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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHEREEN McDADE

Plaintiff and Appellant,

v.

TRUDE LEE ASH,

Defendant and Respondent.

B235729

(Los Angeles County
Super. Ct. Nos. BC451883)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

Appleton Law Group and Heather Appleton, for Plaintiff and Appellant.

Towle Denison Smith & Maniscalco and Michael C. Denison, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Shereen McDade, appeals from a judgment dismissing her complaint for malicious prosecution, process abuse and intentional emotional distress infliction. Plaintiff sued defendant, Trude Lee Ash, individually and as trustee of the Trude Lee Ash Trust. Plaintiff is defendant's daughter. This litigation stems from three different

lawsuits: a probate action; the filing of a lien notice in an employment action; and a declaratory relief cross-complaint concerning the validity of the lien notice. The trial court dismissed the complaint after granting defendant's special motion to strike pursuant to Code of Civil Procedure¹ section 425.16. We affirm the judgment.

II. PROCEDURAL HISTORY

A. The Probate Action

Defendant was the objector in a probate action entitled, *In re the Joseph C. and Trude Lee Ash Trust* (Super. Ct. L.A. County, 1997, No. BP048688). Mr. Ash was plaintiff's biological father and is deceased. In the probate action, plaintiff, as a co-trustee, filed a petition for court approval of an accounting and compensation. The probate court denied the petition and surcharged plaintiff \$893,072.76. On February 25, 2000, an amended judgment was entered against plaintiff and in favor of defendant, as trustee of the Joseph C. and Trude Lee Ash Trust. The total amount of the amended judgment in the probate action including the surcharge, prejudgment interest (\$193,295.10) and attorney fees (\$551,170.08) was \$1,637,537.94.

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

B. The Employment Action

On October 18, 2004, plaintiff filed an employment action against her former employer, entitled *Shereen McDade v. Advantage Infiniti of Santa Monica* (Super. Ct. L.A. County, 2004, No. BC323113). On May 13, 2005, the trial court issued an order compelling arbitration of the employment dispute. On May 23, 2006, defendant filed a lien notice in an effort to enforce the amended probate judgment in the employment action. The lien notice states that, as of February 6, 2006, plaintiff owed \$2,865,930 plus interest. The lien notice was served on plaintiff. Also, the lien notice was served on defendant's counsel in the employment action on June 2, 2006. As will be noted, the filing of the lien notice serves as the basis for the process abuse claim in the present case. Plaintiff dismissed the employment action on October 31, 2006.

C. The Declaratory Relief Action

On March 1, 2007, plaintiff filed the declaratory relief action entitled *Shereen McDade v. Trude Lee Ash, etc.* (Super. Ct. L.A. County, 2007, No. BC367134). Plaintiff sought a declaration of rights concerning the validity of the lien notice filed in the employment action. The declaratory relief complaint alleged that the employment arbitration was pending. (The employment action had been dismissed on October 31, 2006.) Plaintiff asserted that declaratory relief was appropriate on the theory: "An actual controversy has arisen and now exists relating to the rights and duties of the parties herein that [defendant] contends that the Lien is valid and enforceable against any recovery obtained by Plaintiff in the contractual arbitration hearing of the claims asserted in [the employment action] and Plaintiff contends the Lien is not enforceable because the pending contractual arbitration is not an 'action' or 'special proceeding' as required for enforcement under [section] 708.410 et seq."

On May 14, 2007, defendant filed a declaratory relief cross-complaint. The cross-complaint sought a declaration the lien was enforceable. Both parties filed judgment on the pleadings motions. On October 5, 2007, plaintiff's judgment on the pleadings motion was granted. Defendant's judgment on the pleadings motion was denied. The trial court ruled the lien was unenforceable because the employment action was extinguished by the order to arbitrate and the dismissal entered upon plaintiff's request. The judgment on the pleadings orders in the declaratory relief action was affirmed by Division Two of this appellate district on January 7, 2009. (*McDade v. Ash* (Jan. 7, 2009, B205215) [nonpub. opn.])

D. The Present Action

On December 23, 2010, plaintiff filed a complaint against defendant and Greenburg Glusker Fields Claman Machtinger (the law firm). The law firm represented defendant in the declaratory relief action. The complaint in the present action asserts claims for malicious prosecution, process abuse and intentional emotional distress infliction. The basis of the malicious prosecution claim is defendant's conduct in filing the cross-complaint in response to plaintiff's declaratory relief complaint. The process abuse claim is predicated on the declaratory relief cross-complaint as well as defendant's conduct in filing the lien notice in the employment action. The intentional emotional distress infliction claim alleges defendant's conduct was so extreme and outrageous that it exceeded the bounds permitted in a decent society.

E. The Special Motion to Strike

On April 28, 2011, defendant filed a special motion to strike the complaint in the present action pursuant to section 425.16. As noted, defendant filed a cross-complaint in the declaratory relief action. And judgment was entered in plaintiff's favor on defendant's cross-complaint. Defendant asserted plaintiff could not prevail on the

complaint because the present action arose from filing of the cross-complaint on the declaratory relief action. And defendant argued plaintiff had no probability of prevailing on any of the theories in the complaint. Defendant argued the malicious prosecution claim had no merit because: the cross-complaint was a defensive response to plaintiff's complaint, both of which sought the same relief; the declaratory relief judgment was not a favorable termination because the amount of the lien was still due; the declaratory relief judgment only determined the lien was extinguished by arbitration and dismissal of the employment action; plaintiff cannot establish lack of probable cause because the propriety of the lien was not frivolous but a tenable legal theory; malice cannot be established because plaintiff still owes a substantial judgment to defendant; as to the process abuse claim, there were no damages; statutory authority existed for filing, serving and refusing to remove the lien notice; and the intentional emotional distress infliction claim was without merit because the lien notice was authorized by law and was not outrageous.

Plaintiff conceded that the malicious prosecution claim arises out of activity enumerated in section 425.16, subdivision (e). But, plaintiff argued the prima facie elements of malicious prosecution were present because: cross-complaints are actionable; defendant's cross-complaint in the declaratory relief action was offensive rather than defensive in nature; plaintiff prevailed in the declaratory relief action; no reasonable person in defendant's position would have cross-complained in the declaratory relief action; defendant acted to increase plaintiff's litigation costs; and plaintiff incurred additional attorney fees as a result of the cross-complaint in the declaratory relief action.

Plaintiff argued she would prevail on the abuse of process claim because the intentional filing of the lien notice in the employment action caused her litigation costs to increase. With full knowledge it was unenforceable, plaintiff argued defendant filed the lien notice and then refused to release it. Plaintiff argued defendant also engaged in abuse of process in prosecution of the cross-complaint by filing a judgment on the pleadings motion and pursuing an appeal. Finally, plaintiff argued the intentional

emotional distress infliction claim was viable because defendant's conduct caused increased costs and delays in the employment litigation. As part of the opposition, plaintiff's attorney, Heather Appleton, filed a declaration outlining the procedural histories of the various actions including the employment arbitration.

The trial court issued a tentative ruling granting the special motion to strike. At the hearing, the trial court adopted its tentative ruling as the final ruling. The trial court ruled plaintiff failed to produce evidence showing a probability of prevailing on any of her claims. With respect to the malicious prosecution cause of action, the trial court ruled plaintiff initiated the declaratory relief action. The trial court ruled appealing from the adverse ruling did not give rise to a malicious prosecution action. The trial court also ruled the complaint and cross-complaint raised the same issue; i.e., whether the lien notice filed in the employment action attached when the trial court ordered binding arbitration. Also, the trial court ruled: the issue was one of first impression and one on which reasonable attorneys could differ; defendant's malice was irrelevant as the \$2 million uncollected judgment provided a sufficient economic basis to file the lien notice; and filing the cross-complaint in the declaratory relief action was only a reciprocal defensive action made in response to plaintiff's initiation of an independent lawsuit. Defendant's reciprocal cross-complaint, even if unnecessary, was not an abuse of process because: it was not an unauthorized litigation action; the filing of the cross-complaint was protected by the litigation privilege; and filing the cross-complaint was neither outrageous nor malicious. Judgment was entered in defendant's favor. Plaintiff filed this timely appeal.

III. DISCUSSION

A. Special Motion to Strike Standards

Section 425.16, subdivision (b)(1) provides for the dismissal of a lawsuit as follows under these circumstances: "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.” Section 425.16, subdivision (e) provides in part: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. . . .” In order to protect the constitutional rights of petition and free speech, the special motion to strike statute is to be construed broadly. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 199; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121.)

When a special motion to strike is filed, the trial court must consider two components. First, the moving party has the initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant’s actions in the furtherance of petition or free speech rights. (§ 425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Second, once the defendant establishes the complaint’s claims arise out of the exercise of petition or free expression rights, the burden shifts to plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Flatley v. Mauro, supra*, 39 Cal.4th at p. 314; *Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) In reviewing the trial court’s order granting the motion, we use our independent judgment to determine whether the defendants were engaged in enumerated activity. (*Flatley v. Mauro, supra*, 39 Cal.4th at pp. 325-326; *Rushen v. Cohen, supra*, 37 Cal.4th at p. 1055.) And, we independently determine whether plaintiff met her burden of establishing a

probability of prevailing on the her malicious prosecution, process abuse and intentional emotional distress infliction claims. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

B. The Probability of Prevailing

1. Overview

Plaintiff concedes that the first prong is established—the filing of the cross-complaint in the declaratory relief action is within the scope of section 425.16, subdivision (e)(1). However, plaintiff argues the trial court erred in concluding she failed to produce evidence showing a probability of prevailing on her malicious prosecution, process abuse and intentional emotional distress infliction claims. We disagree.

2. Plaintiff has no probability of prevailing on the malicious prosecution claim.

Malicious prosecution is traditionally regarded as disfavored due to its potential chilling effect on a citizen's right to open access to courts for redress of their disputes. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872.) To establish a malicious prosecution claim, there must be evidence and plaintiff must prove: the prior litigation was terminated in plaintiff's favor; commencement of a lawsuit by or at defendant's direction was terminated in plaintiff's favor; the prior lawsuit was brought without probable cause; and the prior lawsuit was initiated with malice. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 216.) We conclude plaintiff will be unable to establish either the lack of probable cause or malice elements. The probable cause determination considers whether, in light of the known facts, any reasonable

attorney would have believed the claim to be legally tenable. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 885-886; compare *Sangster v. Paetkau* (1998) 68 Cal.App.4th, 151, 164-165 [probable cause does not exist if the facts relied on are not reasonably believed to be true or recovery is sought on an untenable legal theory under known facts].)

Here, defendant's cross-complaint mirrored plaintiff's declaratory relief complaint. Both pleadings requested a ruling on the lien's enforceability in the employment lawsuit. The circumstances were: an uncollected \$1,637,537.80 judgment; the filing of a lien notice in plaintiff's action against her former employer; the employment action was ordered arbitrated; and plaintiff filed a dismissal request in the employment action. There was no evidence the cross-complaint was filed with any reason except to assert defendant's right to collect the \$1,637,537.80 judgment through the lien notice notwithstanding the arbitration. Reasonable attorneys could have differed on whether the lien was extinguished by the arbitration order and entering dismissal pursuant to plaintiff's request. To avoid serious chilling effects on the assertion of litigation rights, parties may assert arguably correct issues even when they are "extremely unlikely" to win. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 885; see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Although defendant did not ultimately prevail on her claim, it does not mean the theory was not sufficiently legally tenable. The theory was legally tenable so plaintiff cannot show a lack of probable cause. Furthermore, given the motivation of an uncollected \$2 million judgment, there was no basis to conclude the action was maliciously filed. As a result, plaintiff cannot prevail on her malicious prosecution cause of action.

3. Plaintiff cannot prevail on her process abuse claim.

A process abuse claim is established by showing a litigant's use of the judicial process for a purpose other than that for which it was designed. (*Rusheen v. Cohen, supra*, 37 Cal.4th at pp. 1056-1057; *JSJ Ltd. Partnership v. Mehrban* (2012) 205

Cal.App.4th 1512, 1522.) The tort consists of misusing the court's power in order to perpetrate an injustice. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1057 quoting *Meadows v. Bakersfield Sav. & Loan Assn.* (1967) 250 Cal.App.2d 749,753.) Our Supreme Court explained, "To succeed in an action for abuse of process, a litigant must establish the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1057; see also *JSJ Ltd. Partnership v. Mehrban, supra*, 205 Cal.App.4th at p. 1522.) Here, plaintiff's process abuse claim is predicated on defendant's acts in filing the cross-complaint in the declaratory relief action and the lien notice in the employment actions respectively. The process abuse claim is barred by the absolute litigation privilege in Civil Code section 47, subdivision (b). (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; see *JSJ Ltd. Partnership v. Mehrban, supra*, 205 Cal.App.4th at pp. 1522-1523; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 37-38.)

Under these standards, there is no merit to plaintiff's argument defendant is liable for process abuse in filing the cross-complaint in the declaratory relief action. (*JSJ Ltd. Partnership v. Mehrban, supra*, 205 Cal.App.4th at pp. 1522-1523; *Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 216.) Similarly, the litigation privilege bars plaintiff's process abuse claim based upon the filing of the lien notice in the employment action. (§ 708.410, subd. (a); see *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 347 [filing a mechanic's lien is privileged as it directly relates to a judicial foreclosure action]; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 25 [filing of a mechanic's lien is protected by the litigation privilege].) The filing of the lien was authorized by law. And, the lien was related to defendant's efforts to enforce an uncollected \$2 million judgment. Thus, the alleged conduct was absolutely privileged.

4. Plaintiff cannot prevail on her intentional emotional distress infliction claim.

To prevail on the intentional infliction of emotional distress claim, plaintiff must prove: defendant's outrageous conduct; intentional or reckless disregard of the probability of causing emotional distress; plaintiff suffered severe or extreme emotional distress; and defendant's outrageous conduct was the actual and proximate cause of emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108.) The standard for the emotional distress required is "high" and must be so substantial that no reasonable person in a civilized society should be expected to endure it. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051; see also *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 389.) There is no merit to plaintiff's contentions this high standard was satisfied when defendant filed the cross-complaint or lien notice. Both actions are also privileged. (§ 47, subd. (b).) Accordingly, plaintiff has failed to establish a probability of prevailing on her intentional emotional distress infliction claim.

IV. DISPOSITION

The judgment is affirmed. Defendant, Trude Lee Ash, individually and as trustee of the Trude Lee Ash Trust, is awarded her costs on appeal from plaintiff, Shereen McDade.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.