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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FARHAD BASHARDOOST,

Plaintiff and Appellant,

v.

G & F CONCRETE CUTTING, INC., et
al.,

Defendants and Respondents.

G047548

(Super. Ct. No. 30-2012-00572516)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Mark B. Plummer and Mark B. Plummer for Plaintiff and Appellant.

Carno & Carlton, Anna M. Carno, Andrew C. Carlton and Edward Alberola for Defendants and Respondents.

* * *

Plaintiff and appellant Farhad Bashardoost appeals from a judgment entered after the court granted a special motion to strike (Code Civ. Proc., § 425.16;¹ section 425.16; anti-SLAPP motion) his malicious prosecution complaint against defendants and respondents G & F Concrete Cutting Inc., Carno & Carlton, LLP, and Andrew Carlton. He contends the court erred because the cause of action did not arise from protected activity and he demonstrated he had a probability of prevailing on the merits. We conclude the court correctly granted the anti-SLAPP motion and affirm on that ground.

FACTS AND PROCEDURAL HISTORY

Plaintiff was the president of Kaveh Engineering and Construction Inc. (Kaveh).² Kaveh, acting as a general contractor on a project for the County of Los Angeles Public Works, entered into a subcontract for G & F to provide concrete cutting.

In the original lawsuit, G & F sued Kaveh, plaintiff, and others. The causes of action against Kaveh and plaintiff were for breach of written and oral contract, three common counts, and for money due under a license and a payment bond and pursuant to a stop notice. G & F alleged plaintiff was the alter ego of Kaveh. G & F pleaded as to both Kaveh and plaintiff that it performed work in addition to that specified in the subcontract, totaling not quite \$8,300, which remained unpaid.

After trial the court rendered judgment in G & F's favor against Kaveh, it dismissed plaintiff without prejudice.

¹ All further statutory references are to this code.

² Both parties state this as a fact although neither directs us to a record reference in support.

Plaintiff then filed the instant case against defendants for malicious prosecution for naming him in the original action, alleging that, at the time of filing and as the case progressed through trial, they knew he was not personally liable because he was not a party to the subcontract between Kaveh and G & F.

Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

Section 425.16, subdivision (b)(1) provides that a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability he will prevail on the claim. There is a two-step analysis under this section. First, we must determine whether the defendant has met the burden to show “the challenged cause of action is one arising from protected activity.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) Second, it must consider whether plaintiff has met its burden to show the likelihood of prevailing on the claim. (*Ibid.*) We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Protected Activity

A complaint for malicious prosecution is an act “in furtherance of the . . . right of petition or free speech under the United States or California Constitution in connection with a public issue . . .” (§ 425.16, subd. (b)(1)), which is defined as including “any written or oral statement or writing made before a . . . judicial proceeding . . .” (§ 425.16, subd. (e)(1)). A malicious prosecution suit falls within section 425.16, subdivision (b)(1). (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 734.) Contrary to plaintiff’s apparent understanding, the protected activity

does not involve the claims defendants made in the original action. Because a malicious prosecution complaint is protected activity under section 425.16, the only issue is whether plaintiff has made out a prima facie case.

3. *Likelihood of Success on the Merits*

To show the probability of success on the merits of the claim, plaintiff has to “demonstrate that the complaint [was] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence [he] submitted . . . [was] credited.’ [Citations.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) “We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citations.]” (*Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.)

The elements of a cause of action for malicious prosecution are “that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ [Citation.]” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

a. Action Terminated on the Merits in Plaintiff’s Favor

Neither party specifically disputes the first element, i.e., that defendants filed the original action against plaintiff and that plaintiff prevailed on the merits. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056.)

The sole argument defendants raise at all addressing the probability of the likelihood of

success on the merits is plaintiff's alleged failure to provide any facts in support of his cause of action. They point out the only purported evidence proffered was the declaration of Mark Plummer, plaintiff's lawyer, most of which was inadmissible, as demonstrated by the objections they filed in the trial court.

We agree that much of Plummer's declaration was not admissible based on a variety of evidentiary problems. But the complaint in the original action filed by defendant lawyers on behalf of G & F is in the record. Further, the complaint in this case alleges the original action was resolved in plaintiff's favor after a trial on the merits. The only evidence supporting this is a minute order filed in conjunction with the judgment dismissing plaintiff without prejudice from the original action, although no reason is stated.

““A termination [by dismissal] is favorable when it reflects ‘the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant.’” [Citation.] . . . [¶] . . . The focus is not on the malicious prosecution plaintiff's opinion of his innocence, but on the opinion of the dismissing party. [Citation.] ‘The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt.’ [Citation.]”
(*Contemporary Services Corp. v. Staff Pro Inc*, *supra*, 152 Cal.App.4th at pp. 1056-1057, italics omitted.)

Here the parties have not pointed to anything in the record reflecting the underlying reason for the dismissal. But defendants make no specific argument the case was not terminated in plaintiff's favor. Thus, although the court's dismissal might otherwise be questionable as evidence of a favorable termination, we conclude based on the record before us and for purposes of the anti-SLAPP motion the first element of a malicious prosecution action is satisfied. We are left, then, only with the elements of probable cause and malice.

b. Probable Cause

In the complaint plaintiff alleges defendants were “well aware” he was never a party to the contract with G & F and thus he could not be personally liable for the overages. Therefore there was no basis to file or maintain the action against him through trial. He further pleads defendants filed and maintained the action without probable cause, with the intent to cause him to suffer “significant financial hardship” and that he in fact has suffered “mental distress and aggravation,” in addition to special and punitive damages.

Probable cause is a question of law. The test is whether “‘any reasonable attorney would have thought the claim tenable.’ [Citation.]” (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) “Only those actions that “‘any reasonable attorney would agree [are] totally and completely without merit’” may form the basis for a malicious prosecution suit. [Citation.]” (*Ibid.*)

In the original action the claims as to plaintiff personally were substantially based on the allegation he was the alter ego of Kaveh. In the breach of contract cause of action G & F alleged plaintiff, as Kaveh’s alter ego, breached the “contract,” which was not defined but presumably was the subcontract. In the count for breach of oral contract, the complaint alleged defendants entered into an oral agreement to provide concrete cutting and plaintiff was liable, as the alter ego, for failing to pay sums due for the work. In the common counts the complaint merely pleaded Kaveh and Bashardoost were liable. There was no specific mention of alter ego, although those causes of action did incorporate all prior allegations. In the enforcement of license bond count, G & F alleged defendants’ failure to perform as more specifically pleaded, was a violation of the Business and Professions Code. In the causes of action on the stop notice and the payment bond G & F made no specific allegations against plaintiff, at best incorporating all prior allegations.

The record does not reveal any evidence introduced at the original trial showing plaintiff was the alter ego of Kaveh or any other evidence to support the allegations in the other causes of action. In their brief defendants focus solely on a different theory entirely. They point to a personal guarantee executed as part of the subcontract, which they claim plaintiff signed, making him personally liable. Plaintiff disputes this interpretation of the document, arguing it bound only Kaveh.

But whether or not Bashardoost personally guaranteed payment on the subcontract is irrelevant. Defendants did not plead the guarantee as the basis for Bashardoost's alleged liability in the original complaint. In fact the guarantee is not even mentioned. We review only the allegations in the complaint to determine if there was probable cause. (See *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1402 [to determine whether party had probable cause to file original action, court must review its allegations liberally].)

Therefore, at least for purposes of the anti-SLAPP motion, plaintiff has shown a lack of probable cause. Next we turn to malice.

c. Malice

“The malice element of malicious prosecution goes to the defendants’ subjective intent for instituting the prior case. [Citation.] Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range “‘from open hostility to indifference. [Citations.]’” [Citation.] Malice may be inferred from circumstantial evidence, such as the defendants’ lack of probable cause, supplemented with proof that the prior case was instituted largely for an improper purpose. [Citation.] This additional proof may consist of evidence that the prior case was knowingly brought without probable cause” (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113-1114.)

Here, as discussed above, plaintiff sufficiently showed a lack of probable cause. But although he alleged defendants acted with malice, he did not present any evidence to support it. There is nothing admissible in Plummer's declaration supporting this element. Nor is there any other evidence in the record.

Plaintiff contends in his brief that, by suing him on an alter ego theory without any testimony to support it, it was "[o]bvious[]" defendants' "goal was to complicate and increase the cost of the defense by requiring either two separate defense firms or conflict of interest waivers, . . . a review of Kaveh's books, . . . an additional filing fee, and many other costly and completely unnecessary inconveniences and expenses." (Capitalization omitted.) This is consistent with the allegation in the complaint that defendants filed the action intending to cause him "significant financial hardship." But there is no evidence to support either the allegation or the argument.

Plaintiff also asserts that at trial in the original action G & F, denied alleging an alter ego theory. He relies on this to argue he was thus prevented from examining witnesses about the reasons defendants sued him. It is true defendant Carlton initially made this statement. But shortly thereafter he corrected himself. Therefore, plaintiff was not prejudiced or hindered from ascertaining evidence that might support malice.

"'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.' [Citations.]" (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 743.) Thus, because plaintiff failed to show malice, the court properly granted the anti-SLAPP motion.

DISPOSITION

The judgment is affirmed. Defendant G & F Concrete Cutting, Inc. is entitled to attorney fees on appeal and all defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.