Filed 9/17/13 Harbor Real Estate v. Hahn CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HARBOR REAL ESTATE, LP et al., Plaintiffs and Respondents, v. ADRIENNE R. HAHN et al., Defendants and Appellants.	B241940 (Los Angeles County Super. Ct. No. BC477162)

APPEAL from an order of the Superior Court of Los Angeles County. Frederick C. Shaller, Judge. Affirmed.

Anderson, McPharlin & Conners, David T. DiBiase, Thomas J. Kearney, and Peter B. Rustin for Defendants and Appellants.

Freeman, Freeman & Smiley, Bradley D. Ross, and Tal Korn for Plaintiffs and Respondents.

Charles Beven (Beven), represented by Voss, Silverman & Braybrooke, LLP, and its attorneys David C. Voss, Jr., (Voss) and Adrienne R. Hahn (collectively the Attorney Defendants), brought an action against his former employer, Harbor Real Estate, LP (Harbor), and numerous others, including Gregory Schem (Schem), Vaparetto Corporation, Inc. (Vaparetto), EIP LIX, LP (EIP), Schem Family Revocable Trust (Trust), Highland Investment Company, LLC (Highland), Del Rey Dock Company, LLC (Del Rey), and Jessel IV, LLC (Jessel).[1] After respondents prevailed in the underlying action, they initiated this malicious prosecution action against Beven and the Attorney Defendants. The Attorney Defendants responded by filing a special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16,[2] California's anti-SLAPP[3] statute. The trial court denied the anti-SLAPP motion, finding that respondents established a prima facie case of malicious prosecution. The Attorney Defendants appeal.

We agree with the trial court that respondents demonstrated a probability of prevailing on their malicious prosecution action. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Beven was an at will employee of Harbor from 2002 through September 24, 2009. He became controller for Harbor in 2004 and was put in charge of maintaining the bookkeeping and running the payroll.

---

[1] Harbor, Schem, Vaparetto, EIP, Trust, Highland, Del Rey, and Jessel collectively are referred to as respondents.

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

[3] SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5 (*Equilon*).)

In 2008, Beven received a performance review that included "negative aspects" regarding his performance; he was told that corrective action was necessary. During the same year, Beven conceded to Schem that he (Beven) bore a grudge against Schem because Beven did not agree with the size of the bonus that he received.

In July 2009, Beven sought permission from Harbor to take a two-week vacation, even though he had not earned two weeks of vacation time. His supervisor, Schem, responded that it was a bad time because of the poor economy; he told Beven that he should not go on vacation. Beven went on vacation anyway.

Later in 2009, Schem, on behalf of Harbor, asked Beven to document 12 monthly invoices relating to a lease with Jessel for a boat called Titus. Such invoices were to accurately document $12,000 monthly payments that had been made by Harbor to Jessel. In fact, from 2005 through the end of 2008, Beven was the only person that processed the monthly transfers of $12,000 from Harbor to Jessel for the Titus lease. But, Beven never was asked to sign the invoices or put any false dates, false amounts, or false information on the invoices.

Following Beven's unauthorized vacation in 2009, his work performance failed to improve. On September 21, 2009, Schem caught Beven improperly copying Harbor documents on Harbor's premises with the intent to remove them from the premises. Accordingly, Beven's employment with Harbor was suspended for three days. Beven, however, decided not to return to work following the expiration of his suspension. Harbor received a letter from Beven and his lawyers, the Attorney Defendants, advising that it was "'impossible for Mr. Beven to ever work for [Harbor] again.'"

Beven was paid all wages due to him on September 25, 2009, the day after he voluntarily terminated his employment with Harbor.

2. *Employment Development Department (EDD) Claim*

Later in 2009, Beven filed a claim with the EDD for unemployment benefits. In response to the EDD's inquiry regarding the reason for Beven's termination of employment, Beven said that Harbor gave the EDD "reasons for [his] termination that were defaming."

3. *Schem's Prior Relationship with Voss*

Schem has known Voss for over 10 years and has seen him at a variety of different events over the years, such as at Lessees Association meetings and at Chamber of Commerce meetings in Marina Del Rey.

In 2006, Harbor was the successful bidder on the Los Angeles County request for proposal for the property known locally as the Fuel Dock in Marina Del Rey. That purchase was a profitable acquisition.

Within the last few years, Voss confronted Schem at an event in Marina Del Rey. Voss was visibly upset and told Schem, in an angry tone, words to the effect that Schem had "'screwed him'" out of acquiring the Fuel Dock property that Voss had bid on. Schem was shocked that Voss would carry such a baseless grudge for so many years. In fact, Schem did not even know that Voss had bid on the Fuel Dock property.

4. *Underlying Action*

On February 11, 2010, Beven, through the Attorney Defendants, filed the underlying action against respondents (the *Beven* action). The first amended complaint (FAC) alleged the following claims against respondents: wrongful discharge in violation of public policy, breach of the covenant of good faith and fair dealing, defamation per se, failure to timely pay wages upon termination, and unfair business practices. Although the FAC also contained boilerplate alter ego allegations against respondents, the trial court granted respondents' motion to strike these allegations from the FAC.

5. *Beven's Deposition*

Beven was deposed in the *Beven* action on June 8, 2010, and November 19, 2010. At his deposition, Beven made the following concessions and admissions:

Regarding the defamation cause of action, it was based upon a single allegedly defamatory statement made by some unspecified Harbor representative in response to an EDD administrative claim. Aside from Harbor, none of the other seven respondents made any defamatory statements about him.

He was paid all wages due to him.

He was never employed by Schem, Vaparetto, EIP, Trust, Highland, Del Rey, or Jessel.

Regarding the wrongful discharge in violation of public policy claim, Beven was unable to identify any statutory or constitutional provision that he was instructed to violate.

As for the invoices, he stated that no forgery had occurred and that all of the information he was asked to place on the invoices was factually accurate. He did not even know what the invoices were used for. He also had no evidence to suggest that the acts he refused to undertake were illegal. Schem never asked him to forge or falsify any information from the invoices. Rather, Beven testified that Schem asked him to accurately set forth the dates and amounts of the actual lease payments that had been made; he was never asked to sign the invoices or include any false information.

Even though on approximately 10 prior occasions Beven had prepared similar invoices for Harbor, including invoices between Harbor and Jessel, with his job in jeopardy due to poor performance, Beven suddenly asserted that the invoices he was asked to prepare were illegal and that Harbor and/or Schem were trying to defraud the government. But, he also did not know if the invoices were transmitted to any governmental entity.

In the FAC, Beven claimed that the invoices were somehow forgeries because Beven believed that no lease existed between Harbor and Jessel for the Titus. However, he admitted in his deposition that he did not know whether a lease existed. And, in fact, beginning in 2006, a written lease did exist between Harbor and Jessel for the use of the Titus.

6. *Respondents' Successful Motion for Summary Judgment*

Respondents filed a motion for summary judgment on Beven's FAC. On July 28, 2011, the trial court granted respondents' motion, finding, inter alia: (1) There was no employment relationship between Beven and any of the respondents (other than Harbor); (2) With respect to the first, second, and fifth causes of action (wrongful discharge in violation of public policy, breach of the covenant of good faith and fair dealing, and

unfair business practices), Beven presented "no admissible evidence" regarding any respondent other than Harbor; (3) With respect to the third cause of action for defamation, Beven admitted that no respondents other than Harbor had made any statement about him, and the only statement made by Harbor was in connection with a privileged EDD hearing; and (4) With respect to the fourth cause of action (failure to pay wages upon termination), Beven conceded that he had no evidence and admitted at his deposition that he had been paid all wages due before his effective termination date.

Judgment was entered in favor of respondents.

7. *The Instant Malicious Prosecution Action and Anti-SLAPP Motion*

On January 17, 2012, respondents filed the instant action for malicious prosecution against Beven and the Attorney Defendants.

On March 20, 2012, the Attorney Defendants filed an anti-SLAPP motion, arguing that (1) the malicious prosecution action fell within the scope of the anti-SLAPP statute, and (2) respondents could not establish a probability of prevailing on their malicious prosecution claim. In so arguing, they never asserted that respondents could not establish any damages from their malicious prosecution claim.

Respondents opposed the motion.

After entertaining oral argument, the trial court denied the Attorney Defendants' motion. First, the trial court noted that the malicious prosecution action fell within the scope of the anti-SLAPP statute. Then, it turned its attention to the second prong of the anti-SLAPP analysis, namely whether respondents had presented a probability of prevailing on the merits of their claim. It found that they had, reasoning, with respect to the defamation cause of action, that (1) the *Beven* action had been terminated in respondents' favor; (2) there was no evidence to support suing any entity or individual other than Harbor, since the only allegedly defamatory statement had been made by Harbor; (3) the defamation claim arose in connection with a statement made by Harbor to an EDD inquiry; (4) Beven admitted that no one else named as a defendant in the underlying action had ever defamed him; (5) thus, there was no reason to pursue an

action against the respondents other than Harbor; and (6) as for Harbor, the purported statement to the EDD was privileged.

With respect to the wage claim, the trial court noted that Beven lacked probable cause because he did not dispute that all wages due were paid to him on September 25, 2009.

Beven had admitted that he was never employed by anyone other than Harbor. Beven also admitted that he had never been asked to put false information on invoices.

In light of his admissions, malice could have been inferred from the lack of probable cause.

The Attorney Defendants' timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review. [Citation.]" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

II. *The Anti-SLAPP 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." The statute "posits . . . a two-step process for determining whether an action is a SLAPP." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the defendant bringing the special motion to strike must make a prima facie showing that the anti-SLAPP statute applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at p. 819.) Once a moving defendant has met its burden, the motion will be granted (and the claims stricken) unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567–568.)

In order to establish a probability of prevailing, a plaintiff must *substantiate* each element of the alleged cause of action through competent, admissible evidence. (*DuPont Merck Pharmaceutical Co. v. Superior Court*, *supra*, 78 Cal.App.4th at p. 568; see also *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88–89 [reiterating that "'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"'"].) "This requirement has been interpreted to mean that (1) when the trial court examines the plaintiff's affidavits filed in support of the plaintiff's *second step* burden, the court must consider whether the plaintiff has presented sufficient evidence to establish a prima facie case on his causes of action, and (2) when the trial court considers the defendant's opposing affidavits, the court cannot weigh them against the plaintiff's affidavits, but must only decide whether the defendant's affidavits, as a matter of law, defeat the plaintiff's supporting evidence." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184.) Only if he fails to meet this burden, was the motion properly granted. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188–1189.)

III. *The Trial Court Properly Denied the Attorney Defendants' Anti-SLAPP Motion*

It is well-established that a malicious prosecution action is subject to the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) Thus, the burden shifted to respondents to show, through competent, admissible evidence, a probability of success on the merits of their claim in order to defeat the Attorney Defendants' anti-SLAPP motion. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496–1498.) Accordingly, respondents were required to establish that the underlying action (1) was commenced by the Attorney Defendants or at their direction, (2) pursued to a termination in respondents' favor, (3) brought without probable cause, and (4) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871–872 (*Sheldon Appel*); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965–966.)

"'[C]ontinuing to prosecute a lawsuit discovered to lack probable cause' may also support a claim of malicious prosecution. [Citation.] 'Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset.' [Citation.]" (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1398 (*Sycamore Ridge*).)

To succeed on an action for malicious prosecution, a plaintiff need only show that a single cause of action was without probable cause, even if it is combined with other viable causes of action. (*Sycamore Ridge*, *supra*, 157 Cal.App.4th at p. 1399; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

A. Termination in Respondents' Favor

"In order to maintain an action for malicious prosecution, the plaintiff must first demonstrate that there was a favorable termination of the underlying litigation. [Citation.] This requirement is an essential element of the tort of malicious prosecution, and it is strictly enforced. [Citation.]" (*Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, 412–413.)

By prevailing on their motion for summary judgment in the *Beven* action, respondents obtained a favorable termination of the underlying action.

B. Probable Cause

The issue of whether probable cause exists is a question of law. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 884.) The FAC in the *Beven* action lacked probable cause only if all reasonable lawyers would agree that it totally and completely lacked merit. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

We agree with the trial court that respondents established that the *Beven* action lacked probable cause.

1. *Defamation Per Se*

The trial court properly found that the Attorney Defendants did not have probable cause to initiate or continue the defamation cause of action. The FAC in the *Beven* action alleged that all respondents "published false, defamatory, and unprivileged statements to

the effect that [Beven] was terminated due to [his] purported wrongful or incompetent acts, and not as a result of [his] refusal to participate in unlawful activities at [respondents'] directions." But, Beven conceded at his deposition that this cause of action was based upon a single allegedly defamatory statement made by some unspecified Harbor representative in response to an EDD administrative claim that Beven had instituted against Harbor. Beven did not even know what that Harbor representative had told the EDD.

At a minimum, the respondents other than Harbor demonstrated a probability of prevailing on the defamation claim; since there was no claim that any of them had made a defamatory statement against Beven, how could any of them be liable for defamation?

Beven asserts that they could have been liable under an alter ego theory of liability. But, as respondents point out, the alter ego allegations were struck from the FAC early in the litigation. If alter ego was the only basis for liability, then the Attorney Defendants should have dismissed those respondents once their only theory of liability was removed from the case.

Even if they could have been liable as an alter ego of Harbor, any alleged statement by Harbor to the EDD was protected by the litigation privilege. (Civ. Code, § 47, subd. (b); *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Thus, Harbor (and certainly not the other respondents) could not have been liable for defamation. Because the Attorney Defendants knew at least by the time of Beven's deposition that they could not prosecute a defamation claim against respondents, respondents have demonstrated the Attorney Defendants' lacked probable cause to pursue this cause of action. Our analysis of the issue of probable cause could stop here. (*Sycamore Ridge*, *supra*, 157 Cal.App.4th at p. 1399.)

2. *Wages Due*

In his FAC in the *Beven* action, Beven asserted that respondents failed to pay him wages due upon the termination of his employment with Harbor. Beven had no evidence to support this claim whatsoever. He admitted that he had never been employed by any

respondent other than Harbor; since only an employer is required to pay wages due, no respondent other than Harbor could have been liable. (Lab. Code, § 202.) And, Harbor could not have been liable because, as Beven conceded at his deposition, he had been paid all wages due to him before his effective termination date.

Despite the lack of evidence and Beven's clear admission, the Attorney Defendants continued to prosecute the underlying action against respondents. Accordingly, the trial court properly found that the Attorney Defendants lacked probable cause to pursue this claim against respondents.

3. *Employment-related Claims*

The remaining claims arise out of Beven's employment with Harbor. But, Beven conceded at his deposition that only Harbor was his employer; the remaining respondents never employed Beven. As such, there never was any probable cause for Beven to initiate or maintain an employment-based cause of action against these seven respondents. (*Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426, fn. 8 [to establish termination of employment in violation of public policy, there must be an employer-employee relationship].)

As for Harbor, in order for Beven to have prevailed on a claim for wrongful termination in violation of public policy, he was required to show that Harbor "violated a public policy affecting 'society at large rather than a purely personal or proprietary interest of the plaintiff or employer.' [Citations.] In addition, the policy at issue must be substantial, fundamental, and grounded in a statutory or constitutional provision. [Citations.]" (*Holmes v. General Dynamics Corp.*, *supra*, 17 Cal.App.4th at p. 1426.) But, at his deposition, Beven was unable to identify any statutory or constitutional provision that he was instructed to violate; he conceded that no forgery had occurred; and he admitted that all of the information that he was asked to place on the invoices was factually accurate.

C. Malice

Proof of the element of malice requires a plaintiff to show that the proceeding was commenced primarily for an improper purpose and that his or her interests were the target

of the defendant's improper purpose. (*Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089, 1097; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 814.) Malice may be inferred where a party knowingly brings an action without probable cause or continues to prosecute a lawsuit discovered to lack probable cause. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 970.) That being said, the absence of probable cause does not, standing alone, constitute malice. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498–499, fn. 29.) "Merely because the prior action lacked legal tenability, as measured objectively (i.e., by the standard of whether any reasonable attorney would have thought the claim tenable [see *Sheldon Appel*, *supra*, 47 Cal.3d [at] pp. 885–886]), *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence." (*Downey Venture v. LMI Ins. Co.*, *supra*, at p. 498; see also *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743.)

Here, malice may be inferred from the fact that the Attorney Defendants continued to prosecute the action against respondents even after Beven made numerous admissions at his deposition that established that he did not have a viable claim against respondents. Malice could also be inferred from Beven's express statement that he harbored a grudge because he was unhappy about the size of his bonus and Voss's comment to Schem that Schem had "'screwed him'" out of acquiring the Fuel Dock property.

In urging us to reverse, the Attorney Defendants rely heavily upon *Daniels v. Robbins* (2010) 182 Cal.App.4th 204 (*Daniels*). *Daniels* is readily distinguishable. Unlike the attorneys in *Daniels*, the Attorney Defendants here knew, at least after Beven's deposition, that the factual allegations of his FAC in the underlying action had been disproved. (*Daniels*, *supra*, at p. 227.) At that point, they knew there was no probable cause for continuing to prosecute the underlying action. (*Ibid*.) Moreover, as set forth in Schem's declaration, there is evidence of Voss's ill will towards Harbor; imputed malice from the client (Beven) is not the only evidence of malice.

D. Damages

For the first time on appeal, the Attorney Defendants argue that the anti-SLAPP motion should have been granted because respondents failed to present evidence that they suffered damages as a result of the *Beven* action. Because the Attorney Defendants failed to raise this issue in the trial court, they are precluded from raising it on appeal. (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249.)

Even if we were to exercise our discretion and consider the merits of this argument, it would fail. In *Sycamore Ridge, supra*, 157 Cal.App.4th at pages 1411 to 1412, the Court of Appeal noted, "[D]efendants cite no authority establishing that a malicious prosecution plaintiff must present evidence of the facts supporting the damages claimed in order to establish a probability of prevailing [on a malicious prosecution claim]. Rather, the weight of authority holds that in order to prevail, a malicious prosecution plaintiff must establish three elements, i.e., that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. [Citation.] In order to be granted monetary relief, a malicious prosecution plaintiff must also prove damages. However, there is no requirement that, for purposes of surviving an anti-SLAPP motion, a malicious prosecution plaintiff must provide specific evidence of the extent of the damages suffered. A malicious prosecution claim is actionable precisely because the malicious prosecution is presumed to have injured the defendant in the underlying action." We find the reasoning in *Sycamore Ridge* persuasive and conclude a malicious prosecution plaintiff need not establish the amount of its damages in order to defeat an anti-SLAPP motion.

DISPOSITION

The order of the trial court is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ