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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT GRAYSON,

Plaintiff and Appellant,

v.

KELLY J. JOHNSON,

Defendant and Respondent.

G046222

(Super. Ct. No. 30-2011-00477198)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco
F. Firmat, Judge. Affirmed.

Buchalter Nemer, Harry W.R. Chamberlain II, Robert M. Dato; Chavos &
Rau, Laurie D. Rau and Anthony G. Chavos for Plaintiff and Appellant.

Law Offices of John B. Taylor and John B. Taylor for Defendant and
Respondent.

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Plaintiff Robert Grayson appeals from the grant of a special motion to strike his complaint (Code Civ. Pro., § 425.16; anti-SLAPP motion; all further statutory references are to this code unless otherwise stated) filed by defendant Kelly J. Johnson. He argues the court erred when it found he had not met his burden to show he would prevail on the merits of his action for malicious prosecution. He also claims that, rather than dismissing the case, the court should have stayed it pending the final disposition of his appeal from the underlying action. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

This is the second time this case has come before us. In the first case Johnson sued Grayson for quiet title, slander of title, and unjust enrichment, among other claims. (*Johnson v. Grayson* (Jun. 22, 2012, G044975) [nonpub. opn.] p. 4.) The action arose from a dispute as to an interest in real property owned by Johnson and her former husband. In the course of their dissolution action all community interest in the property (lot 2) was awarded to Johnson. (*Id.* at p. 3.) Subsequently Johnson learned Grayson had some interest in lot 2. Johnson's former husband persuaded Grayson to quitclaim his interest in lot 2 to Johnson. After the quitclaim deed was lost Grayson refused to sign a replacement because he did not like Johnson. (*Ibid.*) Instead he subsequently quitclaimed the same property interest to DDD Enterprises in return for a payment of \$30,000. (*Ibid.*) The unjust enrichment cause of action sought to disgorge from Grayson the \$30,000 paid by DDD. Before trial the \$30,000 was repaid to DDD and the interest in lot 2 quitclaimed back to Grayson.

At trial Grayson prevailed on his motion for nonsuit on the unjust enrichment claim on the ground Johnson had no standing because she had not paid any

money to Grayson. But judgment was entered in Johnson's favor on the quiet title and slander of title causes of action.

Thereafter Grayson filed the instant case for malicious prosecution based on Johnson's unsuccessful prosecution of the unjust enrichment cause of action, after which Johnson filed her anti-SLAPP motion. The court granted the motion on the ground Grayson failed to show the likelihood he would prevail on the merits of the action because he could not show a favorable termination of the entire underlying action, a necessary element of a malicious prosecution action.

DISCUSSION

1. Introduction

Code of Civil Procedure section 425.16, subdivision (b)(1) provides that a cause of action arising from a constitutionally protected rights of free speech and petition may be stricken unless the plaintiff establishes the probability he will prevail on the claim. The court must engage in a two-step analysis under this section. First, it must determine whether the defendant has met the burden to show the activity underlying the cause of action is constitutionally protected. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the defendant establishes this, the burden shifts to the plaintiff to show the likelihood of prevailing on the cause of action. (*Ibid.*)

Here, there is no dispute Johnson had the constitutional right to file the underlying action. Nor is there any doubt, as Grayson acknowledges, that a claim for malicious prosecution is subject to an anti-SLAPP motion. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) Thus, the only issue for our consideration is whether Grayson showed he is likely to prevail on the merits of the action by establishing a prima facie case for his malicious prosecution claim.

To show a probability of success on the merits of the action, Grayson ““““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.” [Citation.] . . . [T]he plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. [Citation.]’ [Citation.]” (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 866-867.) On appeal, we independently review the trial court’s ruling. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

2. *Prima Facie Case*

To establish a prima facie case Grayson must show Johnson brought the prior action, or continued to prosecute it, without probable cause and with malice, and that the action terminated in his favor. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970.) Grayson cannot meet the latter requirement so we do not reach any of the other elements. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 686 (*Crowley*); *StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1406 (*StaffPro*).

A malicious prosecution action will not lie unless there was “a favorable termination of the *entire* action. [Citation.]” (*Crowley, supra*, 8 Cal.4th at p. 686; *StaffPro, supra*, 136 Cal.App.4th at p. 1406.) Here, Grayson prevailed on only the claim for unjust enrichment but lost on the quiet title and slander of title causes of action. Thus, he has not satisfied the requirement of termination on the merits.

Grayson maintains he need not show he prevailed on the entire action, but that his success on the unjust enrichment cause of action is sufficient. He engages in a lengthy argument to support his claim that we may sever that claim from the other causes of action on which Johnson prevailed based on the primary right theory of pleading. He

explains that a quiet title claim deals with ownership and slander of title with value and marketability while unjust enrichment goes to a wholly separate primary right, an equitable right of restitution; and the two were completely separate from each other.

But Grayson's analysis is flawed; he conflates favorable termination with probable cause. The primary right analysis applies to a probable cause determination, where each cause of action must satisfy that requirement. If it does not, so long as all the other elements are satisfied, a malicious prosecution action will lie as to those claims lacking probable cause, even if others were based on probable cause. (*Crowley, supra*, 8 Cal.4th at pp. 671, 678.)

Crowley specifically rejects the primary right theory as the basis of a favorable termination analysis. (*Crowley, supra*, 8 Cal.4th at p. 684.) “[T]he Supreme Court’s holding that a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be a favorable termination of the entire action. [Citation.] In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43], the question whether all or only part of the prior action had to be without probable cause arose only after judgment had been reached in the plaintiff’s favor in the prior action as a whole.’ [Citation.]” (*Crowley, supra*, 8 Cal.4th at p. 686.)

None of the cases Grayson cites to support his argument persuades. The discussion in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 385 regarding severability was in the context of probable cause. *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789 and *Singleton v. Perry* (1955) 45 Cal.2d 489 were both decided prior to *Crowley*.

Grayson insists those cases still apply because *Crowley* did not “sub silentio” (italics omitted) overrule them. Grayson quotes from *Crowley*, claiming it supports his argument, that “““it is not necessary that the whole proceeding be utterly groundless, for, if groundless charges are maliciously and without probable cause,

coupled with others which are well founded, they are not on that account less injurious, and, therefore, constitute a valid cause of action.’ [Citations.]” [Citation.]” (*Crowley, supra*, 8 Cal.4th at p. 678.) But it is apparent from the language of the quote and in the context of the opinion it deals with probable cause, not favorable termination. Despite Grayson’s protests, *Crowley* was quite specific that there must be a favorable termination of the entire action.

Further, as illustrated by the in-depth review in *StaffPro*, all of the cases on this issue decided after *Crowley* reached the same conclusion, except one. (*StaffPro, supra*, 136 Cal.App.4th at pp. 1403-1404.) As to that case, *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, *StaffPro* engaged in a detailed analysis to support its conclusion the holding was “unconvincing.” (*StaffPro, supra*, 136 Cal.App.4th at p. 1405.) Specifically, it noted the cases on which *Sierra Club* relied were inapposite, it misread *Crowley*, and even if its interpretation of *Crowley* had merit, *Sierra Club*’s holding could not “be reconciled with the overall message of *Crowley* — that favorable termination must be determined by evaluating “the judgment as a whole” [citation].” (*Id.* at p. 1405.) We agree with this analysis.

3. Stay

Finally, Grayson asserts that, rather than dismissing the case, the trial court should have stayed it pending our resolution of his appeal from the underlying action. This argument is now moot because we issued the opinion in that case and, except for a limited remand to redetermine the amount of attorney fees, we affirmed the judgment. (*Johnson v. Grayson, supra*, G044975, p. 2.) The case is now final.

DISPOSITION

The judgment is affirmed. Johnson is entitled to attorney fees and costs on appeal. The case is remanded for the trial court to determine the amount of such fees.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.