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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HANIL ENGINEERING &
CONSTRUCTION COMPANY, LTD. et
al.,

Plaintiffs and Appellants,

v.

EDWARD AHN et al.,

Defendants and Respondents.

B232200

(Los Angeles County
Super. Ct. No. BC447174)

APPEAL from orders of the Superior Court of the County of Los Angeles,
Maureen Duffy-Lewis, Judge. Reversed.

Parker Shumaker Mills, David B. Parker, William K. Mills, and Justin D.
Denlinger for Plaintiffs and Appellants.

Law Offices of Patrick J. Evans, Patrick J. Evans for Defendants and Respondents
Edward Ahn and Helen Ahn.

Reback, McAndrews, Kjar, Warford & Stockalper, James J. Kjar, Cindy A.
Shapiro, and Evan N. Okamura for Defendant and Respondent Patrick D. Evans dba
Evans & Associates.

Moon & Yang, Kane Moon, and Seung Yang for Defendant and Respondent
David S. Kim dba Law Offices of David S. Kim & Associates.

INTRODUCTION

Plaintiffs and appellants Hanil Engineering & Construction Company, Ltd. and Hanil Cement Company, Ltd.¹ sued defendants and respondents Edward and Helen Ahn (the Ahns), attorney Patrick Evans (attorney Evans), and attorney David Kim (attorney Kim) for malicious prosecution. The trial court granted defendants' special motions to strike under Code of Civil Procedure 425.16² and awarded defendants attorney fees. Hanil appeals from the orders granting the motions to strike and awarding attorney fees.

We hold that Hanil made a prima facie showing of a probability of success on the malicious prosecution claims, and defendants' evidence in support of their motions to strike did not defeat that showing as a matter of law. We therefore reverse the orders granting the special motions to strike and awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Litigation

Hanil Development, Inc. (Development) was the owner of a Koreatown sports and entertainment complex known as the "Aroma Center." Development initiated the underlying litigation in 2001 by filing a declaratory relief action against the Ahns, as present or former shareholders of Development, to resolve a dispute over the control of Development. In response to Development's declaratory relief action, the Ahns, through attorney Kim, filed a cross-complaint against Hanil and other parties, including Development's chairman, Dong Sup Huh, Development, and its board of directors. The

¹ Hanil Engineering & Construction Company, Ltd. and Hanil Cement Company, Ltd. will be referred collectively to in the singular as Hanil.

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

cross-complaint asserted claims against Hanil based on alleged mismanagement of Development in connection with the construction of the Aroma Center and to rescind a 2000 transaction through which Hanil acquired a 75% ownership interest in Development based on alleged fraud (ownership issue).

1. Phase I Trial on Ownership Issue

The trial court, Judge Marvin Lager presiding, bifurcated the ownership issue from the remainder of the claims in the Ahns's cross-complaint.³ Following the Phase I trial on the ownership issue, Judge Lager issued a statement of decision in July 2003 that determined that "the two Korean corporations [Hanil] own 75% of the outstanding shares of stock [of Development], while Dr. Ahn owns 25%." Following a detailed factual analysis, the minute order concluded as follows: "It is the Court's determination that [Development] sold additional shares such that Hanil Construction Co. Ltd. (later with Hanil Cement Co.) acquired 75% of the outstanding corporate stock. It did so upon the consent of 100% of the shareholders. The consent of the objecting shareholder—Dr. Ahn—is confirmed in writing. There was no bad faith involved in the transaction. Further, the sale was authorized by the [Development] Board of Directors. Dr. Ahn and Chairman Huh agreed to the transaction at Dr. Ahn's home, and in the presence of Mrs. Ahn. She voiced no objection to the meeting or the proposed transaction. The interests of each director was known by the others. The transaction was fair, just and reasonable to the corporation. There was no fraud or breach of fiduciary duty."

In April 2004, Hanil filed a motion to recover expenses of proof against Edward Ahn based on his refusal to admit during discovery and trial that he signed the subscription letter that transferred majority ownership of Development to Hanil notwithstanding his assertion that the signature on that document was a forgery. The motion attached certain discovery responses and trial testimony in which Edward Ahn denied under oath that he signed the subscription letter and asserted that it was a forgery.

³ At the time of the Phase I trial, the Ahns had filed a second amended cross-complaint.

Because Judge Lager found, after 30 days of trial, that Edward Ahn had signed the subscription letter, Hanil maintained that it was entitled to recover from Ahn the costs of proving the signature issue. In May 2004, Judge Lager issued a minute order granting the motion to recover costs of proof.

2. *Phase II Trial on Breach of Fiduciary Duty Claim*⁴

In Phase II, the matter proceeded to trial on the breach of fiduciary issue before Judge Joseph Kalin. Having asserted that they were really fifty percent shareholders—their rights allegedly having been diluted by a forged document—the Ahns claimed a breach of fiduciary duties owed them as *minority* shareholders. At the close of evidence, the trial court granted Hanil’s motion for nonsuit.

In a January 29, 2008, statement of intended decision,⁵ Judge Kalin made, *inter alia*, the following findings: “The parties conducted [six] years of discovery and had adequate time to have experts review all financial records and documents in this litigation and have an accounting available at [t]rial. The evidence presented to the Court has shown that there *was a substantial lack of discovery as to financial documents and an inadequate number of depositions taken of knowledgeable persons* as to the facts of this case. . . . [¶] The Court was continually asked to speculate in reaching evidentiary conclusions due to the lack of credible evidence. A substantial amount of time spent in the [t]rial was dedicated to Ahn obtaining discovery from the witness stand from witnesses called to testify.” (Italics added.)

⁴ Prior to the Phase II trial, the Ahns, upon learning that Hanil had insurance for certain claims, dismissed those claims. The Ahns also filed a federal action on the day the Phase II trial was scheduled to commence, including RICO (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961) allegations involving claims similar to those asserted by the Ahns in this action. The District Court subsequently dismissed the RICO claims.

⁵ The trial court subsequently issued a final statement of decision on April 9, 2008, on which judgment was entered.

The statement of intended decision also provided that “[a]n accurate audit based on some discovery would have traced and accounted for all of the income generated by [Development] and its three subsidiaries. If any funds were diverted by [Development] or its subsidiaries Ahn has failed to show by a preponderance of evidence or by evidence more likely true than not, that such diversion occurred or that Ahn has suffered any personal damage. If there was poor management, this does not constitute breach of fiduciary duty. Under the Business Judgment Rule, the legitimate exercise of management decisions does not constitute breach of fiduciary duty. [¶] . . . [¶] Ahn had years to have such an audit conducted, it is too late on the date of [t]rial. [¶] The Court grants non-suit on Ahn’s Cross-Complaint. Ahn was unable to prove any breach of fiduciary duties or that Ahn suffered any damages.”

In the subsequent statement of decision, the trial court found that “there was no evidence against any of the Cross Defendants that they [breached] a fiduciary duty to [Development] (or to Dr. Ahn). There is *no evidence* that any of them undertook any of the allegations made against them in the first cause of action There is *no evidence* that any of them stole, diverted, looted, siphoned etc. a dime from [Development]. There is *no evidence* that they breached a duty by not reporting income by [Development] since there is no evidence that [Development] had any income that was not reported in the audited Financial Statements and Tax Returns through 2004. There is *no evidence* that [Development] had underreported income of approximately \$3m. There is *no evidence* that the audited Financial Statements were faulty. There is *no evidence* that the Tax Returns should have [been] amended to restructure income based on the sale of memberships which were apparently sold out in early 2004.” (Italics added.) The trial court concluded the statement of decision noting that “This case persisted for close to 7 years based on allegations of wrongdoing. None were proven. . . . The point is that there was *a total failure of proof* in this case on many levels. It became clear to the Court that the trial was being used as a discovery device for further litigation. In view of the ruling and the dismissal of the fraud cause of action as a matter of law, and the prior

dismissal of the Assault and Battery cause of action, all causes of actions in all pleadings have been resolved, and a Judgment can be prepared.” (Italics added.)

3. *Prior Appeal*

Edward Ahn appealed from the judgment entered following the issuance of the statement of decision, challenging the trial court’s rulings on, inter alia, the ownership and breach of fiduciary duty issues. On March 15, 2010, in an unpublished opinion, Division Eight of this Court affirmed the judgment, holding that Ahn had forfeited any challenge (i) to Judge Lager’s factual findings in support of his ruling on the ownership issue and (ii) to Judge Kalin’s factual findings in support of his ruling on the fiduciary duty issue. The court concluded that Ahn failed to show the findings lacked substantial support in the record, and failed to identify or discuss the findings. In doing so, the court explained that the “evidence [Ahn] cites in support of his claim for breach of fiduciary duty is too thin and too conclusory to allow a trier of fact to find that respondents breached any fiduciary duty they owed to [Ahn].”

B. Malicious Prosecution Action

In October 2010, Hanil filed a malicious prosecution action against the Ahns, attorney Evans, and attorney Kim. According to the complaint, attorneys Evans and Kim prosecuted the Ahns’s ownership and breach of fiduciary duty claims without probable cause, and despite the fact that no reasonable attorney would have believed those claims were legally tenable. The Ahns, attorney Evans, and attorney Kim each filed special motions to strike the complaint under section 425.16. At the hearings on the motions, the trial court overruled all evidentiary objections, granted each of the motions, and subsequently granted each defendant’s motion for attorney fees. Hanil filed a timely notice of appeal from the orders granting the motions to strike and awarding attorney fees.

DISCUSSION

A. Legal Principles

1. Anti-SLAPP⁶ Statute

“Code of Civil Procedure section 425.16 provides that a cause of action arising from a defendant’s act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).) The analysis of an anti-SLAPP motion under this section is two-fold: the trial court decides first “whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” [Citation.]’ (*Jarrow [Formulas, Inc. v. LaMarche* (2003)] 31 Cal.4th [728,] 733.) [¶] To meet his burden, 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.” [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]’ (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [123 Cal.Rptr.2d 19, 50 P.3d 733], superseded by statute on other grounds as noted in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547 [59 Cal.Rptr.3d 109].)” (*Cole v. Patricia A. Meyer & Associates* (2012) 206 Cal.App.4th 1095, 1104-1105 (*Cole*).) “The standard for determining the merits of defendant’s anti-SLAPP motion to strike a complaint is similar to that for

⁶ SLAPP is an acronym for “Strategic Lawsuits Against Public Participation.” (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn.1.)

determining the merits of a defendant’s motion for summary judgment. Both seek to determine whether a prima facie case has been presented by plaintiff in opposing the motions.” (*Bergman v. Drum* (2005) 129 Cal.App.4th 11, 18; see Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 7:1008, p. 7(II)-48 [“The ‘probability of prevailing’ is tested by the same standard governing a motion for summary judgment, nonsuit, or directed verdict”].)

“We review an order granting an anti-SLAPP motion de novo, applying the same two-step procedure as the trial court. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663 [132 Cal.Rptr.3d 781].) We look at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the defendant’s evidence “only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 [46 Cal.Rptr.3d 638, 139 P.3d 30] (*Soukup*).) The plaintiff’s cause of action needs to have only “minimal merit” [citation]’ to survive an anti-SLAPP motion. (*Id.* at p. 291.)” (*Cole, supra*, 206 Cal.App.4th at p. 1105.)

2. *Malicious Prosecution*

““Malicious prosecution is a disfavored action. [Citations.] This is due to the principles that favor open access to the courts for the redress of grievances.”” (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493 [78 Cal.Rptr.2d 142] (*Downey Venture*).) ‘[T]he elements of the [malicious prosecution] tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim.’ (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 [254 Cal.Rptr. 336, 765 P.2d 498] (*Sheldon Appel*).) Three elements must be pleaded and proved to establish the tort of malicious prosecution: (1) A lawsuit was “commenced by or at the direction of the defendant [which] was pursued to a legal termination in . . . plaintiff’s . . . favor””; (2) the prior lawsuit “was brought without probable cause””, and (3) the prior lawsuit “was initiated with malice.”” (*Citi-Wide Preferred Couriers, Inc. v. Golden*

Eagle Ins. Corp. (2003) 114 Cal.App.4th 906, 911 [8 Cal.Rptr.3d 199].)” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 216.)

“On the other hand, [our Supreme Court has] . . . cautioned that this ‘convenient phrase,’ i.e., the characterization of malicious prosecution as a *disfavored* cause of action, ‘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 authority.’ (*Bertero v. National General Corp.* (1974)] 13 Cal.3d [43,] 53; see *Crowley v. Katleman* (1994)] 8 Cal.4th [666,] 680.)” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 966.)

B. Analysis

The parties agree that the malicious prosecution action satisfies the first prong of the anti-SLAPP statute because the cause of action is one arising from protected activity. Our analysis is therefore limited to whether Hanil carried its burden on the second prong—showing a probability of success on the merits of their malicious prosecution claims—and, if so, whether defendants’ evidence in support of the anti-SLAPP motions defeated Hanil’s *prima facie* showing as a matter of law.

1. Probability of Prevailing on Probable Cause

The malicious prosecution action is based on the ownership and breach of fiduciary duty claims. On those two claims, Hanil prevailed at trial and those rulings were upheld on appeal. Therefore, Hanil satisfied the first element of a claim for malicious prosecution—a legal termination of those claims in its favor. Defendants incorrectly argue that because Hanil did not obtain a favorable termination on every claim asserted in the Ahns’ cross-complaint, Hanil cannot satisfy the first element of a malicious prosecution claim—favorable termination of the underlying action. A malicious prosecution action can be based on just the legally untenable claims asserted in the underlying action. (*Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 679.) Our analysis

begins with Hanil’s evidentiary showing on the probable cause element for the claim in question.

“Probable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts. (*Soukup, supra*, 39 Cal.4th at p. 292.) . . . This objective standard of review is similar to the standard for determining whether a lawsuit is frivolous: whether ‘any reasonable attorney would have thought the claim tenable’ (*Sheldon Appel* [, *supra*,] 47 Cal.3d [at pp.] 885-886)” (*Cole, supra*, 206 Cal.App.4th at p. 1106.)

“ [T]he probable cause element calls on the trial court to make an objective determination of the ‘reasonableness’ of the defendant’s conduct, i.e, to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted.” (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) “Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit.” (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 970.) Continuing to prosecute an action, after the filing of the action, without probable cause may result in liability for malicious prosecution. (*Id.* at pp. 965-970.) Appealing constitutes a continuing prosecution of the action.

““[P]robable cause is lacking ‘when a prospective plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.’” (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512 [126 Cal.Rptr.2d 747], disapproved in part on other grounds in *Zamos v. Stroud* [, *supra*,] 32 Cal.4th [at p.] 973.) ““In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.”” (*Soukup* [, *supra*,] 39 Cal.4th [at p.] 292.) ‘When there is a dispute as to the state of the defendant’s knowledge and the existence of probable cause turns on resolution of that dispute . . . the jury must resolve the threshold question of the defendant’s factual

knowledge or belief.’ (*Sheldon Appel, supra*, 47 Cal.3d at p. 881, citation omitted.)” (*Daniels v. Robbins, supra*, 182 Cal.App.4th at pp. 222-223.)

“ In general, a lawyer ‘is entitled to rely on information provided by the client’.” (*Morrison v. Rudolph, supra*, 103 Cal.App.4th at pp. 512-513.) If the lawyer discovers the client’s statements are false, the lawyer cannot rely on such statements in prosecuting an action. (*Id.* at p. 513; *Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156-157 [91 Cal.Rptr.2d 433] [adversary provided verifiable facts disproving allegations made in demand letter].)” (*Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 223.)

Hanil prevailed at the Phase I trial on the ownership issue. In making that determination, Judge Lager found that the Ahns agreed to the transaction by which Hanil acquired 75% of Development at a meeting at the Ahns’ home and that Development’s Board had authorized the transaction. Judge Lager also found that Edward Ahn signed the subscription letter effecting the transfer of the stock, thereby unequivocally rejecting Ahn’s assertion that the signature on that agreement was a forgery. In addition, Judge Lager sanctioned Edward Ahn for refusing to admit that he signed the subscription letter. Nevertheless, the Ahns and their attorneys continued to claim in the litigation and on appeal that the Ahns were fifty percent shareholders—a contention Judge Lager found lacked merit.⁷

Judge Lager’s factual findings and sanction order supported a reasonable inference that the Ahns’ claims concerning the ownership issue lacked a credible factual basis. As a result, further litigation of the ownership issue *after* Judge Lager’s ruling “cannot be adjudged reasonable” (*Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 222.) Judge Lager found, in effect, that Edward Ahn was not being truthful concerning basic facts about the stock transaction, such as the signature and meeting issues, and substantial evidence supported those findings. As a result, it is reasonably arguable that no

⁷ The Court of Appeal held that Edward Ahn had, in effect, forfeited his assertions concerning the ownership issue by failing to identify or discuss the trial court’s factual findings in support of its ruling.

reasonable attorney with knowledge of those findings would have concluded that further litigation of the ownership issue was legally tenable, and Ahn's forfeited challenge to those findings on appeal confirms that conclusion. Therefore, the evidence in opposition to the anti-SLAPP motions was sufficient to show that Hanil had set forth a prima facie case on the claim that the Ahns and their attorneys lacked probable cause to continue to litigate the ownership issue from and after Judge Lager's ruling.

As to the breach of fiduciary claim, Judge Kalin not only ruled against the Ahns, he made specific findings concerning a complete lack of evidence and inadequate investigation and discovery. Those findings⁸ supported a reasonable inference that the Ahns lacked evidence to support their breach of fiduciary duty claim from the outset and failed to develop any such evidence in discovery. Hanil's evidence in opposition to the anti-SLAPP motion therefore was sufficient to demonstrate a prima facie case on the probable cause element with respect to the breach of fiduciary duty claim.

Given Hanil's prima facie showing on the probable cause element as it relates to the ownership and fiduciary duty issues, we do not evaluate defendants' evidence submitted in support of the anti-SLAPP motions based on credibility issues or comparative probative value. Instead, we consider that evidence only to determine if it defeats Hanil's prima facie showing as a matter of law, which it does not.

On the ownership issue, the Ahns do not point to any evidence that purportedly defeats Hanil's prima facie showing as to the probable cause element, and attorney Kim merely reargues the factual issues underlying that claim that Judge Lager determined against the Ahns and which were affirmed on appeal. Moreover, neither the Ahns nor attorney Kim addresses Hanil's evidence showing they lacked probable cause to pursue the ownership issue *after* Judge Lager determined it against them. Thus, the Ahns and attorney Kim did not submit evidence in support of their anti-SLAPP motions that

⁸ As noted, the Court of Appeal held that Edward Ahn forfeited any challenge on appeal to Judge Kalin's factual findings in support of his ruling on the breach of fiduciary duty claim.

defeated, as a matter of law, Hanil's prima facie showing that the Ahns and attorney Kim lacked probable cause to continue to pursue the ownership issue.

Attorney Evans argues that he had probable cause to continue to litigate the ownership issue subsequent to Judge Lager's determination against the Ahns based on information he learned after he associated in as counsel of record in July 2006. According to attorney Evans, he learned that the meeting at which the Ahns agreed to transfer 75% ownership to Hanil never took place.⁹ He also learned during discovery that Hanil and other entities or persons were "hiding" information that might be relevant to the ownership issue. As to the information about the meeting, Judge Lager expressly found that the meeting took place, and Edward Ahn forfeited any challenge to that factual finding on appeal. The findings and the appellate opinion are sufficient to establish a prima facie case as to lack of probable cause to assert the claim and to pursue the appeal. As to the information concerning alleged failures of Hanil to disclose information, those allegations were speculative and unsupported by evidence.¹⁰ Therefore, attorney Evan's evidence in support of the anti-SLAPP motion on the ownership issue did not defeat Hanil's prima facie showing that attorney Evans lacked probable cause to continue to litigate the ownership issue following Judge Lager's ruling in 2003.

On the breach of fiduciary duty claim, the Ahns, attorney Evans, and attorney Kim point to evidence of "financial shenanigans," including alleged undisclosed profits, spa memberships sold for cash, diverted funds for personal use by Hanil's primary shareholders, and secret financial documents, including a second set of books. Other than asserting that Hanil "controlled" Development, however, defendants fail to link the "financial shenanigans" evidence on which they rely to any specific wrongdoing by Hanil *in its capacity as majority shareholder of Development*—vis à vis the Ahns as minority

⁹ There is nothing in the record showing that attorney Evans made a formal attempt to reopen trial court proceedings on the ownership issue based on newly discovered evidence.

¹⁰ There is nothing in the record showing that Hanil was sanctioned in the trial court for any of the alleged discovery tactics or abuses.

shareholders. At best, defendants' evidence showed potential mismanagement and accounting issues at Development, but it fell short of making a specific showing that Hanil, as majority shareholder, used the power to control the corporate activities of Development to benefit itself alone or in a manner detrimental to the Ahns, as required under *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108. Defendants do not connect their claims of misfeasance, certain litigation tactics, or the denial of summary adjudication¹¹ to the breach of fiduciary duty claim. Moreover, Judge Kalin made specific factual findings concerning a complete lack of evidence supporting the breach of fiduciary duty claim, and Edward Ahn forfeited any challenge to those findings on appeal. That finding constitutes a prima facie showing that defendants lacked probable cause to instigate the claim and pursue an appeal. Therefore, defendants' evidence in support of their anti-SLAPP motions on the breach of fiduciary duty claim did not, as a matter of law, defeat Hanil's prima facie showing that defendants lacked probable cause to pursue that claim.

2. *Probability of Prevailing on Malice*

In addition to making a prima facie showing on the probable cause element, Hanil was also required to make such a showing as to the malice element. "As noted in *Downey Venture, supra*, 66 Cal.App.4th at page 494, '[t]he "malice" element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] 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.' 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;

¹¹ The denial of summary adjudication was based on issues unrelated to the issues of ownership of stock or breach of fiduciary duty involved here.

or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. (*Sycamore Ridge [Apartments LLC v. Naumann* (2007)] 157 Cal.App.4th [1385,] 1407.) If the prior action was not objectively tenable, the extent of a defendant's attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice. (*Ibid.*) [¶] 'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' (*HMS Capital, Inc [v. Lawyers Title Co.* (2004)] 118 Cal.App.4th [204,] 218.)" (*Daniels v. Robbins, supra*, 182 Cal.App.4th at pp. 224-225.)

To show a probability of prevailing on the malice element, Hanil was required to submit evidence of ill-will or improper motive beyond the evidence showing a lack of probable cause. As to the ownership issue, in addition to Judge Lager's findings in the Phase I trial, Hanil submitted evidence that Judge Lager sanctioned Edward Ahn for refusing to admit that he signed the subscription agreement, i.e., Judge Lager made a determination that Edward Ahn's discovery responses and trial testimony on the signature issue were untrue. Hanil also showed that the Ahns and their attorneys continued to litigate the ownership issue after those findings and that order. And Hanil showed that Edward Ahn's appeal on the ownership issue had been forfeited by his failure to address Judge Lager's findings and discuss the evidence that supported those findings. That evidence supported a reasonable inference that the Ahns and their attorneys continued to prosecute what they knew or should have know was a factually baseless ownership claim in an effort to obtain a settlement unrelated to the merits of that claim. In addition, Hanil submitted evidence that the Ahns took steps to deprive Hanil of insurance coverage for certain claims and their defense and filed a federal action against it containing the same type of claims as asserted in this action. Hanil therefore demonstrated a prima facie showing on the claim that the ownership issue was prosecuted with malice.

On the breach of fiduciary duty claim, Hanil submitted Judge Kalin's findings concerning a fundamental lack of evidence at trial and an inadequate investigation prior

to trial. Hanil also submitted evidence that respondents made claims, such as construction defect claims, without any evidence and then dismissed the claims, and made threats regarding alleged violations of law. Under the authorities discussed above, Judge Kalin's finding concerning a lack of adequate investigation is relevant to malice, and it suggests that the Ahns' attorneys, by failing to investigate adequately and develop facts in support of the fiduciary duty claim, acted with malice in the prosecution of that claim. That evidence in opposition to the anti-SLAPP motion was therefore sufficient to demonstrate a prima facie showing on the claim that the Ahns and their attorneys prosecuted the breach of fiduciary duty cause of action with malice.

On the malice issue, defendants argue that there is no evidence of ill-will or an improper motive on the part of the Ahns and their attorneys, an assertion that we reject. The Ahns also suggest that they were merely following the advice of counsel and that Helen Ahn had no involvement in the prosecution of the cross-complaint against Hanil, notwithstanding that she was a named cross-complainant in that action. The attorneys further contend that they relied on their research, their investigation, and certain expert advice.

Because malice is a factual issue, defendants' evidence and arguments based thereon raise, at best, factual disputes that cannot be resolved on the motions to strike. For example, the suggestion that Edward Ahn relied in good faith on the advice of counsel is belied by Judge Lager's finding that he was not being truthful concerning the basic facts giving rise to the ownership issue. If he knew that he signed the subscription letter and attended a meeting at which he agreed to the transaction that made Hanil the majority shareholder in Development, he could not have prosecuted the ownership issue in good faith from the outset. Therefore, defendants' evidence in support of their motions to strike did not, as a matter of law, defeat Hanil's prima facie showing that defendants prosecuted the cross-complaint with malice.

3. *Conclusion*

We do not make any determination as to who should prevail on the malicious prosecution action. All we decide is that based on Hanil's showing and reasonable inferences from that showing, Hanil has established a prima facie case sufficient to defeat the anti-SLAPP motion.

C. Attorney Fees

Because we reverse the orders on which the awards of attorney fees were based, those awards must also be reversed.

DISPOSITION

The orders granting the anti-SLAPP motions and awarding attorney fees are reversed. Hanil is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.