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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

NOSRATOLLAH KERMANINEJAD et
al.

Plaintiffs and Respondents,

v.

STEPHEN M. KAPPOS et al.

Defendants and Appellants.

A146031

(Sonoma County
Super. Ct. No. SCV-256324)

Creditors Trade Association, Inc. (CTA), represented by Stephen Kappos, filed a collection action against Nosratollah Kermaninejad and his daughter Tara Kermaninejad (collectively, the Kermaninejads).¹ After the case was voluntarily dismissed, the Kermaninejads sued CTA, Kappos, and the Law Offices of Robinson-Kappos (collectively, appellants) for malicious prosecution. Appellants filed anti-SLAPP² motions to strike the malicious prosecution action. The trial court denied the motions, found they were frivolous, and awarded the Kermaninejads fees and costs as sanctions. Appellants now appeal the denial of the motions and the sanctions award. On their part, the Kermaninejads have filed motions to dismiss the appeal as moot and to sanction

¹ Because they share the same surname, we refer to Nosratollah and Tara by their first names. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² SLAPP is an acronym for strategic lawsuit against public participation. (*Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728, 732, fn. 1.) Under Code of Civil Procedure section 425.16, a defendant may file an anti-SLAPP motion to strike unmeritorious claims that thwart constitutionally protected speech or petitioning activity.

appellants for filing a frivolous appeal. We affirm the order denying the anti-SLAPP motions, reverse the award of sanctions, and deny the Kermaninejads' pending motions.³

I. BACKGROUND

A. The Kermaninejads and the Corporation

Nosratollah was the sole officer and director of Thirty-Two Lafayette Circle, Inc., which did business as Petar's Restaurant (the Corporation). Tara is his daughter who was born in 1985.

Nosratollah bought the Corporation in 2000. Around the time of the purchase, he executed a credit agreement on behalf of the Corporation with Young's Market Company, a wholesale liquor distributor. The agreement included a section for a personal guaranty, but the section was not filled out and the signature lines were left blank. In their briefing, appellants represent that Nosratollah's social security number was written in the space adjacent to the signature line, but it is impossible for us to verify the accuracy of this representation because this space is blacked out on our record of the credit agreement.

Between 2000 and 2013, the Corporation purchased goods and supplies from Young's Market. In 2013, a dispute arose with the Corporation's landlord. The dispute could not be resolved, and the business closed abruptly. Nosratollah wound down the Corporation, but the assets were insufficient to fully pay all of its creditors, including Young's Market.

B. The Collection Action

Young's Market assigned the Corporation's debt to CTA for collection. In April 2013, CTA filed a collection action against the Corporation, Nosratollah, and Tara in

³ The briefing filed by the Kermaninejads' counsel includes unprofessional and inappropriate remarks, including comments about his own imposing physical stature, impugning the integrity of opposing counsel, and mocking the name of CTA's president. These types of comments are unhelpful and distracting to the Kermaninejads' cause, and they may constitute professional misconduct. (See, e.g., *In re S.C.* (2006) 38 Cal.App.4th 396, 412.) We caution counsel to exercise better judgment in the future to avoid such advocacy.

Sonoma County Superior Court. CTA was represented by Kappos. The complaint alleged that Tara was the sole officer, director, and shareholder of the Corporation, and it maintained that the corporate veil should be pierced because the Kermaninejads were the Corporation's alter egos.⁴ The complaint alleged that Nosratollah had personally guaranteed the debts of the Corporation and that Tara had promised to pay for all the wholesale wine and alcohol purchased from Young's Market, despite the fact that she was only 15 years old when the credit agreement was executed in 2000. According to the complaint, venue was proper in Sonoma under the parties' credit agreement. CTA sought \$5,210.79 plus interest at a rate of 24 percent, as well as attorney fees.

Although the Corporation did not file an answer, Nosratollah and Tara each filed one, and did so without representation. In his answer, Nosratollah asserted he did not guaranty the credit agreement and was therefore not individually liable. Tara asserted she had never had any affiliation whatsoever with the Corporation.

In May 2013, CTA served Nosratollah with discovery requests. After Nosratollah failed to respond, the trial court granted CTA's request for discovery sanctions in the amount of \$390 and deemed the requests admitted.

Default was entered against the Corporation in October 2013. Eventually, a default judgment in the amount of \$8,998.36 was entered against the Corporation.

In April 2014, Tara faxed a letter to Kappos stating it is "clear that my name is not and has never been apart [*sic*] of the corporation." Attached to the letter were records from the Secretary of State showing Tara was not an officer of the Corporation, and a birth certificate showing she was born in 1985. Tara warned that she would bring a malicious prosecution action if the collection action was not "dropped" before April 28.

⁴ The Kermaninejads incorrectly argue that an alter-ego theory was not asserted against Nosratollah. While the complaint devotes a full paragraph to the alter-ego allegations against Tara, it also generally alleges that the Corporation was "controlled, dominated by Defendants [i.e., both Tara and Nosratollah] as their individual businesses [*sic*] and alter egos."

On April 29, Nosratollah filed a case management conference statement asserting he had not guaranteed the loan, and Tara had no association whatsoever with the Corporation.

A case management conference was held on June 19, 2014. Gregory Wonderwheel appeared on behalf of Kappos as counsel for CTA, and Tara and Nosratollah once again appeared without counsel. Tara stated she had provided documentation showing she was in “no way involved in the corporation” but had received no response. The court set the case for trial on August 13, 2014. Tara claims that Wonderwheel told her and Nosratollah after the hearing that CTA wanted to settle the case. Tara replied that they had been wrongfully sued. Wonderwheel said he was not the attorney of record for CTA and could do nothing to help and that Tara should contact Kappos. Tara told Wonderwheel they had left “a dozen phone calls” for Kappos but he had not responded.

The Kermaninejads then retained Wallace Francis to represent them. Francis also consulted with attorney Mark Clausen about the case. They both agreed to represent the Kermaninejads pro bono. Francis sent Kappos a letter on July 9, 2014, asking him to immediately dismiss the case because Tara had no relation to the corporation and Nosratollah did not execute a personal guaranty. Kappos did not respond. Francis also claims he emailed or faxed Kappos a notice of substitution of counsel on July 16, 2014, though the court docket reflects the notice was not filed with the trial court until August 12, 2014. Clausen sent Kappos a letter on July 25, 2014, asserting there was no basis for the case against the Kermaninejads and informing Kappos that sanctions would be requested if the case was not dismissed. Again, Kappos did not respond.

The case was called for trial on August 13, 2014. Douglas Provencher appeared for CTA, and Clausen and Francis appeared for the Kermaninejads. Provencher stated CTA had obtained default against the Corporation, and he had been instructed to dismiss Tara and Nosratollah. The Kermaninejads refused to waive costs and fees.

On August 28, 2014, CTA dismissed the Kermaninejads without prejudice. Less than a week later, the Kermaninejads filed a memorandum of costs, seeking \$2,350.50,

including \$1,600 in attorney fees. The trial court awarded the Kermaninejads costs, but denied their request for attorney fees because they failed to file a noticed motion.

C. The Malicious Prosecution Action

In November 2014, the Kermaninejads filed the instant action for malicious prosecution against appellants. A first amended complaint (FAC) was filed on December 26.⁵ Its caption indicates that the Kermaninejads were bringing the action on behalf of “similarly situated” individuals, but the pleading contains no class action allegations. The Kermaninejads alleged that the collection action had been brought without any tenable factual or legal basis, was purposely filed in the wrong venue, and was prosecuted to force the Kermaninejads to agree to pay an unjust settlement.

Less than two months later, Kappos and CTA filed substantively identical anti-SLAPP motions. Gary E. Looney, president of CTA, and Kappos, who represented CTA in the collection litigation, filed supporting declarations. Looney said he had no recollection of the collection action other than that it was a routine assignment of an unpaid account of just over \$5,000. According to Looney, someone at CTA who reviewed the contracts between the Corporation and Young’s Market must have believed Nosratollah signed the personal guaranty, and “[i]t appears that belie[f] was mistaken.” Looney did not explain why Tara was sued, but stated he now understood that Tara claimed she had nothing to do with the Corporation. Looney further stated he instructed counsel to dismiss the case against the Kermaninejads because he did not want to incur the expense of trial.

Kappos stated the complaint in the collection action was prepared by CTA staff, and his usual practice was to review such complaints before they were filed, though he had no recollection of whether or not he did so in this matter. Kappos further stated he did not know the Kermaninejads or bear them any ill will, and he stated he had nothing to

⁵ The FAC also named Young’s Market as a defendant and asserted a second cause of action for improper credit inquiries. The Kermaninejads later dismissed their claims against Young’s Market, as well as their Fair Credit Reporting Act claim, without prejudice.

gain from naming the Kermaninejads in the complaint because his compensation was not based on the success or failure of any particular case.

The Kermaninejads opposed the anti-SLAPP motions and moved for an order authorizing anti-SLAPP discovery. In support of their efforts, they filed their own declarations and declarations by Francis, Clausen, and Clausen's law clerk, Alex Zatman. Appellants responded by filing over 80 pages of objections to these declarations.

The trial court denied the anti-SLAPP motions, and denied the Kermaninejads' motion for discovery as moot. The court also found that appellants' anti-SLAPP motions were frivolous and the Kermaninejads were therefore entitled to an award of costs and fees. Before appellants filed their notice of appeal, the Kermaninejads filed a second amended complaint.

II. DISCUSSION

A. *The Anti-SLAPP Statute*

The anti-SLAPP statute was enacted to thwart "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16, subd. (a).)⁶ It allows a defendant to 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 heart of the statute states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

In evaluating an anti-SLAPP motion, courts engage in a two-step, burden-shifting analysis. Under the first step, the court considers whether the defendant filing the anti-

⁶ All statutory references in this opinion are to the Code of Civil Procedure unless otherwise specified.

SLAPP motion has made a prima facie showing that the plaintiff's cause of action arises from actions the defendant took in furtherance of the right of petition or the right of free speech in connection with a public issue. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) To make such a showing, the defendant need not show that its actions were protected as a matter of law, but need only establish a prima facie case that its actions fell into one of the categories listed in section 425.16, subdivision (e). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314.) If the defendant cannot make this threshold showing, the anti-SLAPP motion will be denied.

But if the defendant makes this threshold showing, the burden shifts to the plaintiff for consideration of the second step of the analysis. Under this second step, the plaintiff can prevent the anti-SLAPP motion from being granted only by establishing “a probability” of prevailing on the claim, even though the claim arose from protected activity. (§ 425.16, subd. (b)(1).) This means 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.” ’ ” (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 476, italics omitted.) To demonstrate the complaint is legally sufficient, the plaintiff is only required to show a “ ‘minimum level of legal sufficiency and triability.’ ” (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) If the plaintiff meets this burden, the anti-SLAPP motion must be denied, and the plaintiff may continue to litigate the case. (See *Flatley v. Mauro, supra*, 39 Cal.4th at p. 332 & fn. 16.)

In determining whether the plaintiff has met the second step's burden, “ ‘the trial court is required to consider the pleadings and the supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.) 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.) Thus, “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 (*HMS*).

An order granting or denying an anti-SLAPP motion is immediately appealable. (§ 425.16, subd. (i).) An appeal from the denial of an anti-SLAPP motion stays all further trial court proceedings on causes of actions affected by the motion. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 191.) “The right to appeal has a certain logic to it. After all, what use is a mechanism to allow you to get out of a case early if it is undercut by an erroneous decision of the trial judge? The point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights. The right to appeal a denial of an anti-SLAPP motion is important because it protects the interest validated by the anti-SLAPP statute.” (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317-18, italics omitted.)

The Kermaninejads argue that it is fundamentally unfair to stay litigation following the appeal of an order denying an anti-SLAPP motion. They point out that some courts have expressed concerns with this rule. Our colleagues in Division Two, for example, stated: “We do not disagree that the right to appeal can be ‘important.’ But it should not trump all else. And a losing defendant’s ‘loss’ of the right to appeal a lost anti-SLAPP motion, we submit, is a much smaller price to pay than a winning plaintiff having to expend thousands of dollars in attorney fees on appeal, while the plaintiff’s case is stayed for anywhere from 19 to 26 months, all in a setting where the original motion was without merit, if not downright frivolous.” (*Grewal v. Jammu, supra*, 191 Cal.App.4th at p. 1003, fn. omitted.) We share these concerns. The Kermaninejads’ anti-SLAPP motions were filed almost a year and a half ago, and progress toward resolving the merits of their case has been put on hold ever since. Nonetheless, changes to the rules staying litigation pending the appeal of orders denying anti-SLAPP motions must originate with the Legislature. (See *ibid.* [“something is wrong with this picture, and we hope the Legislature will see fit to change it.”])

B. The Kermaninejads' Motion to Dismiss Lacks Merit

The Kermaninejads contend this appeal is moot and should therefore be dismissed because before appellants filed their notice of appeal, the Kermaninejads filed the second amended complaint (SAC), which is now the operative pleading. The argument is meritless.

An argument identical to the Kermaninejads' was rejected by Division Two in *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, and earlier by the Second Appellate District in *Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604. As *Roberts* explained: "An implied stay in the proceedings where the plaintiff files an amended complaint prior to the defendant's appeal of the denial of a SLAPP motion to strike is necessary so that a plaintiff cannot deprive a defendant of the right to the appellate review granted by the Legislature so that the appellate court can determine if the defendant had made a prima facie showing. [¶] There would be little benefit in a right to appeal if the plaintiff could get around appellate review by filing an amended pleading. Nor would a competitive rush to the courthouse fulfill the legislative purpose of a quick and inexpensive method of unmasking and dismissing SLAPP suits." (*Roberts*, at p. 613; see also *Hecimovich*, at p. 461 [adopting *Roberts*'s reasoning].) Contrary to the Kermaninejads' contentions, the instant action is not distinguishable just because the trial court deemed appellants' anti-SLAPP motion to be frivolous. And whether or not the Kermaninejads filed the SAC for the express purpose of avoiding appellate review is irrelevant. We cannot dismiss this appeal merely because the Kermaninejads decided to assert additional legal theories before the appeal was filed.

The Kermaninejads' reliance on *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468 is misplaced. In that case, the plaintiff filed a complaint asserting causes of action that were based in part on protected activity and therefore potentially subject to an anti-SLAPP motion. (*Id.* at p. 470.) Before the defendant filed its anti-SLAPP motion, the plaintiff amended its pleading so as to remove the allegations of the protected conduct as a basis for liability. (*Ibid.*) The court held the filing of the amended pleading mooted the later-

filed anti-SLAPP motion based on the original complaint. (*Ibid.*) The court did not address the effect of an amended pleading on an appeal of an order denying an anti-SLAPP motion. For that reason alone, *Colton* is inapposite. Moreover, unlike the plaintiff in *Colton*, the Kermaninejads did not remove the cause of action based on protected conduct when they amended their pleading. Like the FAC, the SAC asserts a cause of action for malicious prosecution. The Kermaninejads make much of the fact that their SAC is considerably longer than their FAC. But the size of the SAC is irrelevant for the purposes of this analysis.

C. Evidentiary Issues

As we have mentioned, appellants filed over 80 pages of objections to the declarations submitted in support of the Kermaninejads' opposition to the anti-SLAPP motions. The trial court overruled most of these objections, and sustained others. The court made no rulings on the objections to the Zatman declaration. Appellants now argue most of the testimony in the Clausen, Zatman, and Francis declarations is inadmissible.

Relying on *Comden v. Superior Court* (1978) 20 Cal.3d 906 (*Comden*), appellants maintain that the law does not allow attorneys to be both advocate and witness. The argument is meritless. To begin with, *Comden* was decided before the Rules of Professional Conduct were amended to loosen the constraints on attorney testimony. (See *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 579.) Furthermore, to the extent *Comden* remains good law, it governs whether an attorney-witness can be subject to a motion for disqualification, not whether the attestations of the attorney-witness are admissible.

Next, appellants argue that we should disregard the portion of Clausen's declaration in which he asserts Kappos did not prepare or sign the complaint in the collection litigation. Clausen states he obtained information causing him to believe a non-attorney at CTA "most likely" signed the documents for Kappos. In support, Clausen cites to Zatman's declaration and states that other attorneys told him they too suspected someone else signed Kappos's name to the pleadings and letters. We agree that the last statement is inadmissible hearsay, and that Clausen's other statements lack

foundation, as neither he nor Zatman was qualified as a handwriting expert. We also agree with appellants that Clausen's statement that he "believe[s] without equivocation or hesitation that Kappos and CTA knowingly filed and prosecuted the [collection litigation] without probable cause" is inadmissible as a legal conclusion and as speculation.

Finally, appellants assert Zatman's entire declaration is full of hearsay, argument, improper lay opinion, speculation, and irrelevant statements, and lacks foundation and personal knowledge. We agree. Zatman asserts that he located a significant number of cases in which Kappos and CTA brought alter-ego claims against individuals in an effort to collect corporate debts, though he only specifically identifies two. Zatman also asserts that in one of these cases the individual defendants were dismissed with prejudice. The reasons for the dismissals are not reflected in the court docket, but Zatman speculates that further discovery will reveal there was no evidence to support holding the individuals liable for the debts of the corporation. Additionally, Zatman claims CTA and Kappos have previously been sued by others for malicious prosecution. Zatman's opinions about the merits of these various cases is inadmissible as it lacks foundation and is based on speculation.

D. Appellants' Anti-SLAPP Motion Was Properly Denied

Our review of the trial court's order denying appellants' anti-SLAPP motion is de novo. (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1447.) We conclude that appellants satisfied their initial burden in the first step of the anti-SLAPP analysis by establishing a prima facie showing that the Kermaninejads' malicious prosecution action against them arose from actions they took in furtherance of the right of petition. But more importantly we conclude that the Kermaninejads successfully overcame this showing in the second step of the anti-SLAPP analysis by satisfying their burden of establishing a probability of prevailing on their malicious prosecution claim.

1. The Action Arose from Protected Conduct

In the proceedings below, the Kermaninejads initially conceded their malicious prosecution claim arose from the exercise of appellants' rights of free speech or petition. They were right to do so. As the trial court held, appellants clearly satisfied their

threshold burden of showing that the lawsuit arises from protected activity. “[B]y its terms, section 425.16 potentially may apply to every malicious prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch. By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.” (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at pp. 734-735.)

The Kermaninejads now retract from that concession and argue that the anti-SLAPP statute is inapplicable because CTA and Kappos were engaged in criminal conduct, specifically the unauthorized practice of law. Setting aside that this claim was not raised below, we are not convinced. It is true that the anti-SLAPP statute does not protect a defendant engaged in illegal activity. (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 317.) A defendant may not invoke anti-SLAPP protections where “either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.” (*Id.* at p. 320.) “[A] defendant’s ‘mere assertion that his [or her] underlying activity was constitutionally protected’ will not suffice to shift to the plaintiff the burden of showing that the defendant’s underlying activity was criminal.” (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 446.)

Here, however, there is insufficient evidence showing that appellants were engaged in the unauthorized practice of law. While Kappos concedes that CTA’s staff drafted the complaint in the collection action, it is unclear whether that staff was supervised paralegals⁷ or licensed attorneys. Moreover, Kappos asserts it is his practice to review complaints before filing them. Although Clausen and Zatman submitted declarations stating someone else signed Kappos’s name to the pleadings, these statements constitute inadmissible speculation, as we have discussed.

⁷ A paralegal may perform certain tasks under the direction and supervision of an active member of the bar, including drafting and analyzing legal documents; case planning, development, and management; legal research; interviewing clients; and fact gathering and retrieving information. (Bus. & Prof. Code, § 6450, subd. (a).)

2. The Kermaninejads Demonstrated a Probability of Success

Although appellants established that the malicious prosecution action arises out of the exercise of their right to petition, we conclude that the Kermaninejads successfully overcame this showing by satisfying their burden under the second step of the anti-SLAPP analysis of establishing a probability that they would prevail on their malicious prosecution claim.

Malicious-prosecution claims are generally disfavored because of the principles favoring open access to the courts. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493.) The elements of a claim for malicious prosecution have been carefully circumscribed to prevent litigants from being deterred from bringing potentially valid claims. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 872.) To prevail on such a claim, a plaintiff must prove four elements: (1) the defendant commenced a lawsuit that was terminated in the plaintiff's favor, (2) the defendant lacked probable cause to bring the lawsuit, (3) the lawsuit was initiated with malice, and (4) resulting damage. (*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 911; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 449.) The Kermaninejads have shown a probability, albeit not a certainty, of succeeding on each of these elements.

a. Favorable Termination

There can be no question that the first element for a claim of malicious prosecution—that the defendant commenced a lawsuit that was terminated in the plaintiff's favor—was satisfied here. It is undisputed that CTA dismissed its claims against Kermaninejads when trial was called. As the trial court held, “[a] voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury. [Citations.] This is because ‘ “[a] dismissal for failure to prosecute . . . does reflect on the merits of the action [and in favor of the defendant]. . . . The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted.” ’ ” (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400 (*Sycamore*).

Appellants claim that they rebutted the presumption that their dismissal of the action was because it lacked merit. They point to Looney’s statement that he believed it was unnecessary to proceed to trial against the Kermaninejads once default was entered against the Corporation. But Looney’s statement is inconsistent with CTA’s conduct during the collection litigation. Default was entered against the Corporation in October 2013. Eight months later, at the June 2014 case management conference, CTA’s counsel acknowledged the default, but asserted CTA was “[r]eady for trial for the rest,” and agreed to an August 2014 trial date. It was not until the case was called for trial in August, 10 months after the default, that CTA agreed to dismiss its claims against the Kermaninejads.

Appellants also appear to argue that they rebutted the presumption by presenting evidence showing CTA had reason to believe it would prevail in the collection action. But, as we discuss below, there was considerable evidence that CTA’s claims against the Kermaninejads were meritless and that CTA knew or should have known about the weakness of these claims.

b. Probable Cause

The second element of a malicious prosecution claim requires a showing that the underlying action was brought without probable cause. “The question of probable cause is ‘whether as an objective matter, the prior action was legally tenable or not.’ [Citation.] ‘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.’ [Citation.] ‘In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) Put another way, probable cause is lacking where no reasonable attorney would have thought the claim tenable. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 886.)

Based on the record before us, we conclude that it is probable the Kermaninejads can establish that appellants lacked a reasonable basis to sue them. The complaint in the collection action alleged that Tara was liable for the Corporation’s debts under an alter-

ego theory. But the Kermaninejads presented evidence that Tara had nothing whatsoever to do with the Corporation. According to Tara's declaration, she was not an employee, shareholder, or stakeholder of the Corporation; she never had a monetary interest in the Corporation; and she never held herself out as having authority to act on the Corporation's behalf. Moreover, Tara was only 15 years old when Nosratollah purchased the Corporation and executed the credit agreement with Young's Market. Her only connection with the Corporation appears to be that she is Nosratollah's daughter. Appellants have failed to submit any contrary evidence, and the declarations filed in support of their anti-SLAPP motion provide no explanation for why Tara was sued. Kappos's declaration does not even mention Tara, and Looney's merely states Tara was sued and he now understands that she claims she has nothing to do with the Corporation.

Appellants contend that the evidence merely shows CTA made a mistake when it named Tara in the complaint. They argue that it is the Kermaninejads' burden to show what appellants knew at the time they filed the collection action, and the Kermaninejads failed to produce any such evidence. Appellants acknowledge that Tara sent a fax to Kappos with evidence that she had no connection to the Corporation, but they argue that fax was sent too late—11 months after Tara answered the complaint. They also assert there is no evidence Kappos received, read, or understood the fax. Appellants acknowledge that they were contacted by Francis and Clausen concerning the case, but they argue that they had no reason to know Francis and Clausen were representing Tara because a notice of substitution of attorney was not filed until later.

These arguments are not persuasive. Appellants point to no evidence supporting their allegation that Tara was the alter ego of the Corporation, and they appear to concede that no such evidence exists by recognizing that suing Tara was a "mistake." Appellants cannot credibly claim that they were unaware of the absence of evidence when they filed the collection action, especially since they have yet to provide any coherent explanation for why they decided to sue Tara in the first place. Appellants also ignore the fact that Tara's answer, which was filed a month after the collection complaint, denies she had any connection to the Corporation. And appellants provide no support for their contention

that Kappos was oblivious to the attempts by Tara and her attorneys to contact him, other than to speculate that Kappos did not receive, read, or understand litigation correspondence that was sent directly to his office. In any event, appellants should have been aware that they had no evidence of Tara's connection to the Corporation, as our record suggests, before they filed the collection complaint.

There is also strong evidence that appellants lacked probable cause to sue Nosratollah. The complaint in the collection action asserts a claim for breach of contract against him as an "individual guarantor." According to the complaint, Nosratollah personally guaranteed the debts of the Corporation when he executed the credit agreement with Young's Market. But even a cursory review of that agreement would have revealed that Nosratollah made no such guaranty. The section of the agreement concerning guaranties was left entirely blank, with the exception of what may be a crossed-out social security number. The credit agreement was attached to CTA's complaint, so whoever prepared and reviewed the complaint, including Kappos, should have been aware that CTA's breach of contract claim was meritless. Even if appellants somehow failed to read the agreement, Nosratollah's answer should have alerted them to the problems with their pleading. Appellants do not even try to defend their breach of contract claim. In his declaration, Looney asserts someone at CTA must have believed Nosratollah signed the personal guaranty and "[i]t appears that believe [sic] was mistaken."

In their appellate briefing, appellants assert that they had probable cause to sue Nosratollah under an alter-ego theory. Setting aside that probable cause "must exist for every cause of action" (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 292), including the breach of contract claim, we are not convinced. Appellants do not point to any evidence to support their alter-ego theory other than that Nosratollah was the sole officer and director of the Corporation, and he signed the credit agreement on its behalf. Much more is required to establish an alter-ego claim. "Conditions under which the corporate entity may be disregarded vary by circumstance, but courts often consider commingling of funds, personal use of corporate assets, inadequate corporate records,

lack of employees, offices, or operating funds, and inadequate capitalization.”
(*CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 789.)
Appellants assert Nosratollah failed to respond to discovery requests, which would have provided him with the opportunity to show he could not be held liable for the Corporation’s debts. But plaintiffs must have probable cause before filing suit. They cannot rely on discovery to explore mere suspicions about the existence of probable cause.

c. Malice

The third element of a malicious prosecution claim requires a showing that the underlying action was brought with malice. “The malice element of the malicious prosecution tort goes to the defendant’s subjective intent in initiating the prior action. [Citation.] For purposes of a malicious prosecution claim, malice ‘is not limited to actual hostility or ill will toward the plaintiff. Rather, malice is present when proceedings are instituted primarily for an improper purpose.’ ” (*Sycamore, supra*, 157 Cal.App.4th at p. 1407.) An improper purpose may exist where a party knowingly brings an action without probable cause or where proceedings are instituted for the purpose of forcing a settlement that has no relation to the merits of a claim. (*HMS, supra*, 118 Cal.App.4th at p. 218; *Ross v. Kish* (2006) 145 Cal.App.4th 188, 204.)

“A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence. [Citation.] Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. (*HMS, supra*, 118 Cal.App.4th at p. 218.) “ ‘[I]f the trial court determines that the prior action was not objectively tenable, the extent of a defendant attorney’s investigation and research may be relevant to the further question of whether or not the attorney acted with malice.’ ” (*Sycamore, supra*, 157 Cal.App.4th at p. 1407.) Malice may also be found where an attorney continues to prosecute a lawsuit discovered to lack probable cause. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970.)

We conclude that the Kermaninejads demonstrated a probability of success on the element of malice. As we have discussed, the evidence suggests that appellants lacked probable cause to bring the collection action against the Kermaninejads. While lack of probable cause alone is not enough to establish malice, the Kermaninejads presented additional evidence. To begin with, evidence was presented supporting an inference that appellants brought this action for the purpose of forcing a settlement. (See *HMS, supra*, 118 Cal.App.4th at p. 218.) Tara has stated that, immediately after the June 19, 2014 trial setting conference in the collection action, CTA's attorney offered to settle the case.⁸ The settlement offer was also made after Tara provided documentation showing she had no connection to the Corporation and thus could not be held liable under an alter-ego theory.

Evidence was also presented supporting an inference that Kappos failed to investigate the claims against the Kermaninejads before filing the collection complaint. (*Sycamore, supra*, 157 Cal.App.4th at p. 1407.) Although in his anti-SLAPP declaration Kappos states the complaint was prepared by staff and he has a practice of reviewing complaints before they are filed, he has no recollection of reviewing the complaint in this case. And lastly, evidence was presented, which included the Kermaninejads' answers and correspondence with Kappos, supporting an inference that Kappos continued to prosecute the collection action after learning that it lacked probable cause.

The Kermaninejads claim that malice may also be inferred from appellants' decision to file the collection action in Solano County, rather than Contra Costa County, where Nosratollah lived. Appellants counter that venue was proper in Solano County under the credit agreement's venue-selection clause, which they claim allowed for venue in the county in which Young's Market maintained its accounting facility. While the

⁸ Appellants maintain that the reporter's transcript of the August 13, 2014 hearing in the collection litigation proves they made no settlement demand. But the transcript proves no such thing. The settlement demand was supposedly made two months earlier, and the only thing that happened at the August 13 hearing was that defendants agreed to dismiss the case.

copies of the credit agreement included in our appellate record are blurry and in places illegible, it appears the agreement contains no venue-selection clause. The only mention of Young's Market's accounting facility in the contract appears to be in a provision stating that all amounts due are payable at that facility. But regardless of whether there was a venue-selection clause or whether venue was proper in Solano County, sufficient evidence was presented to show a probability that the Kermaninejads would prevail on their malicious prosecution claim.⁹

Taken together, the evidence is sufficient to demonstrate a probability that the Kermaninejads can establish malice.

d. Damages

Finally, the last element of a malicious prosecution claim requires a showing of damages. Appellants argue that the Kermaninejads cannot prove they were personally harmed by the collection litigation. The record suggests otherwise. In their declarations, both Tara and Nosratollah stated they expended time and money, and experienced emotional distress as a result of the collection litigation. Appellants have pointed to no contrary evidence.

E. The Award of Sanctions Cannot Be Sustained

The trial court found that appellants' anti-SLAPP motions were frivolous and thus awarded the Kermaninejads costs and fees. Although this is a close call, we agree with appellants that this ruling cannot be sustained. (See *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 684 [abuse of discretion standard applies in this context].)

The anti-SLAPP statute provides that a prevailing *defendant* on a special motion to strike is automatically entitled to recover attorney fees and costs. (§ 425.16, subd. (c)(1).) But a prevailing *plaintiff* may only recover fees and costs if the court finds the anti-SLAPP motion is frivolous or is solely intended to cause unnecessary delay. (*Ibid.*) A motion is frivolous if it is “ ‘totally and completely without merit’ ” or if it is

⁹ The Kermaninejads also argue that malice may be based on Zatman's declaration regarding other actions filed by and against defendants. But, as we have discussed, most of the statements in Zatman's declaration are inadmissible.

filed “ ‘for the sole purpose of harassing an opposing party.’ ” (*Chitsazzadeh v. Kramer & Kaslow, supra*, 199 Cal.App.4th at p. 683.) “A motion is totally and completely without merit for purposes of a finding of frivolousness under section 425.16, subdivision (c)(1) . . . only if any reasonable attorney would agree that the motion is totally devoid of merit.” (*Id.* at pp. 683-684.)

While the anti-SLAPP motions here were weak, we cannot conclude that they were totally and completely without merit. Appellants satisfied their initial burden under the first step of the anti-SLAPP analysis by showing that the malicious prosecution action arose out of their exercise of their right to petition. While the Kermaninejads ultimately established a probability of succeeding on the merits of their claim under the second-step of the anti-SLAPP analysis, appellants’ opposing arguments were not entirely meritless. Whether the appellants’ pursuit of the collection action was malicious or the result of inattention and carelessness is not obvious, especially since there is no direct evidence of ill will, and the circumstantial evidence presented by the Kermaninejads is less than overwhelming. Thus, we conclude that the trial court improperly found that no reasonable attorney would have filed an anti-SLAPP motion in this case.

The Kermaninejads argue that appellants’ anti-SLAPP motions were plainly dilatory. The trial court appears to have rejected this argument below, as it made no such finding on this point. In any event, the record fails to support the Kermaninejads’ contention. The Kermaninejads point out that the proceedings in the trial court were stayed after appellants filed the instant appeal. But such a stay is routine since an appeal from the denial of an anti-SLAPP motion automatically stays further trial court proceedings. (*Varian Medical Systems, Inc. v. Delfino, supra*, 35 Cal.4th at p. 191.) And we cannot infer that appellants filed the motion for the sole purpose of delay since their anti-SLAPP motion, while weak, was not entirely meritless.

F. The Kermaninejads’ Motion for Sanctions Is Denied

The Kermaninejads have moved for sanctions on appeal, arguing that this appeal is frivolous and filed solely for the purposes of delay. Their arguments on this point are largely repetitive of the contentions concerning the trial court’s award of sanctions. As

we have discussed, we find these contentions unavailing. Accordingly, we deny the motion for sanctions.

III.
DISPOSITION

The trial court's denial of appellants' anti-SLAPP motion is affirmed, and the trial court's award of sanctions is reversed. The Kermaninejads' motion to dismiss this appeal and motion for sanctions are denied. Costs are awarded to the Kermaninejads.

Humes, P.J.

We concur:

Dondero, J.

Banke, J.

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