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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DOUGLAS RISK,

Plaintiff and Appellant,

v.

DAVID D. JONES,

Defendant and Respondent.

G044775

(Super. Ct. No. 30-2010-00405800)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Esposito & Associates and Edward L. Esposito for Plaintiff and Appellant.

Law Offices of Jeffrey A. Coleman and Jeffrey A. Coleman for Defendant and Respondent.

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A property owner filed an action against a contractor and his business enterprises in connection with a construction contract. Judgment was entered against the property owner. The contractor in his individual capacity then filed a malicious prosecution action against the property owner and his attorney, claiming they had no probable cause to name him individually in the first lawsuit. The court granted an anti-SLAPP motion in favor of the attorney and the contractor appeals.

We affirm. The contractor did not demonstrate a probability of prevailing on his claim.

## I FACTS

### A. *Construction Litigation:*

Attorney David Jones (Attorney Jones), acting on behalf of client Michael Powe (Powe), filed a second amended complaint against Douglas Risk (Risk) and Risk Enterprises Inc. doing business as Coastal Builders (the Construction Lawsuit). (*Powe v. Risk Enterprises Inc.* (Super. Ct. Orange County, 2010, No. 00109262).) Powe alleged that he had entered into a \$100,000 contract with Coastal Builders for the restoration of his fire-damaged rental property. He further alleged that he paid \$20,000 to Risk personally as a progress payment on the construction work.

According to Powe, Risk thereafter demanded that he assign his insurance proceeds directly to Risk. However, Powe refused. Powe alleged that Risk then refused to do any work on the property. Characterizing this as a repudiation of contract, Powe sought the return of the \$20,000. Risk Enterprises, Inc. doing business as Coastal Builders filed a cross-complaint for breach of contract.

The court denied recovery to Powe. It found Risk Enterprises, Inc. doing business as Coastal Builders had suffered \$20,146.87 in damages, of which \$20,000 had been paid, leaving an amount of \$146.87 owing. It entered a judgment in the amount of

\$146.87 plus attorney fees and costs in favor of Risk Enterprises, Inc. doing business as Coastal Builders.

*B. Malicious Prosecution Complaint:*

Risk then filed a complaint for malicious prosecution against Powe and Attorney Jones (the Malicious Prosecution Lawsuit). (*Risk v. Powe* (Super. Ct. Orange County, 2010, No. 00405800).) Risk asserted that Powe and Attorney Jones had not had probable cause to file the Construction Lawsuit against him personally and that they had filed the lawsuit with malice. Furthermore, Risk claimed to have suffered damages of at least \$25,807.26 as a result of the lawsuit.

*C. Anti-SLAPP Motion:*

Attorney Jones filed an anti-SLAPP motion in the Malicious Prosecution Lawsuit. In the motion, Attorney Jones stated that Risk had been named in the Construction Lawsuit based on an alter ego theory. He asserted that Risk had commingled corporate money and had failed to respect corporate formalities.

In support of the motion, Attorney Jones filed his own declaration, with numerous exhibits attached. One of those exhibits was a copy of a March 11, 2008 construction contract pertaining to the work on Powe's property. The contractor was listed as "Coastal Builders."

Another of the exhibits to Attorney Jones's declaration was a copy of an unexecuted assignment. That assignment recited: "Risk and Powe have entered into a construction contract whereby Risk, a general contractor, [whose] company, Coastal Builders, Inc., has promised . . . to make repairs to Powe's residence[.]" It further recited: "[T]he parties hereto desire that payments from Powe's insurance company . . . be made directly to Risk (Coastal Builders, Inc.) . . ." The draft assignment also said, "Powe hereby assigns all of his . . . right-to-receive and/or ownership interest in any

insurance proceeds . . . to Douglas Risk and/or Coastal Builders, Inc..” It continued: “Powe agrees to timely execute all documents requested to be executed by the insurance company . . . to ensure that Risk receives prompt payment of the subject insurance . . . proceeds.”

A third exhibit of interest was a copy of a \$20,000 check, dated May 28, 2008, drawn on Powe’s checking account and made payable to Risk. As Risk testified at deposition, he signed the check and deposited it into his bank account.

In his declaration, Attorney Jones noted that the construction contract was printed on Coastal Builders letterhead, but did not provide any indication whether Coastal Builders was a corporation or a “dba.” However, he believed that Coastal Builders was a “dba.” That is to say, he believed that either Risk was doing business as Coastal Builders or Risk Enterprises, Inc. was doing business as Coastal Builders. In an effort to determine which was correct, Attorney Jones served a request for production of documents on Risk Enterprises, Inc. In that request, he sought copies of documents showing ownership structure, bylaws, articles of incorporation, minutes of annual and special shareholder meetings, and shareholder resolutions. Risk Enterprises, Inc. did not provide responses to these particular requests. In the motion, Attorney Jones stated that he construed the failure to respond as a factor in support of an alter ego theory.

Attorney Jones also declared that he never harbored any ill will towards Risk, but named him in the Construction Lawsuit based on the information available to him.

Risk filed his own declaration in opposition to the motion. Risk declared that he was “an officer of Risk Enterprises, Inc. dba Coastal Builders.” He further declared: “The first check that Mr. Powe wrote was made payable to Risk Enterprises, Inc. and that check bounced. I requested a second check from Mr. Powe. Since the check I wrote to a subcontractor against the first insufficient funds check given to me by Powe bounced, I asked Powe to replace it with a second check made payable to me

personally so I could cash it right away and pay my subcontractor who now demanded cash. [¶] . . . Subsequently, I presented Mr. Powe with an Assignment of Proceeds. Due to the problems I encountered with the first two checks, I was concerned that I would not be paid for the work I would be doing for the rental property. Powe refused to enter into the Assignment Contract.”

The court granted the anti-SLAPP motion. Risk appeals.

## II

### DISCUSSION

#### *A. Code of Civil Procedure Section 425.16:*

Code of Civil Procedure section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United 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.” A motion under this provision is commonly known as an “anti-SLAPP” motion. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732-733.) We review the ruling on an anti-SLAPP motion de novo. (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 611.)

#### *B. Anti-SLAPP Motion Analysis:*

“Resolution of an anti-SLAPP motion ‘requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken “in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,” as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has

been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.]” (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 733.)

*(1) First step – cause of action arising from protected activity*

The Supreme Court in *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, at pages 733-734 stated, with respect to the first prong of the analysis under Code of Civil Procedure section 425.16, “on the basis of the statute’s plain language . . . a defendant moving specially to strike a cause of action arising from a statement or writing made in connection with an issue under consideration in a legally authorized official proceeding need not separately demonstrate that the statement or writing concerns an issue of public significance. [Citation.]” The *Jarrow* court upheld the appellate court’s conclusion that a malicious prosecution action “falls within the ambit of a ‘cause of action against a person arising from any act . . . in furtherance of the person’s right of petition’ (§ 425.16, subd. (b)(1)), as statutorily defined.” (*Id. at p. 734.*) Simply put, “malicious prosecution causes of action fall within the purview of the anti-SLAPP statute. [Citations.]” (*Id. at p. 735.*)

Thus, as Risk concedes, Attorney Jones met his burden to show that the challenged cause of action arose from protected activity. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 733.) Having met that burden, the burden then shifted to Risk to show a probability of prevailing on his malicious prosecution claim. (*Ibid.*)

*(2) Second step – probability of prevailing on claim*

*(a) required showing*

“We turn to the second step: whether [the plaintiff] presented evidence sufficient to ‘establish[ ] that there is a probability that [he] will prevail on the claim.’ (§ 425.16, subd. (b)(1).) In ‘making [that] determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2); [citation].) The evidence submitted

by the plaintiff must be admissible [citation], and, if credited at trial, must support a judgment in his favor. [Citations.] Significantly, the trial court cannot and does not weigh the moving party's evidence against the opposing party's evidence, but addresses the factual and legal issues as in a motion for summary judgment. [Citation.] If the opposing party fails to make the requisite showing, the motion must be granted. [Citation.]" (*Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318.)

In the case before us, Risk filed a malicious prosecution claim. Therefore, we must look at the elements of a malicious prosecution claim in order to determine whether he has established a probability of prevailing. "The three primary elements necessary to establish liability for the claim of malicious prosecution are that a prior claim initiated by the [defendant] was: '(1) pursued to a legal termination favorable to the plaintiff . . . ; (2) brought without probable cause; and (3) initiated with malice. [Citations.]' [Citation.]" (*Slaney v. Ranger Ins. Co.*, *supra*, 115 Cal.App.4th at p. 318.)

*(b) legal termination favorable to Risk*

Attorney Jones initiated a prior claim, on behalf of Powe, in the form of the Construction Lawsuit. Risk, in satisfaction of the first element of a malicious prosecution claim (*Slaney v. Ranger Ins. Co.*, *supra*, 115 Cal.App.4th at p. 318), showed that judgment had been entered in his favor in the Construction Lawsuit.

*(c) probable cause to file the Construction Lawsuit*

We now look at the second element of the malicious prosecution claim—Attorney Jones's purported lack of probable cause to file the Construction Lawsuit against Risk. (*Slaney v. Ranger Ins. Co.*, *supra*, 115 Cal.App.4th at p. 318.) Risk asserts that he presented evidence sufficient to establish that probable cause was lacking. We disagree.

*(i) allegations*

In the second amended complaint, Powe alleged as follows. On March 11, 2008, he entered into a \$100,000 construction contract with Coastal Builders, for the

restoration of his fire-damaged rental property. Risk signed the contract. On May 24, 2008, Powe spoke with Risk, who represented that he had been working on the property for months and had retained several subcontractors. Risk requested \$20,000 for the payment of subcontractors and the reimbursement of the costs of work completed. Risk asked that the check be made payable to him personally.

Powe further alleged that on May 31, 2008, Risk prepared an assignment whereby Powe would assign approximately \$100,000 in insurance proceeds to Risk. When Powe refused to sign the document, Risk stated that he would do no more work on the property. Powe then drove about 40 miles to look at his rental property, in San Bernardino, only to learn that no work had been done on it. Risk nonetheless refused to return the \$20,000.

Powe asserted that Coastal Builders, and Risk as the alter ego of Coastal Builders, repudiated the construction contract. Powe also alleged that they had fraudulently induced him to pay the \$20,000 by misrepresenting that work had been performed when it had not. He also contended that Risk never intended to do work on the property, but only intended to swindle him out of his insurance proceeds. Powe stated that his damages included the \$20,000 paid to Risk plus lost rents. In support of his position, Powe provided copies of the construction contract, the draft assignment, and the \$20,000 check payable to Risk.

*(ii) Risk's declaration*

In opposition to the anti-SLAPP motion, as we have observed, Risk filed a declaration in which he admitted to having requested that Powe make the \$20,000 check payable to himself personally. He also admitted to having asked Powe to sign the assignment. The assignment, as we have seen, variously stated that all insurance proceeds be paid to "Risk," "Douglas Risk and/or Coastal Builders, Inc.," or "Risk (Coastal Builders, Inc.)."

*(iii) analysis*

Inasmuch as Powe paid the \$20,000 directly to Risk, at his request and based on his purported misrepresentation, and Powe alleged that Risk wrongfully refused to return the money, we could stop there and state there was probable cause to file a lawsuit against Risk. However, Risk focuses on the breach of contract cause of action. We will address his arguments as framed.

Risk says Powe had no reason to believe that he had a contract with Risk, inasmuch as Coastal Builders was the contracting party. However, in his second amended complaint, Powe alleged that Risk was the alter ego of Coastal Builders, having used corporate funds for his personal purposes and having demonstrated a unity of interest between himself and the corporation. Powe asserted that the “[a]dherence to the fiction of separate existence of the Defendant Coastal Builders as an entity distinct from Defendant Risk would permit an abuse of the corporate privilege and would promote injustice in that it would allow its shareholder to shirk his duty to pay the debts of the corporation and [Powe] would be without remedy.”

Risk contends there was no basis for an alter ego allegation. He admits that his own attorney omitted to respond to Powe’s request for production of corporate documents, but says this omission was inadvertent. Risk seeks to turn the tables and say that because Powe’s attorney failed to make a follow-up demand for the documents, Powe abandoned his right to pursue the alter ego theory. However, he cites no legal authority in support of this proposition. Therefore, we may treat the argument as waived. (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 648-649.)

Turning then to the alter ego allegation, we cannot say that it was wholly without merit. “In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and

the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] ‘Among the factors to be considered in applying the doctrine are commingling of funds . . . of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, . . . and use of one as a mere shell or conduit for the affairs of the other.’ [Citations.]’ (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538-539.)

Here, Powe alleged that Risk, who owned Coastal Builders, directed that a progress payment owing to Coastal Builders be made to him personally instead. He further alleged that Risk directed that no further work be performed under the Coastal Builders construction contract unless Powe assigned all insurance proceeds to himself and/or Coastal Builders. It surely appeared that Risk was using corporate funds for his own purposes and directing the actions of Coastal Builders as though there was no distinction between Coastal Builders and himself. If Powe did not allege that Risk was the alter ego of Coastal Builders, then a cause of action against Coastal Builders seeking the return of the \$20,000 on the basis of repudiation of contract might fail, causing an inequitable result.

Risk’s explanation for his actions is more damning than exculpatory. He admits that he commandeered a \$20,000 progress payment owing to Coastal Builders and directed that the payment be made to himself personally. This demonstrates that he exercises such control over Coastal Builders and its monies that he seizes them for himself and deposits them into his own personal bank account. He stated that he was justified in doing so because he wanted to pay a subcontractor. This is evidence that he treated the subcontractors of Coastal Builders as being his own, that he treated the liabilities and obligations of Coastal Builders as being his own.

Risk admits that he prepared and delivered an assignment to Powe, but says the document should be ignored because Powe refused to sign it. Not so fast. The fact

that Powe refused to sign the assignment does not mean that the document is not evidence of Risk's intentions and his dealings with Coastal Builders.

The assignment Risk drafted recited that "Risk and Powe have entered into a construction contract . . . , " but also stated that Coastal Builders was obligated under the contract. The fact that Risk characterized the construction contract as being between himself and Powe shows that he did not differentiate between himself and Coastal Builders. The fact that the assignment variously referred to "Risk and/or Coastal Builders, Inc." is also quite telling of the blurred distinction between Risk and his corporation. The fact that Risk sought to have all insurance proceeds covering the construction work paid to himself directly is a pretty clear indication of Risk's business dealings with Coastal Builders. We cannot say that Attorney Jones had no basis for raising an alter ego allegation.

The ultimate question with respect to the second element of a malicious prosecution cause of action is whether Attorney Jones had probable cause to name Risk in the Construction Lawsuit. "Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must *separately* show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.' [Citations.]" (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 743, fn. 13.)

We certainly cannot say that all reasonable lawyers would agree that the action against Risk was totally and completely devoid of merit. Risk has failed to show that Attorney Jones named him in the Construction Lawsuit without probable cause.

Consequently, Risk has failed to establish a probability of prevailing on his malicious prosecution claim.

This being the case, we need not address the third element of a malicious prosecution claim. However, we do so because we can dispose of it easily.

*(d) malice*

Turning to the third element of a malicious prosecution claim, Risk argues he successfully showed that Attorney Jones acted with malice in filing the Construction Lawsuit against him. Risk cites *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, which provides: “Malice may be proved directly, or it may be inferred from the fact that the defendant lacked probable cause. [Citation.]” (*Id.* at p. 1371.) Risk says that inasmuch as Attorney Jones lacked probable cause to file suit against him, it may be inferred that Attorney Jones acted with malice. However, as we have said, Attorney Jones did not lack probable cause to name Risk in the Construction Lawsuit. Therefore, we do not infer that he acted with malice.

*(3) Conclusion*

Attorney Jones met his burden to show that a malicious prosecution action may be subject to an anti-SLAPP motion. The burden then shifted to Risk to show he had a probability of prevailing on his malicious prosecution claim. Risk addressed the first element of a malicious prosecution claim by showing that the Construction Lawsuit terminated in his favor. However, he was unable to demonstrate a probability of prevailing in establishing the second and third elements of a malicious prosecution claim—those pertaining to probable cause and malice. Therefore, Risk failed to meet his burden. The court did not err in granting the anti-SLAPP motion.

*C. Evidentiary Objections:*

Risk made certain evidentiary objections, some of which were sustained and some of which were overruled. On appeal, Risk claims the court erred in failing to

sustain all of his objections. However, Risk fails to cite any portion of the record containing the declarations to which the objections were made. He also fails to cite legal authority in support of his allegation of error. Consequently, his argument is deemed waived. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.)

*D. Attorney Fees:*

“Subdivision (c) of Code of Civil Procedure section 425.16 provides that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” [Citation.] ‘The language of the anti-SLAPP statute is mandatory; it requires a fee award to a defendant who brings a successful motion to strike. Accordingly, our Supreme Court has held that under this provision, “any SLAPP defendant who brings a successful motion to strike is *entitled to mandatory* attorney fees.” [Citation.]’ [Citation.] At the same time, ‘a defendant who brings a successful special motion to strike is entitled only to reasonable attorney fees, and not necessarily to the entire amount requested. [Citations.]’ [Citation.] We review the trial court’s ruling for abuse of discretion. [Citation.]” (*G.R. v. Intelligator, supra*, 185 Cal.App.4th at p. 620.)

Here, Attorney Jones filed a motion for attorney fees, seeking \$14,248.50 as the prevailing party on the anti-SLAPP motion. The court awarded only \$10,030. In his opening brief on appeal, Risk purports to challenge the attorney fees award on two grounds: (1) no fees should have been awarded because Attorney Jones should not have been held to be the prevailing party; and (2) even if Attorney Jones were properly held to be the prevailing party, the award of attorney fees was too high.

We have no jurisdiction to consider his arguments. Risk’s notice of appeal was filed on February 7, 2011 and challenged the December 23, 2010 order granting the anti-SLAPP motion. The court granted the motion for attorney fees by minute order of February 10, 2011. No appeal having been taken from the order on the attorney fees

award, that matter is not before this court. (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 632-633.)

However, even were the matter properly before this court, we would conclude that the order on attorney fees must be affirmed. Contrary to Risk's assertion, as we have stated, Attorney Jones was indeed the prevailing party on the anti-SLAPP motion. Consequently, he was entitled to attorney fees under Code of Civil Procedure section 425.16, subdivision (c). We will not address Risk's arguments concerning the amount of the fee award.

Attorney Jones requests his attorney fees on appeal. He is entitled to those fees under the statute. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

### III

#### DISPOSITION

The order granting the anti-SLAPP motion is affirmed. Attorney Jones shall recover his attorney fees and costs on appeal, the amount of which shall be determined by the trial court.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.