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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

MATTHEW McCOMBS, Plaintiff and Respondent, v. CONFIDENTIAL REPORT, LLC, et al., Defendants and Appellants.	B234525 (Los Angeles County Super. Ct. No. BC457751)

APPEAL from an order of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Affirmed.

Law Offices of Frances L. Diaz and Frances L. Diaz for Defendants and Appellants.

Ingber & Associates and Kenneth S. Ingber for Plaintiff and Respondent.

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In a prior action, Confidential Report, LLC, sued Paragon Film Group, LLC, and Matthew McCombs for fraud and other causes of action. At some point during the proceedings, Paragon ceased conducting business and filed a certificate of dissolution with the California Secretary of State. Ultimately, the trial court granted McCombs's motion for summary judgment, which was affirmed on appeal.

Thereafter, McCombs filed a complaint against Charles E. Ruben and Charles E. Ruben and Associates (the firm that represented Confidential in the underlying action, referred to collectively as Ruben) and Confidential for malicious prosecution based on Confidential's fraud cause of action against McCombs. Confidential and Ruben brought a special motion to strike pursuant to Code of Civil Procedure section 425.16, which the trial court denied.[1] In this appeal, Confidential and Ruben argue that the court erred in denying the special motion to strike, contending that McCombs failed to establish a probability of prevailing on his claim that Confidential lacked probable cause and acted with malice in pursuing the underlying fraud action. We disagree and affirm the order.

BACKGROUND OF THE UNDERLYING ACTION

The international sales agency agreement

The procedural and factual background leading up to the instant appeal has been well documented in *Confidential Report, LLC v. Paragon Film Group, LLC, et al.* (Apr. 16, 2010, B215101) [nonpub. opn.], from which we derive the following background. According to the opinion, McCombs stipulated that he and Paragon are alter egos for purposes of that action. Confidential produces films, and Paragon distributes films. Confidential produced a low-budget monster movie entitled, "'The Creature of the Sunny Side Up Trailer Park' AKA 'The Creature'" (the film). In May 2005, Confidential granted Paragon the exclusive right to distribute the film under an "International Sales Agency Agreement" (the contract). The contract term ran from May 4, 2005, to July 1, 2006.

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[1] Undesignated statutory references are to the Code of Civil Procedure.

The contract contained several provisions of central importance to the present dispute. Paragraph 8 of the contract granted Paragon "sole, exclusive and complete control of the exploitation of the rights in the [film], including, but not limited to, provisions of all contracts (including the right to make, cancel and adjust, as well as to settle disputes and give rebates, allowances and credits), the persons with whom to contract or negotiate, and all rights incidental to marketing [the film]." Paragraph 3 gave Paragon this right for "the entire universe," excluding the United States and Canada. In Paragraph 7, entitled "NO WARRANTY OR REPRESENTATION OF LEVEL OF GROSS RECEIPTS," Confidential acknowledged that the marketing of the film would be "speculative" and that Paragon "has not made any warranty, representation, or agreement, express or implied, regarding the exploitation, promotion or exhibition of the [film], or the level of Gross Receipts, or [Confidential's] Share of Gross Receipts." Paragraph 7 further provided that "[a]ny and all estimates or projections as to sales of [the film] by [Paragon] shall be deemed statements of opinion only and shall not be binding on [Paragon]."

Paragraph 20 of the contract contained a standard integration clause in which the parties acknowledged that the written contract contained all of the terms, conditions and understandings between them.[2]

Paragraph 5 of the contract provided that gross receipts from marketing the film were to be divided between Confidential and Paragon as follows: First, Paragon shall deduct and retain a sales agent fee of 15 percent of gross receipts; second, Paragon shall deduct a flat fee of $10,000 per market to cover general out-of-pocket expenses; third, Paragon shall deduct direct, actual out-of-pocket third party costs for promotional

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[2] Paragraph 20 stated: "This Agreement supercedes any understandings, arrangements or agreements heretofore made between the parties hereto with respect to the rights of the [film] or parts thereof[] and constitutes the entire agreement between the parties. The Agreement shall not be changed, modified or discharged in whole or in part except by a writing duly signed by both parties. Except as expressly provided herein, neither party has made any promises, representations or warranties to the other party in connection with negotiation or execution of this Agreement."

materials, with such expenses to be capped at $25,000; fourth, Paragon may deduct direct, actual third party costs for any materials required to complete delivery of the film in an appropriate form to Paragon; and, finally, the balance remaining of the gross receipts shall be remitted to Confidential.

Paragon's distribution of the film

Paragon began to distribute the film internationally, with only limited success. Paragon negotiated and finalized seven international flat-fee licenses for the film, securing gross receipts totaling $74,000. Paragon sold film rights in the following markets, generating license fees as follows: United Kingdom, $10,000; Japan, $20,000; Brazil, $8,000; Mexico, $5,000; Thailand, $6,000; Germany, $15,000; and Indonesia, $10,000. Each of the licenses Paragon granted was for a "flat fee" in which a lump sum was paid by the licensee with no continuing royalties owed. Paragon asserted that no payment was due Confidential from the gross receipts after allowable deductions were taken under the contract.

Paragon provided Confidential with quarterly account statements under the contract that purported to reflect Paragon's licensing activity. After Confidential raised an issue over payment, Paragon provided Confidential with bank records verifying the account statements previously furnished. Confidential notified Paragon it was in default under the contract.

Procedural history of the underlying action

Confidential filed a complaint against Paragon and McCombs, asserting a single claim for accounting and alleging that Paragon had failed to provide the accountings called for under the contract. The operative second amended complaint (SAC) added additional claims for breach of contract, fraud, negligent misrepresentation, and conversion.

Confidential alleged that Paragon and McCombs breached the contract by failing to provide detailed periodic accounting statements, by continuing to sell rights to the film after the contract expired in July 2006 and by failing to return all "films, negatives, masters" and other materials relating to the film. The fraud cause of action in the SAC

alleged that Paragon and McCombs committed fraud by falsely representing, or negligently representing, in order to induce Confidential to enter into the contract, that they would do the following: comply with the terms and conditions of the contract; furnish Confidential with detailed accounting statements; cease and desist from selling any rights in the film "once the contract expired on July 1, 2006"; and return the film to Confidential. But Paragon and McCombs allegedly failed to furnish Confidential with detailed accounting statements; failed to cease and desist from selling any rights in the film "since the contract expired on July 1, 2006, despite demand being made by [Confidential]"; and failed to return the film. The SAC alleged that Confidential entered into the contract in justifiable reliance on Paragon's and McCombs's representations and suffered damages in the sum of $10 million.

After a year of discovery, McCombs moved for summary judgment or, alternatively, summary adjudication of issues (motion for summary judgment). Paragon asserted it was undisputed that: no provision in the contract prohibited flat-fee licenses, and Confidential had no right to approve licenses; Paragon had the right to deduct and retain from gross receipts a sales agency fee of 15 percent, a flat fee of $10,000 per market for marketing expenses and actual out-of-pocket, third party costs for creation of promotional materials, subject to a cap of $25,000; Paragon complied with the terms of the contract; Confidential cannot establish that Paragon breached any express term of the contract and had no admissible evidence that Paragon failed to perform under the contract; and, even if Confidential could produce evidence of any breach of a term of the contract, Confidential had no admissible evidence of damages.

Paragon provided the declaration of McCombs in support of the motion for summary judgment. McCombs declared that Paragon spent significant time and money to market and sell the film overseas. Those efforts included creating a trailer for the film, showing the film at international film markets, and creating printed marketing materials. Paragon entered into seven flat-fee licenses to sell the film, and the film garnered gross receipts of less than $74,000 from these territories. McCombs attached copies of the licenses as exhibits to his declaration.

Based on his nearly 10 years' experience as an international sales agent, McCombs declared there are certain terms and conditions that are "customarily" negotiated between producers and sales agents, including, in certain circumstances, specific prohibitions against flat-fee license agreements. A flat-fee license agreement is one in which the licensee pays a single lump sum for the rights to a film in the territory. In the present case, McCombs stated, Confidential and its attorney did not request such a prohibition and McCombs would not have agreed to such a term because he believed a low-budget horror film such as the one at issue could not be sold internationally in a majority of territories without flat-fee licenses.

McCombs also stated that, based on his experience, the license fees Paragon charged the licensees were reasonable given (1) the DVD market was in decline, (2) the film was produced and directed by unknown novice filmmakers, and (3) low-budget horror films were not in high demand overseas. McCombs attested that, after Paragon made the deductions from gross revenues allowed under the contract, no additional royalties were due or owing to Confidential from the international licensing of the film.

McCombs further declared that Paragon mailed Confidential or its attorneys quarterly account statements on July 30, 2005, and January 30, 2006, and a term and account summary on April 24, 2006. Paragon also furnished Confidential's counsel with additional copies in June 2006. On June 11, 2008, Paragon provided Confidential with unredacted copies of Paragon's banking records for the relevant period. McCombs declared that Confidential thus had in its possession copies of all account statements, summaries and bank records that Paragon possessed.

McCombs admitted that Paragon and its licensees had copies of the film in their possession, but he stated that the contract did not provide for Paragon to return the film. Confidential did not request such a provision, the contract did not include such a provision, and McCombs stated he would have not agreed to such a term for a low-budget horror film such as the one in issue. Confidential did bargain for certain conditions contained in the contract, including the right to audit the books and records with direct respect to the film. Under paragraph 6, Paragon was to furnish Confidential

with quarterly account statements, which were to include, per period and cumulatively: gross receipts, sales agent fee, distribution, marketing and material expenses, as well as the producer's share of gross receipts.

In opposition to the motion for summary judgment, Confidential contended an implied term of the contract prohibited Paragon from entering into flat-fee licenses for the film. It also contended that Paragon's performance under the contract fell below the industry "standard of care" and that Paragon was obligated to return copies of the film to Confidential. Confidential further claimed that before the contract was signed McCombs had estimated to the attorney who negotiated the contract on behalf of Confidential that the film would achieve gross receipts of $1.5 million to $2 million. Confidential stated it suffered $300,000 to $500,000 in damages.

In opposition to the motion for summary judgment, Confidential relied on the declaration of an entertainment attorney who had negotiated the contract on Confidential's behalf. The attorney stated that an implied term prohibiting Paragon from entering into flat-fee licenses for the film should be read into the contract, and that prior to signing the contract McCombs had estimated Paragon would receive gross receipts of $1.5 million to $2 million in licensing fees for the film. Confidential also proffered the declaration of the president of an entertainment company to support its contentions. Both opined that Paragon's performance under the contract fell below the industry "standard of care" and that, pursuant to industry custom, Paragon was obligated to return the film to Confidential.

Paragon filed objections to both declarations, which the trial court sustained.

The trial court granted the motion for summary judgment. In its order granting the motion, the court stated that "[Confidential's] evidence proffered in opposition to [the] motion is not sufficient to raise a triable issue of fact, in that it constitutes inadmissible expert testimony, to which objection at the hearing was duly made and sustained." The court found numerous respects in which Confidential's showing was inadequate, stating: "[Confidential's] allegations of negligence are not relevant to [its] claim for breach of contract. Moreover, pursuant to the Agreement's terms, the Agreement's express,

unambiguous terms constitute the parties' complete agreement. [Confidential] also failed to submit any admissible evidence that it incurred damages. Therefore, [Confidential] failed to meet its burden of establishing by admissible evidence that a triable issue of fact exists."

The trial court entered a judgment in favor of Paragon. Confidential appealed.

On April 16, 2010, Division Eight of this district affirmed the judgment of the trial court. In a footnote, Division Eight stated, "As Paragon notes, Confidential failed to raise any issue regarding its cause of action for fraud in its opening brief or to discuss its claim of fraud in any meaningful way. In its reply, Confidential asserts that the order for summary judgment must be reversed if *any* cause of action is viable, so its abandonment of the fraud claim has 'no legal significance.' We treat the claim of fraud as abandoned and do not address its merits. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)" (*Confidential Report, LLC v. Paragon Film Group, LLC, et al*., *supra*, B215101.)

BACKGROUND OF McCOMBS'S COMPLAINT FOR MALICIOUS PROSECUTION

On March 21, 2011, McCombs filed a complaint for damages for malicious prosecution against Confidential and Ruben. McCombs alleged as follows. The SAC in the underlying fraud action claimed that McCombs "committed fraud by falsely representing that he would comply with the terms and conditions of the contract." Confidential and Ruben failed to produce any evidentiary support for the allegations of the SAC or "identify a single fact, witness or document in support of their fraud claim." Confidential and Ruben did not have reasonable grounds to file a complaint against McCombs as to the cause of action for fraud and "even admitted that the cause of action for fraud against McCombs was brought solely for an improper motive, i.e., to 'teach Hollywood a lesson.'" The trial court granted McCombs's motion for summary judgment on the SAC, which was affirmed by the Court of Appeal.

In response, Confidential and Ruben filed a special motion to strike McCombs's complaint pursuant to section 425.16, arguing that McCombs's lawsuit was a strategic

lawsuit against public participation (SLAPP). Confidential and Ruben urged that the underlying fraud action was brought with probable cause because McCombs admitted he had no ownership interest in the film, yet refused to return it; McCombs had represented that "Paragon would receive gross receipts of between $1,500,000 to $2,000,000"; and McCombs did not produce a detailed accounting as called for by the contract. In addition, Confidential and Ruben argued that McCombs did not establish malice because "[n]either Charles E. Ruben, nor Confidential, nor any agent, representative, employee, or member of Confidential has ever said that filing a lawsuit against McCombs or Paragon was brought to teach Hollywood a lesson."

Attached in support of the special motion to strike were, among other things, the declaration of Elyse Roberts ("a Member of Confidential"); Ruben's declaration; and the pleadings and evidence offered in opposition to the motion for summary judgment on the SAC, including the declarations of the entertainment attorney and the president of an entertainment company, excerpts of Roberts's deposition testimony, and excerpts of McCombs's deposition testimony. In her declaration, Roberts stated that she signed the agreement on behalf of Confidential; denied that she ever said that the lawsuit against McCombs "'was brought to teach Hollywood a lesson'"; and stated that Keith Fleer, the attorney hired by Confidential to negotiate the contract, had stated that McCombs "represented to [him] that he estimated that Paragon would receive gross receipts of between $1,500,000 and $2,000,000 for the licensing fees for the [film]."

In his opposition to the special motion to strike, McCombs argued that, as determined in the underlying action and on appeal from that action, Confidential's expert witness declarations provided no support for a fraud claim; McCombs was under no contractual obligation to return the film to Confidential; and McCombs offered evidence that "Roberts was motivated by open hostility, ill-will and malice."

In support of McCombs's opposition to the special motion to strike, McCombs attached, among other things, the declaration of his counsel, Kenneth S. Ingber, and the pleadings and evidence offered in support of the motion for summary judgment on the

SAC, including a letter dated April 15, 2008, from Ingber to Confidential and an excerpt from the deposition transcript of the director of the film, Christopher Coppola.

Ingber declared that "[f]ollowing the deposition of Elyse Roberts . . . my client and I asked Ms. Roberts why she was pursuing the lawsuit and her response was, 'because you gave away my movie!'" In answer to the question, "What have you been told, if anything, by Ms. Roberts about what this case is about," Coppola stated in his deposition testimony, "Well, the only thing that she told me was she doesn't like the way Hollywood does business. That's the extent of it."

Ingber declared that he sent the April 15, 2008 letter to Ruben. The letter stated that Confidential "failed to identify any material breach by Paragon of the [agreement] which would create any underlying liability to [Confidential]." The letter stated that "[a]s to the fraud and misrepresentation claims that you have recklessly asserted against my client, you may have hoped that asserting such causes of action would have motivated Mr. McCombs to somehow compensate your client for her frivolous and otherwise meritless claims. To the contrary, I assure you that Mr. McCombs is resolved to defending his name and reputation against your client's baseless allegations. Indeed your fraud and misrepresentation claims appear to be little more than an improper effort to 'tortify' a simple breach of contract claim (which is, itself, meritless)." The letter stated, "Moreover, your recent decision to unilaterally cancel the mediation simply underscores your client's malicious intentions underlying this case. Although it is regrettable that your client does not have a serious desire to resolve this dispute, we do not believe that your client appreciates the risk of asserting legal theories that cannot be proven, and which lack evidentiary support. As the attorney advancing such theories, we would ordinarily presume that you conducted a reasonable and appropriate inquiry and investigation prior to commencing suit. Unfortunately, to date, your responses to written discovery reinforce our suspicion that you may not have conducted such an inquiry and do not have any probable basis for your causes of action. [¶] Based upon the foregoing, this letter shall constitute our formal notice to you that my client intends to hold you and your client's principal, Elyse Roberts, personally responsible for any and all direct,

proximate and consequential damages (including emotional distress and the attorney's fees incurred herein) resulting from the initiation and continued pursuit of this frivolous lawsuit. [¶] If you persist in the malicious prosecution of these claims, Mr. McCombs will have no alternative but to vigorously defend himself through a final judgment on the merits. We will then pursue your law firm and clients for the recovery of damages arising from your wrongful pursuit of these claims."

Characterizing Confidential's responses to a first set of form interrogatories as "inadequate, non-responsive, and evasive," the letter requested supplemental responses. The letter stated that Confidential's response that Confidential "cannot respond without [McCombs] producing documents (which are either already in your possession, have been lost, or do not exist), is bad faith and simply reveals that which we have suspected: at the time you filed this lawsuit (through the present) you are not in possession of a single shred of evidence to support your vacuous claims." The letter also stated that Confidential failed to respond to the "vast majority" of Paragon's request for admissions.

At the hearing on the special motion to strike, the trial court concluded that McCombs had made a showing that Confidential and Ruben lacked probable cause to bring the fraud action because there was no evidence supporting the claim that the accounting was insufficient; there was no provision in the contract requiring the return of the film; and the fraud claim had been abandoned on appeal. The court also determined that "an inference of malice" can be drawn based on Coppola's deposition testimony that Roberts had told him that she did not like "the way Hollywood does business"; Ingber's declaration that Roberts had stated that McCombs was "giving away the movie"; and Confidential's "continuing with the lawsuit after letters specifically to counsel citing to the lack of evidence, and saying that it would likely result in a further action."

The court denied Confidential's and Ruben's motion to strike. This appeal followed.

DISCUSSION

The trial court did not err in denying the special motion to strike

Confidential and Ruben argue that the trial court erred in denying the special motion to strike, contending McCombs failed to establish a probability of prevailing on his claim that Confidential lacked probable cause and acted with malice in pursuing the underlying fraud action. We disagree and affirm the order.

Section 425.16, the anti-SLAPP statute, provides that "[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." (§ 425.16, subd. (b)(1).)

In ruling on a special motion to strike, a trial court "engage[s] 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. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) 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. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "The term 'probability [of prevailing]' is synonymous with 'reasonable probability.'" (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 238.) "In order to establish a probability of prevailing on the claim . . . , a plaintiff responding to an anti-SLAPP motion must '"state[] and substantiate[] a legally sufficient claim."' [Citations.] Put another way, 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.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) "'Review of an order granting or denying a motion to strike under section 425.16 is de novo.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326.)

The parties agree that McCombs's malicious prosecution action arises from acts in furtherance of Confidential's and Ruben's right of petition or free speech. Thus, McCombs has the burden — in the words of the statute — "[to] establish[ ] that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.] The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. [Citations.] If the plaintiff presents a sufficient prima facie showing of facts, the moving defendant can defeat the plaintiff's evidentiary showing only if the defendant's evidence establishes as a matter of law that the plaintiff cannot prevail." (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.) "[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

To prevail on his cause of action for malicious prosecution, McCombs must prove he was sued previously on a claim brought without probable cause, initiated with malice, and pursued to a termination in his favor. (See *Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318.) In order to defeat a special motion to strike, McCombs "'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.'" (*Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 821.) As there is no dispute here that the prior action terminated in McCombs's favor, we turn to the issue of probable cause.

"[T]the existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court . . . ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875.) "The 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." (*Id*. 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.'" (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1048.) "'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.'" (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1154.) "Malicious prosecution . . . includes continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973 [trial court improperly granted special motion to strike on plaintiff attorney's malicious prosecution lawsuit where defendant failed to dismiss underlying fraud lawsuit against plaintiff attorney after plaintiff attorney produced evidence in form of reporter's transcripts of nonmeritorious nature of fraud cause of action].)

Crediting his evidence, we conclude McCombs made a sufficient prima facie showing that Confidential and Ruben lacked probable cause in suing McCombs for fraud. "The elements of fraud are '"(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."' (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 . . . .)" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.)

The fraud cause of action in the SAC alleged that Paragon and McCombs committed fraud by falsely representing that they would comply with the terms and conditions of the contract; furnish Confidential with detailed accounting statements; cease and desist from selling any rights in the film "once the contract expired on July 1, 2006"; and return the film to Confidential, all in order to induce Confidential to enter into the contract.

Sierra Club Foundation v. Graham, *supra*, 72 Cal.App.4th 1135, is instructive. There, the Court of Appeal determined that the trial court's entry of summary judgment in the underlying action for fraud and other counts against the Sierra Club Foundation "reflects on the Foundation's innocence of the alleged fraud and negligent misrepresentation claims." (*Id*. at p. 1149.) The court noted that the plaintiff in the underlying fraud action "did not produce any evidence to support the [fraud] contention that at the time he made the gift [of stock] the Foundation did not intend to purchase land. Thus, there could be no fraudulent inducement." (*Ibid*.) Accordingly, the court affirmed the judgment in favor of the foundation for damages for malicious prosecution. Here, the trial court granted summary judgment in favor of McCombs, holding that Confidential did not raise a triable issue of fact as to whether McCombs defrauded Confidential. And, as we explain, on appeal Confidential fails to demonstrate any fraud on the part of McCombs.

Paragon provided Confidential with quarterly account statements under the contract and after Confidential raised an issue over payment, provided Confidential with bank records verifying the account statements previously furnished. (*Confidential Report, LLC v. Paragon Film Group, LLC, et al*., *supra*, B215101.) Yet Confidential notified Paragon it was in default under the contract and eventually filed the SAC, alleging a fraud claim against Paragon. But there simply was no evidence consistent with the theory set forth in the SAC that McCombs acted fraudulently concerning his performance under the contract. And the evidence showed that McCombs furnished detailed accounting statements as required under the contract.

On appeal, Confidential and Ruben rely on expert witness declarations — which the trial court and Division Eight determined were inadmissible in the underlying action — that they claim show McCombs made misrepresentations regarding precontract sales estimates. But as both the trial court in the underlying action and Division Eight of this appellate district determined, the contract contains a clear integration clause which superseded any previous agreements and constituted the entire contract. And because the contract provided that any sales estimates are statements of opinion only and are not

binding on Paragon, any alleged precontract sales estimates were contrary to the terms of the integrated contract which expressly disclaimed reliance on any precontract sales estimates. For the same reason, Confidential's argument that McCombs committed fraud by failing to return the film is unsupported by the terms of the contract, which did not impose any obligation on McCombs to return the film. Finally, Confidential did not support its fraud claim with evidence of damages. Accordingly, there was no evidence of actionable fraud by McCombs, and we conclude that, as a matter of law, Confidential and Ruben lacked probable cause in suing McCombs for fraud.

Next, we determine that McCombs presented evidence that, if credited, would make a prima facie showing that Confidential and Ruben initiated the fraud action with malice. "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action." (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 451.) "As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. [Citations.] It is also said that a plaintiff acts with malice when he asserts a claim with *knowledge of its falsity*, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' [Citation.] A lack of probable cause will therefore support an inference of malice." (*Id*. at p. 452.) "[I]f the trial court determines that the prior action was not objectively tenable, the extent of a defendant attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice." (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 883.)

First, Confidential's and Ruben's lack of probable cause in initiating and maintaining a lawsuit for fraud against McCombs supports an inference of malice. (See *Drummond v. Desmarais*, *supra*, 176 Cal.App.4th at p. 451.) Second, the April 15, 2008 letter, the deposition testimony of Coppola, and the declaration of Ingber regarding

Roberts's statements also support an inference of malice. Although Confidential and Ruben contend on appeal that the letter, the deposition testimony, and the declaration were inadmissible hearsay, they did not make evidentiary objections to the trial court and have forfeited that argument on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re M.R.* (2005) 132 Cal.App.4th 269, 273–274 [failure to object to errors committed at trial is forfeiture of claim of error on appeal].)

The April 15, 2008 letter stated that Confidential's responses to interrogatories were made in bad faith and show Confidential had no evidence to support its claims. The letter also put Confidential and Ruben on notice that the fraud action was meritless and that McCombs intended to hold Ruben and Roberts responsible for any damages resulting from the initiation and continued prosecution of the lawsuit. Thus, Confidential was warned by McCombs that it had no basis for threatening McCombs with punitive damages. Yet Confidential continued with the prosecution of the lawsuit even after Paragon provided Confidential with unredacted copies of Paragon's banking records on June 11, 2008.

Nevertheless, Confidential and Ruben cite *Daniels v. Robbins* (2010) 182 Cal.App.4th 204 for the proposition that "a letter from a litigation adversary merely suggesting it disagrees with the verity of the allegations in the lawsuit is not sufficient to put the lawyer on notice of the falsity of the client's allegations." (*Id.* at p. 223.) But Ingber's letter clearly explained that Confidential had shown no evidence of fraud and the fraud claim was an attempt to convert a breach of contract action into a tort. And Confidential's and Ruben's argument that the letter falsely stated that McCombs offered to return the film is irrelevant; the return of the film was not a condition of the contract.

Further, Ingber declared that in response to his question to Roberts why she was pursuing the lawsuit, Roberts answered, "'because you gave away my movie!'" And in answer to the question, "What have you been told, if anything, by Ms. Roberts about what this case is about," Coppola stated in his deposition testimony, "Well, the only thing that she told me was she doesn't like the way Hollywood does business. That's the extent

of it." A trier of fact could conclude from the above that the fraud cause of action was motivated by Roberts's hostility or ill will, or for some purpose other than to secure relief.

Nor are we convinced by Confidential's and Ruben's argument that the failure of Confidential to pursue the fraud cause of action on appeal somehow negates malice because Confidential continued to litigate the fraud action after receiving the April 15, 2008 letter until summary judgment was entered on January 21, 2009.

Confidential and Ruben also assert that Roberts's and Ruben's good faith reliance on the advice of counsel established a complete defense to the malicious prosecution action, contending that Roberts relied in good faith on Ruben; Roberts and Ruben relied in good faith on Fleer, who negotiated the contract; and Ruben relied in good faith on the advice of the president of an entertainment company, a non-attorney. We disagree. We first note that the defense of good faith reliance on counsel is available to the client, not the client's attorney. "'Reliance upon the advice of counsel, provided it is given in good faith and is based upon a full and fair statement of the facts *by the client*, may afford the latter a complete defense to an action for malicious prosecution. [Citation.] But it is an affirmative defense . . . .'" (*Albertson v. Raboff* (1960) 185 Cal.App.2d 372, 386, italics added.) The burden of establishing the affirmative defense of reliance on advice of counsel in good faith is on the defendant. (*Ibid*.) "[R]eliance on advice of counsel is not a defense if the defendant knows . . . that it does not have probable cause to file suit." (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 814; *Baker v. Gawthorne* (1947) 82 Cal.App.2d 496, 501 [trial court was warranted in inferring malice on the part of appellant where there was "paucity of proof of violation of her lease by respondent"].) Where, in response to a special motion to strike a malicious prosecution complaint, a plaintiff has made a prima facie showing of facts which would support a judgment in his or her favor, the defendant's advice of counsel defense must defeat the plaintiff's showing *as a matter of law* in order for the defendant to prevail on a special motion to strike. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197, 203.)

Confidential and Ruben failed to produce evidence from which we can conclude as a matter of law that Roberts relied in good faith on Ruben—or for that matter, Fleer, who was not her litigation counsel— to bring the lawsuit. Further, in light of McCombs's prima facie showing of lack of probable cause; McCombs's evidence supporting the inference of malice; and the absence of evidence that Confidential provided facts showing actionable fraud by McCombs, we cannot conclude that the defense of advice of counsel "'defeats [McCombs's] showing as a matter of law.'" (*Ross v. Kish*, *supra*, 145 Cal.App.4th at p. 197; *id.* at p. 203 [advice of counsel defense did not, as a matter of law, defeat plaintiff's prima facie showing that defendant instituted action for legal malpractice and breach of contract without probable cause, where a trier of fact "reasonably could conclude [defendant] did not disclose all relevant facts to [his attorney] and that [defendant] did not seek opinion of either attorney in good faith"].)

Accordingly, we affirm the trial court's order denying Confidential's and Ruben's special motion to strike.

DISPOSITION

The trial court's order denying Confidential's and Ruben's special motion to strike is affirmed. Matthew McCombs is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.