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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

ROBERTO GOMEZ, Plaintiff and Appellant, v. REAL ESTATE CONSULTING & SERVICES, INC. et al., Defendants and Respondents.	B264240 (Los Angeles County Super. Ct. No. BC544728)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Stephanie Bowick, Judge. Dismissed in part, and reversed in part.

Bewley, Lassleben & Miller and Leighton M. Anderson for Plaintiff and Appellant.

The Alberts Firm; BWA Law Group; Houston M. Watson II and David Brewster for Defendants and Respondents Real Estate Consulting & Services, Inc., and Teresa Gonzalez.

Kimball, Tirey & St. John, Abel Ortiz and Eli A. Gordon for Defendants and Respondents Kimball, Tirey & St. John and Karl P. Schlecht.

This case arises out of a defamation action brought by Real Estate and Consulting Services, Inc. (RECS), a real estate management company, and its on-site manager, Teresa Gonzalez, against Roberto Gomez, a tenant at the mobile home park RECS operated for the City of Santa Monica (city). The defamation action was based on a series of complaints sent by Gomez to the city, highly critical of the company and the city's treatment of tenants. The trial court granted Gomez's special motion to strike the defamation action. Gomez then filed a complaint for malicious prosecution against RECS, Gonzalez, and their attorneys. The trial court granted the defendants' special motions to strike the malicious prosecution complaint and entered judgments of dismissal. Gomez filed a notice of appeal from the orders granting the special motions to strike and from the judgment of dismissal in favor of the attorney defendants.

Gomez contends the trial court erred in concluding that he failed to show a probability of prevailing on the elements of lack of probable cause and malice, and the court abused its discretion in denying his requests for a continuance to conduct further discovery.

We conclude that the order granting RECS's and Gonzalez's special motion to strike was nonappealable because the statutory provisions making an order granting or denying a special motion to strike appealable do not apply to a special

motion to strike a SLAPPback. Gomez did not appeal from the judgment of dismissal in favor of RECS and Gonzalez, so we have no jurisdiction to review the order granting their special motion to strike and must dismiss the appeal from that order.

Because Gomez's complaints to the city were privileged communications under Civil Code section 47, subdivision (b), and Gomez has demonstrated a probability of prevailing on his malicious prosecution claim, the trial court erred in granting the attorney defendants' special motion to strike. As we reverse the judgment in favor of the attorney defendants, we do not address the claim of error relating to the denial of the request for additional discovery.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

RECS operates the Mountain View Mobile Home Park, which is owned by the city. Gonzalez is the on-site manager for RECS. Gomez is a long-term resident of the park. At the time of the events at issue, Richard Lutz was Gonzalez's supervisor, and Paul Strader was RECS's chief executive officer.

In May 2010 the city sued Gomez to evict him for nonpayment of rent. The parties resolved the case, and Gomez remained a tenant. Gomez began to advocate for his rights and the rights of others and speak out against what he considered disrespectful and abusive management practices.

In January 2011 Gomez attended a public meeting of city officials. Gomez held up a sign stating, "ABUSE OF TENANTS BY THE CITY OF SANTA MONICA," and distributed flyers about problems in the park.

In June 2011 Gomez received a violation notice for his conduct in a protest against park management. Gomez claimed that he was not present at the protest and complained to the city. In January 2012 Gomez received another violation notice for parking an unregistered vehicle in the park. Gomez claimed that RECS was selectively enforcing the rules against him in a discriminatory manner and complained to the city.

In July 2011 Gomez submitted to the city a document entitled Report to the Santa Monica City Council. The report stated that the city was abusing its tenants at the mobile home park and that the city attorney was not only looking the other way but was facilitating the abuse by threatening evictions, wrongfully evicting a tenant, and refusing to investigate charges of abuse. The report also faulted the mayor, city council, and city manager for failing to investigate charges of abuse.[1]

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[1] The report stated, for example: "The above referenced city departments [mayor, city council, city manager, and city attorney] are apparently not concerned enough to investigate charges of abuse at *MVMHP* [Mountain View Mobile Home Park] by the housing division and the city attorney[']s office. Numerous letters were sent to all of these city offices and received zero response from them" (capitalization omitted); "[c]ity [a]ttorney[']s office refusal to investigate its own [a]ttorneys for abuse of power i.e.: wrongful eviction. Attempted eviction and other issues. Stating that doing so would be a conflict of interest. Informing tenants that they should hire their own attorneys to defend against tenant harassment"; "[t]enants at MVMHP have complained to the [c]ity [a]ttorney about being harassed by [c]ity [h]ousing and by [a]ssistant [c]ity [a]ttorney . . . . The [c]ity tells us that we should get our own attorney to investigate our complaints. That it would be a conflict of interest for the [c]ity [a]ttorney's office to investigate."

Gomez received a letter dated February 22, 2012 from an attorney with the law firm Kimball, Tirey & St. John (the Kimball firm). The letter stated that Gomez had sent multiple letters to RECS insisting that certain people not be allowed to reside next to his unit, making defamatory attacks on management, and threatening legal action. The letter stated that RECS could not legally prohibit anyone from occupying a particular space. It stated that Gomez's concerns about a particular tenant were being investigated and that he should cease communicating with RECS regarding that tenant. The letter demanded that Gomez cease and desist from making unfounded allegations against park management and threatened legal action against him if he did not comply.

Gomez received another letter, dated March 20, 2012, from an attorney with the Kimball firm stating that despite her previous warning Gomez had continued to harass and threaten management personnel and had escalated his inappropriate behavior. The letter stated that Gomez must direct his communications to the attorney rather than management employees and stated that RECS would seek a restraining order if Gomez did not comply.

On March 21, 2012 RECS filed a petition for a workplace violence restraining order against Gomez together with a declaration by Gonzalez. The declaration stated that on March 19, 2012 Gomez was waiting directly in front of her parking spot when she arrived at work and glared at her in a menacing and threatening manner. It stated that she entered the management office and then exited through a side door to unlock the pool area, and that Gomez was waiting for her there, glared at her again, and walked aggressively toward her. The

declaration stated that Gomez had also spoken to Gonzalez and glared at her in a threatening manner in the past. On April 14, 2012 the court denied the petition.

B. *The Defamation Action*

On April 4, 2012 RECS and Gonzalez filed a complaint against Gomez alleging causes of action for libel per se and trade libel. The Kimball firm and two attorneys in the firm, Karl P. Schlecht and Michaelene H. Kapson, represented the plaintiffs. The complaint described seven allegedly false and defamatory written statements made by Gomez and attached a copy of each written statement. The alleged false and defamatory statements attached to the complaint were all addressed to elected or employed officials of the city, and included the July 26, 2011 report to the city council, and complaints of harassment leveled at RECS and city officials directed or copied to officials within the city. Specifically, the complaint alleged that Gomez "sent an email to the [city] alleging false and unfounded harassment" by Gonzalez; "[made] false and unsupported allegations about [RECS and Gonzalez]"; sent copies of a letter written to RECS and Gonzalez to the city council, the Director of Housing and Economic Development and other city employees which made false statements and allegations of illegal conspiracy about RECS and Gonzalez; sent a letter to the city's housing division requesting that Gonzalez be investigated for abuse of elderly residents; sent another letter to the housing division alleging Gonzalez had served a false notice of violation on Gomez; and a final letter to the division, "mak[ing] further allegations of abuse and harassment."

Gomez filed a special motion to strike the complaint. He argued that all of his alleged statements were designed to prompt the city to take action regarding his concerns with park management, and therefore arose from protected activity under the anti-SLAPP statute. He also argued that RECS and Gonzalez could not establish a probability of prevailing on their complaint because his statements were absolutely privileged under Civil Code section 47, subdivision (b). On September 25, 2012 the trial court granted the special motion to strike. The court found the claims were "based on [Gomez's] communications seeking administrative action . . . by the [city]" and thus were absolutely privileged under Civil Code section 47, subdivision (b). The court analyzed the alleged defamatory statements in some depth and found all of them covered by the privilege as they were made to "induce the [city] to initiate action" or were "'preliminary conversations . . . in some way related to or connected to the pending or contemplated action.'" The court subsequently awarded Gomez as the prevailing defendant on the motion $31,280.66 in attorney fees and costs against RECS and Gonzalez.

C. *Gomez's Malicious Prosecution Complaint*

On May 5, 2014 Gomez filed a complaint against RECS, Gonzalez, the Kimball firm, and Schlecht in the present action. Gomez alleges causes of action for malicious commencement of litigation and malicious continuation of litigation based on the prosecution of the prior defamation action against him. Gomez alleges that the defendants should have known that the alleged defamatory statements were privileged. He alleges that the

defendants initiated and continued to prosecute the defamation action without probable cause and with malice.

D. *The Special Motions To Strike*

On September 5, 2014 RECS and Gonzalez filed a special motion to strike Gomez's complaint under Code of Civil Procedure section 425.16.[2] They argued that they had probable cause to prosecute the defamation action against Gomez, prosecuted the action without malice, and relied on the advice of counsel in doing so. They also argued that Gomez had suffered no damages. Accordingly, they moved to strike the malicious prosecution action on the ground Gomez could not establish a probability of prevailing on his claims against them. RECS and Gonzalez filed declarations by Gonzalez and Schlecht, and other documents, in support of their motion.

On September 11, 2014 the Kimball firm and Schlecht also filed a special motion to strike the complaint. They argued that they had probable cause to prosecute the defamation action against Gomez, they had prosecuted the action without malice, and Gomez had suffered no damages. They filed another Schlecht declaration and a request for judicial notice in support of their motion.

On February 2, 2015 Gomez filed an ex parte application to continue the hearings on the special motions to strike to obtain necessary discovery, pursuant to section 425.18, subdivision (e). All of the defendants opposed the application, and the trial court denied a continuance.

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[2] All undesignated statutory references are to the Code of Civil Procedure.

On February 3, 2015 Gomez filed his opposition to the special motions to strike. Gomez argued that all of his alleged statements were clearly within the scope of the privilege established by Civil Code section 47, subdivision (b), so there was no probable cause to sue him for libel. He also argued that there was no evidence that RECS and Gonzalez had relied on the advice of counsel, that the evidence supported an inference of malice, and that he had suffered damages including attorney fees in excess of those awarded in the prior action. In his opposition papers Gomez again requested a continuance to conduct discovery. Gomez filed his own declaration, a declaration by his attorney, Leighton M. Anderson, and other documents in support of his opposition, to which defendants filed evidentiary objections.

E. *The Orders Granting the Special Motions To Strike*

On April 13, 2015 the trial court filed two orders granting the special motions to strike. The court also granted the defendants' request for judicial notice and ruled on their evidentiary objections. The court stated that because Gomez continued to complain to the city about park management for approximately two years after the city had informed him that it would not investigate his complaints or take any action, it was reasonable to conclude that Gomez's statements were not intended to induce government action and therefore were not privileged. The court also stated that it was reasonable to believe that Gomez had submitted a false report and false affidavits to public officials in violation of Penal Code sections 31 and 148. The court therefore concluded that the defendants had probable cause to sue Gomez for libel and trade libel based on his disparaging statements. The court also stated that RECS and

Gonzalez had reasonably relied on their attorneys' advice and therefore could not be liable for malicious prosecution.

The trial court also concluded that Gomez had failed to present sufficient evidence of malice. Regarding statements made by Gonzalez, "the [c]ourt finds that the evidence shows that . . . Gonzale[z] was actually afraid of [Gomez] and he made her feel unsafe." Regarding a statement by RECS officials that Gomez was threatening their livelihood, the court concluded "[t]his statement does not suggest malice but only concern over [Gomez's] allegedly defamatory remarks." However, the court rejected the defendants' argument that Gomez had suffered no damages, stating that Gomez had presented sufficient evidence that he had suffered noneconomic damages.

F. *The Judgments and Appeal*

On April 23, 2015 the trial court entered a judgment dismissing the complaint against the Kimball firm and Schlecht. On May 11, 2015 the trial court entered a judgment dismissing the complaint against RECS and Gonzalez. On May 20, 2015 Gomez filed a notice of appeal from the orders granting the special motions to strike and from the judgment of dismissal in favor of the Kimball firm and Schlecht. The notice of appeal stated that Gomez was appealing from "the orders granting special motions to strike . . . filed April 13, 2015, copies of which are attached hereto; and from the Judgment of Dismissal entered thereon (as to defendants Kimball, Tirey & St. John, LLP and Karl P. Schlecht, only), filed April 23, 2015, a copy of which is likewise attached; and from all adverse rulings embraced in such orders, which dismissed the complaint in its entirety against all defendants."

CONTENTIONS

Gomez contends (1) the defamation action lacked probable cause because the alleged statements all were clearly within the scope of the official proceedings privilege; (2) Gomez also established a probability of prevailing on his malicious prosecution complaint on the element of malice; (3) RECS and Gonzalez failed to present sufficient evidence to establish a defense to the malicious prosecution complaint based on their reliance on the advice of counsel; and (4) the trial court erred by denying his requests for a continuance of the hearing on the special motions to strike so he could conduct discovery.

DISCUSSION

A. *Pertinent Principles Regarding Special Motions To Strike*

1. *Anti-SLAPP Motions*

A special motion to strike is a procedural remedy to dispose of meritless lawsuits that are brought to chill the valid exercise of the constitutional right of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1165.) A cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the plaintiff demonstrates a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Oasis West Realty, LLC v. Goldman* (2011)

51 Cal.4th 811, 819-820 (*Oasis*).)[3] The defendant bears the initial burden of showing that the cause of action arises from protected activity. If the defendant satisfies this burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Oasis*, at pp. 819-820.)

A plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if credited, would support a judgment in the plaintiff's favor. (*Oasis*, *supra*, 51 Cal.4th at p. 820.) The court does not weigh the evidence, but determines as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) The defendant can defeat the plaintiff's showing by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Oasis*, at p. 820; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) We review an order granting or denying a special motion to strike de novo. (*Oasis*, at p. 820.)

2. *Anti-SLAPPback Motions*

A SLAPPback is a cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a

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[3] Section 425.16 is known as the anti-SLAPP statute. SLAPP is an acronym for "strategic lawsuit against public participation." (*Oasis, supra,* 51 Cal.4th at pp. 819-820.) The Legislature has declared that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." (§ 425.16, subd. (a).)

prior action that was dismissed on a special motion to strike. (§ 425.18, subd. (b)(1).) A SLAPPback defendant may file a special motion to strike the complaint under section 425.18. (*West v. Arent Fox LLP* (2015) 237 Cal.App.4th 1065, 1071.) The Legislature has declared, "'a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy.' (§ 425.18, subd. (a).)" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 281 (*Soukup*).)

A special motion to strike a SLAPPback is subject to some of the same rules as other special motions to strike, and some different rules. (§ 425.18, subd. (c); *Soukup*, *supra*, 39 Cal.4th at pp. 281-282.)[4] Among the differences, as relevant here, the provisions making an order granting or denying a special motion to strike appealable (§§ 425.16, subd. (i), 904.1, subd. (a)(13)) do not apply to a special motion to strike a SLAPPback. (§ 425.18, subd. (c).) Instead, an aggrieved party may seek appellate review of an order denying a special motion to strike a SLAPPback or an order granting a special motion to strike as to some but not all claims alleged in a complaint containing a SLAPPback claim by

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[4] "The provisions of subdivisions (c), (f), (g), and (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1, shall not apply to a special motion to strike a SLAPPback." (§ 425.18, subd. (c).)

filing a petition for a peremptory writ. (*Id.*, subd. (g).) The court explained in *Soukup*, "[t]he import of these provisions is to stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike. They do so by providing the plaintiff with both a longer timeframe—and the means with which—to conduct discovery that might yield evidence to resist the motion to strike, exempting the plaintiff from fees and costs even if the plaintiff's SLAPPback action is stricken and minimizing the delays and expense the plaintiff might otherwise incur while the case is on appeal by limiting the unsuccessful defendant to writ review." (*Soukup*, at p. 282.)

3. *Appealability*

An order granting or denying a special motion to strike ordinarily is appealable under sections 425.16, subdivision (i), and 904.1, subdivision (a)(13). As stated, those provisions do not apply to a special motion to strike a SLAPPback. (§ 425.18, subd. (c).)

Gomez appealed from the orders granting the special motions to strike and from the judgment of dismissal in favor of the Kimball firm and Schlecht. The judgment in favor of the Kimball firm and Schlecht finally resolved all issues as between Gomez and those two defendants, and therefore was an appealable judgment. (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 821, fn. 3, disapproved on another ground in *Della Pena v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, fn. 5; *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9.) The judgment of dismissal in favor of RECS and Gonzalez was appealable for the same reason, but Gomez did not appeal from that judgment.

Gomez contends the order granting RECS's and Gonzalez's special motion to strike dismissed his complaint against those defendants and therefore was appealable. A signed order dismissing a complaint is an appealable judgment. (§ 581d; *The Inland Oversight Committee v. City of Ontario* (2015) 240 Cal.App.4th 1140, 1144; *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 136-137 [signed order granting a special motion to strike *and* dismissing the complaint].) Contrary to Gomez's argument, however, the order granting RECS's and Gonzalez's special motion to strike did not dismiss the complaint against those defendants. The trial court dismissed the complaint against RECS and Gonzalez by entering a judgment of dismissal in favor of those defendants on May 11, 2015, and did not order a dismissal at any time before that date.

A reviewing court should liberally construe a notice of appeal if the appellant's intention to appeal from a particular judgment or order is reasonably clear and the respondent would not be misled or suffer prejudice. (Cal. Rules of Court, rule 8.100(a)(2) ["The notice of appeal must be liberally construed"]; *In re Joshua S.* (2007) 41 Cal.4th 261, 272.) Gomez's notice of appeal showed his intention to appeal from the order granting RECS's and Gonzalez's special motion to strike (a nonappealable order) and from the dismissal purportedly encompassed within that order, but the order did not encompass a dismissal.[5] The notice of appeal did not mention or reflect an

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[5] Again, the notice of appeal specified the orders granting the special motions to strike, the judgment of dismissal in favor of the attorney defendants, and "all adverse rulings embraced in such orders, which dismissed the complaint in its entirety against all defendants."

intention to appeal from the judgment of dismissal in favor of RECS and Gonzalez.

"[I]t is well 'beyond liberal construction' to view an appeal from one order as an appeal from a 'further and different order.' [Citation.] 'Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed.'" (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 225.) *Baker* held that a notice of appeal from an interlocutory order, misdesignated a "judgment," awarding compensatory damages could not be construed as an appeal from a later final judgment awarding compensatory and punitive damages. (*Ibid.*) Similarly here, we conclude that Gomez's notice of appeal from the order granting RECS's and Gonzalez's special motion to strike, and from the rulings purportedly encompassed within that order, cannot be liberally construed to extend to the judgment of dismissal later entered in favor of RECS and Gonzalez.

Because the order granting RECS's and Gonzalez's special motion to strike was nonappealable, and because we cannot liberally construe the notice of appeal as an appeal from the judgment of dismissal in favor of those defendants, we have no jurisdiction to consider the appeal as to RECS and Gonzalez. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113 ["the filing of a timely notice of appeal is a jurisdictional prerequisite"].) Accordingly, we must dismiss the appeal as to RECS and Gonzalez.[6]

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[6] The order granting the attorney defendants' special motion to strike was not separately appealable, but is reviewable on appeal from the subsequent judgment. (§ 906.)

B. *Standard of Review*

We review an order granting a motion to strike a SLAPPback lawsuit de novo, as with a motion to strike a SLAPP suit. (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.) "We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Ibid.*) Under this standard, we treat as true the evidence put forth by Gomez as the plaintiff in the malicious prosecution action and determine whether the Kimball firm and Schlecht have defeated that evidence as a matter of law. "The plaintiff need only establish that his or her claim has 'minimal merit.'" (*Id.* at p. 291.)

All parties concede that RECS and Gonzalez's defamation action was itself protected speech and thus meets the first prong of the SLAPP analysis, shifting the burden to Gomez to establish a probability of prevailing on the merits of his malicious prosecution claim. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [""[t]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action""].)

C. *The Law of Malicious Prosecution*

The plaintiff in a malicious prosecution action must prove that (1) the defendant or someone acting at the defendant's direction initiated or continued to prosecute a prior action against the plaintiff resulting in a termination on the merits in the

plaintiff's favor; (2) the defendant prosecuted the action without probable cause; and (3) the defendant prosecuted the action with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740-741; *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1539 (*Jay*).)

"Probable cause" in this context means an objectively reasonable belief that the action is legally tenable based on the facts known to the malicious prosecution defendant at the time. (*Soukup*, *supra*, 39 Cal.4th at p. 292; *Silas v. Arden* (2012) 213 Cal.App.4th 75, 90.) A person has no probable cause to initiate or continue to prosecute an action if the person relies on facts that he or she has no reasonable cause to believe to be true, or seeks recovery on a legal theory that is untenable under the facts known to him or her. (*Soukup*, at p. 292; *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1106.) There is no probable cause to initiate or continue to prosecute an action if, and only if, no reasonable attorney would believe that the action has any merit and any reasonable attorney would agree that the action is totally and completely without merit. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743, fn. 13; *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200.) "'Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed.'" (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1449; accord, *Jarrow*, at p. 742.)

"[E]very case litigated to a conclusion has a losing party, but that does not mean the losing position was not arguably meritorious when it was pled. [Citation.] And just as an action that ultimately proves nonmeritorious may have been brought with probable cause, successfully defending a lawsuit does not

establish that the suit was brought without probable cause." (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743.)

"Whether there was probable cause to initiate or continue to prosecute an action in light of the facts known to the malicious prosecution defendant [at the time] is a legal question for the court to decide." (*Yee v. Cheung*, *supra*, 220 Cal.App.4th at p. 200; see *Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 817.) Any controversy concerning what facts were known to the malicious prosecution defendant at the time presents a question of fact for the trier of fact. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 927.)

Whether a party acted with "malice" inquires into the defendant's subjective intent or purpose in prosecuting the prior action. (*Soukup*, *supra*, 39 Cal.4th at p. 292; *Jay*, *supra*, 218 Cal.App.4th at p. 1543.) Malice is not limited to actual hostility or ill will, but exists whenever a person prosecutes an action primarily for an improper purpose; that is, a purpose other than to secure a proper adjudication on the merits. (*Soukup*, at p. 292; *Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 466-467.) "Because direct evidence of malice is rarely available, 'malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' [Citation.]" (*Jay*, at p. 1543.)

Malice turns on the defendant's subjective intent in prosecuting the prior action and therefore cannot be inferred based solely on the determination that the action objectively lacked probable cause. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743; *Jay*, *supra*, 218 Cal.App.4th at p. 1543.) Lack of probable cause is a factor in determining the presence of malice, but is insufficient alone to establish malice.

(*Jay*, at p. 1543.) "'Merely because the prior action lacked legal tenability, as measured objectively . . . *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.' [Citation.]" (*Jarrow*, at p. 743.) Instead, some other evidence is needed to prove malice, such as evidence that the defendant believed a cause of action had no merit (*Lanz v. Goldstone*, *supra*, 243 Cal.App.4th at p. 467; *Jay*, at p. 1543), was indifferent to the merits of the action (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1409), or prosecuted a claim for the purpose of forcing a settlement unrelated to the merits (*Lanz*, at p. 467; *Jay*, at p. 1543). If the defendant is an attorney, the paucity of the defendant's investigation and research before prosecuting the prior action, together with lack of probable cause, may support an inference of malice. (*Lanz*, at p. 468; *Cole v. Patricia A. Meyer & Associates, APC*, *supra*, 206 Cal.App.4th at p. 1114; *Sycamore*, at p. 1409.)

D. *Gomez Established a Probability of Prevailing on the Element of Lack of Probable Cause*

Gomez contends defendants lacked probable cause to sue him for defamation because his letters to the city are protected by the absolute privilege established by Civil Code section 47, subdivision (b). The defendants argue to the contrary, and the trial court found, that the defendants had reason to believe the statements were not privileged because (1) Gomez understood that the city would not act on his complaints, so he did not intend to induce government action; and (2) the statements involved

false reports and false affidavits to public officials in violation of the Penal Code.

Civil Code section 47, subdivision (b), states that a statement made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable [by writ of mandamus]" is privileged, with certain exceptions that are inapplicable here. The privilege bars all tort causes of action with the exception of malicious prosecution. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242 (*Action Apartment*); *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360 (*Hagberg*).)[7] The privilege is absolute and applies even if the statement was false and made with malice. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956; *Rusheen v. Cohen*, *supra*, 37 Cal.4th at pp. 1058, 1063.)

"[T]he absolute privilege established by [Civil Code] section 47[, subdivision] (b) serves the important public policy of assuring

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[7] The privilege does not preclude criminal prosecution under a specific statutory provision if a conflict between the privilege and the statute compels the conclusion that the Legislature intended to create an exception to the privilege. (*Action Apartment*, *supra*, 41 Cal.4th at pp. 1245-1247.) The privilege also is inapplicable if a civil statute specifically prohibits the alleged conduct. (*People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1275-1277 [unfair competition law claim based on a violation of the state Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.) or federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.)]; *Komarova v. National Credit Assistance, Inc.* (2009) 175 Cal.App.4th 324, 339-340 [claims under the Rosenthal Fair Debt Collection Practices Act].)

free access to the courts and other official proceedings. It is intended to "'assure utmost freedom of communication between citizens and *public authorities whose responsibility is to investigate and remedy wrongdoing*.'" [Citation.] . . . [B]oth the effective administration of justice and the citizen's right of access to the government for redress of grievances would be threatened by permitting tort liability for communications connected with judicial or other official proceedings. Hence, without respect to the good faith or malice of the person who made the statement, or whether the statement ostensibly was made in the interest of justice, 'courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings.' [Citation.]" (*Hagberg*, *supra*, 32 Cal.4th. at pp. 360-361.) This litigation privilege has existed "'[f]or well over a century,' and '[a]t least since then—Justice Traynor's opinion in *Albertson* v. *Raboff* (1956) 46 Cal.2d 375 [295 P.2d 405], California courts have given the privilege an expansive reach.' [Citation.]" (*Jacob B. v. County of Shasta*, *supra*, 40 Cal.4th at p. 961.)

The privilege not only applies to statements made *during* an official proceeding but also to statements made in anticipation of an official proceeding or to initiate proceedings. (*Hagberg*, *supra*, 32 Cal.4th at p. 368.) To be protected by the privilege a communication only must be "'in furtherance of the objects of the [proceeding].' [Citation.]" (*Action Apartment*, *supra*, 41 Cal.4th at p. 1251; accord, *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 282.)

"[T]he critical question is the *aim* of the communication, not the forum in which it takes place. If the communication is

made 'in anticipation of or [is] designed to prompt official proceedings, the communication is protected.' . . . It is well settled that communications may be privileged even when they occur outside any hearing or proceeding . . . ." (*Hagberg*, *supra*, 32 Cal.4th at p. 368.) "[C]ommunications are privileged under [Civil Code] section 47[, subdivision] (b) when they are intended to instigate official governmental investigation into wrongdoing . . . ." (*Id.* at p. 370.)

We do not here reconsider whether the statements alleged to be defamatory are, *in fact*, privileged under Civil Code section 47, subdivision (b). The original trial court, in granting the special motion to strike the defamation action, found the statements to be covered by the absolute privilege because they were intended to induce the city to take action or were preliminary communications connected to an action contemplated by Gomez.

The question before this court, as before the trial court in considering the current special motion to strike, is "'whether, as an objective matter, the prior action was legally tenable or not.' [Citation.]" (*Soukup*, *supra*, 39 Cal.4th at p. 292.) In other words, we must determine whether a reasonable attorney would have known at the time the suit was instituted that the statements were protected by an absolute privilege. We hold that the prior action was objectively untenable when it was filed; at the time the defamation action was instituted in 2012, the law was clear that the conduct engaged in by Gomez was protected by the absolute privilege of Civil Code section 47, subdivision (b).

Eight years earlier, the California Supreme Court had conducted an exhaustive review of the scope of the privilege, giving it broad application in the context where an individual

seeks redress by complaining to a public agency. (*Hagberg*, *supra*, 32 Cal.4th at pp. 362-366 [summarizing cases].) The privilege was held to apply to a letter urging a division of the Attorney General's office to institute an investigation into a health care provider named by the letter writer (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892); communications between private parties regarding whether they should urge the Attorney General's office to investigate violations of charitable trust rules, since such communications between private persons were "preliminary to the institution of an official proceeding" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 781-783); a man's "unfounded and malicious report" to the Department of Motor Vehicles that his wife was unfit to drive due to drug use because the statement was made "to initiate official action" (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303); a letter written by a lawyer to a state agency complaining that a real estate agent had failed to pay a required refund (*King v. Borges* (1972) 28 Cal.App.3d 27); complaints to the state auditor (*Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382); statements by two workers compensation insurers to the state Department of Insurance and the local district attorney's office accusing a physician of insurance fraud (*Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 876-877); a letter written to the local district attorney's office intended to prompt a criminal prosecution (*Passman v. Torkan* (1995) 34 Cal.App.4th 607, 616-619); a physician's letter to the state Board of Medical Quality Assurance accusing another physician of performing unnecessary surgeries, because the letter "was sent to prompt board action and was thus part of an official proceeding" (*Long v. Pinto* (1981) 126 Cal.App.3d 946, 948); and

communications by a "disgruntled former business associate" to the federal Internal Revenue Service accusing a person of tax fraud (*Tiedemann v. Superior Court* (1978) 83 Cal.App.3d 918, 924-926). (*Hagberg*, at pp. 362-363.)

No case had recognized the exception relied upon by defendants and accepted by the trial court—namely that the privilege ceases to exist when the agency has turned a deaf ear to the complaints, or indicated that it will not provide any assistance. For good reason, as """[t]he policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing."" (*Hagberg*, *supra*, 32 Cal.4th at p. 364.) This policy would be defeated if a petitioner could be subject to a lawsuit merely because the official to whom a complaint was made did not initiate an official investigation or proceeding. This point was driven home more than 40 years ago in *King v. Borges*: "It seems obvious that in order for the [public official] to be effective there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate protection under the circumstances." (*King v. Borges*, *supra*, 28 Cal.App.3d at p. 34.)

Moreover, the law was also well established by 2012 that "[a]ny doubt as to whether the privilege applies is resolved in favor of applying it." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.) *Fontani v. Wells Fargo Investments, LLC*

(2005) 129 Cal.App.4th 719, 731-732 (*Fontani*),[8] the case relied upon by defendants and the trial court, does not stand for the proposition that the privilege ceases to exist when the public entity complained to informs the individual that it will not take action. *Fontani* contains no such statement. If anything, *Fontani* stands for the contrary position, that the governmental body's action or inaction is irrelevant to the question whether the privilege applies.

Fontani considered a bank's invocation of the privilege to cover its Form U-5 filing (also known as the Uniform Termination Notice for Securities Industry Registration) with the National Association of Securities Dealers (NASD), on which the bank had allegedly made defamatory statements about the plaintiff, an employee of the bank. The plaintiff argued that the Form U-5 could not be deemed to have been made in an official proceeding because his conduct was never under review or consideration by the NASD. The court disagreed, finding the Form U-5 was designed to prompt official action. The court opined it was irrelevant whether the NASD actually investigated the plaintiff based on the Form U-5 allegations or otherwise. Because an investigation "is at least [a] potential consequence of a Form U-5 filing that contains allegations of improper conduct by a broker-dealer," the communication constituted a ""communication[] made . . . in anticipation of the bringing of an

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8 *Fontani*, *supra*, 129 Cal.App.4th 719, was disapproved on other grounds in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203, footnote 5, disapproving *Fontani*'s conclusion that "to qualify as an 'official' body under the anti-SLAPP statute, . . . the entity must be one that exercises governmental power."

action or other official proceeding . . . .'" [Citation.]" (*Fontani*, *supra*, 129 Cal.App.4th at pp. 731-732.) *Fontani* could not reasonably be interpreted to hold that inaction or disinterest by officials withdraws the privilege from communications to an official body. No subsequent case has cited *Fontani* for that proposition.

Efforts to carve out exceptions to the absolute privilege have been soundly rejected by the courts, further undermining defendants' claim they reasonably believed they could bring suit against Gomez because he continued to make complaints to the city in the face of the city attorney's inaction. (See *Silberg v. Anderson* (1990) 50 Cal.3d 205, 218-220 [rejecting requirement that in addition to furthering litigation, a statement must promote the "'interest[s] of justice'" in order to qualify for the absolute privilege of Civ. Code, former § 47, subd. (2)].) As the court explained in *Silberg*, "[a] rule that an otherwise privileged communication is not privileged under [Civil Code former] section 47[, subdivision] (2) unless made for the purpose of promoting the 'interest of justice' is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged." (*Silberg*, at p. 218; see also *Hagberg*, *supra*, 32 Cal.4th at pp. 366-369 [rejecting the proposition that the privilege only applied to statements made in quasi-judicial proceedings]; *King v. Borges*, *supra*, 28 Cal.App.3d at p. 33 [motive of person filing a complaint with governmental agency is irrelevant due to the public policy underlying strict application of the absolute privilege].) Defendants' proposed exception would, in effect, reinject the issue of whether the plaintiff acted reasonably or with malice in continuing to file complaints with a governmental agency, precisely the result

rejected by *Silberg* when it disapproved an "'interest[s] of justice'" exception to Civil Code section 47, subdivision (b).

Given the state of the law at the time with respect to interpretation of the privilege, no reasonable attorney would have concluded that the action was objectively tenable. Each of the alleged defamatory statements was written by Gomez and transmitted to the city as part of an ongoing dispute he was having with the city about its maintenance, management and treatment of residents in the mobile park home. That he was petitioning for the city to investigate or take remedial action is plainly revealed on the face of the documents:

1) Gomez's letter to Barbara Collins in the City of Santa Monica Housing Division dated August 16, 2010 advised Collins that he was being harassed and subjected to disparate treatment at the mobile park and informed the city if the harassment did not cease he would pursue legal action. The letter was copied to the city attorney and various other officials.

2) Gomez's July 26, 2011 report was sent to the city mayor, city attorney, city manager and rent control office and described multiple acts of abuse of the tenants at the park by the city. It contained reports of wrongful evictions; uninhabitable conditions; refusal to investigate by the city attorney; improper use of inspection warrants by the city attorney; lack of water; destruction of trees; failure to comply with HUD requirements; and many other issues. Much of the complaint is against the city attorney's office which Gomez accuses of "facilitat[ing] the abuse."

3) Gomez's memo to the mayor, city council members and city manager dated November 9, 2011 complained of abuse by the city attorney and the city's failure to investigate tenant complaints at the park. The memo complained that tenants

believed they did not "have the tenant rights that [other] tenants in Santa Monica enjoy simply because we are tenants of the [c]ity which is our landlord" and questioned whether it "make[s] any sense." The memo encouraged other tenants to call the offices of the mayor and other city officials to ask them to investigate "our complaints."

4) A letter to Strader, the CEO of RECS, dated February 19, 2012, complained of threats of violence against Gomez by the family members of an alleged gang member housed next to him at the park and informed Strader that Gomez intended to bring a lawsuit against the park and potentially the city and would make a complaint to the state real estate licensing board. The mayor, city manager and city council members were copied.

5) Gomez's letter to an RECS official dated February 19, 2012 complained about unequal enforcement of rules in the park relating to parking and threatened legal action. It also was copied to city officials.

6) Gomez's letter to officials in the city's housing division, apparently responding to a letter from one such official, complained about illegal towing, wrongful evictions, and abuse of elderly handicapped residents and other homeowners. Gomez stated he would report the specific city official to HUD and file a civil suit; and

7) Gomez's letter to the director of the city's Housing and Economic Development Department dated March 5, 2012, reported harassing conduct by Gonzalez and asked the department head to investigate and take action or face legal action. This letter was in response to an allegedly false notice of violation with which Gomez had been served by Gonzalez, which

accused him of taking part in a tenant protest on June 13, 2011 and obstructing removal of a fence.

Notably, the defamation action was directed, at least in part, to the first letter sent by Gomez to city officials on August 16, 2010, nearly a year before Gomez supposedly was notified by the city attorney that the office could not assist him.[9] On its face, the August 16, 2010 letter clearly asked for an investigation. The fact that defendants sought to sue Gomez for complaints he filed a year before the city told him there was a conflict of interest is strong evidence defendants were not relying on *Fontani*, *supra*, 129 Cal.App.4th 719, when they filed the defamation action.

But even were we to disregard the earliest complaint by Gomez, the other letters plainly are appeals to city officials, requesting they investigate the city attorney or take direct action to assist Gomez and other tenants. These letters on their face were designed to prompt action—in fact the communications beseech the city to take action. Given the language of these complaints and established case law, no reasonable attorney

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[9] The only evidence in the record as to when the city informed Gomez it would take no action is a letter from the city attorney's office dated July 6, 2011, indicating that the office "will be unable to assist you in this matter due to a conflict of interest." As Gomez correctly points out, this letter was by no means an unequivocal statement from the city that it would not investigate his allegations, but only that the city would not be able to provide legal assistance to him due to a conflict of interest. But even if the city's response had been more definitive, it could not be interpreted to foreclose Gomez from bringing new complaints to the city's attention as they arose.

would have concluded these communications were not privileged communications under Civil Code section 47, subdivision (b). No reasonable attorney would have advised RECS and Gonzalez to proceed to sue Gomez for defamation on the baseless legal theory that the privilege was not available to him because the city attorney had advised him it had a conflict of interest and was not responding to his complaints. As a resident of the city, a resident of the mobile home park, or as a concerned member of the public, Gomez was entitled to send a communication to the city any time he was concerned about treatment of tenants, housing conditions, or misconduct by city employees, and to request assistance, regardless of the city attorney's inaction.

Defendants raise several arguments with which we can also easily dispense. The law firm defendants argue, and the trial court accepted, that because the statements to the city contain arguably libelous statements, such statements were "illegal as a matter of law" and therefore not privileged. This circular argument has been rejected by all courts to encounter it. The privilege under Civil Code section 47, subdivision (b), protects all statements made to public officials "when they are intended to instigate official governmental investigation into wrongdoing" even if false, malicious or accusing an official of misconduct. (*Hagberg*, *supra*, 32 Cal.4th at p. 370; *Silberg v. Anderson*, *supra*, 50 Cal.3d at pp. 216, 218 [the privilege is absolute in nature, applying "to *all* publications, irrespective of their maliciousness" otherwise the "exception would subsume the rule"]; see also *Kashian v. Harrisman*, *supra*, 98 Cal.App.4th at p. 911 [conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose the protection of the litigation privilege "simply because it is *alleged* to have been unlawful or

unethical. If that were the test, the statute (and the privilege) would be meaningless"], fn. omitted.)

Defendants' reliance on *Action Apartment*, *supra*, 41 Cal.4th 1232, is also misplaced as the court there upheld the absolute litigation privilege from an argument identical to that now advanced by defendants. The court explained that while certain crimes were exempted from the litigation privilege, e.g., perjury, that exemption can only be invoked by the state when prosecuting someone for perjury. The court rejected the very exception urged by the law firm defendants here, that all perjured statements are outside the privilege, as such an exemption would entirely swallow the rule. (*Id.* at pp. 1245-1246.) Nor was this a new pronouncement of the law. The courts had previously held on numerous occasions the absolute privilege "extends even to civil actions based on perjury." (*Jacob B. v. County of Shasta*, *supra*, 40 Cal.4th at p. 956.)

Defendants' final argument that because RECS and Gonzalez were employees of the city, they were public servants against whom a false allegation of misconduct constitutes a misdemeanor under Penal Code section 148, misses the mark for the same reason. As *Action Apartment*, *supra*, 41 Cal.4th 1232, explained, while the state can prosecute someone for such a crime and not be barred by the privilege, the exception is no broader than the prosecution itself; the litigation privilege bars any other attempt to sue someone for tort damages for otherwise protected conduct. No reasonable attorney would have believed, given this state of the law, that one could bring a preemptive defamation action against a citizen because the citizen made an allegedly false accusation of misconduct against a public servant given the absolute privilege under Civil Code section 47, subdivision (b).

Accordingly, we conclude that Gomez has established defendants lacked probable cause to institute the defamation action as a matter of law.

E. *Gomez Established a Probability of Prevailing on the Element of Malice*

Gomez contends he presented a prima facie showing of facts supporting the element of malice. He cites evidence that RECS regarded Gomez as a nuisance and a threat to the company's business. On February 10, 2012, Lutz of RECS wrote an email to attorney Schlecht stating, "Regardless of the circumstances, we do not believe that Mr. Gomez can dictate who moves where in the Park. We also believe that he is threatening our livelihood by claiming he is going to report [RECS] to the [Department of Real Estate] because of our 'oppressive acts exacted on the residents of MOUNTAIN VIEW MOBILE HOME PARK.' [¶] Paul [Strader] feels we need to let this person know that even though he has his free speech rights, he doesn't run the Park, nor does he have rights to disparage us and threaten lawsuits."

On April 4, 2012, at a hearing on RECS's unsuccessful petition for a workplace violence restraining order against Gomez, Gonzalez testified regarding Gomez: "He's complained about how things are run. He has harassed other residents in the park. We have a file so thick that we have actually moved onto another file. He's constantly harassing us through the fax machine; before that it was through e-mail." In response to the trial court's question whether Gomez had threatened her, Gonzalez testified that Gomez had sent her a 17-page fax "calling

for me to be fired and giving a list of reasons why he believes that I should be fired."

This evidence suggests that RECS and Gonzalez were displeased with Gomez's repeated complaints and his conduct toward park management and considered Gomez's conduct disparaging and bad for business. Such conduct naturally could engender hostility toward Gomez, and Lutz's email to Schlecht suggests a perceived need to teach Gomez a lesson despite "his free speech rights." The evidence supports a reasonable inference that RECS's and Gonzalez's primary purpose in suing Gomez was to silence him regardless of whether his complaints had merit, and also supports a reasonable inference that the Kimball firm and Schlecht, as the recipient of Lutz's email, were aware of their clients' improper purpose.

The paucity of the attorney defendants' investigation and research before commencing the defamation action, together with the lack of probable cause and the attorneys' awareness of their clients' improper purpose, supports a reasonable inference that the attorney defendants shared their clients' improper purpose. (*Lanz v. Goldstone*, *supra*, 243 Cal.App.4th at p. 468 ["[t]here is also no evidence that [the defendant] did anything to research the applicable law before making the serious charges"]; *Cole v. Patricia A. Meyer & Associates, APC*, *supra*, 206 Cal.App.4th at pp. 1114-1115; *Sycamore Ridge Apartments LLC v. Naumann*, *supra*, 157 Cal.App.4th at p. 1409 [the attorneys' "fail[ure] to adequately familiarize themselves with the case before associating in as cocounsel . . . would indicate a degree of indifference from which one could also infer malice"].)

Schlecht testified in his deposition that he discussed the case with Strader before filing the complaint, but Schlecht could

not recall the specifics of the conversation. Schlecht testified that he and Strader discussed "some of the issues I believe or most of the issues that were raised in the [c]omplaint . . . . I don't really remember specifics other than we reviewed some of the actions." Schlecht testified further, "I don't have any recollection of specifics. I do have a recollection of generalities, so that's the best answer I can give you today." Schlecht acknowledged that he was aware of the "potential hurdle" in a defamation action that Gomez's statements might be privileged, but he could not recall what factual investigation he undertook before filing the complaint. Schlecht also could not recall "when we specifically formed the opinion as to, you know, which direction that we wanted to head on that issue." In his two declarations in support of the motion to strike, Schlecht did not describe any investigation undertaken by him or the firm into the facts or law. Schlecht merely stated that it was his "opinion" that the derogatory statements made by Gomez were libelous and on that basis he "reasonably presumed that [p]laintiff's statements could not be considered privileged or protected speech because of the libelous nature of those statements." There is no evidence of any actual research being conducted by the firm pre-filing into whether Gomez's statements were privileged under the law.

We conclude that the evidence could support a reasonable inference that defendants' primary purpose in sending letters to Gomez threatening a lawsuit and then filing a lawsuit against Gomez was to cause him to desist regardless of whether his complaints had merit. Considered together with the lack of

probable cause, this evidence is sufficient to support a finding of malice.[10]

DISPOSITION

The appeal from the order granting RECS's and Gonzalez's special motion to strike is dismissed. The judgment in favor of the Kimball firm and Schlecht is reversed. RECS and Gonzalez are entitled to costs on appeal. Gomez is entitled to costs on appeal as against the Kimball firm and Schlecht.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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[10] As we find that the trial court erred in granting the attorney defendant's special motion to strike the malicious prosecution action on the evidence presented, Gomez's argument on appeal that he was entitled to additional discovery to combat the motion is moot.

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