

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID CUCCIA et al.,
Plaintiffs and Respondents,
v.
GILBERT L. PURCELL et al.,
Defendants and Appellants

A137598

(Marin County
Super. Ct. No. CIV-1201675)

Defendants Gilbert L. Purcell, Gilbert L. Purcell, a Law Corporation, and Roxanne Sheridan, appeal from the denial of their special motion to strike (Code Civ. Proc., § 425.16)¹ the malicious prosecution action brought against them by plaintiffs David Cuccia and Stacy Cuccia.² The parties agree that the action satisfies the first prong of the analysis under section 425.16, as it arises from conduct in furtherance of the right of petition or free speech, but disagree as to whether plaintiffs carried their burden of establishing their ability to prevail. Finding plaintiffs have satisfied their burden, we conclude the motion was properly denied and affirm.

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

² Inasmuch as plaintiffs David Cuccia and Stacy Cuccia have the same last name, we shall refer to plaintiff Stacy Cuccia by her first name for purposes of clarity and intend no disrespect.

I. BACKGROUND

A. *Introductory Facts*

In October 2007, Sausalito resident Roxanne Sheridan hired David Cuccia to manage the Main Street Café (MSC), a small restaurant in Angels Camp, California. Pursuant to the terms of the management agreement between Sheridan and Cuccia, Cuccia was to be paid on a weekly basis at the rate of \$35 per hour; any overtime worked would also be at the rate \$35 per hour.

Gilbert Purcell is a practicing attorney doing business as Gilbert L. Purcell, A Law Corporation (GPC). Purcell is partner at the Brayton Purcell law firm. Purcell was an investor and financial consultant for MSC. According to Sheridan, Cuccia “agreed to be paid” by GPC “since . . . Purcell made the financial decisions for [MSC]”

Cuccia wrote down his hours on MSC guest checks on a daily basis and these time tallies would be forwarded to Sheridan or Purcell. On at least one occasion, Cuccia emailed Purcell with his hours. Purcell paid Cuccia by checks drawn from GPC’s checking account.

Initially, the parties’ business arrangement appeared to be functioning quite well. Cuccia made various improvements at MSC, including the installation of a high-end, computerized ice-cream machine that was leased to MSC by his wife, Stacy. During his tenure, Cuccia was featured in the local newspaper and MSC was named the “Best Breakfast” in Calaveras County. Purcell was pleased with Cuccia’s work at MSC, writing in a January 2008 email: “I very much appreciate good progress in making the diner economically viable and your efforts to turn things around. . . . [¶] I have asked for a daily email from you that simply but accurately reports the total daily sales revenue, daily costs . . . so that a daily profit or loss figure/estimate gets reported to me. . . .”

According to Cuccia, he was not paid on a weekly basis, despite the provision in the management agreement requiring payment at such intervals. Nevertheless, Cuccia “had no problem being paid monthly or twice monthly,” so long as he was paid in time to cover his mortgage. Cuccia averred that by the beginning of April 2008, he had not received payment for his March hours. According to Cuccia, Sheridan authorized him to

pay himself from the MSC account and to deduct \$400 as payment for a television Cuccia had purchased from Sheridan. As such, Cuccia wrote a check to himself in the amount of \$3,342.50 to cover the balance of his March 2008 wages.

Cuccia further claimed he was not paid for the hours he worked in April 2008 and Sheridan failed to respond to his repeated requests for payment. Increasingly frustrated by the situation, Cuccia told Sheridan that he would stop working at MSC if she did not pay him. On May 19, 2008, Sheridan told Cuccia to go home and come back in a few days. When Cuccia returned to MSC, he discovered that he had been replaced as general manager and that the new person was being paid half of what Cuccia had earned.

Thereafter, Cuccia filed a claim for unpaid wages in the amount of \$6,475 and \$330 in overtime with the state Labor Commission. The hearing before the Labor Commission took place on April 28, 2009. Prior to entering the hearing, Purcell allegedly approached Cuccia and offered him \$3,000 to settle and dismiss the case. Purcell allegedly told Cuccia that if he did not accept the \$3,000 and dismiss his claim, he would make Cuccia “ ‘sorry.’ ”

The Labor Commission found in Cuccia’s favor and awarded him \$4,341.95 for back wages and overtime.

B. *Small Claims Action*

On April 24, 2009, Purcell filed a small claims action on his own behalf against Cuccia in Marin County Superior County for malicious prosecution, seeking \$4,079.50. The superior court dismissed Purcell’s claim on venue grounds, noting that Cuccia resided in Calaveras County.

C. *Marin Action*

On April 24, 2009, Purcell also filed a civil suit in Marin County (Marin Action), naming Sheridan, doing business as MSC, as plaintiff and Cuccia and Stacy as defendants; neither Purcell, GPC, nor Brayton Purcell were named in the Marin Action. The complaint alleged seven causes of action, to wit: 1) breach of contract (Cuccia); 2) account stated (Cuccia and Stacy); 3) overpayment on account (Cuccia); 4) fraud and

deceit (Cuccia and Stacy); 5) conversion (Cuccia and Stacy); 6) negligence (Cuccia and Stacy); and 7) injury to prospective economic advantage (Cuccia).

The gist of the Marin Action was that Cuccia allegedly used and sold drugs at MSC, falsified time records, stole MSC equipment, wrote and cashed unauthorized checks for himself and his wife, made sexual propositions and harassed MSC servers and employees, misrepresented his background and experience, failed to properly discharge his duties as manager, and failed to keep accurate books and records. The Marin Action also alleged that Cuccia failed to pay for a television and heat lamp he took from MSC, and the Cuccias took payments for providing an ice cream machine that did not work, and for spending time providing training for MSC personnel that Stacy allegedly never provided.

The Marin Action proceeded as a bench trial. Following the presentation of Sheridan's case, the court granted Stacy's nonsuit motion, finding "there was absolutely no evidence of any wrongdoing by Mrs. Cuccia with respect to [Sheridan] or [Sheridan's] little restaurant business in Angel's Camp." The court then ordered judgment in Stacy's favor, with costs. The court denied Cuccia's nonsuit motion as to the first (breach of contract), third (overpayment), and fifth (conversion) causes of action, finding there was enough evidence presented to require Cuccia to put on a defense as to those claims. The court, however, granted Cuccia's nonsuit motion as to the second (account stated), fourth (fraud and deceit), sixth (negligence), and seventh causes of action (injury to prospective economic advantage). In so ruling, the court explained there was no evidence of any account stated or of any negligence. The court further found "there was no evidence of any fraud or deceit by [] Cuccia in this case," explaining that "[t]here was not even an effort to show that." As to the claim of injury to prospective economic advantage, the court explained: "there was no evidence, indeed, the evidence was to the contrary, that this restaurant was losing money when [] Cuccia came on board and continued to lose money at all times until he left."

The trial proceeded as to the three remaining causes of action against Cuccia for breach of contract, overpayment on account, and conversion. At the conclusion of the

defense case, the court entered judgment for Cuccia and awarded him costs. In closing remarks, the trial judge stated: “I don’t know why this lawsuit wasn’t brought in Small Claims Court. I think it’s very sad when people are put to the defense of a lawsuit, especially when it’s brought by an attorney and the attorney’s close friend. I really have to frown upon that, and I’m sorry that there isn’t an attorney—an attorney’s fees clause in this contract that Miss Sheridan wrote.”

Judgment was entered for the Cuccias on April 22, 2010.

D. Malicious Prosecution Action and Special Motion to Strike

On April 6, 2012, the Cuccias filed the instant malicious prosecution action against Sheridan, Purcell, GPC, and Brayton Purcell. Defendants filed a special motion to strike pursuant to section 425.16, arguing, among other things that the claim against attorney defendants Purcell, GPC, and Brayton Purcell was barred by the statute of limitations (§ 340.6).

1. Evidence in Support of Special Motion to Strike

Included with the motion was a declaration from Purcell, in which he attested that he reviewed the evidence supporting Sheridan’s potential claims against the Cuccias prior to filing the Marin Action. Based on his “independent analysis and investigation,” Sheridan and MSC commenced the Marin Action against the Cuccias. In her declaration, Sheridan averred that Cuccia was “never authorized to issue MSC checks to himself for services rendered.” She further stated that in spring 2008, certain of MSC’s vendors and employees told her that there were “ ‘irregularities’ ” with regard to Cuccia’s employment and his handling of MSC’s business. Sheridan further averred that upon investigation, she learned that “certain MSC vendor accounts were months in arrears—in the case of SERVCO Foodservice, Inc., as much as \$13,000 dollars—and that MSC equipment and inventory had been misappropriated” by the Cuccias. According to Sheridan, the misappropriated items included, but were not limited to, a flat-screen television and heat lamps the Cuccias took in exchange for work they never actually performed. Sheridan stated that Stacy’s “ice cream machine was never in working order, and she failed to provide any training to MSC employees regarding its operation.”

Sheridan further attested that she “learned that [] Cuccia was often not present at MSC as he had agreed to be; [] Cuccia often called in sick and showed up late; and that his co-workers were concerned he was selling and using illegal drugs at MSC.” Sheridan became concerned Cuccia was not honoring the management contract and was fraudulently submitting invoices for time not worked. As a result, she requested that computer consultant Jason Armstrong conduct a forensic examination of the computer system in use at MSC. Following his examination, Armstrong determined that Cuccia had accessed MSC’s time-keeping software and “intentionally altered and corrupted entries therein to create the impression he and/or his wife had worked hours they truly had not.”

In his declaration in support of defendants’ motion to strike, Armstrong attested that he analyzed “the time card punches” at MSC and determined that Cuccia “would often punch in during the early morning, punch out 1.5 to 2 hours later, then come back later in the day or the next morning, and edit his previous time card punches to create the impression he was onsite longer than he really was.” Armstrong further stated that Cuccia “did this with increasing frequency during his tenure at MSC” and also “edited other employee’s time card punches in a similarly deceptive fashion.”

Armstrong further averred that, “as part of [his] job duties at MSC, [he] was also familiar with the ice cream machine Stacy Cuccia agreed to provide and service.” Armstrong “never once saw that ice cream machine working” and to his “knowledge,” Stacy “never trained any MSC employees how to use it, for the simple fact it was never turned on.”

Also included with defendants’ special motion to strike was a declaration from former MSC employee Caroline Kuca. In her declaration, Kuca attested that she “frequently worked” with Cuccia at MSC, and had the opportunity to observe him in the restaurant. Kuca represented that, “[o]n multiple occasions, [she] witnessed [] Cuccia sell marijuana and prescription pain killers to MSC employees on MSC’s premises.” She further attested that Cuccia “frequently failed to show up for work in the morning.” According to Kuca, Cuccia would call into the restaurant and ask the employees to cover

for him if Sheridan called. Kuca averred that Cuccia would often tell the employees that they “ ‘should help him’ ” if they “ ‘liked [their] job.’ ”

2. *Evidence in Opposition to Special Motion to Strike*

The Cuccias filed an opposition to anti-SLAPP motion, each submitting lengthy declarations refuting the factual allegations in the Marin Action.

In his declaration, Cuccia attested that MSC was “losing about \$20,000 per month” at the time he started. Additionally, MSC “had outstanding past-due invoices of more than \$20,000, owed primarily to its main food supplier, Servco.” Cuccia explained that Armstrong had set up the computer system at MSC and he assigned everyone a numeric code to enter in the hours they worked. Cuccia “never clocked into the computer” to log his own hours, but he used his code to adjust employee time cards. Cuccia further stated that Armstrong had also installed a digital camera system at MSC “to prevent theft, and this camera viewed everything that happened” at MSC. Cuccia averred that he had no access to the video surveillance camera. According to Cuccia, Armstrong only worked for a few days at MSC.

Cuccia had reviewed Kuca’s declaration and vehemently challenged the veracity of her assertions, stating that the declaration was “absolutely false in its assertion that she saw me sell marijuana and pain killers at [MSC]. I never sold drugs at [MSC], or anywhere else for that matter, and . . . I never used drugs, or even drank alcohol because of my prior illness. If I had been selling drugs at [MSC] it would have been seen by the security camera that Armstrong installed.” Cuccia similarly challenged Kuca’s statements that he failed to show up for work in the mornings, or that he asked employees to cover for him. Cuccia averred that these accusations were “simply false,” adding that “[t]hose things never occurred.”

Cuccia also refuted the allegations that he manipulated his time records on the computer, explaining that it was his “standard management practice[.]” not to enter his hours on the computer where other employees might have access. Rather, he wrote down his hours on guest checks daily, and submitted the guest checks to Sheridan or to Purcell

for payment. Attached to his declaration was a copy of some of the guest checks noting his hours.

Cuccia explained that his wife Stacy owned a very high-end, computerized ice-cream machine that she purchased when she owned and operated another business. The machine cost about \$21,000, and Stacy purchased it through a lease-to-own program in which she paid \$450 per month. Cuccia averred that he entered into a verbal agreement with Sheridan in which MSC would pay \$300 per month to rent the ice cream machine. Cuccia stated that the ice cream machine was working and fully functional at all relevant times and he advertised in the local media that MSC had the “ ‘only soft serve ice cream and flavor burst system in the County.’ ” Attached to his declaration were copies of some of these advertisements.

Cuccia stated that when he started working at MSC, there was a room next to the dining room with a bar, a pool table, television, and two heating lamps. He explained that since MSC did not have a liquor license, the pool table room did not generate any substantial revenue. As such, Cuccia decided to turn the room into a business meeting room or party room to try and attract more business customers during the lunch hour and to generate other business. As part of this transformation, Sheridan asked him to get rid of the pool table and the television set. Cuccia sold the pool table to a local chef and gave the proceeds to Sheridan. Cuccia then asked Sheridan if he could buy the television set. She agreed, and they negotiated the price of \$400. According to Cuccia, Sheridan also threw in the heating lamps for the same price.

Cuccia attested that, by all accounts, his turn-around efforts were very successful and both Sheridan and Purcell were pleased with his progress at MSC. Under his management, MSC was named the “Best Breakfast” in Calaveras County for both 2007 and 2008. Moreover, by January 2008 MSC went from losing \$20,000 per month to losing only \$1,000 per month, and the monthly outstanding past-due invoices were gradually being reduced. As such, Cuccia averred that Sheridan’s declaration stating that she suddenly learned that MSC was in arrears to Servco in the amount of \$13,000 was “false.”

Cuccia averred that he had never been paid on a weekly basis, despite the parties' agreement requiring Cuccia to be paid weekly. Cuccia explained that he "had no problem being paid monthly or twice monthly" so long as he was paid in time to cover his home mortgage payment. However, by the beginning of April 2008, Cuccia had not received payment for his March hours, and his mortgage payment was coming due. He spoke to Sheridan and asked if she was coming down anytime soon to pay him, and she told him "to go ahead and write out a check to [himself] from the [MSC] account." She also told him to deduct \$400 as payment for the television that he purchased from her, and to add \$50 for a cash advance that he had given to an MSC employee. Cuccia averred that Sheridan authorized him to pay himself \$1,200 for his hours; he, thus, deducted \$400 from \$1,200, and added \$50, and wrote himself a check for \$850.

According to Cuccia, Sheridan later told him to write himself a check for the balance of his March salary, and he wrote a check for \$3,342.50. Cuccia, however, was not paid for his hours in April, and Sheridan did not respond to his requests for payment.

Cuccia averred that Purcell told him to dismiss his labor commission claims or else he would make Cuccia " 'sorry.' "

In her declaration, Stacy attested that she had purchased a very high-end ice cream machine that made soft-serve, flavor burst ice cream. She explained that the machine dispenses soft-serve ice cream, while injecting various flavors into the ice cream. The machine was purchased in her name and cost about \$21,000. She owned it through a lease-to-own program, in which she paid \$450 per month for the machine.

Stacy averred that her husband had entered into an agreement with Sheridan to lease the ice cream machine at MSC for \$300 per month. Stacy declared that she knew that the machine "was always fully operational during the time" Cuccia worked at MSC. In fact, she saw the many advertisements that Cuccia placed in the local papers advertising MSC as having the only soft-serve, flavor burst ice cream in Calaveras County.

Stacy further attested that she went to MSC "several times to teach the employees how to operate, clean and maintain the ice cream maker." She explained that the training

“was important not only so that they could sell the ice cream, but also because the machine is very expensive, and had to make sure that it was operated and maintained properly so that it was kept in good working order and would not lose its value.” Stacy averred that she trained the following MSC employees: “Ariel Seagraves, Caroline Kuca, and Melissa Louden.”

Stacy declared that other than payments for the lease of the ice cream machine, she never worked at MSC, “never submitted any hours, and was never paid for any work at [MSC].” Stacy averred that neither she nor Cuccia “ever st[ole] any food or anything else from [MSC].” She further attested that Cuccia told her Sheridan “was selling him the television set at [MSC] for \$400.”

Stacy also attested that she accompanied Cuccia to the Labor Board hearing. She was “present and witnessed [] Purcell threaten David that, if he didn’t agree to take \$3,000 and drop his claim, he would make David ‘sorry.’ ”

Stacy reviewed Kuca’s declaration in which she claimed that “she saw David selling marijuana and prescription drugs at [MSC].” Stacy averred that she knew Cuccia “doesn’t use or sell drugs.”

3. *Trial Court Ruling on Special Motion to Strike*

The court granted the anti-SLAPP motion as to Brayton Purcell, but denied the motion as to Sheridan, Purcell, and GPC. In finding that the malicious prosecution action was timely filed against Purcell and GPC, the court explained that “[l]ooking to the principal purpose of the cause of action, it appears that [p]laintiffs named Purcell and GPC as defendants because of their involvement in a *business capacity*—not because of their role as attorneys for . . . Sheridan The evidence on this motion allows a reasonable inference that Purcell and GPC would have been ‘actively instrumental’ in the commencement of the action, through their roles as financial partners with Sheridan and decision-makers in the business.” (Italics added.)

As to the merits, the trial court ruled as follows: “At minimum, [p]laintiffs showed that [d]efendants lacked probable cause for their allegations that Mrs. Cuccia had aided and abetted Cuccia’s conversion of property, equipment and monies, and that

Cuccia had fraudulently obtained such property, equipment and monies. . . . Presumably [d]efendants had ready access to reliable information as to whether the ice cream machine was operating, and the Cuccias' evidence shows that it *was* operating and that the benefits more than offset the cost. This evidence is not undermined by conclusory statements in Sheridan's declaration . . . or the declaration of a computer consultant that he personally never saw the machine in operation and had no personal knowledge of employees being trained Further, Cuccia's declaration shows that he bought the subject television and heating lamps from Sheridan, and explains the amount of the checks questioned by [d]efendants If Cuccia's statements are true (as the court must assume on this motion), Sheridan would have lacked probable cause to allege that Cuccia converted the television and lamps, and fraudulently issued the two checks. One can presume that Sheridan had knowledge of how Cuccia acquired the television and lamps, and why he wrote the checks."

The trial court further ruled that although the Marin Action "included serious allegations that Cuccia had sold drugs on the premises and sexually propositioned and harassed employees," defendants "never attempt to justify these allegations." Instead, in the declarations purporting to establish probable cause, defendants failed to mention sexual propositions or harassment, and Cuccia denied any such misconduct. The court determined that Kuca's declaration offered "no facts as to support her conclusory statement that she 'witnessed' drug sales by Cuccia, and never mention[ed] what information Kuca passed to Sheridan." The court noted that "[e]ven if Kuca had conveyed her observations to Sheridan, Cuccia's declaration indicates that Sheridan had a readily available means of investigating and confirming Kuca's conclusions before filing the complaint. It further indicates that security camera tapes would have confirmed the lack of any drug sales." Thus, as to breach of contract claims, the court ruled that defendants failed to show the existence of probable cause as a matter of law.

As to the prior claim of injury to prospective economic advantage, the court ruled that plaintiffs' evidence showed that there was no actual " 'drop in sales' " or loss of business reputation; thus, "one could reasonably infer that [d]efendants had reason to

know those allegations absolutely lacked merit.” The court further determined that even if Armstrong had told defendants that Cuccia was manipulating computer-generated time sheets for himself and/or his wife, defendants “would not have probable cause for that claim if they knew that no such time sheets existed.” The court expressed no opinion with respect to the malice element, noting that defendants had failed to address this element in their anti-SLAPP motion.

Finally, the court overruled defendants’ objections to plaintiffs’ evidence and sustained all but one of plaintiffs’ objections to defendants’ evidence.

II. DISCUSSION

Defendants assert the court erred in denying their special motion to strike the complaint under section 425.16. Our review of the court’s order is de novo, and entails an independent review of the entire record. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

A. *Anti-SLAPP Motion Analytical Framework*

“ ‘SLAPP is an acronym for “strategic lawsuits against public participation.” [Citation.] A special motion to strike a SLAPP action, codified in . . . section 425.16, provides a procedural remedy to gain an early dismissal of a lawsuit or a cause of action that qualifies as a SLAPP.’ [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 210, fn. 1 (*Daniels*).

Section 425.16 establishes a two-step process for determining whether an action is a “strategic lawsuit against public participation” or SLAPP. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1, 88.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech . . . *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Id.* at p. 89.)

The first step of the inquiry is not disputed here. The anti-SLAPP statute defines an “ ‘act in furtherance of a person’s right of petition or free speech’ ” to include “any written or oral statement or writing made before a . . . judicial proceeding” (§ 425.16, subd. (e)(1).) Thus, “[t]he plain language of the anti-SLAPP statute dictates that every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 [.]” (*Daniels, supra*, 182 Cal.App.4th at p. 215.)

“The question presented in this case relates to the second step of the anti-SLAPP inquiry: Did the [Cuccias] meet [their] burden of ‘establish[ing] that there is a probability [they] will prevail on [their] claim[s?]’ (§ 425.16, subd. (b)(1).) “[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether ‘the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim’ (italics added), past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.” [Citation.] “[T]he court’s responsibility is to accept as true the evidence favorable to the plaintiff. . . .” [Citation.] “[T]he defendant’s evidence is considered with a view toward whether it defeats the plaintiff’s showing as a matter of law, such as by establishing a defense or the absence of a necessary element.’ [Citation.]” (*Daniels, supra*, 182 Cal.App.4th 204 at p. 215.)

B. Preliminary Issues

1. Evidentiary Issues

Defendants assert that the trial court incorrectly overruled all of their evidentiary objections and sustained all but one of the Cuccias’ objections. As defendants acknowledge, the applicable standard of review for evidentiary rulings in an anti-SLAPP motion is abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337,

1348, fn. 3; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.) Other than generally asserting that the declarations of Purcell and Sheridan had adequate foundation, defendants fail to establish how the trial court erred or how any purported error prejudiced their case. “Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there. Since the appellate court must affirmatively find prejudice such finding must be based either upon the facts found in the record or upon the reasonable inferences to be drawn therefrom.” (*Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77.) By their argument, or more aptly the lack thereof, defendants fail to establish any prejudicial abuse of discretion by the trial court in its evidentiary rulings.

In a somewhat related argument, defendants argue the court erred in its analysis of the evidence under the second prong of the anti-SLAPP framework. According to defendants, the trial court “erred by (1) weighing the evidence and assessing credibility and (2) altogether failing in some instances to consider [their] evidence to determine if it defeat[ed] [the Cuccias’] evidence as a matter of law.”

Contrary to defendants’ contention the record does not disclose that the trial court erroneously weighed the evidence or otherwise improperly assessed credibility. Rather, the court acknowledged its responsibility to accept as true the evidence favorable to the Cuccias and considered whether defendants’ evidence defeated the Cuccia’s showing as a matter of law. (*Daniels, supra*, 182 Cal.App.4th 204 at p. 215.)

3. *Policy Considerations*

Defendants contend that “[a]s a matter of policy, when competing evidence and disputed facts exist, an anti-SLAPP motion directed at a malicious prosecution complaint—specifically the element of probable cause—ought to be granted.”

Actions for malicious prosecution are often said to be “not favored” (see, e.g., *Ball v. Rawles* (1892) 93 Cal. 222, 228; *Haydel v. Morton* (1935) 8 Cal.App.2d 730, 732; *Sebastian v. Crowley* (1940) 38 Cal.App.2d 194, 202), because of the potentially chilling effect they may have on the public’s willingness to resort to the courts for the resolution of disputes. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon*

Appel); *Babb v. Superior Court* (1971) 3 Cal.3d 841, 847.) However, as the Supreme Court has said, this policy “should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by unjustifiable criminal [or civil] prosecution.” (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 159-160.) “The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney’s fees [citations], compensation for injury to his reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-51.) And “[t]he judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals ‘ . . . as instruments with which to maliciously injure their fellow men.’ [Citation.]” (*Id.* at p. 51.)

It is quite true, as defendants are keen to remind us, that there is a “rather lenient standard for bringing a civil action,” and attorneys “ ‘ ‘have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win’ ” [citations]” (*Wilson v. Parker, Covert & 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), and that California courts therefore carefully scrutinize malicious prosecution actions. However, this policy clearly cannot be used for the preemptive purpose for which defendants seek to invoke it, which is to make it irrelevant whether, as the Cuccias claim, the underlying action was maliciously commenced and not even arguably meritorious.

Thus, we turn to the genuine question, which is whether defendants had probable cause to participate in the filing of the Marin Action and it was therefore error for the trial court to deny their special motion to strike.

C. Malicious Prosecution

1. Statute of Limitations as to Purcell and GPC

Before addressing whether defendants had probable cause to initiate the Marin Action, we address Purcell’s claim that the Cuccias did not have a probability of prevailing on the merits because their malicious prosecution claim against him and GPC was barred by the statute of limitations. Purcell claims the trial court erred in applying the two-year limitations period set forth in section 335.1. Purcell asserts that the Cuccias’ claim was subject to the one-year limitations period under section 340.6, which governs most causes of action against attorneys. We disagree.

Section 340.6, subdivision (a), which provides in relevant part, “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.”

“Section 340.6 by its terms applies only to actions arising out of the performance of professional services by attorneys.” (*Von Rott v. Johnson* (1983) 148 Cal.App.3d 608, 612 (*Von Rott*)). Relying on *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 (*Vafi*), Purcell argues that the Cuccias’ claim against him and GPC falls within the ambit of section 340.6. In *Vafi, supra*, 193 Cal.App.4th 874, the court held that the one-year limitations period of section 340.6, subdivision (a) applied to malicious prosecution actions against an attorney. (*Vafi, supra*, 193 Cal.App.4th at p. 880.) In so holding, the court reasoned that inasmuch as the plain language of section 340.6 referred to a “plaintiff” rather than a “client,” section 340.6 “applies to all actions, except those for actual fraud, brought against an attorney ‘for a wrongful act or omission’ which arise ‘in the performance of professional services.’ ” (*Vafi, supra*, 193 Cal.App.4th at pp. 881-

882.) The court explained that the statute does not exempt malicious prosecution actions from its limitations period, and if, as here, “ ‘exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary.’ ” (*Id.* at p. 881.) Finally, *Vafi* noted that under traditional rules of statutory construction, “the more specific statute of limitations under section 340.6 overrides the general catchall statute” provided in section 335.1. (*Ibid.*)

While we have no quarrel with the stated principle, we find *Vafi* is inapplicable to the instant case. Here, the basis for the malicious prosecution claim against Purcell is his financial partnership with Sheridan and MSC. This claim is based on the theory that Purcell and GPC financed MSC and its operations. It is alleged that Purcell and GPC acted as decision-makers for MSC, paying Cuccia’s wages and making financial decisions for and on behalf of MSC. In declining to apply section 340.6 to the Cuccias’ claims, the trial court determined that Purcell and GPC were named as defendants “because of their involvement in a business capacity—not because of their role as attorneys” for Sheridan in the Marin Action. A review of the applicable case law supports the trial court’s conclusion.

In *Von Rott, supra*, 148 Cal.App.3d 608, a woman brought an action against the attorney who drafted the legal documents relating to the sale and purchase of her business and who became a pledgeholder for the stock involved in the transaction. In declining to apply the tolling provision of section 340.6 to the claims, the court explained: “Section 340.6 by its terms applies only to actions arising out of the performance of professional services by attorneys. Defendant’s role as a pledgeholder was separate and distinct from his role as attorney. In his role as pledgeholder, defendant acted simply as an escrow, holding shares of the corporation for the benefit of plaintiff One need not be an attorney to act as pledgeholder, and it is clear that one acting as a pledgeholder is not performing legal services.” (*Von Rott, supra*, 148 Cal.App.3d at pp. 612-613.) The court thus concluded that “defendant’s status as pledgeholder was only tangentially related to the legal representation he provided plaintiff and thus did not operate to toll the statute of limitations.” (*Id.* at p. 613.)

Quintilliani v. Mannerino (1998) 62 Cal.App.4th 54 (*Quintilliani*) is instructive in explaining the scope of “professional services” referenced in section 340.6. In *Quintilliani*, rock concert promoters brought an action for negligent performance of administrative consulting services, breach of an independent contractor agreement, breach of fiduciary duty, and negligent representation against an attorney who was providing, pursuant to contract, both legal and administrative consulting services. (*Id.* at pp. 63-64.) The court dismissed all the claims under section 340.6, other than the claim for the negligent performance of administrative services, which, it held, did not arise while providing legal services. (*Id.* at pp. 58, 66-69.) In so holding, the court rejected the attorney’s attempted expansion of the term “professional services” to encompass all professional services performed by an attorney, without differentiation between legal and nonlegal services. (*Id.* at p. 64.) Declining to adopt an overly broad interpretation of section 340.6, the court explained: “When an attorney becomes involved in nonlegal business activities, he may not claim protection of the legal malpractice statute because the basis for a legal malpractice action is a claim of *professional negligence*.” (*Ibid.*)

Discussing *Von Rott, supra*, 148 Cal.App.3d 608, the *Quintilliani* court reasoned that, “An attorney who undertakes to provide both legal and nonlegal services to a client, and who is sued because of deficiencies in performing the nonlegal services, may not claim the protection of section 340.6 because ‘[t]he California statute does not include actions for wrongs by the defendant that were not committed as an attorney The statute only applies to the performance of legal services.’ [Citations.]” (*Quintilliani, supra*, 62 Cal.App.4th at p. 65.)

Citing *Davis & Cox v. Summa Corp.* (9th Cir.1985) 751 F.2d 1507, 1520, and *Day v. Greene* (1963) 59 Cal.2d 404, 411, the *Quintilliani* court further explained that the “ ‘gravamen of a complaint and the nature of the right sued on, rather than the form of the action or relief demanded, determines which statute of limitation applies.’ ” (*Quintilliani, supra*, 62 Cal.App.4th at p. 66.) It then held that section 340.6 did not apply to bar the claims for negligent performance of administrative consulting services. (*Quintilliani, supra*, 62 Cal.App.4th at pp. 66-67.)

With respect to the causes of action for legal malpractice and breach of fiduciary duty, the *Quintilliani* court held these claims were barred by section 340.6, as the duty allegedly breached occurred during the provision of legal services. (*Quintilliani, supra*, 62 Cal.App.4th at pp. 67-68.) Alternatively, with respect to the breach of contract claim, the court determined that the contract contemplated both legal and nonlegal services. Because the legal and nonlegal services complained of in the breach of contract claim were “inextricably intertwined,” the court applied Section 340.6. (*Quintilliani, supra*, 62 Cal.App.4th at pp. 67 & 69.) Thus, *Quintilliani* distinguishes between attorneys’ acts or omissions committed in the course of their providing legal services and acts or omissions that are unrelated to providing legal services. Section 340.6 is applicable to the former; it is inapplicable to the latter.

In attempting to discern the parameters of the phrase “professional services” in this statute, it is also instructive to consider *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, which held the one-year statute of limitations applicable to the practice of law also applied to a breach of fiduciary duty claim, where the facts of the alleged breach were integrally connected to the practice of law. (*Id.* at pp. 1367, 1369.) There, an attorney was retained by a corporation to help locate and acquire a snow skiing area. (*Id.* at pp. 1364-1365.) The attorney, however, failed to disclose to the client that he had already entered into a finder’s fee agreement with the owner of a ski resort for the sale of the resort. (*Id.* at p. 1365.) After reviewing the legislative history of section 340.6, the *Stoll* court concluded that the phrase “wrongful act or omission . . . arising in the performance of professional services” more precisely conveyed the scope of claims which the Legislature intended to be covered by the statute than the phrase “legal malpractice.” (*Id.* at p. 1368.) The court concluded, “The Legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims.” (*Ibid.*) It went on to conclude that the one-year limitations period was intended to counteract “the potential of lengthy periods of potential liability” and “thereby reduce the costs of malpractice insurance.” (*Ibid.*)

Here, the basis for the Cuccias' claim is malicious prosecution, and its purpose is to recover damages for defending against a meritless lawsuit that was lodged against them with "hostility" and "ill will." It is well-established that a person injured by groundless litigation may seek compensation from any person who procures or is *actively instrumental* in putting the litigation in motion or participates after the institution of the action. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, fn. 11.) Persons who procure a third person to file suit (*Siffert v. McDowell* (1951) 103 Cal.App.2d 373, 378-379), or who initiate an action without personally signing the complaint (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371-1373), may be held liable for malicious prosecution. One who aids and abets another in commencing or continuing a groundless lawsuit, with knowledge of its malicious intent, is equally liable, even though not nominally a party to the original proceeding. (*Peebler v. Danziger* (1951) 104 Cal.App.2d 614, 619-620.)

Thus, the undisputed fact that Sheridan was the only named plaintiff in the Marin Action does not, standing alone, rule out potential liability on the part of Purcell and GPC. To begin with, there is extensive evidence in the record suggesting that Purcell had an active role in MSC's financial and business decisions. That he also provided legal services to Sheridan and MSC does not allow him to claim section 340.6 protection. The gravamen of the claim against Purcell and GPC relates to their personal involvement in MSC. Specifically, the allegations of "ill will" and "hostility" pertain to the malicious motives of Purcell and GPC in filing the Marin Action in their business capacity. The business decisions of Purcell and GPC were not integral to the legal services they provided. They are not analogous to the breach of fiduciary duty claims in *Quintilliani* and *Stoll* that were deemed to be intertwined with the legal services provided. Rather, Purcell and GPC's financial dealings at MSC are akin to the nonlegal administrative services at issue in *Quintilliani*.

Although Purcell is eager to point out that only a lawyer can file a lawsuit on behalf of another party, the record indicates that his role as attorney for MSC was only tangentially related to his personal involvement with Sheridan and his financial role in

the business affairs of MSC. Stated differently, Purcell was not sued because he filed the Marin Action on behalf of a client. Rather, Purcell was sued because, acting with a personal and financial motive, he was “actively instrumental” in the commencement of an alleged meritless action. This personal involvement clearly distinguishes the instant case from cases in which an attorney files an action on behalf of a client. In none of the cases cited by Purcell and GPC were the attorneys ostensibly also representing themselves. (See, e.g., *Vafi, supra*, 193 Cal.App.4th at pp. 877-878; *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 190-191.)

Accordingly, we conclude that section 340.6 did not apply to the malicious prosecution claim against Purcell and GPC.

2. *Probable Cause*

“Probable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts. [Citation.] . . . This objective standard of review is similar to the standard for determining whether a lawsuit is frivolous: whether ‘any reasonable attorney would have thought the claim tenable’ [Citation.]” (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1106 (*Cole*).

“[T]he probable cause element calls on the trial court to make an objective determination of the ‘reasonableness’ of the defendant’s conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted.” (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) “Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit.” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970.)

“ ‘ “What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury.” ’ [Citations.]” (*Sheldon Appel, supra*, 47 Cal.3d at p. 877.) “ ‘ “[P]robable cause is lacking ‘when a prospective

plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.’ ” ’ [Citation.] ‘ “In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.” ’ [Citation.]” (*Daniels, supra*, 182 Cal.App.4th at pp. 222-223.)

Where more than one claim is advanced in the underlying action, *each* claim must be based on probable cause. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [one of multiple causes of action may serve as basis for malicious prosecution where that cause of action lacks probable cause]; *Bertero v. National General Corp., supra*, 13 Cal.3d at p. 57 [refusing to permit “plaintiffs and cross-complainants to pursue shotgun tactics by proceeding on counts and theories which they know or should know to be groundless”].) Thus, the Cuccias may prevail by making a prima facie showing that “any one of the theories in [the Marin Action] was legally untenable or based on facts not reasonably believed to be true. [Citation.]” (*Cole, supra*, 206 Cal.App.4th at p. 1106.)

Here, the underlying complaint asserts a single cause of action for malicious prosecution based on the filing of seven causes of action in the Marin Action. Although the record reflects that many of defendants’ claims lacked a credible factual basis, for purposes of determining the existence of probable cause, we focus on the cause of action for book account stated. The gist of this cause of action is that the Cuccias misappropriated the television and heat lamps “in exchange for worked they never actually performed.”

The record reflects that the claim regarding the alleged misappropriation of the television set and heating lamps was not based on facts reasonably believed to be true. The evidence establishes the hours Cuccia worked at MSC, as well as his efforts to improve MSC. As noted, one of the improvements Cuccia made to MSC was the transformation of the bar into a meeting room. As part of this renovation, Cuccia needed to dispose of the existing furnishings—a pool table, a television set, and two heat lamps—which he did do. Cuccia also sought to improve MSC by adding soft serve ice cream to the restaurant’s menu.

Although Sheridan attests that the ice cream machine “was never in working order,” nowhere in her declaration does she provide a factual basis for this assertion. While it is true that computer consultant Armstrong states that he “never once saw that ice cream machine working” or “turned on,” there is no indication that he ever told Sheridan about his observations or that he was even remotely qualified to assess the functionality of that particular machine. Moreover, at no time did Sheridan seek to obtain declarations from MSC employees regarding Stacy’s alleged failure to train MSC employees how to operate the machine. In opposition, the Cuccias averred that not only was the ice cream machine operational, its installation at MSC was a draw for customers. In support of their declarations, they presented numerous print advertisements marketing the ice cream machine at MSC, highlighting that it was the only soft serve machine in the county with flavor burst technology. Notably, Stacy averred that she had trained Kuca, and two other MSC employees how to operate the machine.

This evidence is sufficient to meet the minimal requirements of establishing that defendants lacked probable cause in asserting a cause of action for book account stated. As a result, the Cuccias have met their burden. Contrary to defendants’ contention, considering the evidence in opposition does not necessitate an impermissible weighing of the evidence or assessing of credibility. Rather, in assessing whether the Cuccias have met their burden of making a “prima facie showing of facts” that could support a judgment if believed it is “ ‘the court’s responsibility . . . to accept as true the evidence favorable to the plaintiff[s]’ ” (*Soukup v. Law Office of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*)).

In any event, to the extent there is competing evidence, this evidence establishes a dispute as to the facts known to defendants at the time they filed the Marin Action, which, if resolved in the Cuccias’ favor, could also support the element of lack of probable cause as to the cause of action for book account stated. (*Sheldon Appel, supra*, 47 Cal.3d at p. 877; *Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1450.)

Because the Cuccias have asserted a single cause of action of malicious prosecution based in part on the filing and prosecution of the book account stated cause

of action, a lack of probable cause as to that cause of action supports this required element as to the entire cause of action. (See *Soukup, supra*, 39 Cal.4th at p. 292 [“ ‘[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted’ ”].)

3. *Malice*

Although defendants failed to address the issue of malice below and continue to ignore it on appeal, we, nevertheless, briefly address this element. “ ‘The “malice” element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action.’ ” (*Soukup, supra*, 39 Cal.4th at p. 292.) “ ‘[T]he malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose.’ ” (*Ibid.*) Malice “ ‘may range anywhere from open hostility to indifference,’ ” and “ ‘may also be inferred from the facts establishing lack of probable cause.’ ” (*Ibid.*)

Here, as discussed above, the court determines that there is a sufficient basis upon which, if the facts introduced by the Cuccias are credited, the court could make a determination that there was a lack of probable cause at least as to one of the causes of action. Such a lack of probable cause could support an inference of malice. (*Soukup, supra*, 39 Cal.4th at p. 292.) In addition, the Cuccias introduced additional evidence that, if credited (as the court must do on this motion), could support an inference of malice. Such evidence includes: 1) that Purcell approached Cuccia outside the Labor Commission Hearing and pressured him to drop his claims; and that 2) Purcell told Cuccia to accept half of what he was owed, or else he would be “ ‘sorry.’ ” (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383, partially abrogated by statute on other grounds as noted in *La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 473 [suits brought with improper purposes include those in which “ ‘the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim’ ”].)

Whether or not the above and other evidence in the Cuccias’ opposition papers would likely persuade a jury that the causes of action were brought against the Cuccias

with ill will or for an improper purpose, it is sufficient to constitute a “prima facie showing” of facts that, if credited by a jury, could support the malice element.

D. Sanctions

The Cuccias contend they are entitled to sanctions on appeal. Essentially, their position is that defendants’ appeal is no less frivolous than the original motion.

“ ‘California courts have the inherent power to dismiss frivolous appeals.’ ” (*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343, 349; *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1318.) “In addition, . . . section 907 provides that ‘[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.’ California Rules of Court, rule 8.276[] allows the court to impose sanctions on a party or an attorney for the taking of a frivolous appeal or appealing solely to cause delay. An appeal is frivolous ‘only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]’ [Citation.] The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. [Citation.] ‘While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together “with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.” [Citations.]’ [Citation.]” (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.)

Ordinarily, a court will not impose sanctions because an appeal is based on a creative argument with little hope of success. “[C]ounsel must have the freedom to file appeals on their clients’ behalf without the fear that an appellate court will second-guess their reasonable decisions.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648.)

Here, while we agree that the anti-SLAPP motion was properly denied, we reject the argument that the appeal is frivolous. The instant appeal involves complicated legal

issues, prompting extensive briefing by both sides. Moreover, there is no indication the appeal was brought for purposes of harassment or delay. Accordingly, we deny the request by the Cuccias for imposition of sanctions on appeal. (Cal. Rules of Court, rule 8.276.)

III. DISPOSITION

The order denying the anti-SLAPP motion is affirmed. The Cuccias as the prevailing parties on appeal are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278.)

REARDON, ACTING P. J.

We concur:

RIVERA, J.

HUMES, J.