Filed 7/25/12 Birenbaum v. Katz CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SAM BIRENBAUM et al., Plaintiffs and Respondents, v. MATTHEW KATZ, Defendant and Appellant.	B232031 (Los Angeles County Super. Ct. No. SC079729)

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

Gladstone Michel Weisberg Willner & Sloane and Arthur Grebow for Appellant.

No appearance for Respondents.

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Respondents Sam and Nidia Birenbaum sued appellant Matthew Katz and others for malicious prosecution and other alleged torts. The trial court denied Katz's 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.[1] We reverse and direct the trial court to enter an order granting the motion.

BACKGROUND

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

In August 2003, Katz invited the Birenbaums to stay in a house he owned in Malibu. The Birenbaums and Katz were friends and Mr. Birenbaum had previously represented Katz as an attorney.

The nature of the Birenbaums' occupancy of Katz's house is disputed. The Birenbaums claim that they and Katz entered into a "lease." Katz denies there was any type of lease and contends that he simply provided "temporary lodging" for the Birenbaums.

On September 29, 2003, 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 refused to immediately vacate the premises. Katz then allegedly hired two agents to intimidate them. On October 26, 2003, the Birenbaums left the house.

2. *The Pleadings in the Underlying Action*

On November 13, 2003, Katz in propria persona filed a complaint against Sam and Nidia Birenbaum (the underlying action). In May 2004, Katz filed a first amended complaint and then in August 2004, he filed a second amended complaint, the operative pleading. The second amended complaint stated causes of action for trespass and other torts. In January 2005, the Birenbaums filed a cross-complaint against Katz for forcible entry and detainer and for numerous common law tort causes of action.

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

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

The superior court held a bench trial in October and November 2006. 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. At the conclusion of the trial, the court ruled in favor of the Birenbaums and against Katz with respect to four of the Birenbaums' causes of action and awarded the Birenbaums compensatory and 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 (the malicious prosecution action) 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.

5. *Katz Obtains Counsel in the Underlying Action*

On February 22, 2007, while the appeal was pending, Katz retained the law firm of Berger Kahn. Arthur Grebow and Julie 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 Weisberg Willner & Sloane (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 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 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. We denied Ms. Birenbaum's request on October 7, 2009. [2]

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.

9. *The Trial Court Dismisses the Malicious Prosecution Cause of Action*

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 dismissing the malicious prosecution action as "moot."

10. *Katz's Dismissal of Sam Birenbaum*

On or about April 21, 2010, Katz filed a status conference report 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.

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[2] On October 9, 2009, the bankruptcy court granted Katz's motion for relief from the automatic 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.

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, Katz's attorney orally moved to dismiss Katz. This oral motion was granted.

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

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. The trial court granted the motion on June 24, 2010.

On July 23, 2010, the Birenbaums filed a first amended complaint in the malicious prosecution action.[3] This pleading set forth causes of action for (1) malicious prosecution, (2) abuse of process, (3) intentional infliction of emotional distress, (4) defamation and (5) assault.

12. *Katz's Anti-SLAPP Motion*

On August 31, 2010, Katz filed a motion to strike the first cause of action in the malicious prosecution action pursuant to section 425.16. On January 10, 2011, the trial court denied Katz's anti-SLAPP motion. Katz filed a timely notice of appeal of the January 10, 2011, order.[4]

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[3] The Birenbaums named Berger Kahn, Gladstone Michel, Arthur Grebow and Julie Rubin (attorney defendants) as "Doe" defendants. The only cause of action the Birenbaums asserted against the attorney defendants was for malicious prosecution.

[4] The attorney defendants also filed an anti-SLAPP motion, which was granted. The Birenbaums filed a timely notice of appeal of the order granting that motion. On April 18, 2012, we issued an unpublished opinion (*Katz II*) affirming the order granting the attorney defendants' anti-SLAPP motion to strike the Birenbaums' malicious prosecution cause of action.

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*

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." 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*

As we explained in *Katz II*, the Birenbaums' malicious prosecution cause of action arises from activity protected by the anti-SLAPP statute. (*HMS Capital*, *supra*, 118 Cal.App.4th at p. 213; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1397-1398 (*Sycamore*).)

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

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.)

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

In the trial court, the Birenbaums argued 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*, Katz presented evidence rebutting the presumption that his voluntary dismissal of the underlying action was a favorable termination on the merits. The record indicates that Katz dismissed the underlying action in order to save costs and for other reasons that had nothing to do with the merits of his 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 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 Katz's lawyers determined, based on Nidia Birenbaum's bankruptcy papers and other evidence, that the Birenbaums were essentially "judgment proof." They further concluded 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 a sworn declaration, Katz's lead attorney stated that Katz dismissed the second amended complaint for this reason and not because of any assessment of the merits of Katz's claims.[5]

In their papers filed in the trial court, the Birenbaums did not present any evidence that indicates Katz dismissed the second amended complaint because it lacked merit, and we have found none. Accordingly, the Birenbaums did not make a prima facie showing that Katz's second amended complaint was terminated on the merits.

b. *Probable Cause and Malice*

Because we conclude the Birenbaums did not make a prima facie showing that they can establish the first element of malicious prosecution—a favorable termination on the merits—we do not reach the issues of whether they can establish the second (probable cause) and third (malice) elements.

[5] Katz's attorney Arthur Grebow also stated in his declaration that Katz had a second reason for dismissing Nidia Birenbaum. Katz wanted to eliminate any possible question regarding his 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.

DISPOSITION

The order dated January 10, 2011, denying Katz's motion to strike pursuant to section 425.16 is reversed. The trial court is directed to enter a new order granting Katz's motion to strike the first cause of action for malicious prosecution. Katz is awarded costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.