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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RHONDA LACY, Plaintiff and Appellant, v. HEALTHCOMP, INC., Defendant and Respondent.	F069943 (Super. Ct. No. 14CECG00098) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. M. Bruce Smith, Judge.

Lang, Richert & Patch and William T. McLaughlin II for Plaintiff and Appellant.

Gordon & Rees, Gary J. Lorch and Elizabeth B. Vanalek for Defendant and Respondent.

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The Board of Trustees of the Fresno City Employee's Health and Welfare Trust (Trust) filed a complaint against Rhonda Lacy, a Fresno City employee, to recover

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* Before Levy, Acting P. J., Poochigian, J. and Detjen, J.

payments it made for medical expenses incurred by Lacy's ex-husband. The Trust alleged that Lacy's ex-husband was ineligible to receive benefits and that Lacy intentionally misrepresented her ex-husband's status.

Following a bench trial, the court ruled in favor of Lacy on the Trust's complaint. Thereafter, Lacy filed a malicious prosecution action against the Trust and the Trust's administrator, HealthComp, Inc. (HealthComp). HealthComp filed a motion to strike the complaint as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure[1] section 425.16. The trial court granted HealthComp's motion.

Lacy challenges the trial court's order granting the special motion to strike. Lacy acknowledges that HealthComp was not a party to the Trust action but contends that there is sufficient evidence that HealthComp was instrumental in prosecuting the suit.

The trial court properly granted HealthComp's motion to strike. Accordingly, the judgment will be affirmed.

BACKGROUND

Lacy was employed by the City of Fresno. As part of her compensation, Lacy was entitled to healthcare coverage under a benefits plan and could enroll her spouse and dependent children.

The benefits plan was operated by the Trust. HealthComp provided third-party administrative services with respect to the medical benefits portion of the plan under an administration services agreement it entered into with the Trust. Under this agreement, HealthComp was to administer the Trust health plans and process and pay claims in accordance with the rules and regulations established by the Trust. HealthComp did not have any independent authority to modify any of the terms of the plan and was not considered a fiduciary. HealthComp's authority extended no further than as expressly stated in the administrative services agreement and HealthComp had no authority to incur

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[1] All further statutory references are to the Code of Civil Procedure.

any debt or liability against the Trust or to otherwise bind or commit the Trust except as expressly authorized.

In late 1996, Lacy and her husband divorced. The dissolution judgment provided that Lacy was to provide medical/dental insurance for the minor children if available through her employment. Lacy also agreed, "to the extent reasonably possible, to maintain medical/dental insurance for Husband through her employment."

Lacy testified that she notified HealthComp of her divorce in 1996 and provided HealthComp with a copy of the dissolution judgment. HealthComp made electronic log notes to contemporaneously record events relating to plan participants. There is no log note for late 1996 relating to Lacy. However, in a log note dated March 24, 1997, a HealthComp employee recorded "per court order recvd today Rhonda is to provide medical and dental coverage for Danica & Derrick sent info to Belinda to add."

Lacy noticed that, after providing HealthComp with the dissolution judgment, HealthComp continued to list her ex-husband on the annual verification forms. These verification forms required a participant to make changes if any of the information was inaccurate and return the forms to HealthComp. Lacy testified that she wrote "ex" next to her husband's name on the verification forms for a couple of years but later stopped because she assumed that HealthComp had determined her ex-husband was eligible for continued coverage.

HealthComp did not have copies of Lacy's verification forms for the years 1996 through 2000. At that time, participants were required to return the form only if information on the form was inaccurate. However, HealthComp did have Lacy's verification forms for 2001 through 2008. Lacy did not make any changes to those forms to indicate that she was no longer married to her spouse.

In 2009, the Trust decided to conduct an audit of member eligibility to address multiple instances of non-eligible dependents having been found to be enrolled in the plan. The Trust instructed HealthComp to perform the audit on the Trust's behalf and

specified the manner in which it was to be conducted. HealthComp notified plan participants of the audit and provided verification forms. On the verification form dated April 2009, Lacy wrote "ex" next to "spouse" and "see order on file."

The Trust instructed HealthComp to informally seek restitution on behalf of the Trust from the individual members who had maintained enrollment for ineligible participants. Lacy was one of those individuals.

HealthComp sent a letter to Lacy in October 2009 informing her that it had been determined that her ex-husband was ineligible for benefits effective October 1996 and that it was her obligation to repay the Trust approximately $16,000 for the improperly obtained benefits. Lacy objected to the audit findings and submitted an appeal to the Trust.

HealthComp gave the Trust appeals committee all documents concerning the eligibility benefits determination, with the names removed, for its review and consideration. HealthComp was not, nor had it ever been, a member of the appeals committee.

The appeals committee denied Lacy's appeal and recommended to the Trust that Lacy's appeal be denied. Thereafter, the Trust unanimously accepted the appeals committee's recommendation to deny the appeal.

Following HealthComp's unsuccessful attempts to informally obtain reimbursement from Lacy, the Trust, in consultation with its counsel, voted to file a civil lawsuit against Lacy. The case proceeded to trial in 2012 and Lacy prevailed.

Lacy then filed the underlying complaint stating one cause of action for malicious prosecution against the Trust and HealthComp. HealthComp filed a motion to strike the complaint as a SLAPP under section 425.16.

In opposing the SLAPP motion, Lacy submitted copies of documents from the action filed by the Trust against Lacy, including the complaint, the reporter's transcript of the trial, the claim log notes from HealthComp, the various verification forms,

correspondence, and discovery. HealthComp objected on the ground that this evidence was not properly authenticated and lacked foundation.

The trial court sustained HealthComp's evidentiary objections and granted the motion on that ground.[2]

DISCUSSION

1. *The anti-SLAPP statute.*

Section 425.16 was enacted in 1992 to provide a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) It is California's response to meritless lawsuits brought to harass those who have exercised these rights. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) This type of suit, referred to under the acronym SLAPP, or strategic lawsuits against public participation, is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.)

When served with a SLAPP, the defendant may immediately move to strike the complaint under section 425.16. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) The initial burden rests with the defendant to demonstrate that the challenged cause of action arises from protected activity. (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 457 (*Greene*).) If the court concludes that the defendant has met this burden, the court must then determine whether the plaintiff has demonstrated a

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[2] Lacy's request that this court take judicial notice of the order denying the motion to strike filed by the Trust is denied on the ground that it is irrelevant.

probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).)

Here, the parties do not dispute that the malicious prosecution action arose from protected activity. Thus, the issue is whether Lacy demonstrated a probability of prevailing on her claim.

To establish the requisite probability of prevailing, the plaintiff need only have "'"stated and substantiated a legally sufficient claim."'" (*Navellier, supra,* 29 Cal.4th at p. 88.) "'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Id*. at pp. 88-89.) 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.) Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 614.)

The questions of whether the action is a SLAPP suit and whether the plaintiff has shown a probability of prevailing are reviewed independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

2. *Lacy did not demonstrate a probability of prevailing on her claim against HealthComp.*

In opposing HealthComp's motion to strike the malicious prosecution complaint, Lacy submitted the declaration of her current counsel with attached exhibits. The trial court concluded that counsel failed to demonstrate personal knowledge with regard to those exhibits and establish the foundation for their admission into evidence. Based on this evidentiary ground, the court ruled that Lacy could not establish, by admissible evidence, a prima facie showing of facts to support a favorable judgment.

Lacy contends the trial court erred in not reaching the merits of her malicious prosecution claim against HealthComp. According to Lacy, the trial court must consider the entire evidentiary record and should not exclude evidence for technical reasons. Lacy argues that, at trial, there would be little or no difficulty laying a foundation for admission of her proffered evidence.

We need not decide whether the trial court abused its discretion in excluding Lacy's evidence. Even considering that evidence, Lacy cannot demonstrate a probability of prevailing on the merits of her claim.

To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was commenced by or at the defendant's direction and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494.)

HealthComp was not a party to the prior action. That action was brought by the Trust alone. Thus, for HealthComp to be liable for malicious prosecution, Lacy must demonstrate that HealthComp was actively instrumental in causing the prosecution. (*Greene, supra,* 216 Cal.App.4th at p. 464.)

HealthComp is the Trust's agent. While an agent is liable to third persons for wrongful acts taken in the course of the agency, such liability requires affirmative misfeasance. An agent is not liable to third parties for the failure to perform duties owed to its principal. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 65.)

Lacy argues there is "abundant" evidence that would support a finding that HealthComp was instrumental in the Trust suing Lacy for fraud. However, the actions taken by HealthComp preparatory to the fraud action, i.e., the audit, the informal restitution efforts, and providing documents to the Trust appeals committee, were undertaken within the course and scope of its agency. HealthComp made it clear when corresponding with Lacy that it was acting on behalf of the Trust. Lacy also argues that

HealthComp was actively involved in the fraud litigation because it verified discovery. However, the undisputed evidence demonstrates that HealthComp provided this verification solely in its capacity as the Trust's agent.

The only specific instance of misfeasance alleged by Lacy is her claim that HealthComp falsely denied that Lacy provided it with information concerning her divorce. However, this claim, even if true, is not evidence that HealthComp was acting outside the course and scope of its agency. There simply is no evidence that HealthComp was acting with independent and affirmative misfeasance rather than on behalf of and at the direction of the Trust. Accordingly, Lacy has not shown that HealthComp instigated the fraud action or was actively instrumental in its continued prosecution.

Lacy cannot establish the first element of a malicious prosecution action against HealthComp. Therefore, she has not met her burden of demonstrating a probability of prevailing on the merits of her claim.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.