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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GARY V. HIXON,

Plaintiff and Respondent,

v.

ZIPPY'S CURRENCY X-CHANGE, INC.,
et al.,

Defendants and Appellants.

B256439

(Los Angeles County
Super. Ct. No. BC527402)

APPEAL from an order of the Superior Court of Los Angeles County,
Yvette M. Palazuelos, Judge. Reversed with directions.

Ryan Gordon; Lee & Baghoomian and Steve Baghoomian for Defendants and
Appellants.

Lozoya & Lozoya and Frank J. Lozoya IV for Plaintiff and Respondent.

Zippy's Currency X-Change, Inc. (Zippy's), Mark J. Zippert, Carol Zippert, Lewis & Ham, LLP, Michael R. Lewis, and Yoon O. Ham (collectively Defendants) appeal an order denying in part their special motion to strike (Code Civ. Proc., § 425.16) a complaint against them.¹ The trial court granted the motion as to a count for abuse of prosecution, but denied the motion as to a malicious prosecution count. Defendants contend Gary V. Hixon failed to establish a probability of prevailing on the elements of lack of probable cause and malice. We conclude that Hixon failed to establish a probability of prevailing on the element of lack of probable cause and therefore reverse the order with directions to grant the motion as to both counts.

FACTUAL AND PROCEDURAL BACKGROUND

1. Complaint in Case No. 1, Trial, and Judgment

Taylor Concrete Pumping Corp. and Taylor Transportation, Inc. (collectively Taylor) filed a complaint against Zippy's, Mark J. Zippert, and others (Super. Ct. L.A. County, No. BC418774) (case No. 1). After a nonjury trial in May 2010, the court entered a judgment awarding Taylor \$163,259.18 in damages against the defendants on counts for money lent, money had or received, and conversion. The judgment also awarded prejudgment interest and costs. The total amount of the judgment was \$183,849.60.

2. Complaint in Case No. 2, Taylor's Writ of Execution, and Stipulation for Entry of Judgment

Taylor filed a complaint against Zippy's, Mark J. Zippert, Carol Zippert, and others in May 2010 alleging that the defendants transferred their assets before the trial in case No. 1 to defraud their creditors (Super. Ct. L.A. County, No. BC438252) (case No. 2). Taylor alleged counts (1) to set aside fraudulent transfers and (2) for recovery of a claim under the bulk sales law.

Taylor obtained a writ of execution on the judgment in case No. 1 in July 2010. In October 2010, the sheriff levied a \$100,000 certificate of deposit held by Farmers &

¹ Code of Civil Procedure section 425.16 is commonly known as the anti-SLAPP statute. SLAPP is an acronym for Strategic Lawsuit Against Public Participation.

Merchants Bank pursuant to the writ. The bank did not release the funds at that time, apparently because the certificate of deposit had not yet matured.

Taylor entered into a Stipulation for Entry of Judgment with Zippy's and the Zipperts on August 19, 2011. The stipulation stated that the Zipperts assigned to Taylor Transportation, Inc., the \$100,000 certificate of deposit, that Zippy's and the Zipperts "will use their best efforts to ensure that the proceeds of the CD are disbursed to TAYLOR TRANSPORTATION, INC., on or before August 31, 2011," and that "[t]he maturity date of the CD shall be no later than June 30, 2012." It stated that Zippy's and the Zipperts would pay Taylor \$5,000 by August 31, 2011, and another \$5,000 by September 30, 2011, and would deliver those payments to Taylor's attorneys. It also stated that Zippy's and the Zipperts stipulated to entry of a judgment against them for fraud in the amount of \$195,000, and it included the judgment as an attachment. The stipulation stated that Taylor could have the judgment entered on or after September 1, 2011, without further notice to the defendants. It stated further that upon Taylor's receipt of the two \$5,000 payments and the proceeds of the \$100,000 certificate of deposit, Taylor would file an acknowledgment of full satisfaction of judgment in both case No. 1 and case No. 2.

The stipulation stated that if Zippy's and the Zipperts failed to timely make either of the \$5,000 payments or Taylor failed to receive the proceeds of the certificate of deposit by June 30, 2012, "TAYLOR shall be entitled to pursue all available collection remedies to collect the judgment being entered in this ACTION pursuant to this Stipulation." Zippy's also executed an assignment of the \$100,000 certificate of deposit to Taylor Transportation, Inc., on August 19, 2011.

3. *Initial Settlement Payments to Taylor*

Counsel for Zippy's and the Zipperts sent Taylor's counsel a \$5,000 check on August 26, 2011, pursuant to the stipulation, and sent him another \$5,000 check on September 22, 2011. The second check had not arrived by October 3, 2011, so Taylor's counsel, Wayne S. Marshall, granted an extension of time to deliver the second

payment. Marshall received the second \$5,000 payment by wire transfer on October 5, 2011.

4. *Entry of Stipulated Judgment in Case No. 2*

Taylor requested entry of judgment on the stipulation on October 27, 2011. Taylor's counsel represented to the trial court that Taylor had settled with Zippy's and the Zipperts and that the stipulation allowed for entry of judgment without further notice. The trial court granted the request and, on October 28, 2011, entered a judgment on the stipulation awarding Taylor \$195,000 against Zippy's and the Zipperts "for fraud." (Capitalization omitted.)

5. *Assignment of Certificate of Deposit*

Taylor Transportation, Inc., assigned the \$100,000 certificate of deposit to its attorney, Marshall, on November 29, 2011. The assignment stated that it would take effect upon the bank's acknowledgment of receipt of the assignment.

6. *Assignments of Judgment*

Benjamin Taylor, as president of both Taylor Concrete Pumping Corp. and Taylor Transportation, Inc., signed two assignments of judgment on December 19, 2011, stating that Taylor's judgments in case No. 1 and case No. 2 were assigned to Hixon doing business as HBH Services. Hixon filed the assignments in the two cases on that same date, but filed no proof of service. Hixon later served two notices of assignment on February 15, 2012. The notices stated that all payments to satisfy the judgments must be paid to Hixon and that any payments made to Taylor after the date of the notices would not apply toward satisfaction of the assigned judgments.

7. *Hixon's Collection Efforts*

Hixon obtained a writ of execution on each of the two judgments in March 2012. He levied the judgment debtors' bank account on April 2, 2012, receiving \$6,613. He also attempted to levy the \$100,000 certificate of deposit.

Counsel for Zippy's and the Zipperts sent Hixon a letter on April 5, 2012, together with a copy of the Stipulation for Entry of Judgment, but omitting page three of the stipulation. The letter stated that the stipulation was a settlement agreement and that

it limited Hixon's rights to collect on the assigned judgments. The letter stated, "According to the settlement, your recovery is limited to a certificate of deposit and nothing more," and demanded that Hixon cease his enforcement efforts and return the levied funds.

Hixon responded by e-mail on April 6, 2012, stating, "I do not understand your statement 'According to the settlement, your recovery is limited to a certificate of deposit and nothing more.' Moreover, page three of the Stipulation for Entry of Judgment was missing from your attachment. Please provide me with clarification of your aforementioned statement." Hixon also stated that Mark Zippert had been convicted of money laundering and was on probation and that "[a]ny settlement alleged to have been agreed to by Mr. Zippert must be highly suspect, given his propensity to commit fraud."

Counsel for Zippy's and the Zipperts responded by e-mail on April 6, 2012, stating that the settlement agreement limited Hixon's rights of recovery and that he must cease his collection efforts. Hixon responded by e-mail on April 6, 2012, stating that there were two entirely different judgments. Counsel for Zippy's and the Zipperts responded by e-mail on April 7, 2012, stating that he was resending the entire Stipulation for Entry of Judgment, including page three, and that page three showed that the settlement applied to both prior judgments. Counsel also stated that his clients had made the initial payments totaling \$10,000 "and will transfer the certificate of deposit on or before *April 30, 2012*. Until that point, you have no right to any collection efforts on your part."² (Italics added.)

8. *Complaint in Case No. 3 and Ex Parte Application for a Temporary Restraining Order*

Zippy's and the Zipperts filed a complaint against Hixon on April 19, 2012, alleging counts for (1) breach of contract; (2) breach of the implied covenant of good

² The Stipulation for Entry of Judgment stated that Taylor must receive the proceeds of the \$100,000 certificate of deposit by June 30, 2012.

faith and fair dealing; (3) bad faith denial of contract; (4) negligence; (5) conversion; (6) trespass to chattels; (7) intentional infliction of emotional distress; (8) negligent infliction of emotional distress; and (9) specific performance (Super. Ct. L.A. County, No. BC483103) (case No. 3). Lewis & Ham, LLP, and attorneys Lewis and Ham represented Zippy's and the Zipperts as plaintiffs.

Zippy's and the Zipperts alleged in the first count for breach of contract that the Stipulation for Entry of Judgment was a settlement agreement and that Hixon as assignee of the judgments was a party to the settlement agreement. They alleged that Hixon breached the settlement agreement by enforcing the judgments before June 30, 2012, the date by which they were required to turn over the \$100,000 certificate of deposit. They alleged in the second count for breach of the implied covenant that Hixon deprived them of the benefit of the settlement agreement by enforcing the judgments prematurely. They alleged in the third count for bad faith denial of contract that Hixon, in bad faith, denied the existence of the settlement agreement or that he was bound by it.

Zippy's and the Zipperts alleged in the fourth count for negligence that Hixon owed them a duty to use ordinary care in enforcing the judgments and breached that duty by engaging in acts intended to harm them and deprive them of the benefits of the settlement agreement. They alleged in the fifth and sixth counts for conversion and trespass to chattels that Hixon wrongfully converted and wrongfully took possession of \$6,713 from their bank account through writs of possession. They alleged in their seventh and eighth counts for intentional and negligent infliction of emotional distress that Hixon's conduct in enforcing the judgment was outrageous and that he knew or should have known that he had no right to enforce the judgment. They alleged in their ninth count for specific performance that they had made the initial payments totaling \$10,000, that they were not yet required turn over the \$100,000 certificate of deposit, and that the settlement agreement should be specifically enforced.

Zippy's and the Zipperts filed an ex parte application in case No. 3 on April 25, 2012, seeking a temporary restraining order and an order to show cause re: preliminary injunction to enjoin Hixon from undertaking any collection efforts not specifically

allowed under the Stipulation for Entry of Judgment. The trial court denied the ex parte application, stating that the plaintiffs failed to show irreparable harm.

9. *Ex Parte Applications and Substitution of Attorney in Case No. 2*

Zippy's and the Zipperts filed an ex parte application in case No. 2 on May 10, 2012, for an order quashing the writs of execution obtained by Hixon. They argued that the Stipulation for Entry of Judgment effectively stayed all collection efforts on both judgments unless and until they failed to comply with their payment obligations under the stipulation. They argued that they had performed the obligations required of them under the stipulation to that date and that Hixon had no right to enforce the judgments at that time. The trial court granted the ex parte application on May 10, 2012. Hixon filed a motion for reconsideration of the order.

Hixon's counsel, Frank L. Lozoya, filed a substitution of attorney in case No. 2 on May 17, 2012. It stated that Hixon as assignee of the judgment creditor, Taylor, was a self-represented party and that Lozoya was his new legal representative. Taylor filed an ex parte application in case No. 2 on June 1, 2012, for an order striking the substitution of attorney and for monetary sanctions under Code of Civil Procedure section 128.5. Taylor argued that neither Taylor nor its counsel had consented to the substitution and that Hixon obtained the assignment by fraud and for no consideration. Marshall, as Taylor's counsel, declared that the trial court's docket listed him as " 'former attorney' " for the judgment creditors after the substitution and that this was incorrect. He declared that he had denied Lozoya's request to sign the substitution of attorney.

Benjamin Taylor declared that he owed \$30,000 to a third party and that Hixon had approached him to collect the debt. He declared that Hixon convinced him to sign papers that would enable Hixon to collect the debt from one of the other judgment debtors in case No. 1. He declared that he signed those papers without reading them and later came to learn that they were assignments of the judgments. The trial court denied the ex parte application "without prejudice" on June 1, 2012

10. *Further Disputes Concerning the Certificate of Deposit*

Taylor filed an ex parte application in case No. 1 on August 2, 2012, for an order staying Hixon's enforcement of the judgment and directing the sheriff to disburse the execution proceeds to Taylor and Marshall. Taylor argued that the sheriff had levied the \$100,000 certificate of deposit pursuant to Taylor's writ of execution, and not pursuant to Hixon's later writ of execution, that its attorneys maintained a lien against the funds and were assignees of the certificate of deposit before the judgment was assigned to Hixon, and that Hixon obtained the assignment by fraud or mistake and for no consideration. Marshall declared that Farmers & Merchants Bank released the proceeds of the certificate of deposit in the amount of \$100,472.90 to the sheriff on June 28, 2012. Benjamin Taylor explained in a declaration the circumstances in which he signed the assignments of judgments and stated that he believed that Hixon intentionally deceived him. The trial court denied the ex parte application.

Marshall served a Third-Party Claim of Ownership of Levied Property on the sheriff on August 3, 2012, stating that he owned the certificate of deposit as Taylor's assignee under the assignment dated November 29, 2011. On August 7, 2012, he filed a petition for a hearing on his third party claim in case No. 1.

Marshall filed an ex parte application in case No. 1 on August 9, 2012, for an order staying the disposition of the proceeds of the \$100,000 certificate of deposit pending a ruling on the validity of his third party claim. He made some of the same arguments made in Taylor's ex parte application on August 2, 2012. The trial court denied Marshall's ex parte application, stating in its minute order that the appropriate remedy was under Code of Civil Procedure section 720.010 et seq. The court heard Marshall's third party claim on August 31, 2012, denied the claim, and denied a request for a statement of decision.

The trial court in case No. 2 heard Hixon's motion for reconsideration of the order quashing Hixon's writs of execution on September 28, 2012, after twice continuing the hearing to allow Zippy's and the Zipperts to present evidence that their settlement payments were timely pursuant to an agreed extension. The court filed an

order on October 4, 2012, granting reconsideration and vacating its prior order quashing the writs of execution “[f]or the reasons stated in the Moving papers, the Reply and pursuant to the testimony of Witness Manning and exhibits entered during the September 28, 2012 hearing.” The order stated that the court had ordered Zippy’s and the Zipperts to produce Marshall for oral testimony regarding the extension, but they failed to produce him and instead presented oral testimony by Maria T. Manning, an attorney from Marshall’s office.

The trial court in case No. 1 entered an order on October 19, 2012, directing the sheriff to disburse the proceeds of the certificate of deposit to Hixon as Taylor’s assignee.

11. *Summary Judgment Motion, Trial, and New Trial Motion in Case No. 3*

Defendants filed a summary judgment motion in case No. 3 in February 2013. The trial court denied the motion in May 2013. The court stated at the hearing that it was denying the motion on purely procedural grounds.

The trial court conducted a nonjury trial in case No. 3 in June 2013. The appellate record includes no reporter’s transcript of the trial proceedings. According to counsel, Zippy’s and the Zipperts voluntarily dismissed or abandoned several counts at trial and prosecuted only their counts for breach of contract, breach of the implied covenant, and specific performance. The trial court granted a nonsuit, stating in its minute order dated June 20, 2013, “The Court grants the Motion for Nonsuit as Plaintiffs have failed to carry the burden of proof.”

Zippy’s and the Zipperts moved for a new trial arguing that they had presented evidence supporting their counts for breach of contract and specific performance and that there was no basis for a nonsuit. The trial court denied the motion on September 13, 2013, stating in its minute order, “Nothing submitted by plaintiffs in their new trial motion has caused the court to reconsider its decision. Plaintiffs failed to carry their burden of proof to establish that defendant breached the settlement agreement and therefore the motion for new trial is denied.” The court also adopted its tentative ruling stating:

“Although not pleaded in their complaint, the court understands that plaintiffs’ [*sic*] claim that defendant breached the settlement agreement when he undertook collection efforts in April of 2012. At trial, for the first time, plaintiffs established that the two \$5,000 payments required under the settlement agreement were timely paid. Plaintiffs failed to attach proof of the payments to their complaint in this case and failed to supply proof of payments in connection with their efforts to quash the writs obtained by defendant. In the absence of such proof, defendant’s efforts to execute on the judgments were not a breach of the settlement agreement.”

“Furthermore, plaintiffs never established that the proceeds of the \$100,000 certificate of deposit were received by the judgment creditor by June 30, 2012 as required by the settlement agreement. Plaintiffs argued at trial that they were excused from this obligation because of defendant’s pre-existing breach. As the court stated in its decision, plaintiffs’ [*sic*] failed to plead this theory in their complaint. And this theory is in fact inconsistent with plaintiffs’ counsel’s promise to release the proceeds of the CD to defendant by April 30, 2012. The court is still unaware of the status of the CD.”

12. *Complaint in Case No. 4*

Hixon filed a complaint against Zippy’s, the Zipperts, Lewis & Ham, LLP, Lewis, and Ham on November 12, 2013 (Super. Ct. L.A. County, No. BC527402) (case No. 4). He alleges counts for (1) malicious prosecution and (2) abuse of process. He alleges that the Stipulation for Entry of Judgment provided for entry of judgment in case No. 2 if Zippy’s and the Zipperts failed to comply with certain financial obligations. He alleges that they failed to timely comply with those obligations, so judgment was entered on October 27, 2011.

Hixon alleges in his count for malicious prosecution that prior to filing their complaint in case No. 3, Defendants knew that it lacked merit and knew that there were no facts supporting the nine counts alleged in their complaint. He alleges that Defendants were obligated to turn over the \$100,000 certificate of deposit by August 31, 2011, but failed to do so, so they had no factual basis to allege that they had

satisfied their obligations under the Stipulation for Entry of Judgment. He also alleges that Lewis stated in an e-mail message that the certificate of deposit would be transferred by April 30, 2012, but it was not transferred to Hixon by that date. He alleges that Defendants filed an ex parte application on April 25, 2012, with no evidentiary support for the claim that they timely paid amounts due under the stipulation and that they unsuccessfully moved for summary judgment in case No. 3, but they continued to prosecute their claims without probable cause and without any reasonable belief that their case had merit. Hixon also alleges that Defendants initiated and prosecuted case No. 3 with malice.

Hixon alleges in his count for abuse of process that Defendants knowingly prosecuted meritless claims in case No. 3 in order to prevent or hinder his execution of judgment.

13. *Special Motion to Strike in Case No. 4*

Defendants filed a special motion to strike Hixon's complaint in case No. 4 on January 10, 2014. They argued that the complaint arose from protected activity under the anti-SLAPP statute and that Hixon could not establish a probability of prevailing on his claims for malicious prosecution and abuse of process. They filed declarations, exhibits, and a request for judicial notice in support of their motion.

Hixon argued in opposition to the motion that case No. 3 was terminated in his favor by a defense judgment. He argued that the gravamen of Defendants' claims in case No. 3 was that he had no right to enforce the judgments as long as Zippy's and the Zipperts satisfied their obligations under the Stipulation for Entry of Judgment. He argued that the evidence showed that Defendants lacked probable cause because Taylor did not timely receive the second \$5,000 payment, and Defendants repeatedly failed to produce evidence of timely payment, and because Zippy's and the Zipperts failed to turn over the \$100,000 certificate of deposit by August 31, 2011, as purportedly required under the terms of the stipulation, or by April 30, 2012, as stated in Lewis's e-mail message of April 7, 2012. He argued that Taylor requested entry of judgment in case No. 2 only because Zippy's and the Zipperts failed to satisfy their settlement

obligations. Hixon also argued that Defendants continued to prosecute their complaint in case No. 3 despite knowing that they could not prove their case, and therefore acted with malice.

Hixon filed his own declaration stating that Defendants presented no proof that they timely made the payments due under the Stipulation for Entry of Judgment in their various ex parte applications, their complaint in case No. 3, or in response to his attorney's request for proof. He declared that Defendants admitted that the second \$5,000 was untimely by representing in case No. 3 that the payment was made on October 5, 2011, which was after the due date under the Stipulation for Entry of Judgment. He declared that Defendants failed to produce Marshall to testify at the continued hearing on Hixon's motion for reconsideration in case No. 2, as ordered by the court, and instead presented testimony by Manning, who testified that the payment was late. Hixon also declared that Marshall represented to the trial court in case No. 1 at a hearing on August 31, 2012, that even if Zippy's and the Zipperts complied with their obligations under the Stipulation for Entry of Judgment, Hixon was still entitled to collect \$195,000 under the judgment in case No. 2. Hixon filed excerpts from the reporter's transcript of the hearing.

Hixon argued that malice could be inferred from evidence that Defendants continued to prosecute the action after they became aware that the action lacked probable cause. He presented evidence of rulings against Defendants on various motions and ex parte applications.

The trial court filed an order ruling on the special motion to strike on May 10, 2014. It stated that both counts alleged in Hixon's complaint arose from protected activity under the anti-SLAPP statute. It stated that Hixon had presented evidence supporting each element of his count for malicious prosecution, but failed to present any evidence of an abuse of process. The court therefore granted the special motion to strike as to the abuse of process count and denied the motion as to the malicious prosecution count.

The order stated that the gravamen of Defendants' complaint in case No. 3 was that Hixon had no right to enforce the judgments because Zippy's and the Zipperts had complied with the terms of the Stipulation for Entry of Judgment. It stated regarding lack of probable cause:

“Plaintiff argues that the court in the underlying action rejected Defendants' arguments that they made the settlement payments in timely fashion. In support, Plaintiff provides the court's June 20, 2013 Minute Order, which states that Hixon's motion for nonsuit is granted ‘as Plaintiffs have failed to carry the burden of proof. Judgment is ordered for Defendant [Hixon].’ Plaintiff's RJN Exh. 40. The Court's ruling states that: ‘In the absence of such proof, defendant's efforts to execute on the judgments were not a breach of the settlement agreement Plaintiffs failed to carry their burden of proof to establish that defendant breached the settlement agreements.’ Plaintiff's RJN Exh. 42.

“Plaintiff further argues that under the settlement, Defendants were required to turn over the certificate of deposit by August 30, 2011, but that they failed to do so. Plaintiff states in his declaration that Defendant Lewis stated in an April 7, 2012 email to Plaintiff that he would ‘transfer the certificate of deposit [CD] on or before April 30, 2012.’ Hixon Decl. ¶¶77-78; Ex. 32. Plaintiff thus argues that Defendants lacked probable cause to file the underlying action, in which they argued that Hixon breached the settlement agreement when he undertook collection efforts. Plaintiff's RJN Exh. 20. Plaintiff thus presents evidence in support of a lack of probable cause.”

The order stated that malice can be inferred from evidence that the defendant knowingly brought the prior action without probable cause. It stated:

“Plaintiff presents evidence that Defendants knew that the underlying litigation lacked probable cause. For example, Defendant Lewis knew that the CD transfer had not been timely complied with. In his declaration, Plaintiff states that Defendant Zippert stated that: ‘. . . those lawyers promised me they would be able to delay you and here I am—I'm not paying you a dime, I will never pay you a dime.’ Hixon Decl. ¶134. The plaintiff need only establish that his or her claim has ‘minimal

merit’ . . . to avoid being stricken as a SLAPP.’ *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291. Thus, the special motion to strike this cause of action is denied.”

The trial court also ruled on evidentiary objections and requests for judicial notice.

14. *Appeal*

Defendants timely appealed the denial in part of their special motion to strike.³

CONTENTIONS

Defendants contend Hixon failed to show a probability of prevailing on his malicious prosecution claim because (1) they had probable cause to sue Hixon in case No. 3 as a matter of law and (2) there is no evidence of malice.⁴

DISCUSSION

1. *Special Motion to Strike*

A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party’s constitutional right of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) The court must strike a cause of action if the defendant shows that the cause of action arises from an act in furtherance of the defendant’s constitutional right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) On appeal, we independently review both of these determinations. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345-1346.)

³ An order granting or denying a special motion to strike is appealable. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13).)

⁴ Defendants do not challenge the trial court’s determination that the malicious prosecution claim arises from protected activity under the anti-SLAPP statute. A malicious prosecution claim arises from petitioning activity and necessarily arises from protected activity under the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735-736 (*Jarrow*); *Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1355.)

A plaintiff establishes a probability of prevailing on a claim by showing that the cause of action alleged in the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) To satisfy this requirement, a plaintiff need only make this showing as to “ ‘any part’ ” of a cause of action. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Taus, supra*, at p. 714.) Thus, only a minimal showing of merit is required. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*)) The defendant can defeat the plaintiff's evidentiary showing, however, by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail on the cause of action. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*).)

“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.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We must affirm an order granting or denying a special order to strike if it is correct on any ground, regardless of the trial court's stated reasons. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.)

2. *Law of Malicious Prosecution*

A plaintiff in a malicious prosecution action must prove that (1) a prior action was commenced by or at the direction of the defendant and terminated in the plaintiff's favor; (2) the defendant initiated or continued to prosecute the action without probable cause; and (3) the defendant acted with malice in initiating or continuing to prosecute the action.⁵ (*Soukup, supra*, 39 Cal.4th at p. 292; *Zamos, supra*, 32 Cal.4th 958, 970.)

⁵ *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970, held that “an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause.” The rule that an attorney may be held liable for continuing to

A favorable termination means a termination in favor of the malicious prosecution plaintiff in circumstances reflecting the plaintiff's innocence of the alleged misconduct. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342.) The voluntary dismissal of an action constitutes a favorable termination if the circumstances of the dismissal reflect the opinion of the trial court or the defendant that the action had no merit. (*Sycamore, supra*, 157 Cal.App.4th at p. 1399.) Conflicting evidence as to the reasons for the dismissal creates a question of fact for the trier of fact to decide. (*Ibid.*; cf. *Ross v. Kish* (2006) 145 Cal.App.4th 188, 198.)

“Probable cause” means an objectively reasonable belief that the action is legally tenable based on the facts known to the malicious prosecution defendant at the time. (*Soukup, supra*, 39 Cal.4th at p. 292; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878 (*Sheldon Appel*)). A person has no probable cause to initiate or continue to prosecute an action if the person relies on facts that he or she has no reasonable cause to believe to be true, or seeks recovery on a legal theory that is untenable under the facts known to him or her. (*Soukup, supra*, at p. 292.) There is no probable cause to initiate or continue to prosecute an action if, and only if, no reasonable attorney would believe that the action has any merit and any reasonable attorney would agree that the action is totally and completely without merit. (*Jarrow, supra*, 31 Cal.4th at p. 743, fn. 13; *Wilson, supra*, 28 Cal.4th at p. 817.)

Probable cause must exist for each cause of action in an action in order to avoid liability for malicious prosecution. (*Soukup, supra*, 39 Cal.4th at p. 292.) A malicious prosecution plaintiff need not show that the defendant lacked probable cause for each and every cause of action in the prior action, but need only show that the defendant lacked probable cause for any single cause of action. (*Id.* at p. 293.)

prosecute an action after discovering that it lacks probable cause compels the conclusion that the defendant's malice in continuing to prosecute an action in those circumstances satisfies the element of malice. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226 (*Daniels*); *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1408 & fn. 12 (*Sycamore*)).

The existence of probable cause to initiate or continue to prosecute an action in light of the facts known to the malicious prosecution defendant at the time is a legal question for the court to decide. (*Wilson, supra*, 28 Cal.4th at p. 817; *Sheldon Appel, supra*, 47 Cal.3d at p. 875.) A controversy as to what facts were known to the defendant at the time the action was initiated or prosecuted presents a question of fact for the trier of fact. (*Sheldon Appel, supra*, at p. 881.) Probable cause is a low threshold in order to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. (*Jarrow, supra*, 31 Cal.4th at pp. 742-743; *Wilson, supra*, at p. 817.)

Malice concerns a person's subjective intent in initiating or continuing to prosecute an action, and is a question of fact for the trier of fact. (*Sheldon Appel, supra*, 47 Cal.3d at p. 874.) A person initiates or continues to prosecute an action with malice only if he or she acts primarily for an improper purpose; that is, a purpose other than to secure a proper adjudication on the merits. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494 (*Downey Venture*); see Rest.2d Torts, § 676.) Such situations may include (1) when the person does not believe that the claim is meritorious; (2) when the person prosecutes the action because of hostility or ill will, to harass the defendant; (3) when the person prosecutes the action to deprive another person of the beneficial use of his or her property; (4) when the person prosecutes the action to force a settlement unrelated to the merits of the action; and (5) when a person prosecutes a cross-complaint to delay adjudication of the complaint. (*Albertson, supra*, 46 Cal.2d at p. 383, citing Rest., Torts, § 676, com. b; *Sycamore, supra*, 157 Cal.App.4th at p. 1407; see Rest.2d Torts, § 676, com. c., pp. 462-463.)

Malice turns on the subjective intent of the malicious prosecution defendant and therefore cannot be inferred based solely on the determination that the action objectively lacked probable cause. (*Jarrow, supra*, 31 Cal.4th at p. 743; *Downey Venture, supra*, 66 Cal.App.4th at p. 498.) Lack of probable cause is a factor in determining the existence of malice, but is insufficient alone to establish malice. (*Jay v. Mahaffey*

(2013) 218 Cal.App.4th 1522, 1543.) “ ‘Merely because the prior action lacked legal tenability, as measured objectively . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind.’ [Citation.]” (*Jarrow, supra*, at p. 743, quoting *Downey Venture, supra*, at p. 498.) Rather, a malicious prosecution plaintiff must present some other evidence of the defendant’s subjective intent to misuse the judicial system for an improper purpose, such as evidence that the defendant subjectively believed that a cause of action was meritless. (*Jay, supra*, at p. 1543; *Downey Venture, supra*, at p. 498.)

3. *Hixon Failed to Establish a Probability of Prevailing on the Element of Lack of Probable Cause*

Defendants contend they had probable cause to bring case No. 3 because Hixon had no legal right to enforce the judgments as long as they complied with their payment obligations under the Stipulation for Entry of Judgment. They contend the evidence shows that they complied with their payment obligations. They argue that their only objective in case No. 3 was to stop Hixon’s premature efforts to enforce the judgments.

The Stipulation for Entry of Judgment provided for the entry of judgment against Zippy’s and the Zipperts in the amount of \$195,000 on or after September 1, 2011, without further notice to the defendants. It stated, however, that upon Taylor’s receipt of two \$5,000 payments and the proceeds of a \$100,000 certificate of deposit, Taylor would file an acknowledgment of full satisfaction of judgment in both case No. 1 and case No. 2.

The stipulation stated that Zippy’s and the Zipperts assigned a \$100,000 certificate of deposit to Taylor Transportation, Inc., that they “will use their best efforts to ensure that the proceeds of the CD are disbursed to TAYLOR TRANSPORTATION, INC., on or before August 31, 2011,” and that “[t]he maturity date of the CD shall be no later than June 30, 2012.” It stated that Zippy’s and the Zipperts would pay Taylor \$5,000 by August 31, 2011, and another \$5,000 by September 30, 2011. It also stated that if Zippy’s and the Zipperts failed to timely make either of the \$5,000 payments or

Taylor failed to receive the proceeds of the certificate of deposit by June 30, 2012, “TAYLOR shall be entitled to pursue all available collection remedies to collect the judgment being entered in this ACTION pursuant to this Stipulation.”

We interpret a stipulation in accordance with the ordinary rules of contract interpretation. (*Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 694.) Our goal is to give effect to the mutual intention of the contracting parties at the time of contract formation. (Civ. Code, § 1636.) We ascertain that intention solely from the written contract if possible, but we also consider the circumstances under which it was made and the matter to which it relates. (*Id.*, §§ 1639, 1647.) We consider the contract as a whole and interpret its language in context giving effect to each provision, rather than interpret contractual language in isolation. (*Id.*, § 1641.) We interpret words in their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.*, § 1644.) We interpret a contract de novo if the interpretation does not turn on the resolution of a factual dispute concerning the credibility of extrinsic evidence, as here. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 (*Parsons*).)

We interpret the stipulation to mean that the timely delivery by Zippy’s and the Zipperts of the two \$5,000 payments to Taylor and their delivery of the proceeds of the certificate of deposit by June 30, 2012, would fully satisfy their obligations under the judgments in case No. 1 and case No. 2. As we interpret the stipulation, Taylor, and Hixon as Taylor’s assignee, could enforce the judgment only if Zippy’s and the Zipperts failed to timely deliver the agreed payments.

Evidence presented in support of the special motion to strike showed that counsel for Zippy’s and the Zipperts timely delivered the initial \$5,000 payment before the due date of August 31, 2011. The evidence showed that counsel sent the second \$5,000 payment on September 22, 2011, but the check had not arrived by October 3, 2011, so Marshall granted an extension of time to deliver the second payment. Marshall received the second \$5,000 payment by wire transfer on October 5, 2011. Marshall considered

the payment to be timely pursuant to the extension. Hixon presented no evidence to the contrary. Defendants' failure in prior proceedings to prove timely payment is not evidence that any payment was untimely.

Hixon levied the judgment debtors' bank account in April 2012 and attempted to levy the certificate of deposit at or about that time. Hixon made those enforcement efforts after Zippy's and the Zipperts had timely delivered the two \$5,000 payments and before the time they were required to deliver the proceeds of the certificate of deposit under the terms of the stipulation. Because they had timely delivered the two \$5,000 payments and the delivery of the proceeds of the certificate of deposit was not yet due, Hixon's enforcement efforts were premature and arguably breached the stipulation and the implied covenant of good faith and fair dealing.

We conclude as a matter of law based on the evidence in the record that Defendants had probable cause to initiate and continue to prosecute their complaint against Hixon for breach of contract, breach of the implied covenant, and specific performance. We need not decide whether the other counts alleged in the complaint were supported by probable cause because Hixon failed to argue in the trial court, or on appeal, and has not shown that the voluntary dismissal or abandonment of those counts reflected their lack of merit and constituted a favorable termination on the merits of those counts. We therefore conclude that Hixon failed to establish a probability of prevailing on the essential element of lack of probable cause. In light of our conclusion, we need not address the element of malice.

DISPOSITION

The order granting in part and denying in part Defendants' special motion to strike Hixon's complaint is reversed with directions to enter a new order granting the motion as to both the abuse of process and malicious prosecution counts. Defendants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.