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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO\

R. STEPHEN GOLDSTEIN,
Plaintiff and Respondent,

v.

PATRICIA DOBASHI,
Defendant and Appellant.

A129746

(San Francisco County
Super. Ct. No. CGC-09-493095)

INTRODUCTION

Defendant Patricia Dobashi appeals the superior court's denial of her Code of Civil Procedure section 425.16 special motion to strike the malicious prosecution claim brought against her by plaintiff R. Stephen Goldstein.^{1 2} Goldstein sued defendant Patricia Dobashi for malicious prosecution and abuse of process following judgment in his favor in a prior lawsuit filed by Dobashi against Goldstein and Helene Truly Osuna in which Dobashi accused Goldstein of property theft, conversion, conspiracy to convert, fraud, breach of contract, and negligence, in connection with the alleged theft of Dobashi's jewelry. Dobashi contends the court erred in denying her anti-SLAPP claim on the malicious prosecution cause of action on the ground that Goldstein demonstrated a probability of prevailing on his malicious prosecution claim.

¹ All statutory references are to the Code of Civil Procedure, unless otherwise specified.

² Section 425.16 is commonly known as the anti-SLAPP or SLAPP statute.

Specifically, Dobashi contends: (1) the prior action did not terminate in favor of Goldstein as to the fraud and conversion causes of action, where Dobashi voluntarily dismissed these claims after Goldstein moved for sanctions pursuant to section 128.7; (2) Dobashi has a viable advice of counsel defense and otherwise demonstrated probable cause for all her causes of action; Goldstein did not present sufficient evidence of malice to allow the malicious prosecution action to proceed. We shall affirm the denial of the anti-SLAPP motion as to the malicious prosecution cause of action.

I. BACKGROUND

A. *Dobashi's Action Against Goldstein*³

1. *The initial complaint in the prior action.* Dobashi filed her initial complaint against Goldstein and Osuna on October 18, 2006, alleging causes of action against both Goldstein and Osuna for conversion, against Osuna for trespass and intentional tort, and against Goldstein for breach of contract and fraud. (*Dobashi v. Goldstein, supra*, A120481, p.* 3.) Therein Dobashi alleged:

Dobashi and Goldstein had been engaged in a personal relationship for about a year when she gave him a key to her residence. Goldstein previously had been romantically involved with Osuna, whom Dobashi accused of stalking her in the months before the jewelry disappeared. Unbeknownst to Dobashi, Goldstein continued to have a relationship with Osuna, allowing her free access to his home.

On or about November 1, 2003, Dobashi's jewelry disappeared from her residence, along with other items. There was no evidence of forced entry. After the jewelry disappeared, Dobashi notified the police. Goldstein attempted to persuade Dobashi neither to sue Osuna nor to have her prosecuted. He claimed Osuna had not

³ Many of the facts and much of the procedural discussion of the underlying action by Dobashi are taken from the nonpublished opinion of Division Five of this court in *Dobashi v. Goldstein* (June 11, 2009) A120481 [2009 WL 1640044], addressing the trial court's grant of judgment in favor of Goldstein following its sustaining of demurrers to Dobashi's breach of contract and negligence causes of action, the only causes of action remaining after she voluntarily dismissed the conspiracy/conversion and fraud causes of action without prejudice. (*Id.* at p* 3.)

taken Dobashi's jewelry. In late November, Dobashi's relationship with Goldstein ended.

In September 2004, Goldstein told Dobashi that Osuna had used the key to enter her residence and take her jewelry. Goldstein promised to either recover the jewelry or to replace it himself. Dobashi alleged she relied on this promise and did not pursue Osuna and she reestablished her relationship with Goldstein. "Goldstein knew from the beginning that Osuna had entered [Dobashi's] home and taken the jewelry because he either provided the key to Osuna or left it in a location where he knew she would find it." He knew Osuna was likely to steal this jewelry given the opportunity, because she had stolen jewelry from Goldstein in the past. "Goldstein cooperated with Osuna to steal [Dobashi's] jewelry and therefore became a co-actor with Osuna in carrying out the theft." In 2005, Goldstein presented Dobashi with three rings which had been among the stolen items. The three rings were a small part of the missing jewelry.

Goldstein demurred to the complaint and moved to strike certain allegations. "The court granted the motion to strike in part and sustained his demurrer with leave to amend, stating the following grounds: '1. The conversion claim fails to establish that [Goldstein] had knowledge of or agreed to the theft of the jewelry. [¶] 2. The breach of contract and fraud claims fail to allege damages as a consequence of the act pleaded.' " (*Dobashi v. Goldstein, supra*, A120481, at p. *3.)

2. Amended complaints, demurrers, voluntary dismissals and judgment.

"Dobashi then filed a first amended complaint, alleging causes of action against Goldstein and Osuna for breach of contract and conspiracy to commit conversion, against Goldstein for fraud, and against Osuna for trespass." (*Dobashi v. Goldstein, supra*, at p. *3.) As to the additional conspiracy to commit conversion, Dobashi alleged that "the theft of her jewelry was the result of a conspiracy between Osuna and Goldstein based on the following: Goldstein's statements to plaintiff that he knew Osuna committed the theft of plaintiff's jewelry; that he knew Osuna had used the key to plaintiff's residence, which plaintiff had given to Goldstein, to commit the theft; and later, Goldstein returned some of the jewelry stolen from plaintiff's residence." (*Ibid.*)

“On April 30, 2007, Goldstein again demurred and served a motion for sanctions under Code of Civil Procedure section 128.7 on the basis that the first amended complaint was filed for the improper purpose of harassing him and was unwarranted by the facts and law. On May 21, 2007, within the 21-day ‘safe harbor’ provision provided in the statute,^[4] *Dobashi dismissed the causes of action for conspiracy/conversion and fraud without prejudice.* On May 22, 2007, Goldstein filed the motion for sanctions, along with a supplemental memorandum of points and authorities and a supplemental declaration.” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, italics added.)

“The court sustained the demurrer as to the cause of action for breach of contract, with leave to amend ‘to allege damages resulting from Goldstein’s alleged breach of a promise to recover or replace Plaintiff’s jewelry.’ The court denied the motion for sanctions.” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, fn. omitted.)

“Dobashi then filed a second amended complaint, alleging a cause of action for breach of contract against Goldstein, as well as causes of action against Osuna alone for conversion and trespass.” (*Dobashi v. Goldstein, supra*, A120481, at p. *3.) Dobashi alleged the value of the stolen jewelry that Goldstein neither recovered nor replaced was \$250,000 and that she had spent \$20,000 by reason of the breach of contract. “Goldstein again demurred, and Dobashi moved for leave to file a third amended complaint adding a cause of action for negligence, and included a proposed third amended complaint. The court sustained the demurrer to the breach of contract cause of action without leave to amend. The court denied leave to file the proposed third amended complaint, but granted Dobashi the ‘opportunity to file within . . . 15 days of this Order an amended complaint

⁴ “ ‘A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. . . .’ (Code Civ. Proc., § 128.7, subd. (c)(1).)” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, fn. 2.)

that alleges facts based on this new theory [of negligence] sufficient to meet the criteria of *Palma*.^{5]}” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, fns. omitted.)

“On August 28, 2007, Dobashi filed a third amended complaint alleging a cause of action for negligence against Goldstein, and he again demurred. The court sustained the demurrer without leave to amend, on the basis that ‘Goldstein’s conduct did not create or increase the risk of harm to Dobashi.’ [¶] Judgment was entered in favor of Goldstein on December 10, 2007.” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, fn. omitted.)

3. The appeal. Dobashi appealed, contending the court had erroneously sustained the demurrers to her second amended complaint alleging breach of contract and to her third amended complaint alleging negligence. (*Dobashi v. Goldstein, supra*, A120481, at p. *1.) Goldstein cross-appealed from denial of his sanctions motion. (*Ibid.*) The Court of Appeal (Division Five) affirmed the trial court rulings, and denied Goldstein’s motion for sanctions on appeal. (*Dobashi v. Goldstein, supra*, A120481, at p. *1.) The appellate court affirmed the trial court’s sustaining of the demurrer to the breach of contract cause of action on the ground that Goldstein’s promise to return Dobashi’s jewelry lacked consideration. The appellate court recognized that “[w]hile an agreement ‘not to sue upon [a] claim . . . for a[ny] period of time’ may constitute adequate consideration, the act of forbearance without an agreement to do so is insufficient. [Citations.] Dobashi did not allege that she *agreed* to forbear.” (*Id.* at p. *5.) Nor did she assert on appeal that she could have amended her complaint to allege such an agreement. (*Id.* at p. *6.) In support of its determination, the appellate court, like the trial court, cited *Tiffany & Co. v. Spreckles* (1927) 202 Cal. 778, 789-790 (*Tiffany*) [forbearance without an agreement to forbear does not constitute consideration] and *Simonian v. Patterson* (1994) 27 Cal.App.4th 773 (*Simonian*) [a friend’s gratuitous promise to help a creditor-friend collect a debt from a third party is unenforceable as a matter of law, notwithstanding the creditor-friend’s forbearance from filing suit in reliance on the promise].

⁵ “*Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.” (*Dobashi v. Goldstein, supra*, A120481, at p. *3, fn. 5.)

As to the negligence cause of action, the appellate court rejected Dobashi's claim that "Goldstein owed her a duty of care 'to keep his key to Dobashi's residence out of Osuna's hands.'" (*Dobashi v. Goldstein, supra*, A120481, at p. *6.) The court held that Goldstein "had no duty to control Osuna's conduct." (*Id.* at p. *8.)

The appellate court also rejected Goldstein's challenge to the trial court's denial of his section 128.7 motion for sanctions. Goldstein maintained the court abused its discretion when it sustained his demurrer with leave to amend to allege damages, rather than on the basis of lack of consideration under *Simonian, supra*, 27 Cal.App.4th 773. (*Dobashi v. Goldstein, supra*, A120481, at p. *9.) The sanctions determination was reviewed for abuse of discretion and the appellate court observed that "[a] party may make a nonfrivolous argument for the extension, modification, or even reversal of existing law, without being subject to sanctions. The fact that the trial court, erroneously or not, did not sustain the demurrer [to the first amended complaint] specifically on the basis of *Simonian*, and granted leave to amend [to assert adequate damages], is a 'reliable indicator' that Dobashi's first amended complaint was not so frivolous as to merit sanctions. [Citation.]" (*Dobashi v. Goldstein*, at p. *9.)

B. *Goldstein's Malicious Prosecution Action and Dobashi's Anti-SLAPP Motion*

On October 1, 2009, Goldstein filed the underlying action for malicious prosecution and abuse of process action against Dobashi and the two attorneys who represented her in her action.⁶ Dobashi answered and, on May 18, 2010, moved to strike the complaint under the anti-SLAPP statute. (§ 425.16.) Goldstein sought discovery from Dobashi and the court permitted him to take her deposition, limited to her state of mind concerning the malice element of his malicious prosecution claim against her.

⁶ Dobashi was initially represented in her property theft action by attorney Michael Miller and later by Charles F. Bourdon. Goldstein sued Dobashi and both attorneys for malicious prosecution. The court granted attorney Bourdon's anti-SLAPP motion, striking the complaint as to him and ordered attorney's fees. Goldstein appealed both orders. (A128166, A128423.) We dismissed the two appeals pursuant to the stipulation of Goldstein and Bourdon. In the trial court, Goldstein dismissed Miller from the malicious prosecution action without prejudice.

During that deposition, Dobashi stated she did not think that Goldstein had stolen her jewelry when she filed the lawsuit, nor did she think that he had either planned to steal her jewelry or conspired with Osuna to steal the jewelry. She had reported the theft of four pieces of jewelry to the police and sued Goldstein for the value of that jewelry. She reported to the police that the value of the four pieces of stolen jewelry was \$123,000. She overvalued the jewelry in her police report. She claimed she did not “really” read the lawsuit before it was filed. She “tried to read them but I don’t understand them so I don’t.” She gave her narrative to the attorney and he drafted the lawsuit. She maintained that when she consulted with her attorney, Miller, she “told him all the truthful things as I knew it.” Asked whether she reviewed the complaint to assure it was truthful, she stated “I discussed it with him, but I did not read the complaint.” Asked whether she ever read any of the lawsuits she brought against Goldstein, she responded: “I would read them. In the beginning I would read a couple pages, but I find them very complex and so I didn’t. I didn’t understand them all.”

Goldstein filed opposition to the anti-SLAPP motion on July 7, 2010. Dobashi filed her reply on July 13, 2010. In her reply, Dobashi for the first time asserted she would rely on the “advice of counsel” defense. She argued that Goldstein had admitted in his opposition brief that Dobashi told the true facts to her lawyers.

Following a hearing on the anti-SLAPP motion, the superior court denied Dobashi’s motion to strike as to Goldstein’s main cause of action for malicious prosecution (wrongful institution of civil proceedings), but struck the accompanying cause of action for abuse of process. The court explained the litigation privilege barred the abuse of process cause of action, but the court recognized that the abuse of process claim essentially duplicated the malicious prosecution cause of action. The court overruled Goldstein’s objections, including his objection to Dobashi’s claim of the advice of counsel defense for the first time in her reply brief. Neither party either sought or obtained an order for attorney fees. (§ 425.16, subd. (c).)

Dobashi filed a timely notice of appeal from the order denying her special motion to strike Goldstein’s first cause of action for malicious prosecution. (§§ 425.16, subd (i); 904.1, subd. (a)(13).)

DISCUSSION

I. Standards of Review

A. Anti-SLAPP Law

“Subdivision (b)(1) of section 425.16 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.’ ” (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463 (*Hecimovich*); see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312 (*Flatley*).) The anti-SLAPP motion provides a summary-judgment-like procedure at an early stage of litigation to screen out meritless claims. (*Flatley*, at p. 312.)

“A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the [moving party (usually, as here, the defendant)] has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff’s complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 . . . (*Navellier*).)” (*Hecimovich, supra*, 203 Cal.App.4th at p. 463.) To satisfy this burden, the plaintiff must demonstrate that the complaint is legally sufficient and the elements of plaintiff’s claim are supported by a sufficient prima facie showing of facts such that, if the evidence submitted in support of these facts is credited, plaintiff would be entitled to a favorable judgment. (*Zamos v. Stroud* (2004)

32 Cal.4th 958, 965.) Subdivision (a) of section 425.16 expressly mandates that the statute “shall be construed broadly.”

We review the trial court’s ruling de novo. (*Hecimovich, supra*, 203 Cal.App.4th at p. 463; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

As we stated in *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989: “We decide the second step of the anti-SLAPP analysis on consideration of ‘the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).) Looking at those affidavits, ‘[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law.’ [Citation.] [¶] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is ‘not high.’ [Citation.] In the words of the Supreme Court, plaintiff needs to show only a ‘minimum level of legal sufficiency and triability.’ (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438 fn. 5.) In the words of other courts, plaintiff needs to show only a case of ‘minimal merit.’ (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675, quoting *Navellier*[, *supra*,] 29 Cal.4th 82, 95, fn. 11).” (Accord, *Hecimovich, supra*, 203 Cal.App.4th at pp. 468-469.)

Although the plaintiff’s burden may not be “high,” he or she must demonstrate that his claim is legally sufficient. (*Navellier, supra*, 29 Cal.4th at p. 93.) And the plaintiff “must show that it is supported by a sufficient prima facie showing, one made with ‘competent and admissible evidence.’ [Citations.]” (*Hecimovich, supra*, 203 Cal.App.4th at p. 469.)

B. Malicious Prosecution

Malicious prosecution claims fall squarely within the coverage of the anti-SLAPP statute because they are based on the underlying lawsuit, that is, a petition to the courts for redress of grievances. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728,

734-735 (*Jarrow*); *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 449 (*Drummond*.) Plaintiff Goldstein does not contend otherwise.

Turning to the second step of the inquiry, the question is whether Goldstein’s complaint was legally sufficient to establish the elements of malicious prosecution and whether Goldstein satisfied his burden of making a sufficient prima facie showing of facts to support his claim. “To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (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. [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 292.) “A claim for malicious prosecution may also apply to a defendant who has brought an action charging multiple grounds of liability when some, but not all, of the grounds were asserted without probable cause and with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 671, citing *Bertero v. National General Corp.* (1974) 13 Cal.3d 43 (*Bertero*).)” (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 (*Sycamore Ridge*.)

II. Malicious Prosecution-Favorable Termination

Dobashi contends there was no favorable termination as to the fraud and conversion causes of action of her complaint, because she dismissed them during the safe harbor period provided by section 128.7, following Goldstein’s motion for sanctions. The trial court disagreed.

“A necessary element of a cause of action for malicious prosecution is that the underlying proceeding terminated favorably to the malicious prosecution plaintiff. [Citation.] A termination is ‘favorable’ if it was based on a determination of the merits of the action—that is, relating to the fault of the defendant, rather than on a technical or procedural ground. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750 [*Lackner*].) Favorable termination is a necessary element because the very essence of a malicious prosecution action is the bringing of an unwarranted or unjustifiable action against the defendant. [Citations.]” (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 514 (*Padres*.) “The twofold prerequisite of a termination is finality and a conclusion that

was favorable to the former defendant. The determination of these issues presents an issue of law for the court, though resolution of predicate factual disputes is for the trier of fact.” (1 *Mallen and Smith, Legal Malpractice* (West/Thomson Reuters 2012) § 6:15, pp. 639-640, fn. omitted.)

As emphasized by our Supreme Court in *Crowley v. Katleman, supra*, 8 Cal.4th at page 686, the requirements of favorable termination and lack of probable cause serve different purposes. The rule that “ ‘a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause (*Bertero v. National General Corp., supra*, 13 Cal.3d at pp. 55-57 does not alter the rule there must first be a favorable termination of the *entire* action. (*Friedberg v. Cox* [(1987)] 197 Cal.App.3d [381,] 386-387, italics added.) In *Bertero*, the question whether all or only part of the prior action had to be without probable cause arose only after judgment had been reached in the plaintiff’s favor in the prior action as a whole.’ (*Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1300.)” (*Crowley v. Katleman*, at p. 686.)

“ [T]he criterion by which to determine which party was successful in the former action is the decree itself in that action. The court in the action for malicious prosecution will not make a separate investigation and retry each separate allegation without reference to the result of the previous suit as a whole. . . .’ [Citation.] ‘[T]he question whether the original suit was successfully prosecuted against the plaintiff is to be determined by the judgment or decree therein upon the final adjudication, and not by the separate allegations and charges and the proof for and against each. . . .’ [Citation.]” (*Freidberg v. Cox, supra*, 197 Cal.App.3d at p. 385.) Applying this principle, we do not separately investigate each charge and allegation; rather we look to the outcome of the litigation as a whole. Judgment was entered in favor of Goldstein and affirmed on the merits on appeal. The litigation terminated in his favor. (See *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789 [defendant who prevails on fewer than all causes of action in underlying litigation not necessarily precluded from stating subsequent cause of action for malicious prosecution].)

Here, it is indisputable that the entire underlying action resulted in a final judgment in favor of Goldstein, whether or not voluntary dismissal of the causes of action for fraud and conversion was “on the merits.” Dobashi does not appear to argue that dismissal of her breach of contract and negligence causes of action against Goldstein and entry of judgment against her, affirmed by the Court of Appeal, was other than a final determination against her on the merits of the litigation.

Were we to look solely to the conversion and fraud causes of action, we would agree with the trial court that her voluntary dismissal of those two causes of action following Goldstein’s filing of a demurrer and motion for section 128.7 sanctions against her was a favorable termination on the merits, rather than termination on a technical or procedural ground.

“ ‘When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff’s innocence of the misconduct alleged in the underlying lawsuit.’ [Citation.] If the evidence of the circumstances of the termination is conflicted, ‘ ‘the determination of the reasons underlying the dismissal is a question of fact.’ ’ [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217 (*Daniels*); see 1 Mallen and Smith, *Legal Malpractice, supra*, § 6:15, p. 644.)

“ ‘ ‘In some instances the manner of termination reflects the opinion of the court that the action lacks merit In others, the termination reflects the opinion of the prosecuting party that, if pursued, the action would result in a decision in favor of the defendant, as . . . where the plaintiff in a civil proceeding voluntarily dismisses the action [citations omitted].’ ’ . . . (*Lackner, supra*, 25 Cal.3d. at p. 750)” (*Sycamore Ridge, supra*, 157 Cal.App.4th at pp. 1399-1400.)

In *Daniels, supra*, 182 Cal.App.4th 204, the appellate court held that the malicious prosecution plaintiff responding to an anti-SLAPP motion made a prima facie showing that the underlying action was terminated in her favor where termination was the result of discovery sanctions. (*Id.* at p. 217.) The *Daniels* court catalogued several types of dismissals considered favorable dismissals under the first element of a malicious

prosecution cause of action, including voluntary dismissal: “Similar types of dismissals are also favorable terminations in appropriate circumstances. For example, ‘[a] *voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury.*’ (*Sycamore Ridge, supra*, 157 Cal.App.4th at pp. 1400-1401 [sufficient anti-SLAPP prima facie showing of favorable termination made in voluntary dismissal case]; compare with *Contemporary Services Corp. v. Staff Pro. Inc.* (2007) 152 Cal.App.4th 1043, 1056-1058 [malicious prosecution plaintiffs failed to meet anti-SLAPP burden to show voluntary dismissal in underlying case reflected on the merits [(*Contemporary Services*)]]).” (*Daniels*, at p. 218, italics added.)^{7 8} In *Sycamore Ridge*

⁷ *Sycamore Ridge, supra*, 157 Cal.App.4th 1385, 1401, footnote 8, distinguished *Contemporary Services, supra*, 152 Cal.App.4th 1043: “In *Contemporary Services*, the court stated that the malicious prosecution plaintiffs had not made a sufficient showing that ‘the dismissal of the complaint in the underlying action reflects their innocence of the misconduct alleged therein.’ (*Id.* at p. 1057.) Specifically, the court noted that ‘the record shows defendants could not afford to pursue the matter, not that they lost faith in the merit of their claims.’ (*Ibid.*) The court further observed, ‘[t]he record does not show defendants sustained any adverse rulings in the case, or *otherwise had reason to believe their claims would be unsuccessful.*’ [*Ibid.*, italics added [by *Sycamore* court].) In this case, in contrast, *Sycamore Ridge* has presented evidence that defendants [in the malicious prosecution action] had reason to believe that a number of [the plaintiff’s claims in the underlying action] would be unsuccessful.”

⁸ In *Drummond, supra*, 176 Cal.App.4th 439, the appellate court set aside a lower court’s order in the underlying suit by the malicious prosecution defendant (Desmarais) on the ground that he had attempted to pursue his claims in the wrong forum under the compulsory cross-complaint rule, and where he was required under that rule to bring the claims in a court where plaintiffs’ claims were already pending. (*Id.* at p. 450.) The appellate court ordered the lower court to take no further action in that matter and Desmarais voluntarily dismissed that suit. In a subsequent malicious prosecution suit by the former defendants, the Court of Appeal termed its previous ruling an interim appellate victory, and held it was not a favorable termination on the ground that “a termination based upon violation of the compulsory cross-complaint rule is a ‘technical’ disposition rather than one ‘on the merits.’ [Citation.]” (*Id.* at pp. 450, 457.) This case is distinguishable as there is nothing that can similarly be characterized as an “interim victory.” Furthermore, as the *Drummond* court reasoned, had the complaint been dismissed *while the appeal was pending*, on the ground that it was filed in the wrong forum, “[t]here is little doubt . . . the dismissal would have been considered technical rather than substantive. This is because ‘[a] malicious prosecution action will not lie

the court rejected the argument that a voluntary dismissal of claims should not be considered a favorable termination. The court explained that a voluntary termination “is presumed to be a favorable termination on the merits” because “ “[a] dismissal for failure to prosecute . . . does reflect on the merits of the action [and in favor of the defendant] The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted.” ’ ” (*Lackner, supra*, 25 Cal.3d. at pp. 750-751.)” (*Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1400.)

“Uncertainty about the reason for a dismissal may be resolved by the terms of the dismissal itself. Ambiguity can raise an issue of fact.” (1 *Mallen and Smith, supra*, § 6:15, p. 644, fns. omitted.) Here, Dobashi voluntarily dismissed the fraud and conspiracy/conversion causes of action of the first amended complaint in the face of Goldstein’s demurrer and motion for sanctions. (Goldstein’s previous demurrer to the fraud, conversion and the breach of contract cause of action alleged in the initial complaint had been sustained with leave to amend, on grounds that: “ ‘1. The conversion claim fails to establish that [Goldstein] had knowledge of or agreed to the theft of the jewelry. [¶] 2. The breach of contract and fraud claims fail to allege damages as a consequence of the act pleaded.’ ” (*Dobashi v. Goldstein, supra*, A120481, at p. *3.) Dobashi’s attorney in the underlying lawsuit acknowledged that Goldstein’s “pleadings supporting the demurrer [to the first amended complaint] were almost identical to those filed in support of his demurrer to the original complaint.”

Dobashi does not argue that her voluntary dismissal of the conversion and fraud causes of did not reflect her view of the likely success of Goldstein’s latest demurrer or

while an appeal from the judgment in the underlying action is pending.’ (5 *Witkin, Summary Cal. Law [(10th ed. 2005)] Torts*, § 499, p. 734.) So long as the appeal is pending, the plaintiff cannot truthfully allege a *termination* of the action, and a malicious prosecution action is ‘premature.’ [Citation.] ‘[P]rematurity’ is among the recognized ‘technical grounds’ of disposition for purposes of malicious prosecution liability. [Citation.]” (*Drummond*, at p. 457.)

fear that the court would grant Goldstein's motion for sanctions under section 128.7.⁹ Rather, she contends that because she voluntarily dismissed the fraud and conspiracy/conversion causes of action within the safe harbor provision of that statute, the dismissal was not on the merits. We disagree.

On the evidence presented, it seems almost certain that Dobashi dismissed the two causes of action due to her assessment that she not only would lose on the merits of the claims, but also would be subject to sanctions for violating subdivision (b) of section

⁹ Section 128.7 provides in relevant part:

“(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

“(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

“(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

“(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

“(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

“(c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

“(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.”

128.7 by presenting pleadings “primarily for an improper purpose” (§ 128.7, subd. (b)(1)), or by presenting claims that were not “warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law” (§ 128.7, subd. (b)(2)), or by making “allegations and other factual contentions” lacking adequate “evidentiary support” (§ 128.7, subd. (b)(3)). The central question is whether voluntary dismissal of those causes of action within the 21-day time limit of subdivision (c) of the statute not only provided her a safe harbor from sanctions, but also from a malicious prosecution action premised in part on those voluntarily dismissed causes of action.

“By mandating a 21-day safe harbor period to allow correction or withdrawal of an offending document, section 128.7 is designed to be remedial, not punitive. [Citation.] ‘ “The purpose of the safe harbor provisions is to permit an offending party to avoid sanctions by withdrawing the improper pleading during the safe harbor period. [Citation.] This permits a party to withdraw a questionable pleading without penalty, thus saving the court and the parties time and money litigating the pleadings as well as the sanctions request.” ’ [Citations.]” (*Li v. Majestic Industry Hills, LLC* (2009) 177 Cal.App.4th 585, 590-591.)

We agree with the trial court that the provision for a safe harbor from sanctions afforded by section 128.7 does not eviscerate the ability of a wrongfully sued party to bring a malicious prosecution action for the “grander scale of harm inflicted” by the underlying action. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162 [differentiating sanctions under § 128.7 from damages available for malicious prosecution].) “While court sanctions are available in many jurisdictions against frivolous claims and delaying tactics (e.g., Code Civ. Proc., § 128.7), such sanctions are meted out on a pleading-by-pleading and motion-by-motion basis. By their nature they do not address the grander scale of harm inflicted from a lawsuit seen to judgment.” (*Sierra Club Foundation v. Graham*, at p. 1162.)

In *Wright v. Ripley* (1998) 65 Cal.App.4th 1189 (*Wright*), the appellate court addressed the relationship between malicious prosecution actions and sanctions under

section 128.5, before enactment of section 128.7, and its accompanying safe harbor provision. The court's analysis is instructive. In *Wright*, the question was whether the summary denial of sanctions under section 128.5 in the underlying action on the ground that "bad faith" was not established, collaterally estopped the plaintiff in the later malicious prosecution action from proving the malice element of his claim. The appellate court held it did not. (*Wright*, at p. 1191.) The court reasoned: "The majority of sanction motions can be resolved summarily, and the party seeking sanctions should be encouraged to pursue that option rather than pushed into seeking a full evidentiary hearing." (*Id.* at p. 1194.) "Because the sanction proceeding is of a summary nature, it is not particularly burdensome, and the complaining party will still be entitled to only one opportunity to fully litigate the claim." (*Id.* at p. 1196; see also *Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 113-114 [failure of attorney disqualification motion does not estopp plaintiff from later prosecuting claim for breach of loyalty. "[I]f the party knows it may be penalized for initiating a motion to disqualify by being denied a later forum in which to fully develop the facts and litigate the issue head on, fewer motions will be made and an opportunity to prevent attorney breaches of duty of loyalty before they occur will be lost. From a practical standpoint, it makes more sense to have summary resolution in the ongoing proceeding and a full and fair litigation later if need be."].) A party should not be penalized for seeking section 128.7 sanctions by the knowledge that in doing so, he or she will be prevented from pursuing a later malicious prosecution action for damages suffered, should the party against whom sanctions are sought "fold" within the safe harbor period. Such a result would undermine not only malicious prosecution actions, but would likely result in fewer sanction motions under this section.

Moreover, "allowing a person denied sanctions to pursue a malicious prosecution case would not undermine the integrity of the judicial system by creating the possibility of inconsistent results. [S]ection 128.5 was not intended to replace suits for malicious prosecution. (*Crowley v. Katleman*[, *supra*,] 8 Cal.4th 666.) It serves a different purpose. Whereas a malicious prosecution action is intended to compensate the wronged

litigant, section 128.5 was enacted to broaden the courts' power to manage their calendars and expedite litigation. [Citation.] Thus, a court's decision whether to award sanctions may be influenced by factors extrinsic to a malicious prosecution case." (*Wright, supra*, 65 Cal.App.4th at p. 1195.) Unlike section 128.5, section 128.7 does not expressly state that the liability it imposes is "in addition to other liability imposed by law." (§ 128.5, subd. (e).) However, it does provide that the sanction imposed "shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated." (§ 128.7, subd. (d).) Such limitation is much narrower than that available in a malicious prosecution action, which seeks to fully compensate the wronged litigant for the injury suffered.

Finally, we are persuaded that had the Legislature intended to alter the tort of malicious prosecution by enacting the safe harbor provision of section 128.7, it would have said so clearly in the statute. (See *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1134, citing *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017, 1027, fn. 5 ["statutes 'in derogation of the common law rule . . . must be strictly construed'"].)

Dobashi benefitted from the safe harbor provision of section 128.7 by immunizing herself and her counsel from liability for sanctions under section 128.7 for the conversion and fraud claims she dismissed. She was not simultaneously granted safe harbor from damages for the "grander scale of harm inflicted" by the malicious prosecution of the action. (*Sierra Club Foundation v. Graham, supra*, 72 Cal.App.4th at p. 1162.)

The trial court did not err in concluding that Goldstein made a prima facie showing that the underlying action was terminated in his favor.

III. Malicious Prosecution-Probable Cause

Dobashi contends the court erred in determining Goldstein had made a prima facie showing that her underlying action was brought without probable cause. "Probable cause exists when a cause of action is, objectively speaking, legally tenable. [Citations.]" [Citation.] The claim need not be meritorious in fact, but only "arguably tenable . . ." (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1019 . . . (*Paiva*)). "The presence or absence of probable cause is viewed under an objective standard applied to

the facts upon which the defendant acted in prosecuting the prior case. [Citation.] The test . . . is whether any reasonable attorney would have thought the claim to be tenable. [Citation.]’ (*Id.* at p. 1018; see *id.* at p. 1019 [‘ “not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable” ’].) Thus ‘[a] litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.’ (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.)” (*Drummond, supra*, 176 Cal.App.4th at p. 453, second italics added; see *Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1402 [same]; *Padres, supra*, 114 Cal.App.4th at p. 517 [“The issue of whether probable cause exists presents a question of law for the court and requires a determination of whether any reasonable attorney would have considered the action legally tenable in light of the facts known to the underlying plaintiff . . . at the time the suit was filed. [Citations]”].)

“If there is a dispute concerning the facts or beliefs on which the former plaintiff acted, that question must be resolved by a trier of fact. [Citation.] It is a question of law for the court, however, whether the facts found support a tenable claim. [Citation.]” (*Drummond, supra*, 176 Cal.App.4th at p. 453.)

Consequently, the question here is whether the evidence of record would support a finding that when Dobashi instituted or maintained her malicious prosecution action, she either “relie[d] upon facts which [s]he ha[d] no reasonable cause to believe to be true,” or was pursuing a theory that was “untenable under the facts known to [her].” (*Sangster v. Paetkau, supra*, 68 Cal.App.4th at pp. 164-165; accord, *Drummond, supra*, 176 Cal.App.4th at p. 453.) We think a jury could easily conclude Dobashi did not believe and had no reasonable cause to believe that Goldstein was complicit in the theft of her jewelry when she brought suit. (We are not saying that a jury *must* so conclude, but rather, that the pleadings and the evidence presented by Goldstein made a *prima facie* showing that these claims were brought without probable cause and were untenable on the facts known to Dobashi.)

A. Evidence That Dobashi Relied on Facts She Had No Reasonable Cause to Believe Were True

Goldstein presented evidence that, at the time Dobashi filed the lawsuit accusing him of theft of her jewelry and complicity with Osuna in the theft, Dobashi did not think that Goldstein had stolen her jewelry, had planned to steal her jewelry, or had conspired with Osuna to steal the jewelry. Nevertheless, she reported the theft of four pieces of jewelry to the police and sued Goldstein for the asserted value of that jewelry, alleging as to all causes of action of her original complaint that, “Goldstein knew from the beginning that Osuna had entered Plaintiff’s home and taken the jewelry because he either provided the key to Osuna or left it in a location where he knew she would find it. . . . In fact, Goldstein cooperated with Osuna to steal Plaintiff’s jewelry and therefore became a co-actor with Osuna in carrying out the theft.” In her first amended complaint, Dobashi continued to allege that Goldstein either provided the key to Osuna or negligently left it in a location where he knew she would find it and use it to harm Dobashi. She further alleged “the theft of her jewelry was the result of a conspiracy between Osuna and Goldstein,” that Goldstein “knew Osuna was likely to steal [Dobashi’s] jewelry given the opportunity,” and that he “conspired with Osuna to steal [the] jewelry”

Dobashi’s claim that she did not “really” read the lawsuit before it was filed and that she had “tried to read them but I don’t understand them so I don’t,” did not establish those facts as undisputed. A jury could disbelieve this statement and could believe that Dobashi did know her complaints accused Goldstein variously of theft, of complicity in the theft and of conspiracy with Osuna in the theft, where Dobashi either knew or had reason to know such allegations were false. Further, a jury could also disbelieve her claim that she told her attorneys “all the truthful things as I knew it.”

B. Advice of Counsel

Our conclusion that a jury could find Dobashi not credible as to her claims that she told her attorneys the truth and that she did not “really” read the complaints also compels our rejection of her claim to have established her advice of counsel defense.

“Reliance on the advice of counsel may be a good defense, provided there was a full disclosure of the facts to the attorney, and a resulting honest belief in the guilt of the injured party. [Citations.] [¶] The defendant must have disclosed all pertinent and material facts within his or her knowledge. [Citations.]” (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 482, p. 707; see *Bertero, supra*, 13 Cal.3d 43, 53-55.) “The burden of proving this affirmative defense is, of course, on the party seeking to benefit by it. [Citations.]” (*Bertero*, at p. 54.) Whether the defendant disclosed all pertinent and material facts within her knowledge is a question of fact.

The jury could disbelieve Dobashi’s statement that she told the “true facts” to her counsel, given the conflict between her deposition admission that she did not believe Goldstein had taken her jewelry or had conspired with Osuna to do so and the allegations of the complaints that followed. Moreover, the phrasing of declarations by Dobashi and attorney Bourdon, submitted in support of her anti-SLAPP motion, may be described as “artful” on this point. She avers that “[i]n the underlying case, *Dobashi v. Goldstein*, I told to both my attorneys all the facts relating to the above described events before they filed the complaint and amended complaints.” Bourdon declared that, “[b]ased on the facts that Dobashi told me, I believe that Dobashi had viable causes of action against Goldstein as set forth in the original complaint and each of the amended complaints. As to each of the amended complaints I filed on behalf of Dobashi, I advised Dobashi that I would file that complaint and, in effect, conveyed to her that the complaint had merit.” Missing from both declarations is any description of *what* Dobashi told either attorney Miller or Bourdon with regard to Goldstein’s role in converting or conspiring with Osuna to convert the jewelry.

C. *Goldstein’s Purported Concession*

Dobashi relies upon the asserted concession of Goldstein in his declaration and motion opposing the anti-SLAPP motion that she told the true facts to her lawyers. Goldstein stated in his declaration, “I was astounded that Ms. Dobashi readily admitted in her deposition testimony that she filed a lawsuit against me even though she did not think I collaborated or conspired in any way with the theft of her jewelry. Ms. Dobashi also

admitted that she told her lawyers that I did not steal her jewelry or conspire with the thief to steal it, and yet they filed several versions of a complaint against me accusing me of those very things.” In his memorandum opposing the anti-SLAPP motion, Goldstein argued: “Ms. Dobashi readily admitted that she filed suit against Mr. Goldstein even though she did not believe he stole her jewelry or conspired with Ms. Osuna to steal it. [Citation.] Ms. Dobashi said she told her attorneys that Mr. Goldstein did not steal or conspire to steal her jewelry, but she did nothing to stop her lawyers from filing complaints making those slanderous allegations; she didn’t even read the complaints. [Citations.]”

We note that the advice of counsel defense was first raised by Dobashi in her reply to Goldstein’s opposition to the anti-SLAPP motion. Assuming the defense was timely raised, we believe it would be unfair to sandbag Goldstein by preventing him from arguing other inferences raised by Dobashi’s testimony, where neither Dobashi nor her attorneys specified what “truth” was told by her to her attorneys.

In any event, on the facts presented, it was for the trier of fact to determine whether Dobashi told her attorneys that Goldstein did not take her jewelry and did not conspire with Osuna to do so, and whether or not she read and understood her complaints. In the context of an anti-SLAPP motion, “the defendant [moving party] also generally bears the burden of proving its affirmative defenses. (Evid. Code, § 500; [citation].) Thus, although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. [Citation.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, supra*, 133 Cal.App.4th 658, 676.) The trier of fact could determine on the evidence presented that Dobashi failed to establish her advice of counsel defense.

D. Other Probable Cause Contentions

1. Conversion and conspiracy to convert. Dobashi argues that she showed probable cause for the conversion and conspiracy to convert causes of action against

Goldstein by presenting evidence that he returned some of her jewelry and that he told Dobashi he knew where the rest of her jewelry was, but could not tell her, and that he initially denied that Osuna had taken the jewelry. The foundation for a conversion claim “ ‘ “rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. . . .” ’ [Citation.] Not every failure to deliver property to the rightful owner constitutes a conversion. [Citation.] ‘To establish a conversion, it is incumbent upon the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of the property.’ [Citation.]” (*Spates v. Dameron Hosp. Assn.* (2003) 114 Cal.App.4th 208, 222.)

We have previously determined that questions of fact regarding what Dobashi knew regarding Goldstein’s alleged involvement could lead a jury to determine that she knew he neither stole her jewelry nor conspired nor cooperated with Osuna in doing so. In light of this knowledge, Dobashi’s allegations that Goldstein told her he knew where her jewelry was and that he recovered and returned three of the four pieces she had reported lost (the fourth piece had been misplaced by Dobashi) do not as a matter of law establish probable cause for her theft, conversion and fraud claims against him.

Moreover, as recognized in *Simonian, supra*, 27 Cal.App.4th at page 781, “ ‘a refusal to deliver personal property is not a conversion unless the party has it in his power at the time to deliver the goods. [Citations.]’ ” Consistent with this rule, the trial court sustained the demurrer to Dobashi’s original conversion claim on grounds that Dobashi “fail[ed] to establish that [Goldstein] had knowledge of or agreed to the theft of the jewelry.” The holding of *Simonian, supra*, 27 Cal.App.4th 773, 774, that a gratuitous promise to help a creditor-friend collect a debt from a third party is unenforceable as a matter of law, reinforces our conclusion that on the facts a jury could find were known to Dobashi when suit was initiated and maintained, no reasonable attorney would have believed she had a tenable claim for conversion or conspiracy to convert.

2. Fraud. Dobashi maintains she had probable cause for her fraud causes of action where Goldstein did not dispute specific factual allegations contained in the fraud claim, that is, that he lied to Dobashi about returning or replacing her jewelry. ~(AOB 39)~ We disagree. Dobashi’s fraud claim, like the negligent misrepresentation claim in *Simonian, supra*, 27 Cal.App.4th 773, failed because the alleged “breach of promise to see to the return of property is not actionable in contract, and calling that breach a tort does not make it one. In essence, the negligent misrepresentation claim is identical to the failed breach of contract claims because the information which plaintiff relied upon was nothing other than [the] gratuitous promise to do what he could about seeing to the return of [her] property. Because no legal duty arose as a result of the gratuitous promise, any failure to see to the return of property is not recognizable as a tort cause of action.” (*Id.* at p. 783.) Moreover, before Dobashi initiated her action against him, Goldstein had recovered and returned to Dobashi three of the four pieces that she had reported to police and the fourth piece she found after she had misplaced it.

3. Negligence and breach of contract. Dobashi also argues that the trial court’s sustaining of demurrer to her negligence and breach of contract causes of action did not demonstrate she lacked probable cause for those claims.

We agree that the sustaining of a demurrer does not *necessarily* demonstrate the underlying claim was brought without probable cause. However, the bases upon which the demurrers were sustained may provide some evidence on the question.

(i) **Negligence cause of action.** The trial court sustained the demurrer to the negligence cause of action on the basis that “ ‘Goldstein’s conduct did not create or increase the risk of harm to Dobashi.’ ” (*Dobashi v. Goldstein, supra*, A120481, p.* 3.) The Court of Appeal affirmed on the ground that *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451, upon which the trial court relied, found there was no duty as a matter of law in a similar situation. (*Dobashi v. Goldstein*, at pp. *7-8.) The appellate court concluded as a matter of law that “Goldstein had no duty to control Osuna’s conduct.

There were no special circumstances pleaded which would impose such a duty on Goldstein” (*Id.* at p. *8.) Goldstein has made a prima facie showing that the negligence cause of action was brought without probable cause.

(ii) ***Breach of contract cause of action and denial of sanctions.*** Dobashi next contends that the trial court’s refusal to award sanctions under section 128.7 and the Court of Appeal’s denial of sanctions on appeal established those causes of action were not frivolous and, therefore, that she had probable cause to pursue the breach of contract and negligence causes of action.¹⁰

Dobashi cites to the opinion by the appellate court in the underlying case, holding that Goldstein had failed to demonstrate the trial court abused its discretion in refusing to award sanctions in the underlying action. In so holding, the appellate court recognized that a party may make a nonfrivolous argument for the extension, modification or reversal of existing law without being subject to sanctions. (*Dobashi v. Goldstein, supra*, A120481, p. *9.) The appellate court reasoned that the trial court’s refusal, “erroneous or not,” to sustain the demurrer specifically on the basis of *Simonian, supra*, 27 Cal.App.4th 773, and its grant of leave to amend to allege damages, was “a ‘reliable indicator’ that Dobashi’s first amended complaint was not so frivolous as to merit sanctions. [Citations.]” (*Ibid.*) Dobashi relies on this statement as support for her argument that she had probable cause to bring the breach of contract cause of action.

As we have previously stated, the denial of sanctions, either at the trial or appellate level, is no bar to a malicious prosecution action. (See *Wright, supra*, 65 Cal.App.4th at p. 1194; *Crowley v. Katleman, supra*, 8 Cal.4th 666.) The sanctions statutes and the malicious prosecution action serve different purposes—“a court’s decision whether to

¹⁰ In her reply brief, Dobashi somewhat confusingly maintains she never argued that the trial court’s denial of sanctions *established* probable cause, but rather “that the Court of Appeal’s denial of Goldstein’s motion for sanctions was evidence of probable cause.”

award sanctions may be influenced by factors extrinsic to a malicious prosecution case.” (*Wright*, at p. 1195.)¹¹ Nor do we agree with Dobashi that the analysis of *Wright* and *Crowley v. Katleman* are limited to the malice element of the tort. Rather, the refusal of these courts to preclude a malicious prosecution action solely on the basis of the court’s denial of a sanctions award in the underlying litigation appears equally applicable to all elements of the malicious prosecution action.

However, the Court of Appeal’s “ ‘reliable indicator’ ” comment on appeal of the *Dobashi v. Goldstein* action provides some support for Dobashi’s contention that the breach of contract cause of action was not so frivolous as to merit sanctions. Although we are tempted to conclude as a matter of law that, in view of *Simonian, supra*, 27 Cal.App.4th at page 780 and *Tiffany, supra*, 202 Cal. 778, 782, no reasonable attorney would have thought the claim tenable, we are reminded that, “[p]robable 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. ‘[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637), i.e., probable cause exists if “any reasonable attorney would have thought the claim tenable.” ([*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863,] 886.) This rather lenient standard for bringing a civil action reflects “the important public policy of avoiding the chilling of novel or debatable legal claims.” (*Id.* at p. 885.) Attorneys and litigants . . . “ ‘have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win’ ” (*Ibid.*, quoting *In re Marriage of Flaherty, supra*, at p. 650.) Only those actions that “ ‘any reasonable attorney would agree [are] totally and completely without merit’ ” may form the basis for a malicious prosecution suit. (*Ibid.*)’ (*Wilson [v. Parker, Covert &*

¹¹ Furthermore, at the time the Court of Appeal affirmed the trial court’s denial of sanctions, Dobashi had not yet testified in her deposition that when she brought suit, she did not believe Goldstein had been complicit in the theft of her jewelry.

Chidester (2002)] 28 Cal.4th [811,] 817 [abrogated by statute on another point of law as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 545-550].)” (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047-1048.) The Court of Appeal’s comment in the prior action that the trial court’s denial of sanctions, its failure to sustain the demurrer to the breach of contract cause of action of the first amended complaint specifically on the basis of *Simonian*, and its grant of leave to amend was “a ‘reliable indicator’ that Dobashi’s first amended complaint was not so frivolous as to merit sanctions,” prevents us from concluding as a matter of law that the breach of contract cause of action was brought without probable cause.

Nevertheless, our determination that the breach of contract cause of action did not lack probable cause as a matter of law does not mean the court erred in denying Dobashi’s anti-SLAPP motion and allowing Goldstein’s malicious prosecution action to proceed. A suit for malicious prosecution lies for bringing an action charging multiple grounds of liability when *some but not all* of those grounds were asserted with malice and without probable cause. (*Crowley v. Katleman, supra*, 8 Cal.4th at pp. 671, 678-679; *Bertero, supra*, 13 Cal.3d at p. 57.)

IV. Malicious Prosecution–Malice

Dobashi contends that Goldstein failed to present evidence of malice in filing any of her causes of action. We disagree.

“For purposes of a malicious prosecution tort, malice relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 874.)” (*Padres, supra*, 114 Cal.App.4th at p. 522.) To establish malice, Goldstein is required to show that Dobashi harbored ill will toward him or that she had an improper motive in bringing the prior action. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 204, citing *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 633, overruled on other grounds in *Zamos v. Stroud, supra*, 32 Cal.4th 958, 973 and *Reid v. Google* (2010) 50 Cal.4th 512, 532, fn. 7;

Padres, at p. 522.) We must determine whether Goldstein has presented sufficient evidence to establish a prima facie showing of malice by a preponderance of evidence. (*Padres*, at p. 522.)

“Malice is usually proved by circumstantial evidence. (See *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 875.) Although a lack of probable cause, standing alone, does not support an inference of malice, malice may still be inferred when a party knowingly brings an action without probable cause. [Citation.]” (*Padres*, *supra*, 114 Cal.App.4th at p. 522.)

Here, Goldstein has submitted evidence from which a reasonable person could infer that Dobashi acted with malice in filing her action against him. We have determined that Goldstein made a prima facie case that all causes of action, except for the breach of contract claim, were brought against him without probable cause. Dobashi admitted in her deposition that she did not believe he stole her jewelry or conspired with the thief to steal it. Nevertheless, she still filed multiple complaints against him for property theft and conspiracy to convert the property, having no reason to believe they could be held valid. The initial pleadings she filed referred to her romantic relationship with Goldstein and to Goldstein’s continuing to maintain a relationship with Osuna while dating Dobashi. Further, Dobashi testified that Goldstein and she broke up initially because he defended Osuna. A year later he wanted a rapprochement and in order to do so, admitted that Osuna had stolen the jewelry and he promised to return it or to compensate her for it. Although he returned three pieces of jewelry, she sued him because he “didn’t do enough.” The foregoing provides ample circumstantial evidence that the lawsuit was brought against Goldstein primarily because of Dobashi’s hostility and ill will against him, arising out of the breakup of their romantic relationship and his ongoing relationship with Osuna, whom she knew had stolen her jewelry.

In addition, Dobashi admitted she sought to recover \$250,000 from Goldstein to settle or dismiss her lawsuit against him, even though she knew before filing her suit that

he had not stolen her jewelry, that he had in fact *recovered* three of the four pieces of jewelry she had reported as stolen to the San Francisco Police Department, and that she had found the fourth piece, a charm bracelet she valued at \$15,000, at the back of her jewelry drawer. Evidence was also presented that Dobashi grossly overvalued the jewelry in the police report and then sued Goldstein for more than the value she had reported to the police.¹² She filed the police report because she wanted to prove to Goldstein that she was serious about pursuing this case. She claimed she had failed to report all the missing jewelry because she wanted the police report “to be an impetus for [Goldstein] to get the jewelry and return it” to her. ~(CT 317)~ The actual value of the jewelry she reported missing was significantly less than the value she reported to the police and much less than the \$250,000 that she claimed in her action against Goldstein.

Taken together, Goldstein has satisfied his burden of making a prima facie showing that Dobashi brought the entire lawsuit and all the causes of action of that suit with malice.

CONCLUSION

The trial court did not err in denying Dobashi’s anti-SLAPP motion on the malicious prosecution cause of action, as Goldstein made a sufficient prima facie showing of a probability of prevailing on his malicious prosecution claim.

DISPOSITION

The order of the superior court denying Dobashi’s special motion to strike the malicious prosecution cause of action is affirmed. Goldstein shall recover his costs on this appeal.

¹² She admitted that she lied to the police that the yellow diamond ring she lost was worth \$70,000, when it was actually worth less than \$1,000. She valued a square cut diamond ring, worth approximately \$200, at \$20,000 in the police report, and a ruby ring worth about \$200, she reported as worth \$18,000.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.