

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 ONE

NICK C. GRAY et al.,
Plaintiffs and Respondents,
v.
HERMAN FRANCK,
Defendant and Appellant.

A141611
(San Francisco City & County
Super. Ct. No. CGC-13-535531)

Margaret Narron, as trustee of a family trust, filed an unlawful detainer action against Nick C. Gray and Robert L. Garrett (collectively, respondents). Throughout the action, Narron was represented by Herman Franck. The action was terminated after the trial court granted respondents' unopposed motion to dismiss. Respondents subsequently sued Narron and Franck for negligence and malicious prosecution. Franck filed an anti-SLAPP¹ motion, which was granted as to the negligence claim and denied as to the claim for malicious prosecution. Franck now appeals, arguing the motion should have been granted in its entirety because (1) respondents did not obtain a decision on the merits in the underlying unlawful detainer action, and (2) the unlawful detainer action was filed with probable cause. We affirm.²

¹ SLAPP is an acronym for "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728, 732, fn. 1.)

² Respondents' pending request for judicial notice is granted.

I. BACKGROUND

This case arises out of a dispute between Narron and respondents concerning Narron's San Francisco property. In 2003, Narron, as trustee of the Survivor's Trust of the Narron Family Trust, transferred title of the property to herself. About four years later, respondents reached an oral agreement with Narron to rent an in-law apartment on the property for \$900 per month.

In 2008, Narron informed respondents she intended to move to Colorado to be closer to her children. The three agreed respondents would manage and repair the property to make it marketable for short-term rentals, and Narron would cover respondents' out-of-pocket expenses. In or around August 2008, Narron began accepting respondents' services in lieu of cash as rent for the in-law apartment. Respondents agreed to defer reimbursement for their expenses until the property was rented. The parties entered into a written management agreement in November 2008. Respondents designed a vacation rental Web site and began renting out the property sometime thereafter. They claim Narron deferred reimbursing their expenses because her money was tied up in an action filed by Narron's daughter to remove Narron as trustee of one of the Narron family trusts.

In June 2011, Narron told respondents she intended to move back to San Francisco, but they should continue booking the house through May 2012. Sometime in August 2011, Narron said she wanted to move into the in-law apartment, and she asked respondents to vacate the premises before June 2012. In October 2011, after a contentious conversation, Narron told respondents they now had to move out by January or February 2012. The relationship deteriorated from there. Narron filed six police reports against respondents between February and May 2012. In February 2012, Narron changed the locks on the property and told respondents to stop arranging rentals. According to respondents, Narron also refused to reimburse them for any of the expenses they had incurred in managing the property.

Litigation ensued. In June 2013, respondents filed a collection action against Narron. Around the same time, Narron served on respondents a three-day notice to quit,

asserting they breached their rental agreement by failing to vacate by May 31, 2012. As trustee of the Narron Family Decedents Trust, Narron also filed an unlawful detainer action against respondents. The trust retained Franck to prosecute the action. According to the complaint, respondents failed to move out by May 31, 2012, as agreed by the parties, and Narron had not received rent since November 2011.

Respondents moved to quash. Before the motion was heard, Narron amended her complaint. Respondents demurred, arguing Narron, not the trust, was the true owner of the property. The trial court sustained the demurrer with leave to amend.

Around that time, Narron transferred title of the property from herself as an individual to herself as trustee of the Survivor's Trust of the Narron Family Trust. Narron then filed a second amended complaint, with herself as plaintiff. Respondents moved to strike on the ground the complaint was filed in violation of the court's prior order. In the alternative, respondents moved to quash, arguing the court lacked jurisdiction because the complaint failed to allege compliance with the just cause requirements of the San Francisco Residential Rent Stabilization and Arbitration Ordinance. The trial court denied the motion to strike as untimely, but granted the motion to quash "because there ha[d] not been a proper substitution of the plaintiff."³

Based on the record before us, it is unclear whether Narron was granted leave to once again amend her complaint. In any event, the register of actions indicates Narron did not file a third amended complaint. The register of actions also indicates respondents subsequently filed an unopposed motion to dismiss and for judgment. As Franck did not include the motion in his appendix on appeal, the basis of that motion is unclear. The trial court granted the motion and entered judgment in favor of respondents.

Respondents filed an action for malicious prosecution and negligence against Narron and Franck on November 18, 2013, and filed an amended complaint several days

³ It appears the trial court may have confused the motion to quash with the motion to strike, though neither party raises the issue.

later. The original complaint is included in the record on appeal, but the amended complaint—the operative pleading in that matter—is not.

Franck moved to strike the amended complaint pursuant to California’s anti-SLAPP law, codified at Code of Civil Procedure⁴ section 425.16. Franck asserted respondents’ claim for negligence violated the constitutional right to petition for redress of grievances and was barred by the litigation privilege. As to respondents’ claim for malicious prosecution, Franck argued respondents could not state a claim because the unlawful detainer action was not decided on the merits. In support, he filed a declaration asserting the unlawful detainer action was dismissed on technical grounds because “there was a problem that Peggy Narron’s [*sic*] understood the grant deed to be in her name, but in fact the grant deed was in the name of her family trust.” Franck also asserted: “The only reason why I did not file a new complaint for Unlawful Detainer is that my client Peggy Narron was so upset over the deed issue that she could no longer speak with me, and the attorney client relationship was terminated.”

The motion to strike was granted as to respondents’ claim for negligence but denied as to their claim for malicious prosecution. With respect to the denial, the court reasoned respondents obtained a favorable determination in the unlawful detainer action, the judgment was based on the merits as Narron was not a proper plaintiff, and respondents demonstrated malice by Narron and Franck in their continued prosecution of the underlying action despite knowing Narron was not a proper plaintiff.

II. DISCUSSION

A. *Anti-SLAPP Motion*

Pursuant to the anti-SLAPP statute, a party may move to dismiss “certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity.” (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420–1421.) The statute provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United

⁴ All statutory references are to the Code of Civil Procedure.

States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

(§ 425.16, subd. (b)(1).)

In evaluating an anti-SLAPP motion, a court conducts a two-step analysis. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech.’ ”

(*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the defendant makes such a showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim, “i.e., to proffer a prima facie showing of facts supporting a judgment in the plaintiff’s favor.” (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

The outcome of the first step of the inquiry is not in dispute here. The anti-SLAPP statute defines “ ‘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).) Thus, the statute dictates respondents’ claim for malicious prosecution arises from protected activity because every such claim necessarily depends upon the written and oral statements in prior judicial proceedings. (See *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215.)

The question presented here relates to the second step of the test. Specifically, did respondents meet their burden of establishing a probability they would prevail on their claim for malicious prosecution? (See § 425.16, subd. (b)(1).) The Legislature did not intend for courts to weigh conflicting evidence to determine whether it is more probable than not that a plaintiff will prevail on the claim, “but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation.” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) “The court considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the

evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) Whether the plaintiff has established a prima facie case is a question of law, which we review de novo. (*Ibid.*)

B. Probability of Prevailing on Malicious Prosecution Cause of Action

In light of the principles favoring open access to the courts, malicious prosecution is disfavored as a cause of action. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493.) Accordingly, the elements of malicious prosecution have been carefully circumscribed so the prospect of such a claim will not deter litigants from bringing potentially valid claims to court. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 872.) To prevail on a claim for malicious prosecution, a plaintiff must prove three elements: (1) the defendant commenced a lawsuit which was pursued to termination in plaintiff's favor, (2) the defendant lacked probable cause to bring the prior lawsuit, and (3) the prior lawsuit was initiated with malice. (*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 911.) Franck contends respondents failed to show a probability of prevailing on the first two elements. We disagree.

1. Termination of the Underlying Unlawful Detainer Action

The first element of a claim for malicious prosecution is the underlying case was terminated in favor of the malicious prosecution plaintiff. (*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.*, *supra*, 114 Cal.App.4th at p. 911.) "The basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff's innocence. [Citations.] When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit." (*HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 214.) "Should a conflict arise as to the circumstances of the

termination, the determination of the reasons underlying the dismissal is a question of fact.” (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 198.)

Franck argues termination of the unlawful detainer action did not reflect on the merits of the case because “dismissal [was] based on the inability to continue with [the] case due to improper parties.” He has failed to carry his burden in this regard. The appendix provided by Franck does show the trial court granted respondents’ motion to quash Narron’s second amended complaint in the unlawful detainer action for failure to substitute proper parties. As Franck argues, such a ruling does not reflect on the merits of the case.⁵ However, the disposition of the motion to quash did not terminate the action. Rather, judgment was entered only after the trial court granted respondents’ unopposed motion to dismiss. This suggests the action may have been dismissed due to a failure to prosecute, which does reflect on the merits. (*Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827 [“The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted.”].)

At oral argument, Franck asserted the motion to dismiss was akin to a motion for judgment, and Narron had no grounds to challenge it after the court granted the motion to quash since the court denied Narron’s request to amend her second amended complaint. But Franck failed to include in his appendix on appeal the motion to dismiss, the order disposing of that motion, or any record of Narron requesting or the trial court denying leave to amend after the motion to quash was granted. Without these documents, we can only speculate as to whether Franck’s description of the proceedings is accurate.

⁵ At oral argument, respondents asserted the trial court should have granted the motion to quash on other grounds, not stated in its order, that reflected on the merits, and therefore the disposition of the motion shows Narron’s claims lacked merit. The argument is far from compelling. In determining whether the disposition of the motion to quash reflected on the merits, we are concerned with the stated reasoning of the trial court, not what respondents believe the trial court’s reasoning should have been.

Accordingly, Franck has failed to show the disposition of the unlawful detainer action did not reflect on the merits.⁶

2. *Probable Cause*

“[T]he existence or nonexistence of probable cause is a legal question to be resolved by the court in the malicious prosecution case.” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) “[P]robable cause is determined objectively . . . without reference to whether the attorney bringing the prior action believed the case was tenable.” (*Ibid.*) Actions may give rise to a suit for malicious prosecution only if any reasonable attorney would agree the suit is totally and completely without merit. (*Sheldon Appel Co. v. Albert & Olike, supra*, 47 Cal.3d at pp. 885–886.) In analyzing the issue of probable cause, the court must consider “both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164–165.)

Franck asserts he had probable cause to file the underlying unlawful detainer action because respondents were not “entitled to a lifetime of free rent at Mrs. Narron’s house.” But Franck points to nothing in the record suggesting respondents failed to pay rent, other than his own reply brief in support of the motion to strike, which is not evidence. Moreover, respondents presented evidence, specifically their own declarations, indicating Narron voluntarily ceased accepting rent in cash after respondents agreed to provide property management services. Respondents’ declarations also assert Narron failed to follow through on her promise to reimburse respondents for out-of-pocket

⁶ We do not find respondents established the disposition of the unlawful detainer action reflects on the merits of the case, or even that there is a triable issue in that regard. We merely hold Franck failed to carry his burden on appeal to provide a record demonstrating error. Nothing in this opinion precludes Franck from later raising this issue with the trial court.

expenses they incurred in fixing up and managing the property. To the extent Franck has contradictory evidence, he has failed to present it on appeal.

Franck next argues Narron intended to move back into the house and thus was entitled to evict respondents under San Francisco Administrative Code section 37.9, subdivision (a)(8). But there is no indication Franck asserted this claim as part of the unlawful detainer action. The three-day notice to quit served on respondents merely asserted they breached the terms of their rental agreement by failing to vacate the premises by the date agreed upon by the parties. Likewise, the pleadings in the unlawful detainer action assert respondents failed to pay rent or to vacate at the end of the lease term. In short, we need not determine whether Narron had a tenable claim under section 37.9, subdivision (a)(8) of the San Francisco Administrative Code because it does not appear she sought relief under this particular provision in the underlying action.

For similar reasons, we reject Franck's claim, raised for the first time in his reply brief, that probable cause existed because respondents were Narron's employees, and their tenancy ended with their employment. As an initial matter, we need not consider arguments raised for the first time on reply. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 55.) Moreover, there is no indication the claim was raised in the unlawful detainer action or in Franck's motion to strike, and Franck points to nothing in the record which would suggest respondents were Narron's employees or their employment was terminated.⁷

III. DISPOSITION

The trial court's denial of the motion to strike as to respondents' claim for malicious prosecution is affirmed.

⁷ Respondents argue Franck lacked probable cause since he knew Narron owned the property but brought suit on behalf of a Narron family trust. We disagree. While Franck's inability to identify the correct plaintiff might reflect on the quality of his counsel, it has no bearing on the probable cause inquiry. We see no reason why Franck or Narron should be held liable for malicious prosecution merely because they mistakenly brought suit on behalf of the wrong plaintiff, especially if Narron could have prevailed had she brought suit in her individual capacity.

Margulies, J.

We concur:

Humes, P.J.

Banke, J.