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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONNA URICH, as Administrator, etc.,

Plaintiff and Appellant,

v.

JENNIFER N. SAWDAY et al.,

Defendants and Respondents.

G048825

(Super. Ct. No. 30-2013-00634938)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Burlison Law Group and Robert C. Burlison, Jr., for Plaintiff and Appellant.

Tredway, Lumsdaine & Doyle, Matthew L. Kinley, Carlos A. Becerra and Brandon L. Fieldsted, for Defendants and Respondents.

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Plaintiff Donna Urich, as administrator of the Estate of Lee Weidemoyer, appeals from the grant of an anti-SLAPP motion (Code Civ. Proc., § 425.16) in favor of defendants Jennifer N. Sawday and the law firm of Tredway, Lumsdaine & Doyle, LLP. Urich's complaint alleged a single cause of action for malicious prosecution. Such a claim is subject to the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Our only inquiry therefore is whether, in opposition to the motion, Urich presented admissible evidence to demonstrate a probability of prevailing. (Code Civ. Proc., § 425.16, sub. (b)(1); *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)

To prevail in this action, plaintiff must demonstrate the underlying litigation was terminated in her favor. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341.) Here, Nick Andros, defendants' prior client, voluntarily dismissed the underlying action by filing a "Notice of Withdrawal of Petition for Removal, etc." A dismissal is considered a favorable termination if it reflects on the merits of the claim against the dismissed party. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881-882.) But a "'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751.)

We must thus examine whether Urich demonstrated Andros' voluntary dismissal of the underlying suit "reflect[s] on [her] innocence of the alleged wrongful conduct" asserted in that action. We start with the declaration of Jennifer N. Sawday, filed in support of the motion which indicates the underlining suit was meritorious and was abandoned by Andros because of the cost and the stress it imposed on him. If true, the dismissal, standing alone, would not suffice to establish a favorable termination of the

underlying suit. In *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, we held the voluntary dismissal of a complaint due to the lack of financial resources to maintain it did not constitute a favorable termination. “[T]he record shows defendants could not afford to pursue the matter, not that they lost faith in the merit of their claims.” (*Id.* at p. 1057.)

Although Urich filed points and authorities in opposition to the motion, the record does not show that she presented any evidence to oppose it. The points and authorities are replete with factual assertions. But we cannot consider such “facts” unless supported by a declaration or other documentation. “The only evidence the trial court should have considered and which we may consider here is that contained in the declarations filed in support of and in opposition to the motion. The matters set forth in the unverified ‘Statement of Facts’ and in memoranda of points and authorities are not evidence and cannot provide the basis for the granting of the motion.” (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578.)

Urich also seems to rely on pleadings filed in the underlying litigation and other litigation that preceded it. But the record fails to demonstrate the trial court took judicial notice of these documents in deciding the anti-SLAPP motion. And, even if the court had taken such judicial notice, there is no way we or the trial court can determine from these pleadings that the underlining suit lacked merit.

At oral argument, Urich contended we should disregard Sawday’s declaration because the statements contained in it are hearsay and incompetent, noting Sawday had ceased representing Andros well before the dismissal. But “[t]o obtain reversal based on the erroneous admission of evidence, the record must show a timely objection making clear that specific ground.” (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726.) *Duronslet* held a party’s failure to timely interject a hearsay objection in the trial court “forfeited her claim that the court erred by admitting this evidence.” (*Ibid.*) Urich fails to show us where the record discloses she timely objected to

Sawday's declaration on this ground. As for her claim the statements were incompetent, even assuming Urich timely interposed such an objection it is "well-settled that an objection to evidence upon the ground that it is incompetent, irrelevant and immaterial is too general to include [a specific] objection" and "amounts to a waiver of all grounds not urged." (*Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 662.)

We are thus left with the uncontradicted evidence presented by the moving parties and must conclude Andros' voluntary dismissal of the underlying suit did not relate to the merits. Thus, the termination was not favorable in the sense that it would support a subsequent action for malicious prosecution.

We therefore affirm the order granting the special motion to strike under Code of Civil Procedure section 425.16.

DISPOSITION

The order is affirmed. Respondents shall recover their costs and attorney fees in an amount to be determined by the trial court.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.