution is malice. This element 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.) The plaintiff must show the defendant acted with an "intentionally wrongful purpose of injuring" the plaintiff. (*Id.* at p. 499.) A showing of a lack of probable cause, without more, is

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[7] Respondent Arthur Grebow stated in his declaration that the Attorney Defendants had a second reason for dismissing Nidia Birenbaum. They wanted to eliminate any possible question regarding Katz's alleged violation of the automatic stay imposed by the bankruptcy court. This reason, too, has nothing to do with the merits of Katz's claims.

insufficient. (*Id.* at p. 498.) "[T]he presence of malice must be established by other, additional evidence." (*Ibid.*)

In this case, although the Birenbaums contend there is evidence indicating the Attorney Defendants acted with malice, they cite to no evidence in the record supporting this contention. Further, in our review of the record, we have found no such evidence.

Grebow and Rubin, the two lawyers who represented Katz in the first appeal and in post-appeal proceedings in the trial court, did not know the Birenbaums prior to the litigation and only dealt with the Birenbaums in their professional capacity. Both lawyers filed declarations stating that they had no malicious intent toward the Birenbaums. There is nothing in the record to contradict these statements. The Birenbaums therefore have not met their burden of establishing a prima facie showing that the Attorney Defendants acted with malice.

c. *We Do Not Reach the Issue of Whether the Birenbaums Established a Prima Facie Showing That the Attorney Defendants Lacked Probable Cause to Prosecute the Underlying Action*

As stated *ante*, the second element of a malicious prosecution cause of action is that the defendant did not have probable cause to file or maintain the underlying lawsuit. We do not reach the issue of whether the Birenbaums established a prima facie showing of this element because the Birenbaums did not make such a showing for the other two elements of malicious prosecution.

DISPOSITION

The order dated November 30, 2010, granting the Attorney Defendants' motion to strike pursuant to section 425.16 is affirmed. The Attorney Defendants are awarded costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.