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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

XIN GAO,

Plaintiff and Appellant,

v.

TONY M. LU,

Defendant and Respondent.

B238394

(Los Angeles County  
Super. Ct. No. GC047450)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Jan A. Pluim, Judge. Affirmed.

Xin Gao, in pro. per., for Plaintiff and Appellant.

Tony M. Lu, in pro. per., for Defendant and Respondent.

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**INTRODUCTION**

This appeal arises from an action for malicious prosecution by Appellant Xin Gao against Respondent Tony Lu. Lu, an attorney, represented Town House Land (Miami)

Corporation (Town House) in an action for fraud that it filed against Gao. After Gao obtained a judgment of dismissal in the underlying action, he sued Lu and Town House for malicious prosecution, conspiracy, and abuse of process. In response, Lu filed a special motion to strike under California Code of Civil Procedure section 425.16, the anti-SLAPP statute.<sup>1</sup> The trial court granted the motion to strike. Because Gao did not make a prima facie showing that Lu filed the fraud action against him without probable cause, the trial court properly granted the special motion to strike. Accordingly, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

### **A. Factual Summary**

The background of this case involves four interrelated lawsuits, the last of which is Gao's malicious prosecution action against Lu and the subject of the present appeal.

### **B. Original Lawsuit**

On May 14, 2007, Lu represented Town House in a case alleging multiple causes of action for breach of contract, fraud, negligence, and restitution, against Deal to China (DTC) and its principal, Gao. The case concerned a joint venture agreement, under which DTC had allegedly promised to secure a Standby Letter of Credit in the amount of \$5,000,000 to help finance Town House's real estate ventures in China. As collateral for the Letter, Town House executed a Deed of Trust (DTC Deed of Trust) in the amount of \$795,000 on real property located in Las Vegas, NV (Nevada Property).<sup>3</sup> On its face, the DTC Deed of Trust provides that the Nevada Property is security for repayment of the \$795,000 debt.

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<sup>1</sup> SLAPP is an acronym for "Strategic Lawsuit Against Public Participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

<sup>2</sup> This factual and procedural summary is based on pleadings filed in this and related actions, contained in the record on appeal.

<sup>3</sup> The Nevada Property is the subject of the remaining actions.

After some delay, Town House contacted its bank in January 2007 to inquire about the status of the Letter. On January 11, 2007, the bank informed Town House via fax that it was rejecting the Letter because it had not been issued by a valid banking institution.

DTC argued that it had performed its contractual obligation to procure the Letter. Thus, upon Town House's demand that DTC release its lien on the Nevada Property, DTC refused to do so until it was paid the \$275,000 allegedly owed in commission.

The case settled on September 14, 2007. Under the settlement agreement, DTC received \$150,000 and agreed to reduce its lien interest on the Nevada Property from \$795,000, the principal amount of the lien on record, to \$350,000. On October 11, 2007, a Substitution of Trustee and Partial Release of Lien Under Deed of Trust was recorded.

### **C. Nevada Lawsuit**

On May 23, 2008, Excel Financial filed an action against Town House, DTC, and other defendants; the complaint alleged causes of action for equitable subrogation, temporary and permanent injunction, negligent misrepresentation, and fraud. The case involved a dispute over the priority of liens on the Nevada Property. Lu represented Town House, as well as its principal, Zhong Fang, in the action.

According to the complaint, Town House obtained title to the Nevada Property for a purchase price of \$1,150,000 on March 7, 2005. The complaint further alleged that Town House had executed the DTC Deed of Trust in December, 2006. The DTC Deed of Trust, however, was not recorded until February 9, 2007, at 8:30 a.m. On that same day, Fang and Town House acquired a loan in the amount of \$675,000 from Excel. The Excel loan was secured by a Deed of Trust against the Nevada Property, which was recorded on February 9, 2007, at 1:56 p.m. According to the complaint, Fang and Town House represented that Excel's Deed of Trust would take a first deed of trust position against the Nevada Property.

According to statements made in other pleadings, it appears that on February 19, 2008, DTC sold its lien interest of \$350,000 to Glenview Profit Sharing. A "Corporation Assignment of Deed to Trust" reflecting the assignment of the DTC Deed of Trust to Glenview was recorded on February 29, 2008. DTC also transferred a "Straight Note"

dated December 7, 2006 and signed by Fang, in the principal amount of \$795,000 (Note). The Note allegedly stated that Town House would pay interest at a yearly rate of 12%. Thus, when Town House defaulted on the loan, Glenview sought to foreclose on the Nevada Property. On March 28, 2008, a Notice of Breach and Default and Election to Sell Real Property Under Deed of Trust was recorded against the Nevada Property on behalf of Glenview.

The trial court entered a judgment against all defendants in the action on January 28, 2010. On April 26, 2010, Fang and Town House were dismissed from the suit. A final judgment in the amount of \$410,000 was entered against DTC.

#### **D. Underlying Lawsuit**

On July 15, 2008, Town House filed an action against Gao, alleging causes of action for fraud, cancellation of instrument, slander of title, violation of Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961-1968, violation of Business and Professions Code section 17200 et seq., and seeking declaratory and injunctive relief. Lu represented Town House in the action.

The complaint alleged that after the parties settled the original action, Gao, DTC, and other defendants fabricated the Note and forged the signature of Fang to make the DTC Deed of Trust “negotiable,” and then sold the Note to Glenview. Town House alleged that it had never executed such a note in favor of DTC. On February 19, 2010, after the parties had conducted law and motion proceedings, discovery, and mediation, Lu substituted out of the case. On June 10, 2010, Town House failed to appear at the final status conference. As a result, the trial court dismissed the action with prejudice, finding that Town House had failed to prosecute the action without good cause.

#### **E. Present Lawsuit**

On May 27, 2011, Gao filed an action for malicious prosecution, conspiracy, and abuse of process against Lu, Fang, and Town House. In his complaint, Gao alleged that Lu knowingly brought the underlying action for an improper purpose, namely to avoid

liability in the Nevada action and to “inflict[] maximum financial and emotional distress” on Gao.

On August 29, 2011, Lu filed a special motion to strike Gao’s complaint for malicious prosecution under section 425.16. Lu asserted that Gao could not demonstrate a probability of prevailing on the merits of his claims because (1) the underlying fraud action had not terminated in Gao’s favor, (2) Lu had probable cause to file a claim for fraud on behalf of Town House, and (3) Lu did not initiate the fraud action with malice. Lu further contended that Gao’s malicious prosecution action was actually the third lawsuit Gao had filed against him. Additionally, Lu alleged that during the pendency of the underlying action, Gao had “never complained” that the suit was frivolous; nor had Gao requested a dismissal of the action.

On October 6, 2011, the trial court heard Lu’s anti-SLAPP motion, and granted the special motion to strike. Specifically, the trial court ruled: “Plaintiff’s action arises from defendant’s exercise of protected activity. Plaintiff has failed to meet his burden of showing that he will probably prevail on malicious prosecution, conspiracy, and abuse of process. Specifically, plaintiff has failed to offer evidence that attorney Lu filed the underlying action without probable cause and for an improper purpose. The Complaint in the underlying action alleges and the Declaration by attorney Lu states that plaintiff forged and fabricated a Promissory Note in the amount of \$350,000 which was later sold to Glenview Profit Sharing, LLC. In his Declaration, plaintiff fails to deny that the Promissory Note was a forgery.”

On October 21, 2011, Gao filed a motion for reconsideration of the order granting Lu’s motion to strike. In his motion, Gao admitted that he had failed to deny the allegations in his written opposition, but contended that, in good faith, he believed that he had already denied Lu’s claims in the pleadings he filed in the present action and the underlying action. On November 30, 2011, the trial court denied Gao’s motion for reconsideration.

On December 29, 2011, Gao filed a timely notice of appeal.

## **DISCUSSION**

## **I. Standard of Review**

Section 425.16 provides for a special motion to strike actions brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition. (See § 425.16, subd. (a).) The 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 an anti-SLAPP motion, the trial court engages in a two-step process. First, the court decides whether the defendant has made a threshold showing that the acts at issue arose from protected activity. (§ 425.16, subd. (b)(1); *Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 135 (*Summerfield*).) If the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability that he or she will prevail on the claim. (*Ibid.*)

“On appeal, we independently review whether section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits.” (*Summerfield, supra*, 201 Cal.App.4th at p. 135.) Here, there is no dispute that the allegations of malicious prosecution, conspiracy, and abuse of process in Gao’s complaint arise from constitutionally protected activity and are subject to a special motion to strike under section 425.16. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-90 [filing a lawsuit].) Accordingly, the issue on appeal is whether Gao met his burden of demonstrating a probability of prevailing on the merits of his case against Lu.

## **II. Probability of Prevailing on the Merits of the Action**

“The term “probability [of prevailing]” in the anti-SLAPP statute is synonymous with “reasonable probability.”” (§ 425.16, subd. (b)(2); *Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1541 (*Bleavins*).) The plaintiff must make a prima facie showing of facts that would support a judgment in his or her favor. (*Id.* at p. 1541.) For purposes of this inquiry, the trial court looks 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.]” [Citations.] (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1105, citations (*Cole*)). However, ““the court does not weigh the evidence or make credibility determinations. [Citation.]” (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197.) In ruling on Lu's special motion to strike, the trial court stated that Gao failed to demonstrate a probability of prevailing on his claims for malicious prosecution, conspiracy, and abuse of process.

### **A. Malicious Prosecution**

To prevail on a malicious prosecution claim, a plaintiff must plead and prove that the prior lawsuit (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff, (2) was brought without probable cause, and (3) was initiated with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.) The trial court ruled that Gao did not meet his burden of proving the second and third elements of the malicious prosecution claim. In particular, the trial court noted that Gao failed to deny the allegations of fraud in his declaration.

In ruling on the question of probable cause, the court must decide whether the prior lawsuit was objectively tenable based on the known facts and without regard to the adequacy of the attorney's investigation and legal research. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 883 (*Sheldon*); see *Cole, supra*, 206 Cal.App.4th at p. 1106 [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.]) The question is whether, as an objective matter, any reasonable attorney would have thought the claim tenable. (*Sheldon, supra*, 47 Cal.3d at p. 886.) “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* (2004) 32 Cal.4th 958, 970.)

In his brief, Gao refers to several alleged facts known to Lu, all of which appear to be irrelevant to the question at hand. For example, Gao argues that Lu was aware of the DTC Deed of Trust, which states on its face that the Nevada Property is security for

repayment of the \$795,000 debt, “evidenced by one promissory note of even date herewith.” Lu was also allegedly aware of the settlement terms, providing Gao a \$350,000 lien interest against the Nevada Property. According to Gao, this evidence indicates that Lu should have known that Fang and Town House could have no claims against Gao in relation to the assignment of his lien interest to Glenview. The underlying complaint, however, is focused squarely on the allegation that Gao, DTC, and others had forged, or conspired to forge, the Note to make the DTC Deed of Trust “negotiable” in their dealings with Glenview. The complaint further alleges that Town House had never executed such a promissory note in favor of DTC. Thus, Gao’s argument is misplaced, as he fails to discuss facts relevant to the allegations of fraud against him, but instead focuses on the validity of his \$350,000 lien, a lien not at issue here.

In his response, Lu presents the allegations of fraud in the underlying complaint, which Gao did not controvert, or demonstrate that he could controvert with admissible evidence. By way of background, the complaint refers to the DTC Deed of Trust that was executed prior to the settlement in the original action, as well as the eventual settlement terms reached in that case. Paragraph 14 of the complaint alleges that “some time after the settlement aforementioned, GAO, DEAL TO CHINA, LI, SCHULJAK, and others conspired and fabricated a Straight Note, and forged the signature of Zhong Fang, Plaintiff’s principal. As part of the Straight Note, it is purported that Plaintiff would pay interest at a yearly rate of 12.00%, plus other terms and penalties.” Paragraphs 15 and 16 further allege that DTC and Gao fabricated the Note “in order to make the Deed of Trust negotiable,” and then “sold the Straight Note to Glenview.” Paragraph 17 refers to the eventual Notice of Breach and Default that was recorded against the Nevada Property on behalf of Glenview. Gao’s failure to demonstrate that any of the allegations were false left the court without any basis to determine the complaint had been brought without probable cause.<sup>4</sup>

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<sup>4</sup> Because Gao did not establish a probability of prevailing on the probable cause element of his malicious prosecution claim, we need not address the malice element. “If the court determines that there was probable cause to institute the prior action, the



## **B. Conspiracy and Abuse of Process**

Gao argues that the trial erred because it failed to address the conspiracy and abuse of process claims in its ruling on the special motion to strike. The record, however, indicates that the trial court determined: “Plaintiff has failed to meet his burden of showing that he will probably prevail on malicious prosecution, conspiracy, and abuse of process.” In his brief, Gao also fails to make any arguments or provide any authorities in support of his conspiracy and abuse of process claims. The record supports the trial court’s ruling that Gao failed to make a prima facie showing of both claims.

### **i. Conspiracy allegation.**

Civil conspiracy is not an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) “Standing alone, a conspiracy does no harm and engenders no tort liability.” (*Id.* at 511.) Thus, the conspiracy must be to commit some other unlawful act or tort. (*Ibid.*) A complaint seeking to impose liability on a defendant on the basis of conspiracy must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting. (*Ibid.*)

In the present complaint, Gao’s second cause of action for “Conspiracy to Commit Malicious Prosecution” names all defendants and specifically incorporates all the allegations of the first cause of action for malicious prosecution. In essence, Gao relies on his allegations of malicious prosecution, allegations as to which he failed to make a prima facie showing of supporting facts. Without the malicious prosecution cause of action, Gao’s conspiracy cause of action against Lu cannot survive.

### **ii. Abuse of Process.**

The tort of abuse of process constitutes the use of a legal process against another to accomplish a purpose for which it is not designed. (*Brown v. Kennard* (2001) 94 Cal.App.4th 40, 44.) To prevail on an abuse of process claim, the plaintiff must allege

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malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated.” (*Sheldon, supra*, 47 Cal.3d at p. 875.)

and prove that (1) the defendant had an ulterior motive in using the processes of court, and (2) the defendant acted willfully in the use of the legal process for a purpose other than the one for which it was designed. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168 (*Oren*).)

Gao's third cause of action for abuse of process is based on the general allegations of the first two causes of action for malicious prosecution and conspiracy. The third cause of action, therefore, repeats the allegation that Lu filed the underlying action on behalf of Town House for an improper purpose—essentially to avoid liability in the Excel action. It also adds an additional paragraph alleging that because Fang and/or Town House had suffered no damages as to their fraud claims, they could have no valid claim against Gao.

The heart of Gao's abuse of process claim is based on the allegation that Lu misused the litigation process by filing a frivolous lawsuit. As such, his abuse of process claim fails because the act of filing a lawsuit does not constitute an abuse of process, however motivated. As our Supreme Court has explained:

“The relevant California authorities establish . . . that while a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action. [Citations.] ¶ The rationale underlying these decisions is not difficult to ascertain. The elements of the common law malicious-prosecution cause of action have evolved over time as an appropriate accommodation between the freedom of an individual to seek redress in the courts and the interest of a potential defendant in being free from unjustified litigation. In order to avoid an improper 'chilling' of the right to seek redress in court, the common law provides that to prevail in a tort action for malicious prosecution a party must demonstrate [favorable termination, lack of probable cause, and malice] . . . . Because the lack-of-probable cause requirement in the malicious prosecution tort plays a crucial role in protecting the right to seek judicial relief [citation], we agree with the prior decisions which have concluded that this element may not be circumvented through expansion of

the abuse of process tort to encompass the alleged improper filing of a lawsuit.” (*Oren, supra*, 42 Cal.3d at pp. 1169-1170.)

For these reasons, Gao failed to meet his burden of showing a probability of success on the abuse of process cause of action.

### **DISPOSITION**

The judgment is affirmed. Respondent shall recover his costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.