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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**LAURA ESMERALDA CONTRERAS,**

**Plaintiff and Respondent,**

v.

**STEVEN STUART,**

**Defendant and Appellant.**

**A137957**

**(San Francisco County  
Super. Ct. No. CGC-09-488551)**

This case is before us for the second time. In *Contreras v. Butterworth* (June 30, 2011, A127379 [nonpub. opn.] (*Contreras I*), we held that Laura Esmeralda Contreras had demonstrated a probability of prevailing on claims of malicious prosecution, tenant harassment, and wrongful eviction against Gordon and Carol Butterworth.<sup>1</sup> Accordingly, we concluded Contreras’s claims were sufficient to withstand the Butterworths’ special motion to strike pursuant to California’s anti-SLAPP statute,<sup>2</sup> Code of Civil Procedure section 425.16 (section 425.16).

<sup>1</sup> Although our opinion in *Contreras I* is unpublished, we may cite and rely on it under California Rules of Court, rule 8.1115(b)(1).

<sup>2</sup> “‘SLAPP is an acronym for ‘strategic lawsuit against public participation.’” (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1012, fn. 1.) A special motion to strike under section 425.16 is “commonly known as an ‘anti-SLAPP motion,’ which is ‘a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.’ [Citation.]” (*Paiva v. Nichols, supra*, 168 Cal.App.4th at pp. 1015-1016.)

After Contreras filed a third amended complaint charging appellant Steven Stuart with aiding and abetting the Butterworths' wrongful conduct, Stuart filed a special motion to strike that complaint pursuant to section 425.16. The trial court denied the motion, and Stuart now appeals. As in *Contreras I*, we again conclude Contreras's claims are sufficient to withstand a special motion to strike. Thus, as the trial court did not err in denying the motion, we will affirm its order.

Contreras has filed a motion for sanctions in this court in which she contends Stuart's appeal is frivolous. Although we agree with Contreras that Stuart's arguments are not meritorious, we do not find them so totally and completely without merit as to warrant imposition of sanctions. We will therefore deny the motion.

#### FACTUAL AND PROCEDURAL BACKGROUND

Starting in September 2006, Contreras occupied a small in-law apartment (the Apartment) in a house on Sweeny Street in San Francisco. Each month from September 2006 to June 2008, she paid rent on time and in full to Jonah Roll and Katia Fuentes, who rented the Sweeny Street house from the Butterworths. After Roll and Fuentes moved out in May 2008, Contreras paid rent on time and in full to the Butterworths, from June 2008 through August 2009.

Roll and Fuentes represented to Contreras that the Butterworths had authorized them to sublet the Apartment. The Butterworths were also aware of and implicitly consented to Contreras's occupancy. In November 2007, Roll informed them of her occupancy, and the Butterworths expressed no objection.

In May 2008, Roll and Fuentes moved out of the Sweeny Street house. On or about June 10, the Butterworths served a "Three-Day Notice to Pay Rent or Quit" on Contreras. Contreras had already paid her rent for the period covered by the notice, however; she tendered it to Roll and Fuentes, and the Butterworths had already received rent from Contreras for the subsequent period ending July 15, 2008. Thereafter, although the Butterworths received the rent checks tendered each month by Contreras, they did not deposit those checks until March 2009.

In June 2008, gas and electric service to the Sweeny Street house was disconnected. When Contreras reestablished service in her own name, the Butterworths refused either to provide a separate meter for the Apartment or to agree to an equitable arrangement for dividing the gas and electric bill between the Apartment and the remainder of the house. As a result, Contreras was forced to pay for all the gas and electricity consumed in the house.

On June 14, 2008, the Butterworths attempted to enter the Apartment without notice to or permission from Contreras. When she refused them entry, they attempted to intimidate Contreras by verbal abuse and false statements, including the statement that Stuart, who had wrongfully attempted to gain access to the Apartment, was a lawyer representing them. In fact, Stuart was a former lawyer who had resigned his bar membership while disciplinary action was pending. On July 15, Stuart, who the Butterworths described as their lawyer, attempted to enter the Apartment, again without notice. When Contreras demanded that her right to privacy be respected, Carol Butterworth responded by letter, "If you are not willing to cooperate with the efforts of Mr. Stuart, then you are welcome to leave."

On July 8, 2008, the Butterworths filed an unlawful detainer action against Contreras (the July Action). In their verified complaint, the Butterworths alleged that Contreras was an "illegal squatter." The trial court granted Contreras's motion for summary judgment in October 2008, concluding a Code of Civil Procedure section 1161 unlawful detainer action could not be brought against an "illegal squatter." Judgment was entered in Contreras's favor in January 2009.

In November 2008, the Butterworths filed a second unlawful detainer action against Contreras (the November Action). The Butterworths again failed to allege the existence of any relationship between themselves and Contreras that would satisfy the requirements of Code of Civil Procedure section 1161. After Contreras filed a demurrer, the Butterworths dismissed the action in January 2009.

On December 9, 2008, Contreras had just left the shower when she heard someone approaching her apartment through the garage in which the Apartment is located.

Without knocking, Stuart tore aside a curtain covering a window on her front door and addressed her angrily.

On April 22, 2009, Stuart slid a “Notice of Entry” under the door of the Apartment; in the notice, he identified himself as “Agent for Landlord.” Because the notice failed to specify the reason for the entry, and because Contreras was unable to be present at the time given in the notice, she posted on the Apartment door a note asking that she be told the reason for the entry and that it be rescheduled for a more convenient time. She received no response. On April 24 and 29, someone entered her apartment in her absence and without her permission; Contreras believed it was Stuart who entered her apartment on those two occasions.

Contreras filed the present action against the Butterworths on May 19, 2009, alleging claims for malicious prosecution, wrongful eviction, and tenant harassment. In September 2009, the Butterworths moved to strike all three causes of action against them pursuant to Code of Civil Procedure section 425.16. In October 2009, the trial court granted the motion as to the cause of action for wrongful eviction and denied the motion as to the causes of action for malicious prosecution and tenant harassment. Contreras appealed and the Butterworths cross-appealed.

On June 30, 2011, we filed our opinion in *Contreras I*. We affirmed the trial court’s denial of the Butterworths’ motion to strike as to Contreras’s claims for malicious prosecution and tenant harassment, and we reversed the court’s ruling on her claim for wrongful eviction. (*Contreras I, supra*, at pp. 1-2, 15.) Significant for purposes of the present appeal were our holdings that Contreras’s claims for wrongful eviction and tenant harassment, which arose out of Stuart’s alleged unlawful entry into the Apartment, were neither barred by the litigation privilege of Code of Civil Procedure section 47 nor subject to a special motion to strike under section 425.16. (*Contreras I, supra*, at pp. 13-15.) We further held that Contreras had demonstrated a probability of prevailing on all three of her causes of action against the Butterworths. (*Id.* at pp. 10, 12, 15.) We remanded the case for further proceedings. (*Id.* at p. 15.)

In March 2012, Contreras was granted leave to file a third amended complaint (TAC), which she filed on June 27, 2012.<sup>3</sup> The TAC alleges Stuart aided and abetted the Butterworths in some of the wrongful conduct that gave rise to Contreras's action against them. Specifically, the TAC's first cause of action for malicious prosecution alleged Stuart advised and abetted the Butterworths in filing and continuing to prosecute the July and November Actions. The second cause of action for wrongful eviction alleged Stuart aided and abetted the Butterworths in their attempts to recover possession of the Apartment in violation of the San Francisco Residential Rent Stabilization and Arbitration Ordinance (the RSO). (S.F. Admin. Code, §§ 37.1(a), 37.9(f).) Finally, the third cause of action for tenant harassment alleged Stuart aided and abetted the Butterworths in violating San Francisco Administrative Code section 37.10B.<sup>4</sup>

In October 2012, Contreras moved for leave to file a fourth amended complaint. While that motion was pending, on December 17, 2012, Stuart filed a motion under section 425.16 to strike the TAC. On February 15, 2013, the trial court granted Contreras leave to file a fourth amended complaint and denied Stuart's special motion to strike the TAC. Stuart now appeals the denial of his motion.

#### DISCUSSION

Stuart argues that our decision in *Contreras I* does not control the issues he raises in this appeal. He also contends the trial court should have stricken Contreras's causes of action for tenant harassment, wrongful eviction, and malicious prosecution. This latter argument attacks both the sufficiency of Contreras's pleadings and her alleged failure to make a prima facie showing of facts necessary to sustain a judgment in her favor.

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<sup>3</sup> In addition to Stuart, the named defendants in the TAC are the Butterworths, attorneys Sami Mason and Curtis F. Dowling, their law firm Marquez & Dowling LLP, Roll, and Fuentes. None of the other defendants is a party to this appeal.

<sup>4</sup> In July 2012, the Butterworths' insurer offered to settle the matter for the limits of their policy, and Contreras accepted their offer. The Butterworths' motion for a good faith settlement determination is pending in the trial court and has been stayed pending this appeal.

In addition to her responsive brief, Contreras has filed a motion pursuant to California Rules of Court, rule 8.276 seeking sanctions against Stuart for prosecuting a frivolous appeal. She contends this appeal was undertaken solely for purposes of delaying the approval of a settlement of the action below.

I. *Governing Law and Standard of Review*

Section 425.16 “‘posits . . . a two-step process for determining whether an action is a 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.’ [Citation.] ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278–279 (*Soukup*).

To satisfy the first step, the party filing the anti-SLAPP motion must establish that the plaintiff’s claim arose from protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) If the moving party satisfies that burden, then the party defending against the motion has the burden to establish a probability of prevailing on the claim. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1117 (*Ivie*)). We need not proceed to the second step in this analysis if the moving party fails to meet its burden on the first step by showing that the claim or claims arise from protected activity. (*Ibid.*) In other words, “[i]f the court determines the cause of action did not arise from such protected activity, the motion to strike must be denied.” (*Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1317.)

“‘We review de novo a trial court’s ruling on a motion to strike under section 425.16 by “conducting an independent review of the entire record. [Citations.]” [Citations.] [¶] Thus, our review is conducted in the same manner as the trial court in considering an anti-SLAPP motion. In determining whether the defendant . . . has met its initial burden of establishing that the plaintiff’s . . . action arises from protected activity,

we consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” [Citations.] The second prong—i.e., whether the plaintiff . . . has shown a probability of prevailing on the merits—is considered under a standard similar to that employed in determining nonsuit, directed verdict or summary judgment motions. [Citation.] “[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have “stated and substantiated a legally sufficient claim.” [Citations.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citations.]’ [Citation.] [¶] As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings. [Citations.] The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence. [Citation.] In reviewing the plaintiff’s evidence, the court does not weigh it; rather, it simply determines whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial. [Citation.]’ [Citation.]” (*Paiva v. Nichols, supra*, 168 Cal.App.4th at pp. 1016-1017.)

## II. *The Effect of Contreras I*

Contreras argues that the law of the case doctrine makes our opinion in *Contreras I* partially dispositive of this appeal, and thus it forecloses many of Stuart’s arguments. Contreras contends that opinion establishes: (1) she has stated valid claims for tenant harassment and wrongful eviction against the Butterworths; (2) the November Action was instituted without probable cause; and (3) as to the Butterworths, she has substantiated through a sufficient evidentiary showing legally tenable claims for malicious prosecution, wrongful eviction, and tenant harassment, thus satisfying the first element of her causes of action against Stuart.

Stuart contends our decision in *Contreras I* cannot apply to him because he was not a party to that appeal. Thus, in his view, he has not waived any rights to have the causes of action against him properly pleaded and “supported by real facts.”

Stuart misunderstands Contreras's argument. Contreras alleges Stuart aided and abetted the Butterworths in committing the tortious conduct underlying her claims for malicious prosecution, wrongful eviction, and tenant harassment. She explains that under the aiding and abetting or "concert of action" theory of group liability, she must prove two things. First, Contreras must prove the Butterworths are liable for a tortious conduct, and second, prove Stuart gave advice or encouragement to the Butterworths that was a substantial factor in causing the resulting tortious conduct. (See *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 521 (*Cadlo*) [explaining concert of action theory of liability].) The effect of *Contreras I*, she argues, is that it establishes the *first* element of concert of action liability for purposes of an anti-SLAPP motion, i.e., that she has stated a sufficient prima facie case that the Butterworths are liable for their tortious conduct. Contreras does not argue that our prior decision establishes that her causes of action *against Stuart* do not arise from protected activity or that she has shown a probability of prevailing on the merits with respect to him.

Consequently, while Stuart is correct that the law of the case doctrine applies only to parties to the prior appeal, in these circumstances application of that doctrine does not affect Contreras's burden with respect to him. For example, in *Bergman v. Drum* (2005) 129 Cal.App.4th 11 (*Bergman*), an insurer that had not been a party to a prior appeal argued the law of the case doctrine should not be applied to a lawyer who had represented the insurer in a prior action and who had then been sued for malicious prosecution. (*Id.* at pp. 15, 17, 20.) The court rejected the argument, noting that while the law of the case doctrine applies only to parties to the prior appeal, "the only thing decided by [the prior appeal] was the pretrial procedural determination that plaintiff had presented a prima facie case on her cause of action against [the lawyer] for malicious prosecution. It did not in any way relieve plaintiff from the ultimate burden of proving her case at trial by a preponderance of the evidence." (*Id.* at p. 20.)

A similar result obtains here. *Contreras I* establishes that Contreras has demonstrated a probability of prevailing on her claims against the Butterworths for malicious prosecution, tenant harassment, and wrongful eviction. (*Contreras I, supra*, at

pp. 10, 12, 15.) It does not mean that the court below was relieved of the obligation to determine whether Contreras's claims against Stuart arise from protected activity, and if they do, of determining whether she has a reasonable probability of prevailing on them. (§ 425.16, subd. (b); *Bergman*, *supra*, 129 Cal.App.4th at p. 20.)

III. *Stuart Failed to Demonstrate That Contreras's Causes of Action for Tenant Harassment and Wrongful Eviction Arise From Protected Activity.*

Stuart argues we must strike Contreras's causes of action for tenant harassment and wrongful eviction because Contreras has failed to make a prima facie showing of facts that would support a judgment in her favor on these claims. But Contreras must make this showing *only* if Stuart has first satisfied *his* burden of establishing the challenged causes of action arise out of protected activity. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 965.) He has not done so. Indeed, his opening brief does not even address the first prong of the section 425.16 analysis. As a consequence, he has forfeited any argument that the trial court erred on this score. (See *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 571-572 [appellants forfeited argument that trial court improperly granted motion for summary adjudication where they failed to address legal grounds underlying order and discussed only evidentiary issues].)

In any event, we have already held that Contreras's allegations "that the Butterworths interfered with her utility service, refused to cash her rent checks, and were responsible for two unauthorized entries into her Apartment" "involve conduct unprotected by the anti-SLAPP statute." (*Contreras I*, *supra*, at p. 11; see *id.* at pp. 14-15.) Contreras alleges Stuart aided and abetted the Butterworths in these actions, which she claims violated the RSO. Such actions do not arise from protected activity for purposes of section 425.16. (See *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 110-111 (*Oveido*) [cause of action for illegal rent increase did not arise out of protected unlawful detainer action but rather from violation of rent stabilization ordinance]; *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1289-1290 [suit based on alleged violation of rent stabilization ordinance and fraudulent eviction did not arise from protected activity].) If the Butterworths' actions did not arise out of protected activity, it

logically follows that Stuart's aiding and abetting of those actions does not arise out of protected activity. Since Stuart has not met his threshold burden of showing Contreras's claims of tenant harassment and wrongful eviction arise from protected activity, we need not consider whether Contreras has demonstrated she is likely to succeed on the merits of those claims. (*Id.* at p. 1290.)

#### IV. *Contreras Adequately Pleaded Her Statutory Causes of Action.*

Stuart also challenges Contreras's claims for tenant harassment and wrongful eviction on certain purely legal grounds. He argues these claims are deficient because Contreras does not allege she is within the class of persons protected by San Francisco Administrative Code section 37.10B and because that section was not in effect when some of the allegedly actionable conduct occurred. Neither of these arguments is well taken.<sup>5</sup>

First, the TAC alleges the Apartment is subject to the RSO and that Contreras is seeking damages as an "aggrieved party" under that ordinance. (See S.F. Admin. Code, § 37.9 [section applies to all landlords and tenants of rental units as defined in S.F. Admin. Code, § 37.2]; *id.* § 37.10B(c)(5) ["[a]ny person who violates or aids or incites another person to violate the provisions of this Section is liable for each and every such offense for money damages . . . suffered by an aggrieved party . . .".]) Contreras's complaint clearly alleges that her claims fall within the scope of the RSO. Nothing more is required.

Second, while some of the conduct that forms the basis of Contreras's causes of action occurred prior to the enactment of this section of the RSO, other conduct is alleged to have occurred after it took effect. Thus, even if Stuart had shown that Contreras's complaint arose out of protected activity (and he has not), the complaint would still not be vulnerable to a motion to strike on the grounds Stuart raises. To survive a motion to

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<sup>5</sup> Stuart cites *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803 in support of this argument. That case is wholly inapposite, however, as it concerned the pleading requirements for alleging statutory tort causes of action against public entities. (*Id.* at pp. 808-809.) This case concerns a suit between purely private parties.

strike under section 425.16, Contreras need only “show[] a probability of prevailing on any part of [her] claim[.]” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554.) She has done so, because she presented evidence that Stuart entered the Apartment without her permission, and this evidence, if credited by a jury, might be held to constitute a violation of the RSO’s prohibitions against tenant harassment. (See S.F. Admin. Code, § 37.10B(a)(4), (5), (10), (15) [enumerating actions by landlord that constitute tenant harassment].)

V. *Contreras Has Shown a Substantial Probability of Prevailing on Her Cause of Action for Malicious Prosecution.*

Unlike her causes of action for wrongful eviction and tenant harassment, Contreras’s cause of action for malicious prosecution unquestionably arises out of protected activity. (*Oveido, supra*, 212 Cal.App.4th at p. 111 [unlawful detainer action is protected activity within the meaning of § 425.16].) The first prong of the section 425.16 analysis is therefore satisfied with respect to this cause of action. Thus, we must determine whether Contreras has shown a probability of prevailing on that claim. (See *Ivie, supra*, 193 Cal.App.4th at p. 1117.) We conclude she has.

In our prior opinion in this case, we held Contreras had demonstrated a probability of prevailing on her claim against the Butterworths and affirmed the trial court’s denial of the Butterworths’ motion to strike. (*Contreras I, supra*, at p. 10.) Thus, she has already made a sufficient showing with respect to the Butterworths to withstand an anti-SLAPP motion.<sup>6</sup> The issue now before us is whether she has demonstrated a probability of prevailing on her claim against Stuart. (*Soukoup, supra*, 39 Cal.4th at p. 278.)

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<sup>6</sup> Stuart contends we must strike the cause of action for malicious prosecution because there was probable cause for filing the November Action and because Contreras failed to allege the element of malice in connection with the July Action. We rejected these arguments in *Contreras I*, holding that Contreras had put forth sufficient evidence of the elements of lack of probable cause and malice to demonstrate a probability of prevailing on her malicious prosecution claim. (*Contreras I, supra*, at pp. 9, 10.) We see no reason to revisit those conclusions and will confine our inquiry to the only question properly before us—whether Contreras produced sufficient evidence to demonstrate a probability of prevailing against Stuart on her concert of action theory.

At this stage, to prevail on her malicious prosecution claim against Stuart, Contreras must show that he provided substantial assistance or encouragement to the Butterworths, knowing that their conduct was tortious. (*Cadlo, supra*, 125 Cal.App.4th at p. 521.) On the question of substantial assistance or encouragement, Contreras produced evidence that, if credited by a jury, would be sufficient to sustain a judgment in her favor. (*Paiva v. Nichols, supra*, 168 Cal.App.4th at p. 1017.) For example, in response to Stuart's motion to strike, Contreras produced excerpts of Stuart's deposition in which Stuart explained that he had assisted his parents in attempting to recover possession of the Apartment by drafting letters, three-day notices, and complaints. In addition to assisting with drafting the documentation, Stuart testified he had done "probably just about everything else that was necessary for them to go through the process . . . of an unlawful detainer action[.]" Stuart's own declaration confirmed that he assisted his mother "in the drafting of documents . . . and assisted with the service and filing of appropriate documents with the Court." He also "type[d] up the second unlawful detainer complaint . . . and I was asked to get documents filed and served to continue with the process."

Stuart, a former lawyer, also advised his parents on litigation strategy by suggesting that they file for a default against Contreras. He assisted the Butterworths in obtaining discovery, and with his parents' authorization, Stuart met with Contreras's counsel for that purpose. Stuart drafted pleadings on his parents' behalf, including their settlement conference statement in the July Action. Stuart appears to have been the principal, if not the only, source of legal advice for his parents, since in his declaration he stated that Sami Mason, the Butterworths' attorney of record, provided no legal advice to them in connection with the two unlawful detainer actions. If credited by a jury, this evidence would be sufficient to sustain a finding that Stuart provided substantial assistance and encouragement to the Butterworths. (See *Cadlo, supra*, 125 Cal.App.4th at p. 521.)

Moreover, a factfinder could reasonably infer that Stuart provided this assistance to his parents knowing their conduct was tortious. As we noted in *Contreras I*, the Butterworths did not dispute "that any reasonable lawyer would agree an unlawful

detainer action against an alleged illegal squatter lacks merit.” (*Contreras I, supra*, at p. 7, fn. omitted.) Thus, they conceded “that the July Action was utterly without merit[.]” (*Ibid.*) Similarly, we held that a jury might also find the November Action lacked probable cause and had been brought with malice. (*Id.* at pp. 11-13.) A factfinder could reasonably infer that Stuart, a former lawyer, knew his parents’ conduct in filing the July and November Actions was tortious. (See *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1407, 1410-411 (*Sycamore Ridge*) [evidence showing defendants did not subjectively believe action was tenable is relevant to whether action was prosecuted with malice; attorneys who maintain a case they know to be untenable may be liable for malicious prosecution despite limited role as co-counsel].) This is especially true in light of the evidence showing he provided legal advice to them.

Stuart argues Contreras has failed to provide any evidence that he acted with malice. We disagree. Contreras alleged Stuart aided and abetted the Butterworths in pursuing the July and November Actions. In *Contreras I*, we held a jury could find the Butterworths had acted with malice if it were to credit Contreras’s evidence that the Butterworths instituted those actions despite having consented to her occupancy of the Apartment. (*Contreras I, supra*, at p. 9.) In addition, a jury could find evidence of malice in the Butterworths’ decision to pursue the unlawful detainer actions after serving Contreras with a notice to quit or pay rent and after receiving the rent she subsequently proffered. (*Ibid.*) As explained above, Stuart is alleged to have aided and abetted his parents in their wrongful prosecution of unlawful detainer actions they knew to be groundless and which were undertaken for the purpose of depriving Contreras of possession of the Apartment. The TAC therefore sufficiently alleges malice. (*Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1407 [“malice is present when proceedings are instituted primarily for an improper purpose”].)

#### V. *The Motion for Sanctions*

Contreras has filed a motion seeking imposition of sanctions against Stuart for filing a frivolous appeal. (See Cal. Rules of Court, rule 8.276.) She contends the appeal

is both subjectively frivolous, because it was undertaken solely to cause delay, and objectively frivolous, because it is wholly lacking in substantive merit.

A. *Standards for Determining Whether an Appeal Is Frivolous*

Our express authority to impose sanctions is derived from both the Code of Civil Procedure and the California Rules of Court. Code of Civil Procedure section 907 provides, “When 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.” In addition, under the California Rules of Court, this court may sanction an attorney or a party for “[t]aking a frivolous appeal or appealing solely to cause delay[.]” (Cal. Rules of Court, rule 8.276(a)(1).)

The California Supreme Court has cautioned that “an appeal should be held to be 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.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*)). The first standard is subjective, and its “focus is on the good faith of appellant and counsel.” (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516 (*Gong & Kwong*)). The second standard is objective. (*Ibid.*) ““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.]” (*Ibid.*)

Although the two standards are frequently used together, where an appeal is objectively frivolous, we may impose sanctions even if the record fails to demonstrate the appeal was subjectively frivolous. (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1009.) Thus, even if “counsel’s subjective intent eludes us, [but] we can say with entire confidence that, judged by any reasonable objective standard, this appeal has no chance of success,” sanctions are in order. (*Conservatorship of Gollock* (1982) 130 Cal.App.3d 271, 274.)

B. *Contreras Has Not Shown This Appeal Was Taken Solely to Cause Delay.*

Contreras claims Stuart's appeal is subjectively frivolous because it was undertaken solely to delay Contreras's receipt of compensation under a settlement to which Stuart is a party.<sup>7</sup> Contreras contends Stuart has sought to derail the settlement by engaging in various dilatory tactics, such as seeking to depose his mother, Carol Butterworth, "in the apparent hope of obtaining testimony that would support an objection that the settlement was not in good faith." In addition, Contreras tells us Stuart has made a variety of filings in the trial court that Contreras finds "inexplicable," including opposing her motion for leave to file a fourth amended complaint, a demurrer to the TAC, and the motion to strike that is the subject of this appeal. Contreras submits that it is difficult to conceive of any motive for Stuart's conduct "other than his irrational animus toward her."

We will assume for present purposes that we may consider the materials attached to Contreras's motion, although they are not part of the record on appeal and do not appear to be matters ordinarily subject to judicial notice. Even considering these materials, however, we cannot find the appeal subjectively frivolous. Such a finding has been held "to require proof of an intent to delay by *clear and convincing evidence*, well beyond a mere preponderance and approaching the criminal standard of *beyond a reasonable doubt*." (*San Bernardino Community Hospital v. Meeks* (1986) 187 Cal.App.3d 457, 470, fn. omitted (*Meeks*)). We are not persuaded this standard is met here.

Contreras's arguments focus almost exclusively on Stuart's claimed motivation for various filings he made in the trial court. With respect to the appeal itself, however,

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<sup>7</sup> Counsel for Contreras has attached a copy of the settlement agreement to his declaration. Although Stuart is listed as one of the parties to the agreement, he has not signed it; only the Butterworths and Contreras have done so. In fact, the agreement does not contain a signature line for Stuart, and thus although the agreement releases Stuart from Contreras's claims, it does not appear that his assent to it is contemplated. The agreement states that Contreras "agrees to release and dismiss her claims against Mr. Stuart for the sole purpose of obtaining the monetary benefits of this settlement, absent which she would continue to prosecute her claims against him."

Contreras says only that Stuart filed his notice of appeal the day after the trial court heard and denied his motion to strike under section 425.16 and that this has indefinitely stayed the hearing on the Butterworths' motion for good faith settlement determination.

Under both the Code of Civil Procedure and the California Rules of Court, we may impose sanctions only for the filing of a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a)(1).) Thus, even if Contreras is correct that Stuart's actions in the *trial court* were undertaken to delay approval of the settlement agreement, those actions do not involve the filing or prosecution of a frivolous *appeal*. (See *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 16 [imposition of sanctions imposed for conduct in trial court does not alone justify further sanctions for frivolous appeal].) While those actions might provide the basis for a motion for sanctions in the trial court—a question on which we express no view—they do not serve to demonstrate that Stuart filed this appeal “solely to cause delay.” (Cal. Rules of Court, rule 8.276(a)(1).)

To the extent that we may consider Stuart's actions in the court below as evidence of some larger plan to delay the ultimate resolution of this matter, they do not provide clear and convincing evidence that the appeal was taken solely to cause delay. (See *Meek, supra*, 187 Cal.App.3d at pp. 470, 472.) That Stuart filed a notice of appeal the day after denial of his motion to strike does not suggest an intent to delay the proceedings; to the contrary, it suggests he undertook to initiate the appeal as quickly as possible. And it is difficult to blame Stuart for the stay of the hearing on the motion for good faith settlement determination, because his appeal of the denial of his motion to strike automatically divested the trial court of jurisdiction over the case. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200.)

To find this appeal subjectively frivolous, we must focus on the question of Stuart's good faith. (See *Gong & Kwong, supra*, 163 Cal.App.4th at p. 516.) Here, the facts available to us do not provide the necessary clear and convincing evidence that Stuart undertook *this appeal* solely to cause delay. (See Cal. Rules of Court, rule 8.276(a)(1); *Meeks, supra*, 187 Cal.App.3d at p. 472.)

C. *The Appeal Is Unmeritorious But Not Objectively Frivolous.*

To find this appeal objectively frivolous, we would be required to conclude that “any reasonable attorney would agree that the appeal is totally and completely without merit.” (*Flaherty, supra*, 31 Cal.3d at p. 650.) Our Supreme Court has admonished that in making such a determination, we must “strik[e] a balance that will ensure both that indefensible conduct does not occur and that attorneys are not deterred from the vigorous assertion of clients’ rights.” (*Id.* at p. 648.) In *Flaherty*, the California Supreme Court also cautioned that “[a]n appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*Id.* at p. 650.)

In this case, Stuart’s arguments, while certainly unmeritorious, are not so totally and completely devoid of merit as to be deemed objectively frivolous. (*Flaherty, supra*, 31 Cal.3d at p. 650.) Stuart’s argument on the application of the law of the case doctrine, while ultimately unavailing, was technically correct. (See *Bergman, supra*, 129 Cal.App.4th at p. 20 [law of the case doctrine ordinarily applies only to parties to prior appeal].) He also correctly noted that some of the conduct alleged by Contreras to have violated San Francisco Administrative Code section 37.10B occurred prior to the effective date of that provision of the RSO. Although that argument is not enough to show error by the trial court, since Contreras alleged the conduct complained of continued until well after this section became effective, Stuart has made at least one valid legal point.

Under these circumstances, we will strike the balance required by *Flaherty* by erring on the side of caution. As noted above, “there was at least one legal issue which could fairly be characterized as arguable on appeal.” (*Meeks, supra*, 187 Cal.App.3d at p. 472; see also 2 Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 11:153, p. 11-62 [noting possibility that otherwise objectively frivolous appeal may be justified “despite the doctrine of ‘law of the case’ because for some reason the doctrine should not be followed”].) This is just enough to spare the appeal from being deemed frivolous.

We emphasize that our holding should not be understood as approving of attorneys (or former attorneys) who make unmeritorious arguments. We certainly do not. Nevertheless, we are conscious of our Supreme Court’s directive that sanctions for frivolous appeals “should be used most sparingly to deter *only the most egregious conduct.*” (*Flaherty, supra*, 31 Cal.3d at p. 651, italics added.) The arguments made in this appeal are not among the most egregious we have seen.

DISPOSITION

The order denying appellant’s special motion to strike is affirmed. The motion for sanctions is denied. Contreras shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.